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Court of Appeals No. 36245-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Petitioner

v.

AMERIQUEST MORTGAGE COMPANY,

Respondent

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ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON
COALITION FOR OPEN GOVERNMENT

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I. INTRODUCTION

Amicus Washington Coalition for Open Government (“WCOG”) urges this Court to find that the “other statutes” provision of the Public Records Act (“PRA”) obviates the need to characterize the application of the Gramm-Leach-Bliley Act (“GLBA”) to the customer loan files as “preemption.” WCOG, however, expresses no opinion on what effect the GLBA has on these loan files. WCOG 2nd Amicus Brief (“WCOG Brief”), p. 15.

This Court need not answer the question discussed by WCOG to resolve this case. The Washington Attorney General (AGO), after years of contending otherwise, has finally conceded that the GLBA applies to the customer loan files. See AGO Supplemental Brief, p. 17 n.17. This important concession relieves the Court of the need to undertake any analysis of the method through which the GLBA technically applies to the files. It applies, and that is enough. The dispute, then, has moved past the question of *whether* and *how* the GLBA applies, to whether the GLBA precludes disclosure of the loan files.

If, however, this Court decides otherwise -- that it wants to entertain the question of the technical application method of the GLBA -- it should not be resolved as urged by WCOG. The “other statutes” provision of the PRA is particularly ill-suited to incorporate the GLBA,

considering the diametrically opposed policies of the two statutes. Instead, characterizing the GLBA's application to the loan files as "preemption" is consistent with this Court's precedents and reasoning in Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978), and Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1995) ("PAWS").

II. ARGUMENT

A. The Court Need Not Resolve How the GLBA Applies to the Loan Files.

1. The Court Should Avoid Issues of Preemption if They Are Not Necessary to Resolve the Case.

Petitioner AGO's concession in its Supplemental Brief that it is a non-affiliated third party that is subject to the GLBA ends years of denial on this critical point. It also ends years of substantive arguments about *whether* the GLBA applies to the customer loan files. The GLBA now conclusively applies to the loan files.

The only remaining issue is whether the GLBA precludes the disclosure of the loan files. It does. By its own admission, WCOG's amicus brief does not address this remaining issue at all. Rather, it devotes its entire argument to the technical application of the GLBA to the loan files (whether it should be "other statutes" or preemption). This Court need not address this issue; more importantly, this Court *should* not

address this issue. Like deciding unnecessary issues of constitutionality, if issues of preemption of state law do not have to be addressed, the Court should avoid it. State v. Peterson, 133 Wn.2d 885, 894, 948 P.2d 381 (1997) (Talmadge, J., concurring) (stating that “[p]rinciples of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.”) (quoting Manning v. Upjohn Co., 862 F.2d 545, 547 (5th Cir. 1989)). Given the concession by the AGO, the Court should resolve this case without reaching unnecessary conclusions.

2. Avoiding this Issue Does No Damage to the PRA for Future Cases.

Leaving this issue – *how* the GLBA applies – unanswered will not jeopardize the integrity of the PRA. As part of its pitch to this Court to use the PRA’s “other statutes” provision for the GLBA’s application in this case, WCOG lectures that a finding of “preemption” would “call the entire PRA framework into question.” WCOG Brief, p. 9. Although it cites no legal authority for its proposition, WCOG offers a parade of horrors that it contends would result from the suggestion of preemption. “Other statutes,” argues WCOG, is the only route through which the PRA would remain otherwise intact from the application of the GLBA to these loan files.

This Court should not be induced into deciding this issue because of this false crisis manufactured by WCOG. The *scope* of the GLBA's application to the loan files will not change regardless of the technical method of its application ("other statutes" or preemption). This scope comes from the language of the GLBA itself. Section 6807(a) states:

Sec. 6807. Relation to State laws

(a) In general

This subchapter and the amendments made by this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 6807(a) (emphasis added). Therefore, regardless of the method of its application, the GLBA only supersedes the PRA to the "extent of the inconsistency."¹ Other aspects of the PRA will remain intact. Features of the PRA such as timelines for responses to PRA

¹ Deciding that federal law preempts state law in a particular case does not mean, as WCOG argues, that an entire state law framework is displaced. "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). When analyzing preemption the intended scope of preemption is necessarily part of the court's analysis and it should look to the "[t]he purpose of Congress [which] is the ultimate touchstone," in every pre-emption case." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). In order to understand the intended scope of a preempting statute, courts must primarily rely on "a fair understanding of *congressional purpose*." *Id.* at 485-86.

requests that do not affect the operation of the GLBA and its protection of information from disclosure remain intact pursuant to the language of the GLBA itself. Analyzing the method through which the GLBA applies in this case in order to label it “other statutes” or “preemption” does not, *and could not*, change the GLBA’s congressionally mandated effect on the PRA. The Court can leave this issue unresolved with comfort that the PRA would not be dismantled regardless of the answer.

B. If the Court Decides to Consider the Method Through Which the GLBA Applies in the Case, the PRA’s “Other Statutes” Provision Is the Wrong Answer.

Resolving the method of the technical application of the GLBA to this case (“other statutes” or preemption) is not necessary now that the AGO has conceded that the loan files are subject to the GLBA. However, if this Court is inclined to analyze this issue, WCOG’s suggested route of the PRA’s “other statutes” should not be used. While on the surface WCOG’s argument for inclusion of the GLBA under the PRA’s “other statutes” provision may sound inviting, in the end, it does not withstand scrutiny.

1. The PRA’s “Other Statutes” Provision Requires the “Other” Statute to be Subordinate to the PRA.

Although not discussed by WCOG, the PRA’s “other statutes” provision is not exactly an open door -- it imposes conditions. Under this

Court's interpretation, the PRA and its policy of widespread disclosure permeates all phases of the analysis of the potential "other statute."

As a threshold matter, an "other statute" is not even considered for incorporation into PRA unless it *meshes* with the PRA. PAWS, 125 Wn.2d at 261-62. When discussing the "other statutes" provision, the Court not only required that the other statute "mesh" with the PRA, but also stated that the PRA would preempt the "other statute" in the case of conflict:

[I]f such other statutes mesh with the [PRA], they operate to supplement it. However, in the event of a conflict between the [PRA] and other statutes, the provisions of the [PRA] govern.

Id.; see also RCW 42.56.030.

In addition, according to this Court in the earlier case of Hearst v. Hoppe, the PRA and its policy for widespread disclosure must color the interpretation of the "other statute" itself. Hearst, 90 Wn.2d at 139. When reconciling the PRA with an "other statute," the Hearst court stated that "the overall policy of [the PRA] must be read into the ["other statute.]" Id. at 139. Thus, while the "other statute" may be used to augment the PRA, its application must be infused with the policy of the PRA.

2. "Other Statutes" Should Not Be Applied to Federal Law, Especially When the Policies Are Inconsistent and Conflict.

Given these conditions imposed by the PRA's "other statutes" provision, the GLBA is a poor fit because of both the *source* and the

purpose of the GLBA. First, the “source” of the GLBA is Congress. PAWS instructs that, when utilizing “other statutes,” the PRA preempts in the case of any conflict. Acts of Congress, of course, may not be subjected to preemption by the PRA.² US. v. Hall, 543 F.2d 1229, 1232 (9th Cir.) cert. denied 429 U.S. 1075, 97 S. Ct. 814, 50 L. Ed. 2d 793 (1977) (recognizing that “state law cannot preempt the federal unless the federal act itself sanctions the application of state standards.”).

Second, the policies of the GLBA and the PRA are at cross-purposes. Hearst’s instruction to “read into” the GLBA the overall policy of the PRA cannot be followed without destroying the clear congressional policy behind the GLBA. Indeed, the congressional policy of privacy protection at the very heart of the GLBA cannot be overstated. Congress enacted the GLBA privacy provisions so that customers would have the power of choice to decide with whom a financial institution could share their information. Individual Reference Servs. Group, Inc. v. Fed. Trade Comm’n, 145 F. Supp. 2d 6, 18 (D.C. Cir. 2001). There is no question

² WCOG curiously cites to the PRA’s preemption provision (RCW 42.56.030) in its brief, then claims that the language is “not at issue in this case.” See WCOG Brief, p. 13 n.6. However, if “other statutes” were applied in this case consistently with case law, this provision *would* be at issue. See PAWS, 125 Wn.2d at 262 (see discussion above; court states, “in the event of conflict between the [PRA] and other statutes, the provisions of the [PRA] govern”). Considering the supremacy of federal law, this would be an absurd result, underscoring the error of WCOG’s position.

that this sweeping legislation was ground-breaking and specifically designed to provide “some of the strongest privacy protections to ever be enacted into any federal law” . . . and [represented] ‘*the most comprehensive federal privacy protections ever enacted by Congress.*’”

Id. (citations omitted; emphasis added). Prohibiting the disclosure of “personally identifiable financial information” was of paramount importance to those legislators responsible for crafting and shaping the GLBA:

- Representative LeFalce declared that Congress was “creating federal privacy protections, for the first time. *No financial services bill in decades has gone to the floor with stronger privacy protections* -- indeed, with any privacy protections. A vote for this bill . . . is a vote for consumer privacy protection.” Id. (citations omitted; emphasis added); see also 145 Cong. Rec. H11, 519 (daily ed. Nov. 4, 1999).
- Representative Kelly highlighted the fact that “[a]s for privacy, this legislation represents *the greatest expansion of personal financial privacy in the history of American finance.*” 145 Cong. Rec. H11, 535 (daily ed. Nov. 4, 1999) (emphasis added).
- Representative Bliley -- one of the original sponsors of the GLBA -- heralded the law as “creating the first-ever general financial privacy laws to protect the privacy of consumers’ information,” and that the GLBA “*gives consumers privacy protections.* It gives them the right to stop information from being sold to unaffiliated third parties. . . .” Id. at H11, 533 (emphasis added).

Others testifying about these sweeping privacy protections further underscored the importance of safeguarding this information. For

example, Dr. Mary Culnan from Georgetown University was asked to weigh in on the issue and testified:

[C]onsumers should be able to restrict the further dissemination of personal information disclosed in a financial transaction, *even that which is commonly deemed “public.”* She noted that the “telephone book, one of the most widely available sources of public information, is a good example that people value the ability to make choices about disclosing even their names and addresses, and when offered choices . . . consumers should be able to opt out of having their names and addresses shared for marketing purposes.

Individual, 145 F. Supp. 2d at 19 n.7 (emphasis added).

Unlike the GLBA, the PRA stands for the opposite principle: broad disclosure. Even a brief review of the PRA’s purpose and the history of its enactment demonstrate that its central tenet is directly at odds with the stringent disclosure restrictions in the GLBA:

The Public Records Act “is a strongly worded mandate for broad disclosure of public records”. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). *The Act’s disclosure provisions must be liberally construed, and its exemptions narrowly construed.* RCW 42.17.010(11); .251; .920. Courts are to take into account the Act’s policy “that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others”. RCW 42.17.340(3).

PAWS, 125 Wn.2d at 251 (citing provisions of the PRA now codified in Chapter 42.56 RCW) (emphasis added).

This “broad mandate” for **disclosure** patently conflicts with the spirit and letter of the GLBA -- “the greatest expansion of personal

financial **privacy** in the history of American finance.” 145 Cong. Rec. H11, 535 (daily ed. Nov. 4, 1999) (emphasis added).³

These two policies conflict and cannot be reconciled, as would be required under an “other statutes” analysis. It is impossible to have the overall policy of the PRA “read into” the GLBA, as required by Hearst, without thwarting congressional intent. Indeed, unless the Court is prepared to discard its analysis in PAWS and Hearst and painstakingly carve out federal law exceptions to its existing “other statutes” jurisprudence, “other statutes” will not work for the application of the GLBA in this case.

³ WCOG criticizes both the Court of Appeals and Ameriquest for stating that the GLBA “conflicts” with the PRA because, it argues, the “other statutes” provision removes any conflict. WCOG Brief, pp. 13-14. WCOG’s pejorative rhetoric is based more on misleading wordplay than substance. Until the AGO’s recent concession that the GLBA applied to the loan files, Ameriquest was forced to argue at both the trial and appellate courts that there was inconsistency (or conflict) between the GLBA and the PRA on a substantive level and that the GLBA was more protective of these documents than the PRA was by itself. The Court of Appeals’ six page discussion on preemption focused on the clash between the GLBA’s nondisclosure provision and the PRA’s mandate for disclosure.

WCOG’s arguments, however, are not directed at that “conflict,” but at a distinctly different issue. The appropriate label for the mechanism through which the GLBA applies to records held by a state agency (“other statutes” or “preemption”) is an inquiry that is relevant only after one has concluded that the GLBA is more protective than the pre-existing state law. Since WCOG’s arguments speak entirely to this latter issue, its criticism of both the Court of Appeals and the parties is entirely misplaced.

3. Characterizing the GLBA's Application to This Case as "Preemption" Is Consistent With This Court's Prior Decisions.

Rather than forcing the "square peg" of federal law in the "round hole" of the "other statutes" provision, Washington courts have used a straightforward "preemption" analysis when determining whether federal law limits disclosure under the PRA. PAWS, 125 Wn.2d at 265-67 (utilizing preemption principles when analyzing the impact of federal laws on the PRA); Northwest Gas Ass'n v. Wash. Utils. & Transport. Comm'n, 141 Wn. App. 98, 126, 168 P.3d 443 (2007) (instructing the trial court to "reexamine whether federal law preempts disclosure [under the PRA] of some or all of the requested pipeline shapefile data"). As noted earlier, utilizing preemption rather than "other statutes" does not present any risk to the overall PRA framework. It is merely the acknowledgement that when an Act of Congress explicitly supersedes an aspect of the PRA, the state law must yield.

In the face of this PAWS approach utilizing preemption for federal law, not "other statutes," WCOG argues that PAWS should be discarded because, according to WCOG, "apparently . . . no party argued that federal statutes fell within the 'other statutes' exemption." WCOG Brief, p. 6. WCOG's argument, presumably, is that even though "other statutes" was discussed in the opinion with respect to state law, it would not have occurred to the Court to utilize the "other statutes" provision for federal

law unless a party “argued” the point. WCOG cites to no authority to support this assertion. In fact, WCOG is mistaken on this point. Utilizing “other statutes” for the inclusion of federal law was briefed by the parties in PAWS.⁴ Yet, notwithstanding these arguments, this Court in PAWS analyzed the potential application of federal law under preemption, not “other statutes.” Given the interpretive baggage of the “other statutes” provision discussed above (i.e., reading the “other” statute within the overall policy of the PRA), the PAWS approach is sound and should be followed – *if* the Court is inclined to decide this issue. As the Court of Appeals properly held, when federal preemption principles are applied in this case the GLBA preempts the portions of the PRA which are less protective than the GLBA’s privacy provisions.

III. CONCLUSION

This Court need not decide the issue of how the GLBA applies in this case. But if it does, it should reject WCOG’s “other statutes”

⁴ The University of Washington made the very same arguments regarding “other statutes” that WCOG is making here. On page 10 of its Reply to the ACLU, the University stated:

Washington law exempts from disclosure documents not subject to release under any other law or statute. RCW 42.17.311 [42.56.510]; RCW 42.17.260(1) [42.56.070]. This Washington law authorizes application of the federal disclosure standards.

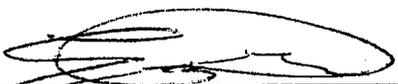
Univ. of Wash. Reply to ACLU Brief, 1993 WL 13558435, *10 (Wash. 1993) (emphasis added; citations omitted).

argument and affirm the Court of Appeals determination that the GLBA preempts the PRA.

RESPECTFULLY SUBMITTED this 30th day of April, 2010.

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Good afternoon,

Attached for filing in .pdf format are Ameriquest Mortgage Company's Answer to Brief of Amicus Curiae Washington Coalition for Open Government and Answer to Brief of Amicus Curiae American Civil Liberties Union of Washington. The attorney filing the attached documents is Erik D. Price, WSBA #23404.

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