II. Information Privacy

Please read the following materials in preparation for our second seminar meeting, August 24, 2004. These materials will raise many of the information privacy issues you are likely to encounter in your seminar paper research and in real-world situations. The statutory materials are included both for reference and as examples of what information privacy legislation looks like. You need not read them in great detail.

This reading material is divided into three parts: Federal law; California law; and Preemption of State Financial Privacy Legislation by Federal Graham-Leach-Bliley Act.

A. FEDERAL LAW

WHALEN v. ROE
429 U.S. 589, 97 S.Ct. 869 (1977)

Mr. Justice STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972 [FN1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy. . . .

> FN1. 1972 N.Y.Laws, c. 878; N.Y.Pub.Health Law s 3300 et seq. (McKinney, Supp. 1976-1977) (hereafter Pub. Health Law, except as indicated in n.13, infra).

Many drugs have both legitimate and illegitimate uses. In response to a concern that such drugs were being diverted into unlawful channels, in 1970 the New York Legislature created a special commission to evaluate the State's drug- control laws. The commission found the existing laws deficient in several respects. There was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, or to prevent doctors from over-prescribing, either by authorizing an excessive amount in one prescription or by giving one patient multiple prescriptions. In drafting new legislation to correct such defects, the commission consulted with enforcement officials in California and Illinois where central reporting systems were being used effectively. [FN6]

> FN6. The Chairman of the T. S. C. summarized its findings:
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> "Law enforcement officials in both California and Illinois have been consulted in considerable depth about the use of multiple prescriptions, since they have been using them for a considerable period of time. They indicate to us that they are not only a useful adjunct to the proper identification of culpable professional and unscrupulous drug abusers, but that they also give a reliable statistical indication of the pattern of drug flow throughout their states: information sorely needed in this state to stem the tide of diversion of lawfully manufactured controlled substances." Memorandum of Chester R. Hardt, App. 87a-88a. T. S. C. Interim Report 21; T.S.C. Second Interim Report 27-44. Cal. Health & Safety Code ss 11158; 11160; 11167 (West, 1975 and Supp.1976); Ill.Ann.Stat., c. 561/2 , ss 1308, 1311, 1312(a) (Supp.1977)..

The new New York statute classified potentially harmful drugs in five schedules. Drugs, such as heroin, which are highly abused and have no recognized medical use, are in Schedule I; they cannot be prescribed. Schedules II through V include drugs which have a progressively lower potential for abuse but also have a recognized medical use. Our concern is limited to Schedule II which includes the most dangerous of the legitimate drugs. [FN8]

> FN8. These include opium and opium derivatives, cocaine, methadone, amphetamines, and methaqualone. Pub.Health Law s 3306. These drugs have accepted uses in the amelioration of pain and in the treatment of epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches.

With an exception for emergencies, the Act requires that all prescriptions for Schedule II drugs be prepared by the physician in triplicate on an official form. [FN9] The completed form identifies the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient. One copy of the form is retained by the physician, the second by the pharmacist, and the third is forwarded to the New York State Department of Health in Albany. A prescription made on an official form may not exceed a 30- day supply, and may not be refilled. [FN10]

FN9. Pub.Health Law ss 3334, 3338. These forms are prepared and issued by the Department of Health, numbered serially, in groups of 100 forms at $10 per group (10 cents per triplicate form). New York State Health Department Official New York State Prescription, Form NC-77 (8/72).

FN10. Pub.Health Law ss 3331-3333, 3339. The pharmacist normally forwards the prescription to Albany after filling it. If the physician dispenses the drug himself, he must forward two copies of the prescription to the Department of Health, s 3331(6).

The District Court found that about 100,000 Schedule II prescription forms are delivered to a receiving room at the Department of Health in Albany each month. They are sorted, coded, and logged and then taken to another room where the data on the forms is recorded on magnetic tapes for processing by a computer. Thereafter, the forms are returned to the receiving room to be retained in a vault for a five-year period and then destroyed as required by the statute. [FN11] The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation. [FN12] Willful violation of these prohibitions is a crime punishable by up to one year in prison and a $2,000 fine. At the time of trial there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified by the computer. Twenty months after the effective date of the Act, the computerized data had only been used in two investigations involving alleged overuse by specific patients.

FN11. Pub.Health Law s 3370(3), 1974 N.Y.Laws, c. 965, s 16. The physician and the pharmacist are required to retain their copies for five years also, Pub.Health Law ss 3331(6), 3332(4), 3333(4), but they are not required to destroy them.

FN12. Section 3371 of the Pub.Health Law states:

> "1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:
> "(a) to another person employed by the department, for purposes of executing provisions of this article; or
> "(b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or
> "(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or
> "(d) to a central registry established pursuant to this article.
> "2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such

information, or record or report of such information is not made public." Pursuant to its statutory authority, the Department of Health has promulgated regulations in respect of confidentiality as follows:
"No person who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:
"(a) to another person who by virtue of his office as an employee of the department is entitled to obtain such information; or
"(b) pursuant to judicial subpoena or court order in a criminal investigation or proceedings; or
"(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by article 33 of the Public Health Law to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or
"(d) to a central registry established pursuant to article 33 of the Public Health Law." 10 N.Y.C.R.R. s 80.107 (1973).

A few days before the Act became effective, this litigation was commenced by a group of patients regularly receiving prescriptions for Schedule II drugs, by doctors who prescribe such drugs, and by two associations of physicians. [FN14] After various preliminary proceedings, a three-judge District Court conducted a one-day trial. Appellees offered evidence tending to prove that persons in need of treatment with Schedule II drugs will from time to time decline such treatment because of their fear that the misuse of the computerized data will cause them to be stigmatized as "drug addicts." [FN16]

FN14. The physicians' associations, Empire State Physicians Guild, Inc. and the American Federation of Physicians and Dentists, articulate no claims which are severable from the claims of the named physicians. We therefore find it unnecessary to consider whether the organizations themselves may have standing to maintain these suits.

FN16. Two parents testified that they were concerned that their children would be stigmatized by the State's central filing system. One child had been taken off his Schedule II medication because of this concern. Three adult patients testified that they feared disclosure of their names would result from central filing of patient identifications. One of them now obtains his drugs in another State. The other two continue to receive Schedule II prescriptions in New York, but continue to fear disclosure and stigmatization. Four physicians testified that the prescription system entrenches on patients' privacy, and that each had observed a reaction of shock, fear, and concern on the part of their patients whom they had informed of the plan. One doctor refuses to prescribe Schedule II drugs for his patients. On the other hand, over 100,000 patients per month have been receiving Schedule II drug prescriptions without their objections, if any, to central filing having come to the attention of the District Court. The record shows that the provisions of the Act were brought to the attention of the section on psychiatry of the New York State Medical Society (App. 166a), but that body apparently declined to support this suit.

The District Court held that "the doctor-patient relationship intrudes on one of the zones of privacy accorded constitutional protection" and that the patient-identification provisions of the Act invaded this zone with "a needlessly broad sweep," and enjoined enforcement of the provisions of the Act which deal with the reporting of patients' names and addresses.

I

The District Court found that the State had been unable to demonstrate the necessity for the patient-identification requirement on the basis of its experience during the first 20 months of administration of the new statute. There was a time when that alone would have provided a basis

for invalidating the statute. Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, involved legislation making it a crime for a baker to permit his employees to work more than 60 hours in a week. In an opinion no longer regarded as authoritative, the Court held the statute unconstitutional as "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ." Id., at 56, 25 S.Ct., at 543.

The holding in Lochner has been implicitly rejected many times. [FN18] State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. [FN19] For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern. [FN20]

FN18. Roe v. Wade, 410 U.S. 113, 117, 93 S.Ct. 705, 709, 35 L.Ed.2d 147; Griswold v. Connecticut, 381 U.S. 479, 481-482, 85 S.Ct. 1678, 1679-1680, 14 L.Ed.2d 510; Ferguson v. Skrupa, 372 U.S. 726, 729-730, 83 S.Ct. 1028, 1030-1031, 10 L.Ed.2d 93; FHA v. Darlington, Inc., 358 U.S. 84, 91-92, 79 S.Ct. 141, 146, 3 L.Ed.2d 132.

FN19. "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation." Olsen v. Nebraska ex rel. Western Reference & Bond Assn., 313 U.S. 236, 246, 61 S.Ct. 862, 865, 85 L.Ed. 1305.

FN20. Mr. Justice Brandeis' classic statement of the proposition merits reiteration:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386-387, 76 L.Ed. 747 (dissenting opinion) (footnote omitted).

The New York statute challenged in this case represents a considered attempt to deal with such a problem. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators [FN21] as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control. [FN22] For if an experiment fails if in this case experience teaches that the patient-identification requirement results in the foolish expenditure of funds to acquire a mountain of useless information the legislative process remains available to terminate the unwise experiment. It follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for

the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional.

FN21. The absence of detected violations does not, of course, demonstrate that a statute has no significant deterrent effect.

> "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs . . .." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (citations omitted). "Nothing in the Constitution prohibits a State from reaching . . . a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." Id., at 63, 93 S.Ct., at 2638.

FN22. "Such regulation, it can be assumed, could take a variety of valid forms." Robinson v. California, 370 U.S. 660, 664, 82 S.Ct. 1417, 1419, 8 L.Ed.2d 758. Cf. Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45, 41 S.Ct. 425, 426, 65 L.Ed. 819; Beauharnais v. Illinois, 343 U.S. 250, 261-262, 72 S.Ct. 725, 732-733, 96 L.Ed. 919.

II

Appellees contend that the statute invades a constitutionally protected "zone of privacy." [FN23] The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. [FN24] One is the individual interest in avoiding disclosure of personal matters, [FN25] and another is the interest in independence in making certain kinds of important decisions. [FN26] Appellees argue that both of these interests are impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

FN23. As the basis for the constitutional claim they rely on the shadows cast by a variety of provisions in the Bill of Rights. Language in prior opinions of the Court or its individual Justices provides support for the view that some personal rights "implicit in the concept of ordered liberty" (see Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, quoted in Roe v. Wade, 410 U.S., at 152, 93 S.Ct., at 726), are so "fundamental" that an undefined penumbra may provide them with an independent source of constitutional protection. In Roe v. Wade, however, after carefully reviewing those cases, the Court expressed the opinion that the "right of privacy" is founded in the Fourteenth Amendment's concept of personal liberty, id., at 152-153, 93 S.Ct., at 726-727.

> "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153, 93 S.Ct., at 727 (emphasis added). See also id., at 168-171, 93 S.Ct., at 734-736 (Stewart, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 500, 85 S.Ct. 1678, 1690, 14 L.Ed.2d 510 (Harlan, J., concurring in judgment).

FN24. Professor Kurland has written:

> "The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form

and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." The private I, the University of Chicago Magazine 7, 8 (autumn 1976). The first of the facets which he describes is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interests referred to in the text.

FN25. In his dissent in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, Mr. Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men"; in Griswold v. Connecticut, 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510, the Court said: "(T)he First Amendment has a penumbra where privacy is protected from governmental intrusion." See also Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542; California Bankers Assn. v. Shultz, 416 U.S. 21, 79, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (Douglas, J., dissenting); id., at 78, 94 S.Ct., at 1525 (Powell, J., concurring).

FN26. Roe v. Wade, supra; Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201; Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832. In Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, the Court characterized these decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.

Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.

The third possibility existed under the prior law and is entirely unrelated to the existence of the computerized data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly. [FN27] And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program. [FN28]

FN27. The T. S. C.'s independent investigation of the California and Illinois central filing systems failed to reveal a single case of invasion of a patient's privacy. T. S. C. Memorandum of Chester R. Hardt, Chairman, Re: Triplicate Prescriptions, New York State Controlled Substances Act, effective Apr. 1, 1973 (reproduced at App. 88a).

Just last Term in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, we rejected a contention that the reporting requirements of the Federal Election Campaign Act of 1971 violated the First Amendment rights of those who contribute to minority parties:

"But no appellant in this case has tendered record evidence . . . . Instead, appellants primarily rely on 'the clearly articulated fears of individuals, well experienced in the political process.' . . . At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative

history of this Act outweighs the harm generally alleged." 424 U.S., at 71-72, 96 S.Ct., at 659 (footnote omitted).

Here, too, appellees urge on us "clearly articulated fears" about the pernicious effects of disclosure. But this requires us to assume even more than that we refused to do in Buckley. There the disclosures were to be made in accordance with the statutory scheme. Appellees' disclosures could only be made if the statutory scheme were violated as described, supra, at 873-874.

The fears of parents on behalf of their pre-adolescent children who are receiving amphetamines in the treatment of hyperkinesia are doubly premature. Not only must the Act's nondisclosure provisions be violated in order to stigmatize the children as they enter adult life, but the provisions requiring destruction of all prescription records after five years would have to be ignored, see n. 11, supra, and accompanying text.

FN28. The physician-patient evidentiary privilege is unknown to the common law. In States where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons. C. McCormick, Evidence ss 98, 101-104 (2d ed. 1972); 8 J. Wigmore, Evidence s 2380, nn. 3, 5, 6, ss 2388-2391 (McNaughton rev. ed. 1961).

Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. [FN29] Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

FN29. Familiar examples are statutory reporting requirements relating to venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fetal death. Last Term we upheld the recordkeeping requirements of the Missouri abortion laws against a challenge based on the protected interest in making the abortion decision free of governmental intrusion, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 79-81, 96 S.Ct. 2831, 2846-2847, 49 L.Ed.2d 788.

Appellees also argue, however, that even if unwarranted disclosures do not actually occur, the knowledge that the information is readily available in a computerized file creates a genuine concern that causes some persons to decline needed medication. The record supports the conclusion that some use of Schedule II drugs has been discouraged by that concern; it also is clear, however, that about 100,000 prescriptions for such drugs were being filled each month prior to the entry of the District Court's injunction. Clearly, therefore, the statute did not deprive the public of access to the drugs.

Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication. Although the State no doubt could prohibit entirely the use of particular Schedule II drugs, [FN30] it has not done so. This case is therefore unlike those in which the Court held that a total prohibition of certain conduct was an impermissible deprivation of liberty. Nor does the State require access to these drugs to be conditioned on the consent of any state official or other third party. [FN31] Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, is left entirely to the physician and the patient.

FN30. It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions. Robinson v. California, 370 U.S., at 664-665, 82 S.Ct., at 1419-1420; Minnesota ex. rel. Whipple v. Martinson, 256 U.S., at 45, 41 S.Ct., at 426; Barsky v. Board of Regents, 347 U.S. 442, 449, 74 S.Ct. 650, 654, 98 L.Ed. 829.

FN31. In Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, for instance, the constitutionally defective statute required the written concurrence of two state-licensed physicians, other than the patient's personal physician, before an abortion could be performed, and the advance approval of a committee of not less than three members of the hospital staff where the procedure was to be performed, regardless of whether the committee members had a physician-patient relationship with the woman concerned.

We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment. [FN32]

FN32. The Roe appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889, at a point where it quotes from Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.
Likewise the Patient appellees derive a right to individual anonymity from our freedom of association cases such as Bates v. Little Rock, 361 U.S. 516, 522-523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480, and NAACP v. Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-1172, 2 L.Ed.2d 1488. But those cases protect "freedom of association for the purpose of advancing ideas and airing grievances," Bates v. Little Rock, supra, 361 U.S., at 523, 80 S.Ct., at 416, not anonymity in the course of medical treatment. Also, in those cases there was an uncontroverted showing of past harm through disclosure, NAACP v. Alabama, 357 U.S., at 462, 78 S.Ct., at 1172, an element which is absent here.
Cf. Schulman v. New York City Health & Hospitals Corp., 38 N.Y.2d 234, 379 N.Y.S.2d 702, 342 N.E.2d 501 (1975).

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IV

A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data whether intentional or unintentional or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

Mr. Justice BRENNAN, concurring.

I write only to express my understanding of the opinion of the Court, which I join.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy, ante, at 876-877, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are familiar ante, at 878 n. 29, and are not generally regarded as an invasion of privacy. Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. See, e. g., Roe v. Wade, 410 U.S. 113, 155-156, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.

In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure. Given this serious and, so far as the record shows, successful effort to prevent abuse and limit access to the personal information at issue, I cannot say that the statute's provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests, any more than the more traditional reporting provisions.

In the absence of such a deprivation, the State was not required to prove that the challenged statute is absolutely necessary to its attempt to control drug abuse. Of course, a statute that did effect such a deprivation would only be consistent with the Constitution if it were necessary to promote a compelling state interest. Roe v. Wade, supra; Eisenstadt v. Baird, 405 U.S. 438, 464, 92 S.Ct. 1029, 1043-1044, 31 L.Ed.2d 349 (1972) (White, J., concurring in result).

Mr. Justice STEWART, concurring.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no "general constitutional 'right to privacy.' . . . (T)he protection of a person's general right to privacy his right to be let alone by other people is, like the protection of his property and of his very life, left largely to the law of the individual States." Id., at 350-351, 88 S.Ct., at 510 (footnote omitted).

"The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's association.' NAACP v. Alabama, 357 U.S. 449,

462, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for . . . ". . . the right of each individual 'to a private enclave where he may lead a private life.' " ' Tehan v. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

As the Court notes, ante, at 876-877, and n. 26, there is also a line of authority, often characterized as involving "privacy," affording constitutional protection to the autonomy of an individual or a family unit in making decisions generally relating to marriage, procreation, and raising children.

Mr. Justice BRENNAN's concurring opinion states that "(b)road dissemination by state officials of (the information collected by New York State) . . . would clearly implicate constitutionally protected privacy rights . . . ." Ante, at 880. The only possible support in his opinion for this statement is its earlier reference to two footnotes in the Court's opinion, ibid., citing ante, at 876-877, and nn. 24-25 (majority opinion). The footnotes, however, cite to only two Court opinions, and those two cases do not support the proposition advanced by Mr. Justice BRENNAN.

The first case referred to, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home. Although the broad language of the opinion includes a discussion of privacy, see id., at 484-485, 85 S.Ct., at 1681-1682, the constitutional protection there discovered also related to (1) marriage, see id., at 485-486, 85 S.Ct., at 1682; id., at 495, 85 S.Ct., at 1687-1688. (Goldberg, J., concurring); id., at 500, 85 S.Ct., at 1690 (Harlan, J., concurring in judgment), citing Poe v. Ullman, 367 U.S. 497, 522, 81 S.Ct. 1752, 1166, 6 L.Ed.2d 989 (Harlan, J., dissenting); 381 U.S., at 502-503, 85 S.Ct., at 1691-1692 (White, J., concurring in judgment); (2) privacy in the home, see id., at 484-485, 85 S.Ct., at 1681-1682 (majority opinion); id., at 495, 85 S.Ct., at 1687 (Goldberg, J., concurring); id., at 500, 85 S.Ct., at 1690 (Harlan, J., concurring in judgment), citing Poe v. Ullman, supra, 367 U.S. at 522, 81 S.Ct. at 1766 (Harlan, J., dissenting); and (3) the right to use contraceptives, see 381 U.S., at 503, 85 S.Ct., at 1691-1692 (White, J., concurring in judgment); see also Roe v. Wade, 410 U.S. 113, 169-170, 93 S.Ct. 705, 735, 35 L.Ed.2d 147 (Stewart, J., concurring). Whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information.

The other case referred to, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, held that an individual cannot constitutionally be prosecuted for possession of obscene materials in his home. Although Stanley makes some reference to privacy rights, id., at 564, 89 S.Ct., at 1247-1248, the holding there was simply that the First Amendment as made applicable to the States by the Fourteenth protects a person's right to read what he chooses in circumstances where that choice poses no threat to the sensibilities or welfare of others, id., at 565-568, 89 S.Ct., at 1248-1250.

Upon the understanding that nothing the Court says today is contrary to the above views, I join its opinion and judgment.

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ZACCHINI v. SCRIPPS-HOWARD BROADCASTING COMPANY
433 U.S. 562, 97 S.Ct. 2849 (1977)

Mr. Justice WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a 'human cannonball' act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Co., the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary. [FN1]

> FN1. The script of the commentary accompanying the film clip read as follows:
> 'This . . . now . . . is the story of a true spectator sport . . . the sport of human cannonballing . . . in fact, the great Zacchini is about the only human cannonball around, these days . . . just happens that, where he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a long act, it's a thriller . . . and you really need to see it in person . . . to appreciate it. . . .'
> (Emphasis in original.) App. 12.

Petitioner then brought this action for damages, alleging that he is 'engaged in the entertainment business,' that the act he performs is one 'invented by his father and . . . performed only by his family for the last fifty years,' that respondent 'showed and commercialized the film of his act without his consent,' and that such conduct was an 'unlawful appropriation of plaintiff's professional property.' App. 4-5. Respondent answered and moved for summary judgment, which was granted by the trial court.

The Court of Appeals of Ohio reversed. The majority held that petitioner's complaint stated a cause of action for conversion and for infringement of a common-law copyright, and one judge concurred in the judgment on the ground that the complaint stated a cause of action for appropriation of petitioner's 'right of publicity' in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial.

Like the concurring judge in the Court of Appeals, the Supreme Court of Ohio rested petitioner's cause of action under state law on his 'right to the publicity value of his performance.' 47 Ohio St.2d 224, 351 N.E.2d 454, 455 (1976). The opinion syllabus . . . declared first that one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation over petitioner's objection and in the absence of license or privilege, of petitioner's right to the publicity value of his performance. Ibid. The court nevertheless gave judgment for respondent because, in the words of the syllabus:

> 'A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the

publicity for some non-privileged private use, or unless the actual intent was to injure the individual.' Ibid.

We granted certiorari, 429 U.S. 1037, 97 S.Ct. 730, 50 L.Ed.2d 747 (1977), to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's statelaw 'right of publicity.' Pet. for Cert. 2. Insofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the United States Constitution required judgment for respondent, we reverse the judgment of that court.

I

. . . . .

There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law. It is also clear that respondent's claim of constitutional privilege was sustained. The source of this privilege was not identified in the syllabus. It is clear enough from the opinion of the Ohio Supreme Court, . . . that in adjudicating the crucial question of whether respondent had a privilege to film and televise petitioner's performance, the court placed principal reliance on Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), a case involving First Amendment limitations on state tort actions. It construed the principle of that case, along with that of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), to be that 'the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private,' and concluded, therefore, that the press is also 'privileged when an individual seeks to publicly exploit his talents while keepting the benefits private.' 47 Ohio St.2d, at 234, 351 N.E.2d, at 461. The privilege thus exists in cases 'where appropriation of a right of publicity is claimed.' The court's opinion also referred to Draft 21 of the relevant portion of Restatement (Second) of Torts (1975), which was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion. The court preferred the notion of privilege over the Restatement's formulation, however, reasoning that 'since the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest and concern, the concept of privilege seems the more useful and appropriate one.' 47 Ohio St.2d, at 234 n. 5, 351 N.E.2d, at 461 n. 5. (Emphasis added.) . . . . .

II

The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had 'a right of publicity' that gave him 'personal control over commercial display and exploitation of his personality and the exercise of his talents.' [FN4] This right of 'exclusive control over the publicity given to his performances' was said to be such

a 'valuable part of the benefit which may be attained by his talents and efforts' that it was entitled to legal protection. It was also observed, or at least expressly assumed, that petitioner had not abandoned his rights by performing under the circumstances present at the Geauga County Fair Grounds.

FN4. The court relied on Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340, 341 (1956), the syllabus of which held:

> 'An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, orthe wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'

The court also indicated that the applicable principles of Ohio law were those set out in Restatement (Second) s 652C of Torts (Tent. Draft No. 13, 1967), and the comments thereto, portions of which were stated in the footnotes of the opinion. Also, referring to the right as the 'right of publicity,' the court quoted approvingly from Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (CA2 1953).

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press 'must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires.' 47 Ohio St.2d, at 235, 351 N.E.2d, at 461. Under this view, respondent was thus constitutionally free to film and display petitioner's entire act. [FN5]

FN5. The court's explication was as follows:

> 'The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here.' 47 Ohio St.2d, at 235, 351 N.E.2d, at 461.

The Ohio Supreme Court relied heavily on Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), but that case does not mandate a media privilege to televise a performer's entire act without his consent. Involved in Time, Inc. v. Hill was a claim under the New York 'Right of Privacy' statute [FN6] that Life Magazine, in the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these nondefamatory falsehoods that allegedly invaded Hill's privacy. The Court held, however, that the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth the same rigorous standard that had been applied in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

FN6. Section 51 of the New York Civil Rights Law (McKinney 1976) provides an action for injunction and

damages for invasion of the 'right of privacy' granted by s 50:

> 'A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.'

Time, Inc. v. Hill, which was hotly contested and decided by a divided Court, involved an entirely different tort from the 'right of publicity' recognized by the Ohio Supreme Court. As the opinion reveals in Time, Inc. v. Hill, the Court was steeped in the literature of privacy law and was aware of the developing distinctions and nuances in this branch of the law. The Court, for example, cited W. Prosser, Law of Torts 831-832 (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif.L.Rev. 383 (1960), both of which divided privacy into four distinct branches. [FN7] The Court was aware that it was adjudicating a 'false light' privacy case involving a matter of public interest, not a case involving 'intrusion,' 385 U.S., at 384-385, n. 9, 87 S.Ct., at 540, 'appropriation' of a name or likeness for the purposes of trade, id., at 381, 87 S.Ct., at 538, or 'private details' about a non-newsworthy person or event, id., at 383 n. 7, 87 S.Ct., at 539. It is also abundantly clear that Time, Inc. v. Hill did not involve a performer, a person with a name having commercial value, or any claim to a 'right of publicity.' This discrete kind of 'appropriation' case was plainly identified in the literature cited by the Court and had been adjudicated in the reported cases. [FN9]

FN7. 'The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone." Prosser, Privacy, 48 Calif.L.Rev., at 389. Thus, according to Prosser, some courts had recognized a cause of action for 'intrusion' upon the plaintiff's seclusion or solitude; public disclosure of 'private facts' about the plaintiff's personal life; publicity that places the plaintiff in a 'false light' in the public eye; and 'appropriation' of the plaintiff's name or likeness for commercial purposes. One may be liable for 'appropriation' if he 'pirate(s) the plaintiff's identity for some advantage of his own.' Id., at 403.

FN9. E. g., Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (CA3), cert. denied, 351 U.S. 926, 76 S.Ct. 783, 100 L.Ed. 1456 (1956); . . . [which] involved a challenge to television exhibition of a film made of a prize fight that had occurred some time ago. Judge Biggs, writing for the Court of Appeals, said:

> 'There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguably, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many gradations, most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture.' 229 F.2d, at 486.
>
> '. . . The fact, is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation. If the artistry of the performance be used as a criterion, every judge perforce must turn himself into a literary, theatrical or sports critic.' Id., at 490.

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. 'The interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.' Prosser, supra, 48 Calif.L.Rev., at 400. By contrast, the State's interest in permitting a 'right of publicity' is in protecting the proprietary

interest of the individual in his act in part to encourage such entertainment. [FN10] As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In 'false light' cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as the gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.

> FN10. The Ohio Supreme Court expressed the view 'that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such.' 47 Ohio St.2d, at 226, 351 N.E.2d, at 456. It should be noted, however, that the case before us is more limited than the broad category of lawsuits that may arise under the heading of 'appropriation.' Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

Nor does it appear that our later cases, such as Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); and Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), require or furnish substantial support for the Ohio court's privilege ruling. These cases, like New York Times, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.

Moreover, Time, Inc. v. Hill, New York Times, Metromedia, Gertz, and Firestone all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid. It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act. [FN11] Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner. Copyrights Act, . . . or to film and broadcast a prize fight, . . .; or a baseball game, . . . where the promoters or the participants had other plans for publicizing the event. There are ample reasons for reaching this conclusion.

> FN11. W. Prosser, Law of Torts 806-807 (4th ed. 1971), generalizes on the cases:
> 'The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be 'for purposes of trade,' they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere

incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of his privacy; nor is the publication of a photograph or a newsreel in which he incidentally appears.' (Footnotes omitted.) Cf. Restatement (Second) of Torts s 652C, Comment d (Tent. Draft No. 22, 1976).

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act free on television, it will be less willing to pay to see it at the fair. [FN12] The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. 'The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.' Kalven, Privacy in Tort Law Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

FN12. It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover. But petitioner has alleged that the broadcast injured him to the extent of $25,000, App. 5, and we think the State should be allowed to authorize compensation of this injury if proved.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in Mazer v. Stein, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954):

> 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.'

These laws perhaps regard the 'reward to the owner (as) a secondary consideration,' United States v. Paramount Pictures, 334 U.S. 131, 158, 68 S.Ct. 915, 929, 92 L.Ed. 1260 (1948), but they were 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public. Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 36, 59 S.Ct. 397, 400, 83 L.Ed. 470 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work. Cf. Goldstein v. California, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974). [FN13]

FN13. Goldstein involved a California statute outlawing 'record piracy' the unauthorized duplication of recordings of performances by major musical artists. Petitioners there launched a multifaceted constitutional attack on the statute, but they did not argue that the statute violated the First Amendment. In rejecting this broad-based constitutional attack, the Court concluded:

> 'The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personal as appeared on the original recording. 'Until and unless Congress takes further action with respect to recordings . . ., the California statute may be enforced against acts of piracy such as those which occurred in the present case.' 412 U.S., at 571, 93 S.Ct., at 2317. (Emphasis added.)

. . . Of course, this case does not involve a claim that respondent would be prevented by petitioner's 'right of publicity' from staging or filming its own 'human cannonball' act.

In Kewanee this Court upheld the constitutionality of Ohio's trade-secret law, although again no First Amendment claim was presented. Citing Goldstein, the Court stated:

> 'Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . ..' 416 U.S., at 479, 94 S.Ct., at 1885.

Although recognizing that the trade-secret law resulted in preventing the public from gaining certain information, the Court emphasized that the law had 'a decidedly beneficial effect on society,' id., at 485, 94 S.Ct., at 1888, and that without it, 'organized scientific and technological research could become fragmented, and society, as a whole, would suffer.' Id., at 486, 94 S.Ct., at 1888.

There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. Time, Inc. v. Hill. But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Respondent knew that petitioner objected to televising his act, but nevertheless displayed the entire film.

We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Mr. Justice POWELL, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: 'a performer's entire act.' The holding today is summed up in one sentence:

> 'Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and

Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.' Ante, at 2856.

I doubt that this formula provides a standard clear enough even for resolution of this case.[FN1] In any event, I am not persuaded that the Court's opinion is appropriately sensitive to the First Amendment values at stake, and I therefore dissent.

FN1. Although the record is not explicit, it is unlikely that the 'act' commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the 'entire act' in its 15-second newsclip and the Court's opinion then would afford no guidance for resolution of the case. Moreover, in future cases involving different performances, similar difficulties in determining just what constitutes the 'entire act' are inevitable.

Although the Court would draw no distinction, ante, at 2857, I do not view respondent's action as comparable to unauthorized commercial broadcasts of sporting events, theatrical performances, and the like where the broadcaster keeps the profits. There is no suggestion here that respondent made any such use of the film. Instead, it simply reported on what petitioner concedes to be a newsworthy event, in a way hardly surprising for a television station by means of film coverage. The report was part of an ordinary daily news program, consuming a total of 15 seconds. It is a routine example of the press' fulfilling the informing function so vital to our system.

The Court's holding that the station's ordinary news report may give rise to substantial liability [FN2] has disturbing implications, for the decision could lead to a degree of media self-censorship. Cf. Smith v. California, 361 U.S. 147, 150-154, 80 S.Ct. 215, 217-219, 4 L.Ed.2d 205 (1959). Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an 'entire act,' [FN3] he may decline coverage even of clearly newsworthy events or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster. . . .

FN2. At some points the Court seems to acknowledge that the reason for recognizing a cause of action asserting a 'right of publicity' is to prevent unjust enrichment. See, e. g., ante, at 2857. But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the plaintiff regardless of any gain to the defendant. See, e. g., ante, at 2857 n. 12. Indeed, in this case there is no suggestion that respondent television station gained financially by showing petitioner's flight (although it no doubt received its normal advertising revenue for the news program revenue it would have received no matter which news items appeared). Nevertheless, in the unlikely event that petitioner can prove that his income was somehow reduced as a result of the broadcast, respondent will apparently have to compensate him for the difference.

FN3. Such doubts are especially likely to arise when the editor receives film footage of an event at a local fair, a circus, a sports competition of limited duration (e. g., the winning effort in a ski-jump competition), or a dramatic production made up of short skits, to offer only a few examples.

In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin with a quantitative analysis of the performer's behavior is this or is this not his entire act? we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for

a routine portion of a regular news program, I would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.

I emphasize that this is a 'reappropriation' suit, rather than one of the other varieties of 'right of privacy' tort suits identified by Dean Prosser in his classic article. Prosser, Privacy, 48 Calif.L.Rev. 383 (1960). In those other causes of action the competing interests are considerably different. The plaintiff generally seeks to avoid any sort of public exposure, and the existence of constitutional privilege is therefore less likely to turn on whether the publication occurred in a news broadcast or in some other fashion. In a suit like the one before us, however, the plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner. He welcomes some publicity, but seeks to retain control over means and manner as a way to maximize for himself the monetary benefits that flow from such publication. But having made the matter public having chosen, in essence, to make it newsworthy he cannot, consistent with the First Amendment, complain of routine news reportage. Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-348, 351-352, 94 S.Ct. 2997, 3006-3011, 3012-3013, 41 L.Ed.2d 789 (1974) (clarifying the different liability standards appropriate in defamation suits, depending on whether or not the plaintiff is a public figure).

Since the film clip here was undeniably treated as news and since there is no claim that the use was subterfuge, respondent's actions were constitutionally privileged. I would affirm.

Mr. Justice STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the 'human cannonball' was a privileged invasion of petitioner's common-law 'right of publicity' because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner.

As I read the state court's explanation of the limits on the concept of privilege, they define the substantive reach of a common law tort rather than anything I recognize as a limit on a federal constitutional right. The decision was unquestionably influenced by the Ohio court's proper sensitivity to First Amendment principles, and to this Court's cases construing the First Amendment; indeed, I must confess that the opinion can be read as resting entirely on federal constitutional grounds. Nevertheless, the basis of the state court's action is sufficiently doubtful that I would remand the case to that court for clarification of its holding before deciding the federal constitutional issue.

B. CALIFORNIA LAW

HILL v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
7 Cal.4th 1, 865 P.2d 633, 26 Cal.Rptr.2d 834 (1994)

LUCAS, C. J.

The National Collegiate Athletic Association (NCAA) sponsors and regulates intercollegiate athletic competition throughout the United States. Under the NCAA's drug testing program, randomly selected college student athletes competing in postseason championships and football bowl games are required to provide samples of their urine under closely monitored conditions. Urine samples are chemically analyzed for proscribed substances. Athletes testing "positive" are subject to disqualification.

Plaintiffs, who were student athletes attending Stanford University (Stanford) at the time of trial, sued the NCAA, contending its drug testing program violated their right to privacy secured by article I, section 1 of the California Constitution. Stanford intervened in the suit and adopted plaintiffs' position. Finding the NCAA's program to be an invasion of plaintiffs' right to privacy, the superior court permanently enjoined its enforcement against plaintiffs and other Stanford athletes. The Court of Appeal upheld the injunction.

By its nature, sports competition demands highly disciplined physical activity conducted in accordance with a special set of social norms. Unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.

A student athlete's already diminished expectation of privacy is outweighed by the NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs. As a sponsor and regulator of sporting events, the NCAA has self-evident interests in ensuring fair and vigorous competition, as well as protecting the health and safety of student athletes. These interests justify a set of drug testing rules reasonably calculated to achieve drug-free athletic competition. The NCAA's rules contain elements designed to accomplish this purpose, including: (1) advance notice to athletes of testing procedures and written consent to testing; (2) random selection of athletes actually engaged in competition; (3) monitored collection of a sample of a selected athlete's urine in order to avoid substitution or contamination; and (4) chain of custody, limited disclosure, and other procedures designed to safeguard the confidentiality of the testing process and its outcome. As formulated, the NCAA's regulations do not offend the legitimate privacy interests of student athletes.

For these reasons, as more fully discussed below, the NCAA's drug testing program does not violate plaintiffs' state constitutional right to privacy. We will therefore reverse the judgment of the Court of Appeal and direct entry of final judgment in favor of the NCAA.

* * * * *

2. The NCAA Drug Testing Program

The NCAA prohibits student athlete use of chemical substances in several categories, including: (1) psychomotor and nervous system stimulants; (2) anabolic steroids; (3) alcohol and beta blockers (in rifle events only); (4) diuretics; and (5) street drugs. At the time of trial, sympathomimetic amines (a class of substances included in many medications) were also

included in the NCAA's list of banned drugs. The NCAA has amended its rules to delete sympathomimetic amines from its list of proscribed substances.

Student athletes seeking to participate in NCAA-sponsored competition are required to sign a three-part statement and consent form. New forms must be executed at the beginning of each year of competition. The first part of the form affirms that the signator meets NCAA eligibility regulations and that he or she has duly reported any known violations of those regulations.

The second part of the form, entitled Buckley Amendment Consent, authorizes limited disclosure of the form, the results of NCAA drug tests, academic transcripts, financial aid records, and other information pertaining to NCAA eligibility, to authorized representatives of the athlete's institution and conference, as well as to the NCAA. The items of information to be disclosed are identified in the statement as "education records" pursuant to the federal Educational Rights and Privacy Act of 1974. (20 U.S.C. § 1232(g).)

The final part of the form is a "Drug-Testing Consent" including the following provisions:

"By signing this part of the form, you certify that you agree to be tested for drugs.

"You agree to allow the NCAA, during this academic year, before, during or after you participate in any NCAA championship or in any postseason football game certified by the NCAA, to test you for the banned drugs listed in Executive Regulation 1-7(b) in the NCAA Manual.

"You reviewed the procedures for NCAA drug testing that are described in the NCAA Drug-Testing Program brochure.

"You understand that if you test positive (the NCAA finds traces of any of the banned drugs in your body), you will be ineligible to participate in postseason competition for at least 90 days.

"If you test positive and lose eligibility for 90 days, and then test positive again after your eligibility is restored, you will lose postseason eligibility in all sports for the current and next academic year.

"You understand that this consent and the results of your drug tests, if any, will only be disclosed in accordance with the Buckley Amendment consent."

The Drug Testing Consent contains dated signature spaces for the student athlete and, if the student athlete is a minor, a parent. Failure to sign the three-part form, including the Drug Testing Consent, renders the student athlete ineligible to participate in NCAA-sponsored competition.

Drug testing is conducted at NCAA athletic events by urinalysis. All student athletes in championship events or postseason bowl games are potentially subject to testing. Particular athletes are chosen for testing according to plans that may include random selection or other selection criteria such as playing time, team position, place of finish, or suspicion of drug use.

Upon written notice following his or her participation in an athletic event, the selected athlete must report promptly to a collection station. The athlete may choose to be accompanied by a witness-observer. At the collection station, the athlete picks a plastic-sealed beaker with a personal code number. In the presence of an NCAA official monitor of the same sex as the athlete, the athlete supplies a urine specimen of 100-200 milliliters. The specimen is identified, documented, and divided into two samples labeled A and B. Both samples are delivered to one of three certified testing laboratories. Chain of custody procedures provide for signed receipts and acknowledgments at each transfer point.

At the laboratory, a portion of sample A is tested by gas chromatography/mass

spectometry-the most scientifically accurate method of analysis available. Positive findings, signifying use of proscribed drugs, are confirmed by testing another portion of sample A, and then reviewed by the laboratory director and reported to the NCAA by code number. The NCAA decodes the reports and relays positive findings to the athletic director of the college or university involved by telephone and overnight letter marked "confidential." The institution is required to notify the athlete of the positive finding. Within 24 hours of notice of a positive finding, sample B of the athlete's urine is tested.A positive finding may be appealed to a designated NCAA committee.

A positive test finding results in loss of postseason eligibility. Refusal by a student athlete to follow NCAA-mandated drug testing procedures yields the same consequence-the offending athlete is barred from competition. [FN1]

> FN1 Since the trial in this case, the NCAA has expanded its drug testing program and made more serious the consequences of a positive finding. At its 1990 convention, the NCAA approved a mandatory, year-round testing program, although the program was restricted to the testing of NCAA Division I football players through August 1992. Under the new program, first-time offenders lose an entire year's eligibility. Those testing positive a second time for "street drugs" lose another year of eligibility. And those caught using steroids twice are banned from intercollegiate athletics for life. (Note, Drug Testing and the Student Athlete: Meeting the Constitutional Challenge (1990) 76 Iowa L.Rev. 107, 116-117.)

* * * * *

Discussion

Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Italics added.)

The phrase "and privacy" was added to California Constitution, article I, section 1 by an initiative adopted by the voters on November 7, 1972 (the Privacy Initiative or Amendment).

To resolve the dispute between the parties, we address three questions of first impression in this court: (1) Does the Privacy Initiative govern the conduct of private, nongovernmental entities such as the NCAA; and (2) if it does, what legal standard is to be applied in assessing alleged invasions of privacy; and (3) under that standard, is the NCAA's drug testing program a violation of the state constitutional privacy right?

1. Application of the California Constitutional Right to Privacy to Nongovernmental Entities

Neither plaintiffs nor Stanford assert that the NCAA is an agency or instrumentality of government or a vehicle for state action. Case law generally confirms the status of the NCAA as a private organization, comprised of American colleges and universities, and democratically governed by its own membership. (National Collegiate Athletic Assn. v. Tarkanian (1988) 488 U.S. 179, 197 [102 L.Ed.2d 469, 488, 109 S.Ct. 454] [NCAA is private actor that "enjoy[s] no governmental powers"]; Arlosoroff v. National Collegiate Athletic Ass'n (4th Cir. 1984) 746 F.2d 1019, 1021 [NCAA is "a voluntary association of public and private institutions"]; O'Halloran v. University of Washington (W.D.Wash. 1988) 679 F.Supp. 997, 1001, revd. on other grounds, 856 F.2d 1375 [NCAA is private entity].)

In its opening attack on the judgment, the NCAA asserts that its private status is dispositive of this action because the Privacy Initiative does not embody a right of action against nongovernmental entities. We disagree.

Article I, section 1 of the California Constitution is an enumeration of the "inalienable rights" of all Californians. "Privacy" is declared to be among those rights. Typical of broad

constitutional declarations of rights, the section does not define "privacy" or explain its relationship to other rights or interests. Nor does it specify how or against whom the right of privacy is to be safeguarded. Mere use of the word "privacy" is not definitive in this regard-at the time of the Privacy Initiative there were two distinct and wellestablished legal sources of privacy rights-the federal Constitution (applicable only to government action) and common law and statutory provisions (applicable as well against nongovernmental entities). (See discussion in pt. 2, post.)

The Privacy Initiative is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California. (Legislature v. Eu (1991) 54 Cal.3d 492, 505 [286 Cal.Rptr. 283, 816 P.2d 1309]; In re Lance W. (1985) 37 Cal.3d 873, 889 [210 Cal.Rptr. 631, 694 P.2d 744].) When, as here, the language of an initiative measure does not point to a definitive resolution of a question of interpretation, " 'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself.' ... Such indicia include the analysis and arguments contained in the official ballot pamphlet." (Legislature v. Eu, supra, 54 Cal.3d at p. 504, quoting in part Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal.3d 245, 250 [279 Cal.Rptr. 325, 806 P.2d 1360]; see also Amador Valley Joint High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].)

The official ballot pamphlet section dealing with Proposition 11, the Privacy Initiative, contains arguments for and against the measure as well as rebuttals. The argument in favor of Proposition 11 is replete with references to information-amassing practices of both "government" and "business." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 26 [hereafter Ballot Argument].) The authors of the argument, then-Assemblyman Kenneth Cory and then-Senator George Moscone, emphasized the capacity of both governmental and nongovernmental agencies to gather, keep, and disseminate sensitive personal information without checking its accuracy or restricting its use to mutually agreed or otherwise legitimate purposes.

As the argument in favor of Proposition 11 observes: "At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian. [¶] The right of privacy ... prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us. [¶] ... The proliferation of government and business records over which we have no control limits our ability to control our personal lives.... [¶] Even more dangerous is the loss of control over the accuracy of government and business records on individuals.... Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors. [¶] ... Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job[,] or get a drivers' license, a dossier is opened and an informational profile is sketched." (Ballot Argument, supra, at pp. 26-27, italics omitted and added.)

The rebuttal to the argument in favor of Proposition 11 and the argument against Proposition 11, both of which were written by then-Senator James Whetmore, do not contest the privacy measure's potential impact on "business" as well as "government." Rather, they challenge only the need for additional privacy safeguards, observing: "To say there are at present no effective restraints on the information activities of government and business is simply untrue." (Ballot Argument, supra, at p. 27, italics added.) Opponents further argued that the receipt of personal information is essential to effectuate the private party relationships and

transactions referred to by proponents of the measure, e.g., credit cards, life insurance policies, and employment interviews. (Ibid.)

The repeated emphasis in the competing ballot arguments on private party relationships and transactions, as well as individual encounters with government, underscores the efforts of the Privacy Initiative's framers to create enforceable privacy rights against both government agencies and private entities. As we have recognized: "[T]he overbroad collection and retention of unnecessary personal information by government and business interests" was one of the principal " 'mischiefs' " at which the Privacy Initiative was directed. (White v. Davis (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94, 533 P.2d 222], italics added.)

Although none of our decisions has squarely addressed the question whether our state constitutional right to privacy may be enforced against private parties (we had no occasion to decide the issue in Schmidt v. Superior Court (1989) 48 Cal.3d 370, 389, fn. 14 [256 Cal.Rptr. 750, 769 P.2d 932]), the Courts of Appeal have consistently answered in the affirmative. (See, e.g., Wilkinson v. Times Mirror Corp. (1989) 215 Cal.App.3d 1034, 1040-1044 [264 Cal.Rptr. 194] [hereafter Wilkinson]; Miller v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 1489-1493 [232 Cal.Rptr. 668, 69 A.L.R.4th 1027]; Cutter v. Brownbridge (1986) 183 Cal.App.3d 836, 841-843 [228 Cal.Rptr. 545]; Kinsey v. Macur (1980) 107 Cal.App.3d 265 [165 Cal.Rptr. 608]; Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, 829-830 [134 Cal.Rptr. 839] [hereafter Porten]; see also Chico Fem. Women's Health Cr. v. Butte Glen Med. S. (E.D.Cal. 1983) 557 F.Supp. 1190, 1201-1203.)

In Porten, supra, 64 Cal.App.3d 825, a college student sought damages from the University of San Francisco, a private institution, alleging it had, without his permission or any good reason, disclosed his academic transcript from another school to a state government agency. The Court of Appeal held the student had stated a cause of action against the university for violation of his state constitutional right to privacy by alleging the unauthorized and improper use of personal and confidential academic information for a purpose not in keeping with its creation or retention. Relying on the references in the ballot argument we have quoted, the court noted that "business" as well as government was the focus of the Privacy Initiative and concluded: "The constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians. [Citations.] Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." (Id. at pp. 829-830.)

Similarly, in Wilkinson, supra, 215 Cal.App.3d 1034, the court reviewed prior cases in support of its holding that the California constitutional right to privacy afforded protection against a private employer that required drugtesting as part of pre-employment physical examinations. Emphasizing that the concerns underlying the Privacy Initiative extended to the conduct of both governmental and nongovernmental entities, the court observed: "Common experience with the ever-increasing use of computers in contemporary society confirms that the [Privacy Initiative] was needed and intended to safeguard individual privacy from intrusion by both private and governmental action. That common experience makes it only too evident that personal privacy is threatened by the information-gathering capabilities and activities not just of government, but of private business as well. If the right of privacy is to exist as more than a memory or a dream, the power of both public and private institutions to collect and preserve data about individual citizens must be subject to constitutional control. Any expectations of privacy would indeed be illusory if only the government's collection and retention of data were restricted." (Id. at p. 1043.)

In its day-to-day operations, the NCAA is in a position to generate, retain, and use personal information about student athletes and others. In this respect, it is no different from a

credit card purveyor, an insurance company, or a private employer (the private entity examples used in the ballot arguments) in its capacity to affect the privacy interests of those with whom it deals.

The NCAA nonetheless urges us to impose a state action prerequisite to suits under the Privacy Initiative because it adds "privacy" to the declaration of rights portion of our state Constitution. The NCAA correctly observes that our decisions construing other provisions in the declaration of rights impose a state action requirement. . . . But those decisions were not premised on the mere location of the respective provisions in the constitutional text, but on their distinct language and histories. As we recognized in Kruger, supra, what the "drafters" of our Constitution's due process clause "intended by that enactment" remains the pivotal factor in determining whose activity is subjected to regulation. (11 Cal.3d at p. 366.) Similarly, what the voters intended in enacting the Privacy Initiative must determine the propriety of any state action requirement in this case. As we have seen, the ballot arguments contain persuasive evidence of drafter and voter intent to recognize a right of action for invasion of privacy against private as well as government entities. (White v. Davis, supra, 13 Cal.3d at pp. 773-776.)

Finally, the NCAA advocates a narrow reading of the history of the Privacy Initiative, calling the reference to "business" in the ballot arguments "nothing more than a general description of increasing strains on privacy in society generally." To the contrary, the repeated ballot argument references to "business" as an equal source of invasions of privacy, when coupled with examples of specific "business" entities that regularly obtain and use personal information, reveal an attempt by the framers of the Privacy Initiative to make their case to voters based on the conduct and practices of entities in the private as well as the public sector. Reading this language, a reasonable voter would most likely have concluded he or she was casting a ballot to safeguard his or her personal privacy against private as well as government entities. [FN4] After the case was so presented, the voters were persuaded. To remove by judicial construction a significant part of what the voters desired would amount to an electoral "bait and switch."

> FN4 See Luedtke v. Nabors Alaska Drilling, Inc. (Alaska 1989) 768 P.2d 1123, 1130 [79 A.L.R.4th 75] ["history surrounding the 1972 adoption of the privacy amendment by the voters of California evinces a clear intent that the clause applies to private as well as governmental action"].

In summary, the Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities. The legal concept of "privacy" as embodied in the initiative is susceptible of such an interpretation; the ballot arguments strongly support it. Our holding in this regard is necessarily confined to the Privacy Initiative. We intimate nothing about the existence of rights of action or permissible defendants in legal proceedings that may be brought either under other clauses in article I, section 1 or other parts of our state Constitution.

2. Standards for Determining Invasion of Privacy Under Article I, Section 1

In evaluating the NCAA's drug testing program, the trial court and the Court of Appeal assumed that private entities were subject to the same legal standards as government agencies with respect to claims of invasion of privacy. Borrowing from a few of our cases involving the conduct of government in its dealings with individual citizens, the lower courts imposed on the NCAA the burden of proving both: (1) a "compelling state interest" in support of drug testing; and (2) the absence of any alternative means of accomplishing that interest. (See Long Beach City Emp. v. City of Long Beach (1986) 41 Cal.3d 937, 948 [227 Cal.Rptr. 90, 719 P.2d 660];

White v. Davis, supra, 13 Cal.3d at p. 775.) Because the NCAA failed to shoulder the purported burden, it was enjoined from carrying out its drug testing program.

The text of the Privacy Initiative does not define "privacy." The Ballot Argument in favor includes broad references to a "right to be left alone," calling it a "fundamental and compelling interest," and purporting to include within its dimensions no less than "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (Ballot Argument, supra, at p. 27.) Regrettably, such vague and all-encompassing terms afford little guidance in developing a workable legal definition of the state constitutional right to privacy.

The principal focus of the Privacy Initiative is readily discernible. The Ballot Argument warns of unnecessary information gathering, use, and dissemination by public and private entities-images of "government snooping," computer stored and generated "dossiers" and " 'cradle-to-grave' profiles on every American" dominate the framers' appeal to the voters. (Ballot Argument, supra, at p. 26.) The evil addressed is government and business conduct in "collecting and stockpiling unnecessary information ... and misusing information gathered for one purpose in order to serve other purposes or to embarrass ...." (Id. at p. 27.) "The [Privacy Initiative's] primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." (White v. Davis, supra, 13 Cal.3d at p. 774.)

Although the argument in favor does contain a cryptic reference to a "compelling public need" for abridgement of privacy, the reference occurs in the context of informational privacy rights against government. The argument states in part: "The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is compelling public need. Some information may remain as designated public records but only when the availability of such information is clearly in the public interest." (Ballot Argument, supra, at p. 27, italics added.) Nothing in this passage compels the conclusion that the phrase "compelling public need" was intended to supply a single, all-encompassing legal test for privacy rights.

Even within the context of government information-gathering, the limited references in the ballot arguments to "compelling" necessity in the ballot arguments are not consistent. When pressed by the opponents of the Privacy Initiative, who maintained that the new right to privacy would place unwieldy burdens on government efforts to obtain information needed to police the welfare system, the framers equivocated, narrowing their description of the initiative's effect. In a rebuttal to the argument against the Privacy Initiative, Assemblyman Cory stated in part: "The right to privacy will not destroy welfare nor undermine any important government program. It is limited by 'compelling public necessity' and the public's need to know. [The Privacy Initiative] will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information." (Ballot Argument, supra, at p. 28, italics added.)

The references to a public "need to know" and to information "legitimately need[ed]" by government serve to limit and narrow the prior reference to "compelling public interest." A mere "legitimate need" for information may be less than overwhelming. Similarly, a type of information may not be "extraneous" or "frivolous" in pursuit of a government task, but the government's claim of entitlement may not be "compelling." For example, if a perceived "need" merely represents greater efficiency or effectiveness in the performance of some public function, but its fulfillment is by no means indispensable to government existence or operation, it might not be regarded as "compelling." And yet, as the ballot arguments reveal, the framers of the

Privacy Initiative preferred, at least in responding to the arguments of their opponents, a more flexible and pragmatic approach to the privacy right than the isolated term "compelling public interest" appears to demand.

As applied to private entities, a "compelling public interest" standard poses additional difficulties. Private entities pursue private ends and interests, not those of government. If every private organization had to establish a "compelling public interest" or "compelling state interest" to justify any activity that had an impact on individual privacy, it would fail to do so in most, if not all, conceivable cases. To use an example referred to in the ballot arguments, a private business extending credit or selling insurance may have a legitimate commercial need for obtaining personal information, but such a need is not thereby legally transformed into a "state interest," let alone a "compelling" one.

The Ballot Argument on the Privacy Initiative is useful in identifying the general evils that concerned its authors, but it does not provide clear or unequivocal support for a universal "compelling public interest" standard for privacy rights, regardless of context or circumstances. Indeed, the argument offers little guidance in developing privacy standards. Rather, at bottom, it counsels careful evaluation in context of all asserted "legitimate" interests at stake in the resolution of privacy claims.

Although confined to the single word "privacy," the language of the Privacy Initiative may be more helpful in developing a suitable legal standard. The term "privacy" was not coined by the authors of the Privacy Initiative. At the time the Privacy Initiative was considered and adopted by the voters, a right to privacy had been recognized and defined in several distinct branches of the law.

When an initiative contains terms that have been judicially construed, " ' " 'the presumption is almost irresistible' " ' " that those terms have been used " ' " 'in the precise and technical sense' " ' " in which they have been used by the courts. . . . Therefore, in order to discern the meaning of "privacy" as used in the Privacy Initiative, we must examine the various legal roots of the privacy concept.

* * * * *

Elements of a Cause of Action for Invasion of the State Constitutional Right of Privacy

Our cases do not contain a clear statement of the elements of a cause of action for invasion of the state constitutional right to privacy. Plaintiffs and Stanford succeeded in convincing the lower courts that the NCAA was required to justify any conceivable impact on plaintiffs' privacy interests by a "compelling interest" and to establish that its drug testing program was the "least restrictive" alternative furthering the NCAA's interests. The NCAA assails the "compelling interest/least restrictive alternative" test; plaintiffs and Stanford naturally come to its defense. We consider the positions of the parties in light of the history of the Privacy Initiative.

Our Privacy Initiative jurisprudence emanates from White v. Davis, supra, 13 Cal.3d 757. In White, we upheld against a general demurrer a taxpayer's complaint seeking to enjoin expenditures of public funds for a police department's covert surveillance of university classes at the University of California at Los Angeles. (Id. at p. 773.) The complaint alleged a level of "extensive, routine, covert police surveillance of university classes and organization meetings" that was "unprecedented in our nation's history." (Id. at p. 776.) According to plaintiff's allegations, police informants and undercover agents disguised themselves as students, attended university functions, and compiled dossiers of statements made by others in attendance, despite the absence of any illegal activity. . . .

Properly analyzed, our decision in White did not establish a blanket "compelling interest" test for all state constitutional right-to-privacy cases. . . .

There remains, however, the question of the correct legal standard to be applied in assessing plaintiffs' claims for invasion of privacy. Based on our review of the history of the Privacy Initiative, we will describe in the remainder of this part the elements of the cause of action for violation of the state constitutional right to privacy and the defenses that might be asserted against such a cause of action.

(1) A legally protected privacy interest

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy").

Informational privacy is the core value furthered by the Privacy Initiative. (White v. Davis, supra, 13 Cal.3d at p. 774.) A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue. As the ballot argument observes, the California constitutional right of privacy "prevents government and business interests from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (Ballot Argument, supra, at p. 27.)

Autonomy privacy is also a concern of the Privacy Initiative. The ballot arguments refer to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference in the form of penal and regulatory laws. (Ballot Argument, supra, at p. 27.) But they do not purport to create any unbridled right of personal freedom of action that may be vindicated in lawsuits against either government agencies or private persons or entities.

Whether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy-common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.

(2) Reasonable Expectation of Privacy

The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on plaintiff's part.

"The extent of [a privacy] interest is not independent of the circumstances." (Plante v. Gonzalez, supra, 575 F.2d at p. 1135.) Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to " 'limit [an] intrusion upon personal dignity and security' " that would otherwise be regarded as serious. (Ingersoll v. Palmer, supra, 43 Cal.3d at p. 1346 [upholding the use of sobriety checkpoints].)

In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. (See, e.g., Whalen, supra, 429 U.S. at p.

602 [51 L.Ed.2d at p. 75] [reporting of drug prescriptions to government was supported by established law and "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care"]; Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia (3d Cir. 1987) 812 F.2d 105, 114 [no invasion of privacy in requirement that applicants for promotion to special police unit disclose medical and financial information in part because of applicant awareness that such disclosure "has historically been required by those in similar positions"].)

A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (See, e.g., Rest.2d Torts, supra, § 652D, com. c ["The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."]

Finally, the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant. (See pt. 2(a)(1), ante.)

(3) Serious invasion of privacy interest

No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part." (Rest.2d Torts, supra, § 652D, com. c.) Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

Defenses to a State Constitutional Privacy Cause of Action

Privacy concerns are not absolute; they must be balanced against other important interests. (Doyle v. State Bar, supra, 32 Cal.3d at p. 20; Wilkinson, supra, 215 Cal.App.3d at p. 1046.) "[N]ot every act which has some impact on personal privacy invokes the protections of [our Constitution] .... [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." (215 Cal.App.3d at p. 1046.)

The diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a "balancing test." The comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law.

Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests. (See pt. 2(a), ante; Ballot Argument, supra, at pp. 26- 27.)

Confronted with a defense based on countervailing interests, the plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to the defendant's conduct that would minimize the intrusion on privacy interests.

(Whalen, supra, 429 U.S. at pp. 600-602 [106 L.Ed.2d at pp. 498-500]; Skinner v. Railway Labor Executives' Assn., supra, 489 U.S. at p. 626, fn. 7 [103 L.Ed.2d at pp. 665-666].) For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged. On the other hand, if sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.

The NCAA is a private organization, not a government agency. Judicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action.

First, the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons. "The government not only has the ability to affect more than a limited sector of the populace through its actions, it has both economic power, in the form of taxes, grants, and control over social welfare programs, and physical power, through law enforcement agencies, which are capable of coercion far beyond that of the most powerful private actors." (Sundby, Is Abandoning State Action Asking Too Much of the Constitution? (1989) 17 Hastings Const.L.Q. 139, 142-143 [hereafter Sundby].)

Second, "an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government." (Sundby, supra, 17 Hastings Const.L.Q. at p. 143.) Initially, individuals usually have a range of choice among landlords, employers, vendors and others with whom they deal. To be sure, varying degrees of competition in the marketplace may broaden or narrow the range. But even in cases of limited or no competition, individuals and groups may turn to the Legislature to seek a statutory remedy against a specific business practice regarded as undesirable. State and federal governments routinely engage in extensive regulation of all aspects of business. Neither our Legislature nor Congress has been unresponsive to concerns based on activities of nongovernment entities that are perceived to affect the right of privacy. (See, e.g., Lab. Code, § 432.2, subd. (a) ["No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment"]; 29 U.S.C. § 2001 [regulating private employer use of polygraph examination].)

Third, private conduct, particularly the activities of voluntary associations of persons, carries its own mantle of constitutional protection in the form of freedom of association. Private citizens have a right, not secured to government, to communicate and associate with one another on mutually negotiated terms and conditions. The ballot argument recognizes that state constitutional privacy protects in part "our freedom of communion and our freedom to associate with the people we choose." (Ballot Argument, supra, at p. 27.) Freedom of association is also protected by the First Amendment and extends to all legitimate organizations, whether popular or unpopular. (Britt v. Superior Court (1978) 20 Cal.3d 844, 854 [143 Cal.Rptr. 695, 574 P.2d 766]; see also Tribe, American Constitutional Law (2d ed. 1988) § 18- 2, p. 1691 [noting rationale of federal constitutional requirement of state action protects "the freedom to make certain choices, such as choices of the persons with whom [one associates]" which is "basic under any conception of liberty"].)

These generalized differences between public and private action may affect privacy rights differently in different contexts. If, for example, a plaintiff claiming a violation of the state

constitutional right to privacy was able to choose freely among competing public or private entities in obtaining access to some opportunity, commodity, or service, his or her privacy interest may weigh less in the balance. In contrast, if a public or private entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals.

Summary of Elements and Defenses

Based on our review of the Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.

Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. (Cf. Gill v. Hearst Publishing Co., supra, 40 Cal.2d at p. 229; Johnson v. Harcourt, Brace, Jovanovich (1974) 43 Cal.App.3d 880, 892 [118 Cal.Rptr. 370] [common law cases].) Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.

A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested.

The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate.

Application of the Elements of Invasion of Privacy to This Case

The NCAA challenges the decision of the Court of Appeal upholding a permanent injunction against its drug testing program as a violation of the state constitutional right to privacy. We will therefore review the record, including the findings made by the trial court, in light of the elements of a cause of action for invasion of privacy as we have just discussed them.

Plaintiffs correctly assert that the NCAA's drug testing program impacts legally protected privacy interests. First, by monitoring an athlete's urination, the NCAA's program intrudes on a human bodily function that by law and social custom is generally performed in private and without observers. (Cf. Skinner v. Railway Labor Executives' Assn., supra, 489 U.S. 602, 617 [103 L.Ed.2d 639, 659-660]; Pen. Code, § 653n [installation or maintenance of two-way mirror permitting observation of restroom is misdemeanor].) Second, by collecting and testing an athlete's urine and inquiring about his or her ingestion of medications and other substances, the NCAA obtains information about the internal medical state of an athlete's body that is regarded as personal and confidential. (Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669, 678 [156 Cal.Rptr. 55] ["A person's medical profile is an area of privacy

infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected."]; see also Wilkinson, supra, 215 Cal.App.3d at p. 1048.)

Observation of urination and disclosure of medical information may cause embarrassment to individual athletes. The first implicates autonomy privacy-an interest in freedom from observation in performing a function recognized by social norms as private. The second implicates informational privacy-an interest in limiting disclosure of confidential information about bodily condition. But, as we have noted, the identification of these privacy interests is the beginning, not the end, of the analysis.

a. Freedom From Observation During Urination

(1) Reasonable expectations of privacy

The observation of urination-a human excretory function-obviously implicates privacy interests. But the reasonable expectations of privacy of plaintiffs (and other student athletes) in private urination must be viewed within the context of intercollegiate athletic activity and the normal conditions under which it is undertaken.

By its nature, participation in intercollegiate athletics, particularly in highly competitive postseason championship events, involves close regulation and scrutiny of the physical fitness and bodily condition of student athletes. Required physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete's life not shared by other students or the population at large. Athletes frequently disrobe in the presence of one another and their athletic mentors and assistants in locker room settings where private bodily parts are readily observable by others of the same sex. They also exchange information about their physical condition and medical treatment with coaches, trainers, and others who have a "need to know."

As a result of its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external. In recognition of this practical reality, drug testing programs involving athletic competition have routinely survived Fourth Amendment "privacy" challenges. Drug testing has become a highly visible, pervasive, and wellaccepted part of athletic competition, particularly on intercollegiate and professional levels. (Schaill, supra, 864 F.2d at p. 1319.) It is a reasonably expected part of the life of an athlete, especially one engaged in advanced levels of competition, where the stakes and corresponding temptations are high.

The student athlete's reasonable expectation of privacy is further diminished by two elements of the NCAA's drug testing program-advance notice and the opportunity to consent to testing. A drug test does not come as a unwelcome surprise at the end of a post season match. Full disclosure of the NCAA's banned substances rules and testing procedures is made at the beginning of the athletic season, long before the postseason competition during which drug testing may take place. Following disclosure, the informed written consent of each student athlete is obtained. Thus, athletes have complete information regarding the NCAA's drug testing program and are afforded the opportunity to consent or refuse before they may be selected for testing.

To be sure, an athlete who refuses consent to drug testing is disqualified from NCAA competition. But this consequence does not render the athlete's consent to testing involuntary in any meaningful legal sense. Athletic participation is not a government benefit or an economic necessity that society has decreed must be open to all. One aspect of the state constitutional right to privacy is "our freedom to associate with the people we choose." (Ballot Argument, supra, at p. 27.) Participation in any organized activity carried on by a private, nongovernment

organization necessarily entails a willingness to forgo assertion of individual rights one might otherwise have in order to receive the benefits of communal association.

Plaintiffs and Stanford have no legal right to participate in intercollegiate athletic competition. (Cf. Steffes v. California Interscholastic Federation (1986) 176 Cal.App.3d 739 [222 Cal.Rptr. 355].) Their ability to do so necessarily depends upon their willingness to arrive at and adhere to common understandings with their competitors regarding their mutual sporting endeavor. The NCAA is democratically governed by its member institutions, including Stanford. Acting collectively, those institutions, including Stanford, make the rules, including those regarding drug use and testing. If, knowing the rules, plaintiffs and Stanford choose to play the game, they have, by social convention and legal act, fully and voluntarily acquiesced in the application of those rules. To view the matter otherwise would impair the privacy and associational rights of all NCAA institutions and athletes.

(2) Seriousness of invasion

Although diminished by the athletic setting and the exercise of informed consent, plaintiffs' privacy interests are not thereby rendered de minimis. Direct observation of urination by a monitor, an intrusive act, appears to be unique to the NCAA's program. Other decided cases, including those involving athlete drug testing, have involved less invasive testing methods, typically unobserved urination in a restroom stall. (See, e.g., Dimeo v. Griffin, supra, 943 F.2d at p. 682 [urine specimen given in "(relative) privacy" of toilet stall with representative standing by but not observing urination]; Schaill by Kross v. Tippecanoe County School Corp., supra, 864 F.2d at p. 1311 [no direct visual observation of urination; monitor stands outside stall to listen for normal sounds of urination and to check temperature of sample by hand].) The NCAA's use of a particularly intrusive monitored urination procedure justifies further inquiry, even under conditions of decreased expectations of privacy.

(3) Competing interests

To justify its intrusion on student athletes' diminished expectations of privacy, the NCAA asserts two countervailing interests: (1) safeguarding the integrity of intercollegiate athletic competition; and (2) protecting the health and safety of student athletes. The central purpose of the NCAA is to promote competitive athletic events conducted pursuant to "rules of the game" enacted by its own membership. In this way, the NCAA creates and preserves the "level playing field" necessary to promote vigorous, high-level, and nationwide competition in intercollegiate sports.

Plaintiffs and Stanford do not contend that the purpose or objectives of the NCAA are contrary to law or public policy. Nor do they attribute bad faith motives to the NCAA or challenge its important role as "the guardian of [the] important American tradition" of intercollegiate athletic competition. (NCAA v. Board of Regents of Univ. of Okla., supra, 468 U.S. at p. 101, fn. 23 [82 L.Ed.2d at p. 84].) The NCAA is, without doubt, a highly visible and powerful institution, holding, as it does, a virtual monopoly on high-level intercollegiate athletic competition in the United States. Although the NCAA, like other private businesses and organizations, is subject to numerous regulations, neither Congress nor our Legislature has seen fit to interfere with its general rulemaking functions, whether in the area of drug testing or in other fields. Therefore, we regard the NCAA's stated motives and objectives, not with hostility or intense skepticism, but with a "respectful presumption of validity." (Ibid.)

Considered in light of its history, the NCAA's decision to enforce a ban on the use of drugs by means of a drug testing program is reasonably calculated to further its legitimate

interest in maintaining the integrity of intercollegiate athletic competition. . . .

But whatever the provable incidence of drug use, perception may be more potent than reality. If particular substances are perceived to enhance athletic performance, student athletes may feel pressure (whether internal or external, subtle or overt) to use them. A drug testing program serves to minimize that pressure by providing at least some assurance that drug use will be detected and the user disqualified. As a result, it provides significant and direct benefits to the student athletes themselves, allowing them to concentrate on the merits of their athletic task without undue concern about loss of a competitive edge. These benefits offset the limited impact on privacy imposed by the prospect of testing.

There was ample evidence in the record that certain kinds of drugs-such as anabolic steroids and amphetamines-are perceived by some athletes to enhance athletic performance. Among other findings, the Michigan State University study showed that 69 percent of the student athletes who reported taking steroids and 37 percent of those taking amphetamines admitted doing so "to improve athletic performance." . . .

Finally, the practical realities of NCAA-sponsored athletic competition cannot be ignored. Intercollegiate sports is, at least in part, a business founded upon offering for public entertainment athletic contests conducted under a rule of fair and rigorous competition. Scandals involving drug use, like those involving improper financial incentives or other forms of corruption, impair the NCAA's reputation in the eyes of the sports-viewing public. A well announced and vigorously pursued drug testing program serves to: (1) provide a significant deterrent to would-be violators, thereby reducing the probability of damaging public disclosure of athlete drug use; and (2) assure student athletes, their schools, and the public that fair competition remains the overriding principle in athletic events. Of course, these outcomes also serve the NCAA's overall interest in safeguarding the integrity of intercollegiate athletic competition. (Cf. Dimeo v. Griffin, supra, 943 F.2d at p. 685 [state's financial interest in horse racing revenues provides partial justification for drug testing of participants to preserve appearance and reality of fair competition]; Shoemaker v. Handel, supra, 795 F.2d at p. 1142 ["It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless [drug] testing [in the horse racing industry]."]

The NCAA also has an interest in protecting the health and safety of student athletes who are involved in NCAA-regulated competition. Contrary to plaintiffs' characterization, this interest is more than a mere "naked assertion of paternalism." The NCAA sponsors and regulates intercollegiate athletic events, which by their nature may involve risks of physical injury to athletes, spectators, and others. In this way, the NCAA effectively creates occasions for potential injury resulting from the use of drugs. As a result, it may concern itself with the task of protecting the safety of those involved in intercollegiate athletic competition. This NCAA interest exists for the benefit of all persons involved in sporting events (including not only drug-ingesting athletes but also innocent athletes or others who might be injured by a drug user), as well as the sport itself.

Plaintiffs and Stanford attempt to undermine the strength of the NCAA's interests with a series of factual arguments based on the trial court's findings. However, as we have noted, those findings were premised on the legal assumption that the NCAA bears the burden of establishing a "compelling interest" in its drug testing program that cannot be addressed by any alternative with a lesser impact on privacy interests. No such showing is required. Because the trial court's findings were premised on an erroneous view of the applicable legal standard, they cannot save the judgment. . . . Although we could remand this case for reconsideration in light of the applicable rules of law, there is no reason to do so. Uncontradicted evidence in the record

demonstrates as a matter of law the constitutional validity of the NCAA's program.

Without reviewing all of the arguments advanced by plaintiffs and Stanford, it is sufficient to note that most, if not all, are based on matters that are immaterial in light of the elements of invasion of privacy described above. . . .

[A]s we have noted, perception may well overpower reality in this area. Although the trial court found that coaches and athletes in general do not perceive drugs as performance-enhancing or as a "major problem," there is clear evidence of a significant perception to the contrary on the part of some coaches and athletes. Plaintiffs' own expert confirmed the perception and opined that it was growing. Rules are often made and enforced to control the behavior of relatively small numbers of individuals whose conduct, if it became more widespread, would undermine a community goal or objective. If athletic drug use became widespread because of a growing perception that drug users thereby obtained a "competitive edge," the integrity and reputation of NCAA athletic competition could be seriously threatened. The NCAA is not required by state constitutional privacy principles to stay its hand until a "minor" problem becomes a "major" one. (Cf. Dimeo v. Griffin, supra, 943 F.2d at p. 684 ["[G]overnment is not limited to addressing public safety problems after serious accidents reveal its want of foresight."].) . . .

Initially, the trial court erred in imposing on the NCAA the burden of establishing that there were no less intrusive means of accomplishing its legitimate objectives. Like the "compelling interest" standard, the argument that such a "least restrictive alternative" burden must invariably be imposed on defendants in privacy cases derives from decisions that: (1) involve clear invasions of central, autonomy-based privacy rights, particularly in the areas of free expression and association, procreation, or government-provided benefits in areas of basic human need; or (2) are directed against the invasive conduct of government agencies rather than private, voluntary organizations.

We have been directed to no case imposing on a private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the "least offensive alternative" possible under the circumstances. Nothing in the language of history of the Privacy Initiative justifies the imposition of such a burden; we decline to impose it. . . .

The closest question presented by this case concerns the method used by the NCAA to monitor athletes as they provide urine samples. A tested athlete's urination is directly observed by an NCAA official of the same sex as the athlete who stands some five to seven feet away. Even the diminished expectations of privacy in a locker room setting do not necessarily include direct and intentional observation of excretory functions. Plaintiffs had a reasonable expectation of privacy under the circumstances; their privacy interest was impacted by the NCAA's conduct. The NCAA was therefore required to justify its use of direct monitoring of urination.

In support of direct monitoring, the NCAA introduced substantial evidence that urine samples can be altered or substituted in order to avoid positive findings and that athletes had actually attempted to do so. The NCAA's interest in preserving the integrity of intercollegiate athletic competition requires not just testing, but effective and accurate testing of unaltered and uncontaminated samples. If direct monitoring is necessary to accomplish accurate testing, the NCAA is entitled to use it. . . .

b. Interest in the Privacy of Medical Treatment and Information

(1) Reasonable expectation

As discussed above, plaintiffs' interest in the privacy of medical treatment and medical information is also a protectable interest under the Privacy Initiative. However, the student

athlete's reasonable expectation of privacy is similarly diminished because of the nature of competitive athletic activity and the norms under which it is conducted. Organized and supervised athletic competition presupposes a continuing exchange of otherwise confidential information about the physical (and medical) condition of athletes. Coaches, trainers, and team physicians necessarily learn intimate details of student athletes' bodily condition, including illnesses, medical problems, and medications prescribed or taken. Plaintiffs do not demon strate that sharing similar information with the NCAA, in its capacity as a regulator of athletic competition in which plaintiffs have voluntarily elected to participate, presents any greater risk to privacy.

(2) Seriousness of invasion

Directed and specific inquiries about personal medications (including questions about birth control pills) in the potentially stressful circumstances of a random drug test are undoubtedly significant from a privacy standpoint. Without a correspondingly important "reason to know," the NCAA would have no right to demand answers to these kinds of questions. Again, however, the extent of the intrusion on plaintiffs' privacy presented by the question must be considered in light of both the diminished expectations of privacy of athletes in such questions, which are routinely asked and answered in the athletic context.

(3) Competing interests

Drug testing for multiple substances is a complex process. Although both parties acknowledge the NCAA has used and continues to use the best available methods of laboratory analysis, mistakes are possible and "false positives" can occur. The NCAA's inquiries to athletes about medications and drugs are designed to ensure accuracy in testing. The NCAA maintains that complete and accurate disclosure of these matters by athletes will, in certain instances and with respect to specified substances, serve to explain findings and prevent the embarrassment and distress occasioned by further proceedings. The record supports the NCAA's contentions. These kinds of disclosures are reasonably necessary to further the threshold purpose of the drug testing program-to protect the integrity of competition through the medium of accurate testing of athletes engaged in competition. The NCAA's interests in this regard adequately justify its inquiries about medications and other substances ingested by tested athletes.

The NCAA follows extensive procedures designed to safeguard test results, including: the numbering of urine specimens, chain of custody procedures, and control of disclosures regarding disqualified athletes. Plaintiffs and Stanford offer no serious criticism of the manner in which the NCAA protects the privacy interests of student athletes in the results or the process of drug testing. They point to no instances in which medical data or drug test results were disclosed to persons other than NCAA officials and the athlete's own college or university.

Although plaintiffs plausibly observe that media interest in positive test results is inevitable, the NCAA cannot be held responsible for public curiosity. Under established NCAA procedures, positive drug testing results are disclosed only to the athlete's school, which, in turn, informs the athlete. Only those with a "need to know" learn of positive findings. Plaintiffs fail to identify any other feasible precaution or safeguard. The uncontradicted evidence in the record thus points to a single conclusion: the NCAA carefully safeguards the confidentiality of athlete medical information and drug test data, using the same only to determine eligibility for NCAA athletic competition in accordance with its demonstrated interests. There is no invasion of privacy in the NCAA's procedure. (Skinner v. Railway Labor Executives' Assn., supra, 489 U.S. at p. 626, fn. 7 [103 L.Ed.2d at pp. 665-666].)

In sum, plaintiffs and Stanford did not prove that the NCAA is "collecting and stockpiling unnecessary information about [student athletes] [or] misusing information gathered

for one purpose in order to serve other purposes or to embarrass [student athletes]." (Ballot Argument, supra, at p. 27.) The NCAA's information-gathering procedure (i.e., drug testing through urinalysis) is a method reasonably calculated to further its interests in enforcing a ban on the ingestion of specified substances in order to secure fair competition and the health and safety of athletes participating in its programs.

In generally upholding the NCAA's drug testing program against plaintiffs' privacy challenge, we intimate no views about the legality of blanket or random drug testing conducted by employers, whether of current employees or applicants for employment, or by other kinds of entities. Employment settings are diverse, complex, and very different from intercollegiate athletic competition. Reasonable expectations of privacy in those settings are generally not diminished by the emphasis on bodily condition, physical training, and extracurricular competition inherent in athletics.

In the government employment context, for example, the Fourth Amendment protection against unreasonable searches and seizures has generally been interpreted to require more than an employer interest in employee job performance or a "drug-free workplace" to justify drug testing without reasonable suspicion. Drug testing has been upheld when particular kinds of employment settings-including prison guarding, train operations, or customs inspection-present extraordinary risks to employer or public interests from employee drug use. . . .

What requirements are imposed on private employers by the California constitutional right to privacy will depend upon the application of the elements and considerations we have discussed to the employer's special interests and the employee's reasonable expectations prevailing in a particular employment setting. We are not called upon to decide any such issues here. . . . We prefer to avoid the continuing uncertainty and confusion inherent in the rigid application of a "compelling interest" test to a multi-faceted right to privacy. . . Even at the risk of losing some degree of flexibility in decision making, a constitutional standard that carefully weighs the pertinent interests at stake in an ordered fashion is preferable to one dominated by the vague and ambiguous adjective "compelling." . . .

Disposition

The NCAA's drug testing program does not violate the state constitutional right to privacy. Therefore, the NCAA is entitled to judgment in its favor. As a result of our disposition, we do not decide whether the recognition of a state constitutional right to privacy in these circumstances would violate the commerce clause of the federal Constitution. . . . This case is remanded with instructions to direct entry of a final judgment in favor of the NCAA. The NCAA shall recover its costs.

Panelli, J., Arabian, J., and Baxter, J., concurred.

Information Practices Legislation

The following excerpts are included simply to illustrate information privacy statutes enacted in many states. It is not intended for intensive reading. The Federal law equivalent of this California statute is the Privacy Act of 1974, which is a counterpart to the Freedom of Information Act (FOIA). (In California the FOIA equivalent is the Public Records Act.)

Excerpts from the CALIFORNIA CIVIL CODE (Information Practices Act of 1977, as amended)

§ 1798.1. Legislative declaration and findings

The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them. The Legislature further makes the following findings:

(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

§ 1798.3. Definitions

As used in this chapter:

(a) The term "personal information" means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.

(b) The term "agency" means every state office, officer, department, division, bureau, board, commission, or other state agency, except that the term agency shall not include:

(1) The California Legislature.

(2) Any agency established under Article VI of the California Constitution.

(3) The State Compensation Insurance Fund, except as to any records which contain personal information about the employees of the State Compensation Insurance Fund.

(4) A local agency, as defined in subdivision (b) of Section 6252 of the Government Code.

(c) The term "disclose" means to disclose, release, transfer, disseminate, or otherwise communicate all or any part of any record orally, in writing, or by electronic or any other means to any person or entity.

(d) The term "individual" means a natural person.

(e) The term "maintain" includes maintain, acquire, use, or disclose.

(f) The term "person" means any natural person, corporation, partnership, limited liability company, firm, or association.

(g) The term "record" means any file or grouping of information about an individual that is maintained by an agency by reference to an identifying particular such as the individual's name, photograph, finger or voice print, or a number or symbol assigned to the individual.

(h) The term "system of records" means one or more records, which pertain to one or more individuals, which is maintained by any agency, from which information is retrieved by the name of an individual or by some identifying number, symbol or other identifying particular assigned to the individual.

(i) The term "governmental entity," except as used in Section 1798.26, means any branch of the federal government or of the local government.

(j) The term "commercial purpose" means any purpose which has financial gain as a major objective. It does not include the gathering or dissemination of newsworthy facts by a publisher or broadcaster.

(k) The term "regulatory agency" means the Department of Financial Institutions, the Department of Corporations, the Department of Insurance, the Department of Real Estate, and agencies of the United States or of any other state responsible for regulating financial institutions.

§ 1798.14. Contents of records

Each agency shall maintain in its records only personal information which is relevant and necessary to accomplish a purpose of the agency required or authorized by the California Constitution or statute or mandated by the federal government.

§ 1798.15. Sources of information

Each agency shall collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source.

§ 1798.16. Personal information; maintaining sources of information

(a) Whenever an agency collects personal information, the agency shall maintain the source or sources of the information, unless the source is the data subject or he or she has received a copy of the source document, including, but not limited to, the name of any source who is an individual acting in his or her own private or individual

capacity. If the source is an agency, governmental entity or other organization, such as a corporation or association, this requirement can be met by maintaining the name of the agency, governmental entity, or organization, as long as the smallest reasonably identifiable unit of that agency, governmental entity, or organization is named.
(b) On or after July 1, 2001, unless otherwise authorized by the Department of Information Technology pursuant to Executive Order D-3-99, whenever an agency electronically collects personal information, as defined by Section 11015.5 of the Government Code, the agency shall retain the source or sources or any intermediate form of the information, if either are created or possessed by the agency, unless the source is the data subject that has requested that the information be discarded or the data subject has received a copy of the source document.
(c) The agency shall maintain the source or sources of the information in a readily accessible form so as to be able to provide it to the data subject when they inspect any record pursuant to Section 1798.34. This section shall not apply if the source or sources are exempt from disclosure under the provisions of this chapter.
§ 1798.17. Notice; periodic provision; contents
Each agency shall provide on or with any form used to collect personal information from individuals the notice specified in this section. When contact with the individual is of a regularly recurring nature, an initial notice followed by a periodic notice of not more than one-year intervals shall satisfy this requirement. This requirement is also satisfied by notification to individuals of the availability of the notice in annual tax-related pamphlets or booklets provided for them. The notice shall include all of the following:
(a) The name of the agency and the division within the agency that is requesting the information.
(b) The title, business address, and telephone number of the agency official who is responsible for the system of records and who shall, upon request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records.
(c) The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information.
(d) With respect to each item of information, whether submission of such information is mandatory or voluntary.
(e) The consequences, if any, of not providing all or any part of the requested information.
(f) The principal purpose or purposes within the agency for which the information is to be used.
(g) Any known or foreseeable disclosures which may be made of the information pursuant to subdivision (e) or (f) of Section 1798.24.
(h) The individual's right of access to records containing personal information which are maintained by the agency.
This section does not apply to any enforcement document issued by an employee of a law enforcement agency in the performance of his or her duties wherein the violator is provided an exact copy of the document, or to accident reports whereby the parties of interest may obtain a copy of the report pursuant to Section 20012 of the Vehicle Code.
The notice required by this section does not apply to agency requirements for an individual to provide his or her name, identifying number, photograph, address, or similar identifying information, if this information is used only for the purpose of identification and communication with the individual by the agency, except that requirements for an individual's social security number shall conform with the provisions of the Federal Privacy Act of 1974 (Public Law 93-579).

§ 1798.19. Contracts for the operation or maintenance of records; requirements of chapter; employees of agency
Each agency when it provides by contract for the operation or maintenance of records containing personal information to accomplish an agency function, shall cause, consistent with its authority, the requirements of this chapter to be applied to those records. For purposes of Article 10 (commencing with Section 1798.55), any contractor and any employee of the contractor, if the contract is agreed to on or after July 1, 1978, shall be considered to be an employee of an agency. Local government functions mandated by the state are not deemed agency functions within the meaning of this section.

§ 1798.20. Rules of conduct; instruction
Each agency shall establish rules of conduct for persons involved in the design, development, operation, disclosure, or maintenance of records containing personal information and instruct each such person with respect to such rules and the requirements of this chapter, including any other rules and procedures adopted pursuant to this chapter and the remedies and penalties for noncompliance.

§ 1798.24. Personal information
No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is:

(a) To the individual to whom the information pertains.
(b) With the prior written voluntary consent of the individual to whom the record pertains, but only if such consent has been obtained not more than 30 days before the disclosure, or in the time limit agreed to by the individual in the written consent.
(c) To the duly appointed guardian or conservator of the individual or a person representing the individual provided that it can be proven with reasonable certainty through the possession of agency forms, documents or correspondence that such person is the authorized representative of the individual to whom the information pertains.
(d) To those officers, employees, attorneys, agents, or volunteers of the agency which has custody of the information if the disclosure is relevant and necessary in the ordinary course of the performance of their official duties and is related to the purpose for which the information was acquired.
(e) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use or transfer is accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency.
(f) To a governmental entity when required by state or federal law.
(g) Pursuant to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.
(h) To a person who has provided the agency with advance adequate written assurance that the information will be used solely for statistical research or reporting purposes, but only if the information to be disclosed is in a form that will not identify any individual.
(i) Pursuant to a determination by the agency which maintains information that compelling circumstances exist which affect the health or safety of an individual, if upon the disclosure notification is transmitted to the individual to whom the information pertains at his or her last known address. Disclosure shall not be made if it is in conflict with other state or federal laws.
(j) To the State Archives of the State of California as a record which has sufficient historical or other value to warrant its continued preservation by the California state government, or for evaluation by the Director of General Services or his or her designee to determine whether the record has further administrative, legal, or fiscal value.
(k) To any person pursuant to a subpoena, court order, or other compulsory legal process if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains, and if the notification is not prohibited by law.
(l) To any person pursuant to a search warrant.
(m) Pursuant to Article 3 (commencing with Section 1800) of Chapter 1 of Division 2 of the Vehicle Code.
(n) For the sole purpose of verifying and paying government health care service claims made pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code.
(o) To a law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law.
(p) To another person or governmental organization to the extent necessary to obtain information from the person or governmental organization as necessary for an investigation by the agency of a failure to comply with a specific state law which the agency is responsible for enforcing.
(q) To an adopted person and is limited to general background information pertaining to the adopted person's natural parents, provided that the information does not include or reveal the identity of the natural parents.
(r) To a child or a grandchild of an adopted person and disclosure is limited to medically necessary information pertaining to the adopted person's natural parents. However, the information, or the process for obtaining the information, shall not include or reveal the identity of the natural parents. The State Department of Social Services shall adopt regulations governing the release of information pursuant to this subdivision by July 1, 1985. The regulations shall require licensed adoption agencies to provide the same services provided by the department as established by this subdivision.
(s) To a committee of the Legislature or to a Member of the Legislature, or his or her staff when authorized in writing by the member, where the member has permission to obtain the information from the individual to whom it pertains or where the member provides reasonable assurance that he or she is acting on behalf of the individual.
(t) To the University of California or a nonprofit educational institution conducting scientific research, provided the request for information includes assurances of the need for personal information, procedures for protecting the confidentiality of the information and assurances that the personal identity of the subject shall not be further disclosed in individually identifiable form.
(u) To an insurer if authorized by Chapter 5 (commencing with Section 10900) of Division 4 of the Vehicle Code.

This article shall not be construed to require the disclosure of personal information to the individual to whom the information pertains when that information may otherwise be withheld as set forth in Section 1798.40.
(v) Pursuant to Section 1909, 8009, or 18396 of the Financial Code.

§ 1798.26. Motor vehicles; sale of registration information or information from drivers' licenses files; administrative procedures

With respect to the sale of information concerning the registration of any vehicle or the sale of information from the files of drivers' licenses, the Department of Motor Vehicles shall, by regulation, establish administrative procedures under which any person making a request for information shall be required to identify himself or herself and state the reason for making the request. These procedures shall provide for the verification of the name and address of the person making a request for the information and the department may require the person to produce the information as it determines is necessary in order to ensure that the name and address of the person are his or her true name and address. These procedures may provide for a 10-day delay in the release of the requested information. These procedures shall also provide for notification to the person to whom the information primarily relates, as to what information was provided and to whom it was provided. The department shall, by regulation, establish a reasonable period of time for which a record of all the foregoing shall be maintained.
The procedures required by this subdivision do not apply to any governmental entity, any person who has applied for and has been issued a requester code by the department, or any court of competent jurisdiction.

§ 1798.29. Agencies owning, licensing, or maintaining, computerized data including personal information; disclosure of security breach; notice requirements

(a) Any agency that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision (c), or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.
(b) Any agency that maintains computerized data that includes personal information that the agency does not own shall notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.
(c) The notification required by this section may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation. The notification required by this section shall be made after the law enforcement agency determines that it will not compromise the investigation.
(d) For purposes of this section, "breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency. Good faith acquisition of personal information by an employee or agent of the agency for the purposes of the agency is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure.
(e) For purposes of this section, "personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted:
(1) Social security number.
(2) Driver's license number or California Identification Card number.
(3) Account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
(f) For purposes of this section, "personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.
(g) For purposes of this section, "notice" may be provided by one of the following methods:
(1) Written notice.
(2) Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in Section 7001 of Title 15 of the United States Code.
(3) Substitute notice, if the agency demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars ($250,000), or that the affected class of subject persons to be notified exceeds 500,000, or the agency does not have sufficient contact information. Substitute notice shall consist of all of the following:
(A) E-mail notice when the agency has an e-mail address for the subject persons.
(B) Conspicuous posting of the notice on the agency's Web site page, if the agency maintains one.

(C) Notification to major statewide media.
(h) Notwithstanding subdivision (g), an agency that maintains its own notification procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of this part shall be deemed to be in compliance with the notification requirements of this section if it notifies subject persons in accordance with its policies in the event of a breach of security of the system.

§ 1798.34. Inspection of personal information in records and accounting; time; copies; form; availability
(a) Except as otherwise provided in this chapter, each agency shall permit any individual upon request and proper identification to inspect all the personal information in any record containing personal information and maintained by reference to an identifying particular assigned to the individual within 30 days of the agency's receipt of the request for active records, and within 60 days of the agency's receipt of the request for records that are geographically dispersed or which are inactive and in central storage. Failure to respond within these time limits shall be deemed denial. In addition, the individual shall be permitted to inspect any personal information about himself or herself where it is maintained by reference to an identifying particular other than that of the individual, if the agency knows or should know that the information exists. The individual also shall be permitted to inspect the accounting made pursuant to Article 7 (commencing with Section 1798.25).
(b) The agency shall permit the individual, and, upon the individual's request, another person of the individual's own choosing to inspect all the personal information in the record and have an exact copy made of all or any portion thereof within 15 days of the inspection. It may require the individual to furnish a written statement authorizing disclosure of the individual's record to another person of the individual's choosing.
(c) The agency shall present the information in the record in a form reasonably comprehensible to the general public.
(d) Whenever an agency is unable to access a record by reference to name only, or when access by name only would impose an unreasonable administrative burden, it may require the individual to submit such other identifying information as will facilitate access to the record.
(e) When an individual is entitled under this chapter to gain access to the information in a record containing personal information, the information or a true copy thereof shall be made available to the individual at a location near the residence of the individual or by mail, whenever reasonable.

§ 1798.44. Application of article
This article applies to the rights of an individual to whom personal information pertains and not to the authority or right of any other person, agency, other state governmental entity, or governmental entity to obtain this information.

§ 1798.45. Civil actions against agencies; grounds
An individual may bring a civil action against an agency whenever such agency does any of the following:
(a) Refuses to comply with an individual's lawful request to inspect pursuant to subdivision (a) of Section 1798.34.
(b) Fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be made on the basis of such record, if, as a proximate result of such failure, a determination is made which is adverse to the individual.
(c) Fails to comply with any other provision of this chapter, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

§ 1798.48. Failure to maintain records properly; noncompliance with provisions of chapter and rules; actual damages; costs; attorney fees
In any suit brought under the provisions of subdivision (b) or (c) of Section 1798.45, the agency shall be liable to the individual in an amount equal to the sum of:
(a) Actual damages sustained by the individual, including damages for mental suffering.
(b) The costs of the action together with reasonable attorney's fees as determined by the court.

§ 1798.53. Invasion of privacy; intentional disclosure of personal information; state or federal records; exemplary damages; attorney fees and costs
Any person, other than an employee of the state or of a local government agency acting solely in his or her official capacity, who intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency or from "records" within a "system of records" (as these terms are defined in the Federal Privacy Act of 1974 (P.L. 93-579; 5 U.S.C. 552a)) maintained by a federal government agency, shall be subject to a civil action, for invasion of privacy, by the individual to whom the information pertains.

In any successful action brought under this section, the complainant, in addition to any special or general damages awarded, shall be awarded a minimum of two thousand five hundred dollars ($2,500) in exemplary damages as well as attorney's fees and other litigation costs reasonably incurred in the suit.
The right, remedy, and cause of action set forth in this section shall be nonexclusive and is in addition to all other rights, remedies, and causes of action for invasion of privacy, inherent in Section 1 of Article I of the California Constitution.

Consult the California Civil Code for the complete version of this statute.

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C. PREEMPTION OF CALIFORNIA FINANCIAL PRIVACY LEGISLATION

1. THE GRAMM-LEACH-BLILEY ACT

Excerpted from Daniel J. Solove and Marc Rotenberg, INFORMATION PRIVACY LAW (2003) pages 533-537.

In 1999, Congress passed the Financial Services Modernization Act, more commonly known as the Gramm-Leach-Bliley (GLB) Act, Pub. L. No. 106-102, codified at 15 U.S.C. §§ 6801-6809. The purpose of the GLB Act is "to enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, an other financial service providers...."[1] The GLB Act was designed to restructure financial service industries, which had long been regulated under the Glass-Steagall Act of 1933. The Glass-Steagall Act, passed in response to the Great Depression, prevented different types of financial institutions (e.g., banks, brokerage houses, insurers) from affiliating with each other. The GLB Act enables the creation of financial conglomerates that provide a host of different forms of financial services.

The law authorizes widespread sharing of personal information by financial institutions such as banks, insurers, and investment companies. The law permits sharing of personal information between companies that are joined together or affiliated with each other as well as sharing of information between unaffiliated companies. To protect privacy, the Act requires a variety of agencies (FTC, Comptroller of Currency, SEC, and a number of others) to establish "appropriate standards for the financial institutions subject to their jurisdiction" to "insure security and confidentiality of customer records and information" and "protect against unauthorized access" to the records. 15 U.S.C. § 6801.

Nonpublic Personal Information. The privacy provisions of the GLB Act only apply to "nonpublic personal information" that consists of "personally identifiable financial information." § 6809(4). Thus, the law only protects *financial* information that is *not public.*

Sharing of Information with Affiliated Companies. The GLB Act permits financial institutions that are joined together to share the "nonpublic personal information" that each affiliate possesses. For example, suppose an affiliate has access to a person's medical information. This could be shared with an affiliate bank that could then turn down a person for a loan. Affiliates must tell customers that they are sharing this information. § 6802(a). The disclosure can be in the form of a general disclosure in a privacy policy. § 6803(a). There is no way for individuals to block this sharing of information.

Sharing of Information with Nonaffiliated Companies. Financial institutions can share personal information with nonaffiliated companies if they first provide individuals with the ability to opt out of the disclosure. § 6802(b). However, people cannot opt out if the financial institution provides personal data to nonaffiliated third parties "to perform services for or functions on behalf of the financial institution, including marketing of the financial institution's own products and services, or financial products or services offered pursuant to joint agreements between two or more financial institutions." § 6802(b)(2). However, the financial institution must disclose the information sharing and must have a contract with the third party requiring the third party to maintain the confidentiality of the information. § 6802(b)(2). Third parties receiving personal data from a financial institution cannot reuse that information. § 6802(c).

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[1] H.R.Rep. 106-434, at 245 (1999), reprinted in 1999 U.S.C.C.A.N. 245, 245.

These provisions do not apply to disclosures to credit reporting agencies.

Limits on Disclosure. Financial institutions cannot disclose (other than to credit reporting agencies) account numbers or credit card numbers for use in direct marketing (telemarketing, e-mail, or mail). § 6802(d).

Privacy Notices. The GLB Act requires that financial institutions inform customers of their privacy policies. In particular, customers must be informed about policies concerning the disclosure of personal information to affiliates and other companies and categories of information that are disclosed and the security of personal data. § 6803(a). Full compliance with the Act was required by July 1, 2001, and prior to that date, financial institutions mailed privacy policies and opt-out forms to their customers. Many individuals, who conducted business with multiple financial institutions, received a number of such mailings.

Security. The GLBA requires the FTC and other agencies to establish security standards for nonpublic personal information. *See 15 U.S.C. §§6801(b);* 6805(b)(2). The FTC issued its final regulations on May 23, 2002. According to the regulations, financial institutions "shall develop, implement, and maintain a comprehensive information security program" that is appropriate to the "size and complexity" of the institution, the "nature and scope" of the institution's activities, and the "sensitivity of any customer information at issue." *16* C.F.R. § 314.3(a). An "information security program" is defined as "the administrative, technical, or physical safeguards [an institution uses] to access, collect, distribute, process, store, use, transmit, dispose of, or otherwise handle customer information." §314.2(b). A security program should achieve three objectives:

(1) Insure the security and confidentiality of customer information;

(2) Protect against any anticipated threats or hazards to the security or integrity of such information; and

(3) Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer. § 314.3(b).

Preemption. The GLB Act does not preempt state laws that provide greater protection to privacy. § *6807(b).*

Constitutional Challenge. The GLB Act and the regulations promulgated thereunder were upheld against a First Amendment challenge in *Individual Reference Services Group v. FTC, 145 F.* Supp. 2d 6 (D.D.C. 2001). . . .

Critics and Supporters. Consider the following critique by Paul Schwartz and Ted Janger:

> The GLB Act has managed to disappoint both industry leaders and privacy advocates alike. Why are so many observers frustrated with the GLB Act? We have already noted the complaint of financial services companies regarding the expense of privacy notices. These organizations also argue that there have been scant pay-off from the costly mailings - and strong evidence backs up this claim. For example, a survey from the American Banker's Association found that 22% of banking customers said that they received a privacy notice but did not read it, and 41% could not even recall receiving a notice. The survey also found only 0.5% of banking customers had exercised their opt-out rights....
>
> Not only are privacy notices difficult to understand, but they are written in a fashion that makes it hard to exercise the opt-out rights that GLB Act mandates. For example, opt-out provisions are sometimes buried in privacy notices. As the

> Public Citizen Litigation Group has found, "Explanations of how to opt-out invariably appear at the end of the notices. Thus, before they learn how to opt-out, consumers must trudge through up to ten pages of fine print...." Public Citizen also identified many passages regarding opt-out that "are obviously designed to discourage consumers from exercising their rights under the statute." For example, some financial institutions include an opt-out box only "in a thicket of misleading statements.". . . A final tactic of GLB Act privacy notices is to state that consumers who opt-out may fail to receive "valuable offers.".. .
>
> The GLB Act merely contains an opt-out requirement; as a result, information can be disclosed to non-affiliated entities unless individuals take affirmative action, namely, informing the financial entity that they refuse this sharing of their personal data. By setting its default as an opt-out, the GLB Act fails to create any penalty on the party with superior knowledge, the financial entity, should negotiations fail to occur. In other words, the GLB leaves the burden of bargaining on the less informed parry, the individual consumer. These doubts about the efficacy of opt-out are supported, at least indirectly, by the evidence concerning sometimes confusing, sometimes misleading privacy notices.... An opt-out default creates incentives for privacy notices that lead to inaction by the consumer.[2]

In contrast, Peter Swire argues that the GLB Act "works surprisingly well as privacy legislation":

> Recognizing the criticisms to date, and the limits of the available evidence, I would like to make the case for a decidedly more optimistic view of the effect of the GLB notices. Even in their current flawed form and even if not a single consumer exercised the opt-out right, I contend that a principal effect of the notices has been to require financial institutions to inspect their own practices. In this respect, the detail and complexity of the GLB notices is actually a virtue. In order to draft the notice, many financial institutions undertook an extensive process, often for the first time, to learn just how data is and is not shared between different parts of the organization and with third parties. Based on my extensive discussions with people in the industry, I believe that many institutions discovered practices that they decided, upon deliberation, to change. One public example of this was the decision of Bank of America no longer to share its customers' data with third parties, even subject to opt-out. The detailed and complex notice, in short, created a more detailed roadmap for privacy compliance.[3]

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[2]Ted Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules, 86* Minn. L. Rev. 1219, 1230-1232, 1241 (2002).

[3]Peter P. Swire, *The Surprising Virtues of the New Financial Privacy Law*, 86 Minn.L.Rev. 1263, 1315-1316 (2002).

2. California Financial Privacy Legislation (at issue in the ABA case that follows)

The purpose of these excerpts is to provide the state statutory context of the court decision that follows. It is intended as a reference, rather than intensive reading.

CALIFORNIA FINANCIAL CODE
California Financial Information Privacy Act (Excerpts)

§ 4051. Legislative intent
(a) The Legislature intends for financial institutions to provide their consumers notice and meaningful choice about how consumers' nonpublic personal information is shared or sold by their financial institutions.
(b) It is the intent of the Legislature in enacting the California Financial Information Privacy Act to afford persons greater privacy protections than those provided in Public Law 106-102, the federal Gramm-Leach-Bliley Act, and that this division be interpreted to be consistent with that purpose.

§ 4051.5. Legislative findings and declarations
(a) The Legislature finds and declares all of the following:
(1) The California Constitution protects the privacy of California citizens from unwarranted intrusions into their private and personal lives.
(2) Federal banking legislation, known as the Gramm-Leach-Bliley Act, which breaks down restrictions on affiliation among different types of financial institutions, increases the likelihood that the personal financial information of California residents will be widely shared among, between, and within companies.
(3) The policies intended to protect financial privacy imposed by the Gramm-Leach-Bliley Act are inadequate to meet the privacy concerns of California residents.
(4) Because of the limitations of these federal policies, the Gramm-Leach-Bliley Act explicitly permits states to enact privacy protections that are stronger than those provided in federal law.
(b) It is the intent of the Legislature in enacting this division:
(1) To ensure that Californians have the ability to control the disclosure of what the Gramm-Leach-Bliley Act calls nonpublic personal information.
(2) To achieve that control for California consumers by requiring that financial institutions that want to share information with third parties and unrelated companies seek and acquire the affirmative consent of California consumers prior to sharing the information.
(3) To further achieve that control for California consumers by providing consumers with the ability to prevent the sharing of financial information among affiliated companies through a simple opt-out mechanism via a clear and understandable notice provided to the consumer.
(4) To provide, to the maximum extent possible, consistent with the purposes cited above, a level playing field among types and sizes of businesses consistent with the objective of providing consumers control over their nonpublic personal information, including providing that those financial institutions with limited affiliate relationships may enter into agreements with other financial institutions as provided in this division, and providing that the different business models of differing financial institutions are treated in ways that provide consistent consumer control over information-sharing practices.
(5) To adopt to the maximum extent feasible, consistent with the purposes cited above, definitions consistent with federal law, so that in particular there is no change in the ability of businesses to carry out normal processes of commerce for transactions voluntarily entered into by consumers.

§ 4052. Definitions
For the purposes of this division:
(a) "Nonpublic personal information" means personally identifiable financial information (1) provided by a consumer to a financial institution, (2) resulting from any transaction with the consumer or any service performed for the consumer, or (3) otherwise obtained by the financial institution. Nonpublic personal information does not include publicly available information that the financial institution has a reasonable basis to believe is lawfully made available to the general public from (1) federal, state, or local government records, (2) widely distributed media, or (3) disclosures to the general public that are required to be made by federal, state, or local law. Nonpublic personal information shall include any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived using any nonpublic personal information other than publicly available information, but shall not include any list, description, or other grouping of consumers, and publicly available

information pertaining to them, that is derived without using any nonpublic personal information.
(b) "Personally identifiable financial information" means information (1) that a consumer provides to a financial institution to obtain a product or service from the financial institution, (2) about a consumer resulting from any transaction involving a product or service between the financial institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in connection with providing a product or service to that consumer. Any personally identifiable information is financial if it was obtained by a financial institution in connection with providing a financial product or service to a consumer. Personally identifiable financial information includes all of the following:
(1) Information a consumer provides to a financial institution on an application to obtain a loan, credit card, or other financial product or service.
(2) Account balance information, payment history, overdraft history, and credit or debit card purchase information.
(3) The fact that an individual is or has been a consumer of a financial institution or has obtained a financial product or service from a financial institution.
(4) Any information about a financial institution's consumer if it is disclosed in a manner that indicates that the individual is or has been the financial institution's consumer.
(5) Any information that a consumer provides to a financial institution or that a financial institution or its agent otherwise obtains in connection with collecting on a loan or servicing a loan.
(6) Any personally identifiable financial information collected through an Internet cookie or an information collecting device from a Web server.
(7) Information from a consumer report.
(c) "Financial institution" means any institution the business of which is engaging in financial activities as described in Section 1843(k) of Title 12 of the United States Code and doing business in this state. An institution that is not significantly engaged in financial activities is not a financial institution. The term "financial institution" does not include any institution that is primarily engaged in providing hardware, software, or interactive services, provided that it does not act as a debt collector, as defined in 15 U.S.C. Sec. 1692a, or engage in activities for which the institution is required to acquire a charter, license, or registration from a state or federal governmental banking, insurance, or securities agency. The term "financial institution" does not include the Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. Sec. 2001 et seq.), provided that the entity does not sell or transfer nonpublic personal information to an affiliate or a nonaffiliated third party. The term "financial institution" does not include institutions chartered by Congress specifically to engage in a proposed or actual securitization, secondary market sale, including sales of servicing rights, or similar transactions related to a transaction of the consumer, as long as those institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party. The term "financial institution" does not include any provider of professional services, or any wholly owned affiliate thereof, that is prohibited by rules of professional ethics and applicable law from voluntarily disclosing confidential client information without the consent of the client. The term "financial institution" does not include any person licensed as a dealer under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code that enters into contracts for the installment sale or lease of motor vehicles pursuant to the requirements of Chapter 2B (commencing with Section 2981) or 2D (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of the Civil Code and assigns substantially all of those contracts to financial institutions within 30 days.
(d) "Affiliate" means any entity that controls, is controlled by, or is under common control with, another entity, but does not include a joint employee of the entity and the affiliate. A franchisor, including any affiliate thereof, shall be deemed an affiliate of the franchisee for purposes of this division.
(e) "Nonaffiliated third party" means any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of that institution and a third party.
(f) "Consumer" means an individual resident of this state, or that individual's legal representative, who obtains or has obtained from a financial institution a financial product or service to be used primarily for personal, family, or household purposes. For purposes of this division, an individual resident of this state is someone whose last known mailing address, other than an Armed Forces Post Office or Fleet Post Office address, as shown in the records of the financial institution, is located in this state. For purposes of this division, an individual is not a consumer of a financial institution solely because he or she is (1) a participant or beneficiary of an employee benefit plan that a financial institution administers or sponsors, or for which the financial institution acts as a trustee, insurer, or fiduciary, (2) covered under a group or blanket insurance policy or group annuity contract issued by the financial institution, (3) a beneficiary in a workers' compensation plan, (4) a beneficiary of a trust for which the financial institution is a trustee, or (5) a person who has designated the financial institution as trustee for a trust, provided that the financial institution provides all required notices and rights required by this division to the plan sponsor, group or

blanket insurance policyholder, or group annuity contractholder.
(g) "Control" means (1) ownership or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, acting through one or more persons, (2) control in any manner over the election of a majority of the directors, or of individuals exercising similar functions, or (3) the power to exercise, directly or indirectly, a controlling influence over the management or policies of a company. However, for purposes of the application of the definition of control as it relates to credit unions, a credit union has a controlling influence over the management or policies of a credit union service organization (CUSO), as that term is defined by state or federal law or regulation, if the CUSO is at least 67 percent owned by credit unions. For purposes of the application of the definition of control to a financial institution subject to regulation by the United States Securities and Exchange Commission, a person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of a company is presumed to control the company, and a person who does not own more than 25 percent of the voting securities of a company is presumed not to control the company, and a presumption regarding control may be rebutted by evidence, but in the case of an investment company, the presumption shall continue until the United States Securities and Exchange Commission makes a decision to the contrary according to the procedures described in Section 2(a)(9) of the federal Investment Company Act of 1940.
(h) "Necessary to effect, administer, or enforce" means the following:
(1) The disclosure is required, or is a usual, appropriate, or acceptable method to carry out the transaction or the product or service business of which the transaction is a part, and record or service or maintain the consumer's account in the ordinary course of providing the financial service or financial product, or to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part, and includes the following:
(A) Providing the consumer or the consumer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product.
(B) The accrual or recognition of incentives, discounts, or bonuses associated with the transaction or communications to eligible existing consumers of the financial institution regarding the availability of those incentives, discounts, and bonuses that are provided by the financial institution or another party.
(C) In the case of a financial institution that has issued a credit account bearing the name of a company primarily engaged in retail sales or a name proprietary to a company primarily engaged in retail sales, the financial institution providing the retailer with nonpublic personal information as follows:
(i) Providing the retailer, or licensees or contractors of the retailer that provide products or services in the name of the retailer and under a contract with the retailer, with the names and addresses of the consumers in whose name the account is held and a record of the purchases made using the credit account from a business establishment, including a Web site or catalog, bearing the brand name of the retailer.
(ii) Where the credit account can only be used for transactions with the retailer or affiliates of that retailer that are also primarily engaged in retail sales, providing the retailer, or licensees or contractors of the retailer that provide products or services in the name of the retailer and under a contract with the retailer, with nonpublic personal information concerning the credit account, in connection with the offering or provision of the products or services of the retailer and those licensees or contractors.
(2) The disclosure is required or is one of the lawful or appropriate methods to enforce the rights of the financial institution or of other persons engaged in carrying out the financial transaction or providing the product or service.
(3) The disclosure is required, or is a usual, appropriate, or acceptable method for insurance underwriting or the placement of insurance products by licensed agents and brokers with authorized insurance companies at the consumer's request, for reinsurance, stop loss insurance, or excess loss insurance purposes, or for any of the following purposes as they relate to a consumer's insurance:
(A) Account administration.
(B) Reporting, investigating, or preventing fraud or material misrepresentation.
(C) Processing premium payments.
(D) Processing insurance claims.
(E) Administering insurance benefits, including utilization review activities.
(F) Participating in research projects.
(G) As otherwise required or specifically permitted by federal or state law.
(4) The disclosure is required, or is a usual, appropriate, or acceptable method, in connection with the following:
(A) The authorization, settlement, billing, processing, clearing, transferring, reconciling, or collection of amounts charged, debited, or otherwise paid using a debit, credit or other payment card, check, or account number, or by other payment means.
(B) The transfer of receivables, accounts, or interests therein.
(C) The audit of debit, credit, or other payment information.

(5) The disclosure is required in a transaction covered by the federal Real Estate Settlement Procedures Act (12 U.S.C. Sec. 2601 et seq.) in order to offer settlement services prior to the close of escrow (as those services are defined in 12 U.S.C. Sec. 2602), provided that (A) the nonpublic personal information is disclosed for the sole purpose of offering those settlement services and (B) the nonpublic personal information disclosed is limited to that necessary to enable the financial institution to offer those settlement services in that transaction.
(i) "Financial product or service" means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to a financial activity under subsection (k) of Section 1843 of Title 12 of the United States Code (the United States Bank Holding Company Act of 1956). Financial service includes a financial institution's evaluation or brokerage of information that the financial institution collects in connection with a request or an application from a consumer for a financial product or service.
(j) "Clear and conspicuous" means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice.
(k) "Widely distributed media" means media available to the general public and includes a telephone book, a television or radio program, a newspaper, or a Web site that is available to the general public on an unrestricted basis.

§ 4052.5. Prohibition against disclosure of nonpublic personal information
Except as provided in Sections 4053, 4054.6, and 4056, a financial institution shall not sell, share, transfer, or otherwise disclose nonpublic personal information to or with any nonaffiliated third parties without the explicit prior consent of the consumer to whom the nonpublic personal information relates.

§ 4053. Consent requirement to disclose nonpublic personal information; requirements and regulation
(a)(1) A financial institution shall not disclose to, or share a consumer's nonpublic personal information with, any nonaffiliated third party as prohibited by Section 4052.5, unless the financial institution has obtained a consent acknowledgment from the consumer that complies with paragraph (2) that authorizes the financial institution to disclose or share the nonpublic personal information. Nothing in this section shall prohibit or otherwise apply to the disclosure of nonpublic personal information as allowed in Section 4056. A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has not provided consent pursuant to this subdivision and Section 4052.5 to authorize the financial institution to disclose or share nonpublic personal information pertaining to him or her with any nonaffiliated third party. Nothing in this section shall prohibit a financial institution from denying a consumer a financial product or service if the financial institution could not provide the product or service to a consumer without the consent to disclose the consumer's nonpublic personal information required by this subdivision and Section 4052. 5, and the consumer has failed to provide consent. A financial institution shall not be liable for failing to offer products and services to a consumer solely because that consumer has failed to provide consent pursuant to this subdivision and Section 4052.5 and the financial institution could not offer the product or service without the consent to disclose the consumer's nonpublic personal information required by this subdivision and Section 4052. 5, and the consumer has failed to provide consent. Nothing in this section is intended to prohibit a financial institution from offering incentives or discounts to elicit a specific response to the notice.
(2) A financial institution shall utilize a form, statement, or writing to obtain consent to disclose nonpublic personal information to nonaffiliated third parties as required by Section 4052.5 and this subdivision. The form, statement, or writing shall meet all of the following criteria:
(A) The form, statement, or writing is a separate document, not attached to any other document.
(B) The form, statement, or writing is dated and signed by the consumer.
(C) The form, statement, or writing clearly and conspicuously discloses that by signing, the consumer is consenting to the disclosure to nonaffiliated third parties of nonpublic personal information pertaining to the consumer.
(D) The form, statement, or writing clearly and conspicuously discloses (i) that the consent will remain in effect until revoked or modified by the consumer; (ii) that the consumer may revoke the consent at any time; and (iii) the procedure for the consumer to revoke consent.
(E) The form, statement, or writing clearly and conspicuously informs the consumer that (i) the financial institution will maintain the document or a true and correct copy; (ii) the consumer is entitled to a copy of the document upon request; and (iii) the consumer may want to make a copy of the document for the consumer's records.
(b)(1) A financial institution shall not disclose to, or share a consumer's nonpublic personal information with, an affiliate unless the financial institution has clearly and conspicuously notified the consumer annually in writing pursuant to subdivision (d) that the nonpublic personal information may be disclosed to an affiliate of the financial institution and the consumer has not directed that the nonpublic personal information not be disclosed. A financial institution does not disclose information to, or share information with, its affiliate merely because information is

maintained in common information systems or databases, and employees of the financial institution and its affiliate have access to those common information systems or databases, or a consumer accesses a Web site jointly operated or maintained under a common name by or on behalf of the financial institution and its affiliate, provided that where a consumer has exercised his or her right to prohibit disclosure pursuant to this division, nonpublic personal information is not further disclosed or used by an affiliate except as permitted by this division.
(2) Subdivision (a) shall not prohibit the release of nonpublic personal information by a financial institution with whom the consumer has a relationship to a nonaffiliated financial institution for purposes of jointly offering a financial product or financial service pursuant to a written agreement with the financial institution that receives the nonpublic personal information provided that all of the following requirements are met:
(A) The financial product or service offered is a product or service of, and is provided by, at least one of the financial institutions that is a party to the written agreement.
(B) The financial product or service is jointly offered, endorsed, or sponsored, and clearly and conspicuously identifies for the consumer the financial institutions that disclose and receive the disclosed nonpublic personal information.
(C) The written agreement provides that the financial institution that receives that nonpublic personal information is required to maintain the confidentiality of the information and is prohibited from disclosing or using the information other than to carry out the joint offering or servicing of a financial product or financial service that is the subject of the written agreement.
(D) The financial institution that releases the nonpublic personal information has complied with subdivision (d) and the consumer has not directed that the nonpublic personal information not be disclosed.
(E) Notwithstanding this section, until January 1, 2005, a financial institution may disclose nonpublic personal information to a nonaffiliated financial institution pursuant to a preexisting contract with the nonaffiliated financial institution, for purposes of offering a financial product or financial service, if that contract was entered into on or before January 1, 2004. Beginning on January 1, 2005, no nonpublic personal information may be disclosed pursuant to that contract unless all the requirements of this subdivision are met.
(3) Nothing in this subdivision shall prohibit a financial institution from disclosing or sharing nonpublic personal information as otherwise specifically permitted by this division.
(4) A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has directed pursuant to this subdivision that nonpublic personal information pertaining to him or her not be disclosed. A financial institution shall not be required to offer or provide products or services offered through affiliated entities or jointly with nonaffiliated financial institutions pursuant to paragraph (2) where the consumer has directed that nonpublic personal information not be disclosed pursuant to this subdivision and the financial institution could not offer or provide the products or services to the consumer without disclosure of the consumer's nonpublic personal information that the consumer has directed not be disclosed pursuant to this subdivision. A financial institution shall not be liable for failing to offer or provide products or services offered through affiliated entities or jointly with nonaffiliated financial institutions pursuant to paragraph (2) solely because the consumer has directed that nonpublic personal information not be disclosed pursuant to this subdivision and the financial institution could not offer or provide the products or services to the consumer without disclosure of the consumer's nonpublic personal information that the consumer has directed not be disclosed to affiliates pursuant to this subdivision. Nothing in this section is intended to prohibit a financial institution from offering incentives or discounts to elicit a specific response to the notice set forth in this division. Nothing in this section shall prohibit the disclosure of nonpublic personal information allowed by Section 4056.
(5) The financial institution may, at its option, choose instead to comply with the requirements of subdivision (a).
(c) Nothing in this division shall restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries; among financial institutions that are each wholly owned by the same financial institution; among financial institutions that are wholly owned by the same holding company; or among the insurance and management entities of a single insurance holding company system consisting of one or more reciprocal insurance exchanges which has a single corporation or its wholly owned subsidiaries providing management services to the reciprocal insurance exchanges, provided that in each case all of the following requirements are met:
(1) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are regulated by the same functional regulator; provided, however, that for purposes of this subdivision, financial institutions regulated by the Office of the Comptroller of the Currency, Office of Thrift Supervision, National Credit Union Administration, or a state regulator of depository institutions shall be deemed to be regulated by the same functional regulator; financial institutions regulated by the Securities and Exchange Commission, the United States Department of Labor, or a state securities regulator shall be deemed to be regulated by the same functional regulator; and insurers admitted in this state to transact insurance and licensed to write insurance policies shall be deemed to be

in compliance with this paragraph.
(2) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are both principally engaged in the same line of business. For purposes of this subdivision, "same line of business" shall be one and only one of the following:
(A) Insurance.
(B) Banking.
(C) Securities.
(3) The financial institution disclosing the nonpublic personal information and the financial institution receiving it share a common brand, excluding a brand consisting solely of a graphic element or symbol, within their trademark, service mark, or trade name, which is used to identify the source of the products and services provided.
A wholly owned subsidiary shall include a subsidiary wholly owned directly or wholly owned indirectly in a chain of wholly owned subsidiaries.
Nothing in this subdivision shall permit the disclosure by a financial institution of medical record information, as defined in subdivision (q) of Section 791.02 of the Insurance Code, except in compliance with the requirements of this division, including the requirements set forth in subdivisions (a) and (b).
(d)(1) A financial institution shall be conclusively presumed to have satisfied the notice requirements of subdivision (b) if it uses the form set forth in this subdivision. The form set forth in this subdivision or a form that complies with subparagraphs (A) to (L), inclusive, of this paragraph shall be sent by the financial institution to the consumer so that the consumer may make a decision and provide direction to the financial institution regarding the sharing of his or her nonpublic personal information. If a financial institution does not use the form set forth in this subdivision, the financial institution shall use a form that meets all of the following requirements:
(A) The form uses the same title ("IMPORTANT PRIVACY CHOICES FOR CONSUMERS") and the headers, if applicable, as follows: "Restrict Information Sharing With Companies We Own Or Control (Affiliates)" and "Restrict Information Sharing With Other Companies We Do Business With To Provide Financial Products And Services."
(B) The titles and headers in the form are clearly and conspicuously displayed, and no text in the form is smaller than 10-point type.
(C) The form is a separate document, except as provided by subparagraph (D) of paragraph (2), and Sections 4054 and 4058.7.
(D) The choice or choices pursuant to subdivision (b) and Section 4054.6, if applicable, provided in the form are stated separately and may be selected by checking a box.
(E) The form is designed to call attention to the nature and significance of the information in the document.
(F) The form presents information in clear and concise sentences, paragraphs, and sections.
(G) The form uses short explanatory sentences (an average of 15-20 words) or bullet lists whenever possible.
(H) The form avoids multiple negatives, legal terminology, and highly technical terminology whenever possible.
(I) The form avoids explanations that are imprecise and readily subject to different interpretations.
(J) The form achieves a minimum Flesch reading ease score of 50, as defined in Section 2689.4(a)(7) of Title 10 of the California Code of Regulations, in effect on March 24, 2003, except that the information in the form included to comply with subparagraph (A) shall not be included in the calculation of the Flesch reading ease score, and the information used to describe the choice or choices pursuant to subparagraph (D) shall score no lower than the information describing the comparable choice or choices set forth in the form in this subdivision.
(K) The form provides wide margins, ample line spacing and uses boldface or italics for key words.
(L) The form is not more than one page.
(2)(A) None of the instructional items appearing in brackets in the form set forth in this subdivision shall appear in the form provided to the consumer, as those items are for explanation purposes only. If a financial institution does not disclose or share nonpublic personal information as described in a header of the form, the financial institution may omit the applicable header or headers, and the accompanying information and box, in the form it provides pursuant to this subdivision. The form with those omissions shall be conclusively presumed to satisfy the notice requirements of this subdivision. [Omitted.]
(B) If a financial institution uses a form other than that set forth in this subdivision, the financial institution may submit that form to its functional regulator for approval, and for forms filed with the Office of Privacy Protection prior to July 1, 2007, that approval shall constitute a rebuttable presumption that the form complies with this section.
(C) A financial institution shall not be in violation of this subdivision solely because it includes in the form one or more brief examples or explanations of the purpose or purposes, or context, within which information will be shared, as long as those examples meet the clarity and readability standards set forth in paragraph (1).
(D) The outside of the envelope in which the form is sent to the consumer shall clearly state in 16-point boldface type "IMPORTANT PRIVACY CHOICES," except that a financial institution sending the form to a consumer in the same

envelope as a bill, account statement, or application requested by the consumer does not have to include the wording "IMPORTANT PRIVACY CHOICES" on that envelope. The form shall be sent in any of the following ways:
(i) With a bill, other statement of account, or application requested by the consumer, in which case the information required by Title V of the Gramm-Leach-Bliley Act may also be included in the same envelope.
(ii) As a separate notice or with the information required by Title V of the Gramm-Leach-Bliley Act, and including only information related to privacy.
(iii) With any other mailing, in which case it shall be the first page of the mailing.
(E) If a financial institution uses a form other than that set forth in this subdivision, that form shall be filed with the Office of Privacy Protection within 30 days after it is first used.
(3) The consumer shall be provided a reasonable opportunity prior to disclosure of nonpublic personal information to direct that nonpublic personal information not be disclosed. A consumer may direct at any time that his or her nonpublic personal information not be disclosed. A financial institution shall comply with a consumer's directions concerning the sharing of his or her nonpublic personal information within 45 days of receipt by the financial institution. When a consumer directs that nonpublic personal information not be disclosed, that direction is in effect until otherwise stated by the consumer. A financial institution that has not provided a consumer with annual notice pursuant to subdivision (b) shall provide the consumer with a form that meets the requirements of this subdivision, and shall allow 45 days to lapse from the date of providing the form in person or the postmark or other postal verification of mailing before disclosing nonpublic personal information pertaining to the consumer.
Nothing in this subdivision shall prohibit the disclosure of nonpublic personal information as allowed by subdivision (c) or Section 4056.
(4) A financial institution may elect to comply with the requirements of subdivision (a) with respect to disclosure of nonpublic personal information to an affiliate or with respect to nonpublic personal information disclosed pursuant to paragraph (2) of subdivision (b), or subdivision (c) of Section 4054.6.
(5) If a financial institution does not have a continuing relationship with a consumer other than the initial transaction in which the product or service is provided, no annual disclosure requirement exists pursuant to this section as long as the financial institution provides the consumer with the form required by this section at the time of the initial transaction. As used in this section, "annually" means at least once in any period of 12 consecutive months during which that relationship exists. The financial institution may define the 12-consecutive-month period, but shall apply it to the consumer on a consistent basis. If, for example, a financial institution defines the 12- consecutive-month period as a calendar year and provides the annual notice to the consumer once in each calendar year, it complies with the requirement to send the notice annually.
(6) A financial institution with assets in excess of twenty-five million dollars ($25,000,000) shall include a self-addressed first class business reply return envelope with the notice. A financial institution with assets of up to and including twenty-five million dollars ($25,000,000) shall include a self-addressed return envelope with the notice. In lieu of the first class business reply return envelope required by this paragraph, a financial institution may offer a self-addressed return envelope with the notice and at least two alternative cost-free means for consumers to communicate their privacy choices, such as calling a toll-free number, sending a facsimile to a toll-free telephone number, or using electronic means. A financial institution shall clearly and conspicuously disclose in the form required by this subdivision the information necessary to direct the consumer on how to communicate his or her choices, including the toll-free or facsimile number or Web site address that may be used, if those means of communication are offered by the financial institution.
(7) A financial institution may provide a joint notice from it and one or more of its affiliates or other financial institutions, as identified in the notice, so long as the notice is accurate with respect to the financial institution and the affiliates and other financial institutions.
(e) Nothing in this division shall prohibit a financial institution from marketing its own products and services or the products and services of affiliates or nonaffiliated third parties to customers of the financial institution as long as (1) nonpublic personal information is not disclosed in connection with the delivery of the applicable marketing materials to those customers except as permitted by Section 4056 and (2) in cases in which the applicable nonaffiliated third party may extrapolate nonpublic personal information about the consumer responding to those marketing materials, the applicable nonaffiliated third party has signed a contract with the financial institution under the terms of which (A) the nonaffiliated third party is prohibited from using that information for any purpose other than the purpose for which it was provided, as set forth in the contract, and (B) the financial institution has the right by audit, inspections, or other means to verify the nonaffiliated third party's compliance with that contract.

§ 4053.5. Disclosure of nonpublic personal information by entity that receives information; permitted uses
Except as otherwise provided in this division, an entity that receives nonpublic personal information from a financial institution under this division shall not disclose this information to any other entity, unless the disclosure would be lawful if made directly to the other entity by the financial institution. An entity that receives nonpublic personal information

pursuant to any exception set forth in Section 4056 shall not use or disclose the information except in the ordinary course of business to carry out the activity covered by the exception under which the information was received.

§ 4054. Required electronic or written notice to consumers

(a) Nothing in this division shall require a financial institution to provide a written notice to a consumer pursuant to Section 4053 if the financial institution does not disclose nonpublic personal information to any nonaffiliated third party or to any affiliate, except as allowed in this division.

(b) A notice provided to a member of a household pursuant to Section 4053 shall be considered notice to all members of that household unless that household contains another individual who also has a separate account with the financial institution.

(c)(1) The requirement to send a written notice to a consumer may be fulfilled by electronic means if the following requirements are met:

(A) The notice, and the manner in which it is sent, meets all of the requirements for notices that are required by law to be in writing, as set forth in Section 101 of the federal Electronic Signatures in Global and National Commerce Act.

(B) All other requirements applicable to the notice, as set forth in this division, are met, including, but not limited to, requirements concerning content, timing, form, and delivery. An electronic notice sent pursuant to this section is not required to include a return envelope.

(C) The notice is delivered to the consumer in a form the consumer may keep.

(2) A notice that is made available to a consumer, and is not delivered to the consumer, does not satisfy the requirements of paragraph (1).

(3) Any electronic consumer reply to an electronic notice sent pursuant to this division is effective. A person that electronically sends a notice required by this division to a consumer may not by contract, or otherwise, eliminate the effectiveness of the consumer's electronic reply.

(4) This division modifies the provisions of Section 101 of the federal Electronic Signatures in Global and National Commerce Act. However, it does not modify, limit, or supersede the provisions of subsection (c), (d), (e), (f), or (h) of Section 101 of the federal Electronic Signatures in Global and National Commerce Act, nor does it authorize electronic delivery of any notice of the type described in subsection (b) of Section 103 of that federal act.

§ 4054.6. Agreements between financial institutions and affinity partners to issue credit cards or financial products or services; disclosure of information; requirements

(a) When a financial institution and an organization or business entity that is not a financial institution ("affinity partner") have an agreement to issue a credit card in the name of the affinity partner ("affinity card"), the financial institution shall be permitted to disclose to the affinity partner in whose name the card is issued only the following information pertaining to the financial institution's customers who are in receipt of the affinity card: (1) name, address, telephone number, and electronic mail address and (2) record of purchases made using the affinity card in a business establishment, including a Web site, bearing the brand name of the affinity partner.

(b) When a financial institution and an affinity partner have an agreement to issue a financial product or service, other than a credit card, on behalf of the affinity partner ("affinity financial product or service"), the financial institution shall be permitted to disclose to the affinity partner only the following information pertaining to the financial institution's customers who obtained the affinity financial product or service: name, address, telephone number, and electronic mail address.

(c) The disclosures specified in subdivisions (a) and (b) shall be permitted only if the following requirements are met:

(1) The financial institution has provided the consumer a notice meeting the requirements of subdivision (d) of Section 4053, and the consumer has not directed that nonpublic personal information not be disclosed. A response to a notice meeting the requirements of subdivision (d) directing the financial institution to not disclose nonpublic personal information to a nonaffiliated financial institution shall be deemed a direction to the financial institution to not disclose nonpublic personal information to an affinity partner, unless the form containing the notice provides the consumer with a separate choice for disclosure to affinity partners.

(2) The financial institution has a contractual agreement with the affinity partner that requires the affinity partner to maintain the confidentiality of the nonpublic personal information and prohibits affinity partners from using the information for any purposes other than verifying membership, verifying the consumer's contact information, or offering the affinity partner's own products or services to the consumer.

(3) The customer list is not disclosed in any way that reveals or permits extrapolation of any additional nonpublic personal information about any customer on the list.

(4) If the affinity partner sends any message to any electronic mail addresses obtained pursuant to this section, the message shall include at least both of the following:

(A) The identity of the sender of the message.

(B) A cost-free means for the recipient to notify the sender not to electronically mail any further message to the recipient.
(d) Nothing in this section shall prohibit the disclosure of nonpublic personal information pursuant to Section 4056.
(e) This section does not apply to credit cards issued in the name of an entity primarily engaged in retail sales or a name proprietary to a company primarily engaged in retail sales.

§ 4056. Application of division; conditions for release of nonpublic personal information by financial institutions
(a) This division shall not apply to information that is not personally identifiable to a particular person.
(b) Notwithstanding Sections 4052.5, 4053, 4054, and 4054.6, a financial institution may release nonpublic personal information under the following circumstances:
(1) The nonpublic personal information is necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or in connection with servicing or processing a financial product or service requested or authorized by the consumer, or in connection with maintaining or servicing the consumer's account with the financial institution, or with another entity as part of a private label credit card program or other extension of credit on behalf of that entity, or in connection with a proposed or actual securitization or secondary market sale, including sales of servicing rights, or similar transactions related to a transaction of the consumer.
(2) The nonpublic personal information is released with the consent of or at the direction of the consumer.
(3) The nonpublic personal information is:
(A) Released to protect the confidentiality or security of the financial institution's records pertaining to the consumer, the service or product, or the transaction therein.
(B) Released to protect against or prevent actual or potential fraud, identity theft, unauthorized transactions, claims, or other liability.
(C) Released for required institutional risk control, or for resolving customer disputes or inquiries.
(D) Released to persons holding a legal or beneficial interest relating to the consumer, including for purposes of debt collection.
(E) Released to persons acting in a fiduciary or representative capacity on behalf of the consumer.
(4) The nonpublic personal information is released to provide information to insurance rate advisory organizations, guaranty funds or agencies, applicable rating agencies of the financial institution, persons assessing the institution's compliance with industry standards, and the institution's attorneys, accountants, and auditors.
(5) The nonpublic personal information is released to the extent specifically required or specifically permitted under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. Sec. 3401 et seq.), to law enforcement agencies, including a federal functional regulator, the Secretary of the Treasury with respect to subchapter II of Chapter 53 of Title 31, and Chapter 2 of Title I of Public Law 91-508 (12 U.S.C. Secs. 1951-1959), the California Department of Insurance or other state insurance regulators, or the Federal Trade Commission, and self-regulatory organizations, or for an investigation on a matter related to public safety.
(6) The nonpublic personal information is released in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of the business or unit.
(7) The nonpublic personal information is released to comply with federal, state, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, administrative, or regulatory investigation or subpoena or summons by federal, state, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.
(8) When a financial institution is reporting a known or suspected instance of elder or dependent adult financial abuse or is cooperating with a local adult protective services agency investigation of known or suspected elder or dependent adult financial abuse pursuant to Article 3 (commencing with Section 15630) of Chapter 11 of Part 3 of Division 9 of the Welfare and Institutions Code.
(9) The nonpublic personal information is released to an affiliate or a nonaffiliated third party in order for the affiliate or nonaffiliated third party to perform business or professional services, such as printing, mailing services, data processing or analysis, or customer surveys, on behalf of the financial institution, provided that all of the following requirements are met:
(A) The services to be performed by the affiliate or nonaffiliated third party could lawfully be performed by the financial institution.
(B) There is a written contract between the affiliate or nonaffiliated third party and the financial institution that prohibits the affiliate or nonaffiliated third party, as the case may be, from disclosing or using the nonpublic personal information other than to carry out the purpose for which the financial institution disclosed the information, as set forth in the written contract.
(C) The nonpublic personal information provided to the affiliate or nonaffiliated third party is limited to that which is

necessary for the affiliate or nonaffiliated third party to perform the services contracted for on behalf of the financial institution.
(D) The financial institution does not receive any payment from or through the affiliate or nonaffiliated third party in connection with, or as a result of, the release of the nonpublic personal information.
(10) The nonpublic personal information is released to identify or locate missing and abducted children, witnesses, criminals and fugitives, parties to lawsuits, parents delinquent in child support payments, organ and bone marrow donors, pension fund beneficiaries, and missing heirs.
(11) The nonpublic personal information is released to a real estate appraiser licensed or certified by the state for submission to central data repositories such as the California Market Data Cooperative, and the nonpublic personal information is compiled strictly to complete other real estate appraisals and is not used for any other purpose.
(12) The nonpublic personal information is released as required by Title III of the federal United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act; P.L. 107-56).
(13) The nonpublic personal information is released either to a consumer reporting agency pursuant to the Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.) or from a consumer report reported by a consumer reporting agency.
(14) The nonpublic personal information is released in connection with a written agreement between a consumer and a broker-dealer registered under the Securities Exchange Act of 1934 or an investment adviser registered under the Investment Advisers Act of 1940 to provide investment management services, portfolio advisory services, or financial planning, and the nonpublic personal information is released for the sole purpose of providing the products and services covered by that agreement.
(c) Nothing in this division is intended to change existing law relating to access by law enforcement agencies to information held by financial institutions.

§ 4056.5. Persons or entities with license and/or written contractual agreement with another licensed person or entity; disclosure of information; contents of contract

(a) The provisions of this division do not apply to any person or entity that meets the requirements of paragraph (1) or (2) below. However, when nonpublic personal information is being or will be shared by a person or entity meeting the requirements of paragraph (1) or (2) with an affiliate or nonaffiliated third party, this division shall apply.
(1) The person or entity is licensed in one or both of the following categories and is acting within the scope of the respective license or certificate:
(A) As an insurance producer, licensed pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Division 1 of the Insurance Code, as a registered investment adviser pursuant to Chapter 3 (commencing with Section 25230) of Part 3 of Division 1 of Title 4 of the Corporations Code, or as an investment adviser pursuant to Section 202(a)(11) of the federal Investment Advisers Act of 1940.
(B) Is licensed to sell securities by the National Association of Securities Dealers (NASD).
(2) The person or entity meets the requirements in paragraph (1) and has a written contractual agreement with another person or entity described in paragraph (1) and the contract clearly and explicitly includes the following:
(A) The rights and obligations between the licensees arising out of the business relationship relating to insurance or securities transactions.
(B) An explicit limitation on the use of nonpublic personal information about a consumer to transactions authorized by the contract and permitted pursuant to this division.
(C) A requirement that transactions specified in the contract fall within the scope of activities permitted by the licenses of the parties.
(b) The restrictions on disclosure and use of nonpublic personal information, and the requirement for notification and disclosure provided in this division, shall not limit the ability of insurance producers and brokers to respond to written or electronic, including telephone, requests from consumers seeking price quotes on insurance products and services or to obtain competitive quotes to renew an existing insurance contract, provided that any nonpublic personal information disclosed pursuant to this subdivision shall not be used or disclosed except in the ordinary course of business in order to obtain those quotes.
(c)(1) The disclosure or sharing of nonpublic personal information from an insurer, as defined in Section 23 of the Insurance Code, or its affiliates to an exclusive agent, defined for purposes of this division as a licensed agent or broker pursuant to Chapter 5 (commencing with Section 1621) of Part 2 of Division 1 of the Insurance Code whose contractual or employment relationship requires that the agent offer only the insurer's policies for sale or financial products or services that meet the requirements of paragraph (2) of subdivision (b) of Section 4053 and are authorized by the insurer, or whose contractual or employment relationship with an insurer gives the insurer the right of first refusal for all policies of insurance by the agent, and who may not share nonpublic personal information with any insurer other than the insurer

with whom the agent has a contractual or employment relationship as described above, is not a violation of this division, provided that the agent may not disclose nonpublic personal information to any party except as permitted by this division. An insurer or its affiliates do not disclose or share nonpublic personal information with exclusive agents merely because information is maintained in common information systems or databases, and exclusive agents of the insurer or its affiliates have access to those common information systems or databases, provided that where a consumer has exercised his or her rights to prohibit disclosure pursuant to this division, nonpublic personal information is not further disclosed or used by an exclusive agent except as permitted by this division.
(2) Nothing in this subdivision is intended to affect the sharing of information allowed in subdivision (a) or subdivision (b).

§ 4057. Liability for negligent disclosure of nonpublic personal information; civil penalty and damages; factors to determine amount of penalty

(a) An entity that negligently discloses or shares nonpublic personal information in violation of this division shall be liable, irrespective of the amount of damages suffered by the consumer as a result of that violation, for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per violation. However, if the disclosure or sharing results in the release of nonpublic personal information of more than one individual, the total civil penalty awarded pursuant to this subdivision shall not exceed five hundred thousand dollars ($500,000).
(b) An entity that knowingly and willfully obtains, discloses, shares, or uses nonpublic personal information in violation of this division shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per individual violation, irrespective of the amount of damages suffered by the consumer as a result of that violation.
(c) In determining the penalty to be assessed pursuant to a violation of this division, the court shall take into account the following factors:
(1) The total assets and net worth of the violating entity.
(2) The nature and seriousness of the violation.
(3) The persistence of the violation, including any attempts to correct the situation leading to the violation.
(4) The length of time over which the violation occurred.
(5) The number of times the entity has violated this division.
(6) The harm caused to consumers by the violation.
(7) The level of proceeds derived from the violation.
(8) The impact of possible penalties on the overall fiscal solvency of the violating entity.
(d) In the event a violation of this division results in the identity theft of a consumer, as defined by Section 530.5 of the Penal Code, the civil penalties set forth in this section shall be doubled.
(e) The civil penalties provided for in this section shall be exclusively assessed and recovered in a civil action brought in the name of the people of the State of California in any court of competent jurisdiction by any of the following:
(1) The Attorney General.
(2) The functional regulator with jurisdiction over regulation of the financial institution as follows:
(A) In the case of banks, savings associations, credit unions, commercial lending companies, and bank holding companies, by the Department of Financial Institutions or the appropriate federal authority; (B) in the case of any person engaged in the business of insurance, by the Department of Insurance; (C) in the case of any investment broker or dealer, investment company, investment advisor, residential mortgage lender or finance lender, by the Department of Corporations; and (D) in the case of a financial institution not subject to the jurisdiction of any functional regulator listed under subparagraphs (A) to (C), inclusive, above, by the Attorney General.

§ 4058.5. Preemption; prospective and retroactive application

This division shall preempt and be exclusive of all local agency ordinances and regulations relating to the use and sharing of nonpublic personal information by financial institutions. This section shall apply both prospectively and retroactively.

§ 4059. Severable provisions

The provisions of this division shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this division shall not be affected thereby.

§ 4060. Operation of division

This division shall become operative on July 1, 2004.

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3. American Bankers Ass'n v. Lockyear,

204 WL 1490432 (E.D. Cal.), slip opinion (June 30, 2004).

MEMORANDUM AND ORDER

ENGLAND, J.

Plaintiffs American Bankers Association, The Financial Services Roundtable, and Consumers Bankers Association ("Plaintiffs") have sued various California state officials (Attorney General Bill Lockyer, Department of Insurance Commissioner John Garamendi, Commissioner of the Department of Corporations William P. Wood, and Commissioner of the Department of Financial Institutions Howard Gould) in an attempt to prevent certain provisions of California law dealing with the dissemination of personal financial information from taking effect. Defendants Lockyer and Garamendi now move to dismiss Plaintiff's complaint for failing to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs have concurrently moved for summary judgment, arguing that the California law in question is expressly preempted by federal statute. Defendants Gould and Wood, in response, have filed a cross-motion for summary judgment on essentially the same grounds as the aforementioned Motion to Dismiss filed on behalf of Defendants Lockyer and Garamendi. Because all parties agree that this matter hinges on a legal question of preemption with no disputed factual contentions, the Court elects to treat Lockyer and Garamendi's request for dismissal as a Motion for Summary Judgment under Rule 56, and will resolve the matter by way of cross motions for summary judgment. For the reasons set forth below, the Court determines that Plaintiffs' lawsuit is legally untenable and accordingly grants summary judgment in favor of the Defendants.

BACKGROUND

In 2003, California enacted the California Financial Information Privacy Act, which becomes operative on July 1, 2004 as California Financial Code sections 4050-4059. Known popularly as "SB1" after the Senate Bill which introduced the legislation, SB1 imposes certain restrictions on the dissemination of personal financial information both between affiliated business institutions and as to non-affiliated third parties.

In requiring that consumers be given control over the transmittal of such financial information, either through "opt-out" provisions in the case of affiliated institutions or express consent for disclosure to non-affiliates, SBI affords greater privacy protection than federal legislation. Title V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-6809 ("GLBA"), expresses congressional will that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customer's nonpublic personal information." 15 U.S.C. § 6801(a). The GLBA requires every financial institution to provide, at least annually, a clear and conspicuous disclosure of its policies and practices regarding the disclosure of customers' personal information to both affiliates and to non-affiliated third parties. 15 U.S.C. § 6803(a)(1). With respect to non-affiliate disclosure, the GLBA requires that consumers be afforded the opportunity to direct that their personal information not be disclosed.

Because § 6807(b) of the GLBA expressly allows states to enact consumer protection statutes providing greater privacy protection, California contends that its passage of SB1 was proper. GLBA's savings clause in that regard provides as follows:

(b) Greater protection under State law. For purposes of this section, a State

> statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter....

Plaintiffs' complaint, on the other hand, seeks to invalidate SB1 by arguing that its provisions are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), and that consequently SB1 violates the Supremacy Clause of the United States Constitution. Although the stated purpose of the FCRA is to protect consumers from unfair or inaccurate credit reporting, rather than information sharing more generally, Plaintiffs seize on a preemption provision within the statute that they argue prohibits state regulation of any information sharing between 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, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996) .....15 U.S.C. § 1681t(b)(2).

Plaintiffs further seek injunctive relief to prevent SB1 from becoming operative on July 1, 2004.

STANDARD

. . .

Summary judgment is appropriate where, as here, a case hinges solely on questions of law. *See Edwards v. Aguillard,* 482 U.S. 578, 595-96, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

ANALYSIS

In arguing that SB1 is expressly preempted by federal law, Plaintiffs have to show either that Congress has explicitly defined the extent to which its enactments displace state law (*English v. Gen. Elect. Co.,* 496 U.S. 72, 78- 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)), or alternatively that in the absence of such explicit language it can nonetheless be inferred that preemption should occur because federal regulation on the subject is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (citation omitted.). *Bank of America v. City & County of San Francisco,* 309 F.3d 551, 558 (9th Cir.2002). In determining whether federal law preempts state law, this Court's task is to "ascertain the intent of Congress. *Id.* at 557-58. Indeed, congressional purpose is the "ultimate touchstone" of preemption analysis. *Oxygenated Fuels Ass'n Inc. v. Davis,* 331 F.3d 665, 668 (9th Cir.2003), citing *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).

In addition, because the provisions of SB1 relate to consumer protection vis-a-vis personal financial information (so as to prevent unfair business practices), the subject matter of the legislation extends to the state's historic police powers. *See Cal. v. ARC Am. Corp.,* 490 U.S. 93, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). This triggers a heightened presumption against preemption. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 518, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (In analyzing whether or not federal law expressly preempts state law, courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations," thereby requiring a "narrow reading" of the federal law provision); *Cal. v. ARC Am. Corp.* 490 U.S. at 101 ("appellees must overcome the presumption against

finding preemption of state law in areas traditionally regulated by the States ...")); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir.1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

With these guidelines in mind we now turn to the federal statutory scheme claimed by Plaintiffs to preempt SB1. The stated purpose and scope of the Fair Credit Reporting Act, as set forth in the first section entitled "Congressional findings and statement of purpose," is to regulate consumer reporting agencies and ensure the accuracy and fairness of credit reporting. 15 U.S.C. § 1681. To that end, the FCRA monitors the compilation, dissemination and use of "consumer reports," a term defined as including any communication by a consumer reporting agency of information bearing on specified characteristics used or expected to be used or collected in whole or part as a factor in determining a consumer's eligiblility for credit, insurance, employment, or other specifically enumerated permissible purposes. 15 U.S.C. § 1681a(d)(1). The FCRA defines a consumer reporting agency as "any person which ... regularly engages in ... the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties ..." 15 U.S.C. § 1681a(f).

Information not constituting a "consumer report" is not governed by the FCRA. *See, e.g., Individual Reference Serv. Group, Inc. v. Fed. Trade Comm'n,* 145 F.Supp.2d 6, 17 (D.D.C.2001)("The FCRA does not regulate the dissemination of information that is not contained in a 'consumer report.' "), *aff'd, Trans Union LLC v. Fed. Trade Comm'n,* 295 F.3d 42 (D.C.Cir.2002). As noted by the Seventh Circuit in *Ippolito v. WNS, Inc.,* 864 F.2d 440 (7th Cir.1988),

> "not all report containing information on a consumer are "consumer reports." To constitute a "consumer report," the information contained in the report must have been "used or expected to be used or collected in whole or in part" for one of the purposes set out in the FCRA." 864 F.2d at 449.

The *Ippolito* court goes on to unequivocally conclude, on the basis of pertinent legislative history, that the FCRA does not apply to reports collected for "business, commercial or professional purposes" that do not fall within the purview of the FCRA as a "consumer report." *Id.* at 452.

In addition, the provisions of the FCRA itself make this distinction. The definition of a "consumer report" subject to the FCRA was amended in 1996 to exclude communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681(d)(2)(A)(ii). By excluding such information from the definition of a "consumer report," Congress made it clear that such information was not subject to the FCRA's requirements, which are not intended to regulate the simple sharing of information between affiliates.

The FCRA preemption provision upon which Plaintiffs premise their argument in this case must necessarily be viewed in the context of the statutory framework as a whole, especially since, as discussed above, in a preemption case like this one the preempting statute must be read both narrowly and with a presumption against finding preemption. [FN3] While Section 1681t(b)(2) does indicate on its face that "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," it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S.

120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989); *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d at 1249 ("in interpreting the intent of Congress it is essential to consider the statute as a whole.").

FN3. Although Plaintiffs urge the Court to focus solely on the "plain language" of the FCRA preemption statute, in isolation, the Supreme Court has recognized in a case involving statutory interpretation that "the meaning of words depends on their context." *Shell Oil Co., v. Iowa Department of Revenue*, 488 U.S. 19, 25, 109 S.Ct. 278, 102 L.Ed.2d 186 (1988). *Shell Oil* goes on to quote Judge Learned Hand's apt remark in this regard: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other but all in their aggregate take their purport from the setting in which they are used ..." ' *Id.* at 25, fn. 6 (citations omitted). Moreover, and even more specifically for purposes of the present case, in *Medtronic v.. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700, the Supreme Court reiterated that while the analysis of the scope of [a] preemption statute begins with its text, the court's interpretation "does not occur in a textual vacuum." Also relevant is "the structure and purpose of the statute as a whole," as revealed by congressional purpose. *Id.* at 486. *See also Dept. of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 343-44, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994).

To interpret the FCRA preemption provision as preventing any state regulation of information sharing between affiliates, as argued by Plaintiffs, ignores the fact that the FCRA expressly removed such information from the purview of the FCRA in Section 1681a(d)(2)(A)(ii). [FN4] It makes no sense to exempt such information sharing in one part of the statute, then argue through a later preemption provision that the FCRA, though not governing such exchange, nonetheless prevents states from doing so. Instead, the only reasonable reading of the FCRA preemption provision is that it prevents states from enacting laws that prohibit or restrict the sharing of *consumer reports* among affiliates. [FN5] This comports with the stated purpose of the FCRA as regulating consumer reporting agencies to ensure the accuracy and fairness of credit reports. 15 U.S.C. § 1681. Contrary to the position espoused by Plaintiffs, the FCRA preemption provision does not broadly preempt all state laws regulating information sharing by affiliates, whatever the purpose or context.

FN4. In addition, the fact that the FCRA preemption statute specifically excludes a pre-existing Vermont credit reporting statute supports the proposition that the FRCA statute was not intended to preempt information sharing in non-credit reporting situations, since otherwise there would have been no need to reference the Vermont statute.

FN5. Plaintiffs argue that because other preemption provisions of the FCRA, unlike Section 1681t(b)(2), do specifically reference consumer reports (see, for example, Section 1681t(b)(1)), Section 1681t(b)(2) must necessarily be read more broadly. That argument fails, however, simply because the FCRA does not regulate affiliate information sharing.

Examination of Title V of the Gramm-Leach-Bliley Act of 1999, which sets forth basic privacy protections that must be provided to consumers by financial institutions, demonstrates that it, and not the FCRA, encompasses the kind of information sharing at issue in this case. The GBLA applies to information sharing by both affiliate organizations and non-affiliated third parties. With regard to affiliates, the GLBA requires that financial institutions disclose their policies and practices regarding the disclosure of customers' personal information. 15 U.S.C. § 6801(a)(1). [FN6] While the same requirement also applies to non-affiliates, at Section 6801(b) the GLBA further requires that financial institutions give consumers the ability to direct that information not be provided to non-affiliates at all.

FN6. While the Northern District's decision in *Bank of America v. City of Daly City,* 279 F.Supp.2d 1118 (N.D.Cal.2003) has been vacated by the Ninth Circuit and consequently lacks precedential authority (*Durning v. Citibank, N.A.,* 950 F.2d 1419, 1424 n. 2 (9th Cir.1991), its reasoning is faulty in any event. In finding the GLBA inapplicable, *Daly City* incorrectly determined that the GLBA does not regulate affiliate information sharing. This Court finds that the GLBA, unlike the FCRA, does in fact encompass general sharing of consumer information between affiliates.

Significantly, the GLBA also contains a savings clause preserving the ability of states to afford more protection against dissemination of financial information than that specifically mandated by the GLBA itself. 15 U.S.C. § 6807 provides that a "state statute ... is not inconsistent with the provisions of this subchapter if the protection such statute ... affords is greater than the protection provided under this subchapter."

While the language of Section 6807 is clear in permitting states to enact stricter financial privacy laws like SB1, examination of the legislative history further confirms Congress' intent to allow more rigorous state regulation. The Conference Report for GLBA, which provides reliable evidence of congressional intent because it "represents the final statement of the terms agreed to by both houses" (*Northwest Forest Res. Council v. Glickman,* 82 F.3d 825, 835 (9th Cir.1996), confirms that "[o]n privacy, States can continue to enact legislation of a higher standard that the Federal standard." 145 Cong. Rec. S13913, at S13915 (Nov. 4.1999). Senator Sarbanes, who authored the state law savings clause that ultimately became Section 6807, explained as follows:

> [W]e were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate. 145 Cong. Rec. 213788, at S13789 (Nov. 3, 1999) (statement of Sen. Sarbanes).[FN7]

FN7. As summarized in the Points and Authorities in Support of Defendants Lockyer's and Garamendi's Motion to Dismiss (at 19:6-18), members of the House of Representatives interpreted the GLBA state-law savings clause in the same way. Representative LaFalce, the Ranking Member of the House Banking & Financial Services Committee, for example, stated that "the conference report totally safeguards stronger state consumer protection laws in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. I, 1999) (statement of Rep. La Falce).

Consequently it is clear that Congress intended that states be afforded the right to regulate consumer financial privacy on behalf of their citizens in adopting statutes more protective in that regard than the provisions of the GLBA. [FN8] This permits state law like SB1, and weighs heavily against the preemption argument advanced by Plaintiffs. *See Exxon Mobil Corp. v. U.S. EPA,* 217 F.3d at 1254.

FN8. While Plaintiffs contend that the savings clause of Section 6807 is limited only to Title V of the GLBA (given the statutory reference to "this subchapter"), that argument is of no real moment since the FCRA preemption clause is inapplicable to the subject matter presently before the Court in any event. Hence the cases cited by Plaintiffs for the proposition that a savings clause expressly limited to one act does not apply to other statutes (*see, e.g., United States v. Locke,* 529 U.S. 89, 106, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)) are inapplicable. In addition, as indicated above, the legislative intent in permitting states to enact more protective privacy regulations appears clear.

Plaintiffs attempt to portray the GLBA as inapplicable because of a preemption clause recognizing the FCRA. That argument fails. Although Title V of the GLBA does recogize that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair

Credit Reporting Act," (15 U.S.C. § 6806), as demonstrated above the FCRA does not apply to general sharing of information by financial institutions with either affiliates or third party nonaffiliates. [FN9] Consequently Section 6806 was intended only to preserve the FCRA's specific consumer protections with respect to consumer reporting, and does not operate to limit the GLBA's explicit preservation, at Section 6807, of states' rights to enact more stringent financial privacy laws.

> FN9. Similarly, Plaintiffs' reliance on the Fair and Accurate Credit Transactions ("FACT") Act, which amended certain provisions of the FCRA in 2003, is also misplaced. While the FACT Act does impose restrictions on consumer solicitations for marketing purposes (at 15 U.S.C. § 1681s-3), it does not purport to regulate, like the GLBA, affiliate information sharing in general and does not evince any congressional intent to do so.

CONCLUSION

The Court finds that the provisions of SB1 are not preempted by the FCRA, whose overriding purpose is to regulate the use and dissemination of consumer reports. Instead, limitations on the sharing of personal financial information between financial institutions in non-credit reporting situations are specifically contemplated by the provisions of the GLBA, which allows states to enact more stringent privacy regulations in that regard, therefore permitting state laws like SB1. Plaintiffs' claim that SB1 must be invalidated consequently fails. Because Plaintiffs' entire lawsuit is premised on that contention, summary judgment on behalf of the Defendants is hereby granted.

NOTE: This decision is currently on appeal to the Ninth Circuit Court of Appeals.