No. S183703

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARKS, ET AL.,

PLAINTIFFS AND APPELLANTS,

vs.

MBNA AMERICA BANK, N.A.,

DEFENDANT AND RESPONDENT.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G040798
REVERSING A JUDGMENT OF THE
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
CASE NO. 04CC00598
THE HONORABLE GAIL S. ANDLER, JUDGE

RESPONDENT'S OPENING BRIEF

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STATEMENT OF ISSUES FOR REVIEW

In this action, Appellant Allan Parks sought to enforce Civil Code section 1748.9 ("§ 1748.9") against Defendant and Respondent MBNA America Bank, N.A. ("MBNA"), a national bank chartered and regulated by the Office of the Comptroller of the Currency ("OCC") pursuant to the National Bank Act ("NBA") (12 U.S.C. § 21 *et seq.*).[1] Section 1748.9 requires banks in California to make certain disclosures in offering "convenience check" loans to credit card customers. In the decision below (the "Decision"), the Court of Appeal – explicitly refusing to follow the decision of the Ninth Circuit in a near-identical case – reversed the trial court's judgment that Parks' attempted use of the "unlawful" prong of California's Unfair Competition Law ("UCL") (Bus. & Prof. Code § 17200 et seq.) to enforce § 1748.9 against MBNA was preempted by the NBA and the OCC's implementing regulations, in particular 12 C.F.R. § 7.4008 ("Section 7.4008").

As set forth in the Petition for Review, the issues presented for review are:

1. Whether the Court of Appeal erred in holding that § 1748.9 is not preempted on its face by the NBA under well-established principles articulated by the U.S. Supreme Court, thereby creating a direct conflict with Ninth Circuit law, which has reached precisely the opposite result on the same legal issue in a recent case involving near-identical allegations.
2. Whether the Court of Appeal erred in holding that the OCC, a federal agency within the U.S. Department of the Treasury, lacked authority to promulgate Section 7.4008 and, therefore, that Section

[1] Through change of name, MBNA America Bank, N.A. is now known as FIA Card Services, N.A. It remains a national bank. (AA 1317-19.)

7.4008 does not preempt § 1748.9, even though both California and federal courts have previously applied that regulation and parallel regulations to preempt application of particular state-law limitations on the exercise by national banks of their federally granted lending powers.

Both questions should be answered in the affirmative.

INTRODUCTION

The Court of Appeal fundamentally misconstrued NBA preemption jurisprudence established over more than a century, creating its own restrictive theory of NBA preemption nowhere present in the governing case law. While citing landmark NBA preemption cases decided by the U.S. Supreme Court, including *Watters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, *Barnett Bank v. Nelson* (1996) 517 U.S. 25, and *Franklin National Bank v. New York* (1954) 347 U.S. 373, the Court of Appeal ignored the core principles underlying those decisions. As the U.S. Supreme Court determined in all three cases, a state law *of any type* – including a state statute imposing particular disclosure mandates – whose application to a national bank would impair, burden, obstruct, or otherwise limit the national bank's ability to exercise fully its federally authorized powers is preempted by the NBA. Under that precedent, Parks' attempt to enforce § 1748.9 against MBNA is plainly preempted.

To reach its contrary holding, the Court of Appeal had to create a direct split of authority with the Ninth Circuit on this fundamental issue of *federal* law. In *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032, a case involving the *same California statute* at issue here, in the context of *an identical claim* against a national bank, a unanimous panel of the the Ninth Circuit held the NBA and the OCC's regulations preempted § 1748.9. The court in *Rose*, following *Watters*, *Barnett Bank*, and *Franklin*, held that state law could not be used to require a national bank's

adherence to § 1748.9, because the NBA explicitly grants federally chartered banks the power to loan money on personal security *without limitation* by state law. (*Rose*, 513 F.3d. at p. 1037.) Because the power to loan money on personal security is the power pursuant to which a national bank extends credit to its cardholders via convenience checks, and because there is no indication that Congress intended that power to be subject to local restriction, the *Rose* court held "the NBA preempts the disclosure requirements of [§] 1748.9, insofar as those requirements apply to national banks." (*Id.* at p. 1038.) Further, the *Rose* court held the OCC's regulation expressly preempting state requirements for specific credit-related disclosures, Section 7.4008, also preempts the application of § 1748.9 to a national bank. (*Ibid.*)

Expicitly acknowledging that it was rejecting this directly relevant decision of the highest federal court in the same jurisdiction, the Court of Appeal "reluctant[ly]" opined that the authorities it deemed relevant "require[d]" it to deviate from *Rose*. (*Parks v. MBNA America Bank, N.A.*(2010) 109 Cal.Rptr.3d 248, 260.) The relevant authorities, however, in no way support – much less compel – a result contrary to *Rose*.

Indeed, to reach its preemption result, the Court of Appeal had to reject not only *Rose* but, also, the underpinnings of the rulings of the U.S. Supreme Court and lower courts in cases dating back to the enactment of the NBA. By ruling that § 1748.9, a state statute overtly targeted at the business of banking, may be applied to MBNA, the Decision invites states other than California to impose their own, individual and potentially conflicting disclosure requirements on national banks. Yet, state law requirements such as those in § 1748.9, " 'if permitted to be applicable [to a national bank], might impose limitations and restrictions as various and as numerous as the States.' " (*Watters*, 550 U.S. at p. 14, quoting *Easton v. Iowa* (1903) 188 U.S. 220, 229.) Such a result is directly at odds with

Congress' objectives for NBA preemption of state law: to enable national banks to operate under the "conditions for uniformity and efficiency that would otherwise obtain." (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 158, *aff'd*, (1996) 517 U.S. 735.)[2] As the *Watters* Court confirmed: "Diverse and duplicative superintendence of national banks' engagement in the business of banking . . . . is precisely what the NBA was designed to prevent." (*Watters*, 550 U.S. at pp. 13-14.)

The Court of Appeal ignored these fundamental and well-established principles, creating a test for NBA preemption that, if adopted by this Court and other courts, will inevitably "subject [national banks] to the varying laws of the several states – a result that might 'throw into confusion the complex system of modern interstate banking' " (*Smiley*, 11 Cal.4th at p. 158, quoting *Marquette Nat'l Bank v. First of Omaha Corp.* (1978) 439 U.S. 299, 312.) According to the Court of Appeal, a determination that the NBA preempts state law requires a *factual showing* that the state law "*forbid[s]*" or "*significantly impairs*" the exercise of national banks' banking powers. (109 Cal.Rptr.3d at pp. 255, 257.) The notion that a "factual record" is required to show preemption not only has no basis in

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[2] The Court may question whether the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) (Pub. L. No. 111-203 (July 21, 2010)), has any impact on this case. The answer is no. The DFA provides for *prospective* amendment of the NBA, and thus does not apply to Parks' claims, filed in 2004, seeking restitution under California statutory law. (See DFA § 1048; Bureau of Consumer Financial Protection, Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010) [designating July 21, 2011, as the effective date of the NBA amendments].) Moreover, when the DFA amendments to the NBA take effect, they reinforce the very same principles that compel preemption of § 1748.9 today. The DFA expressly embraces the *Barnett Bank* standards for preemption, upon which the Ninth Circuit relied in *Rose* and which dictate a decision consistent with *Rose* in this case. (See DFA § 1044 [standards to be codified at 12 U.S.C. § 25b(b)(1)(B)].)

NBA preemption case law, but is flatly at odds with both the very nature of preemption and its underlying policy rationale.

As this Court has explained, "federal preemption presents a pure question of law." (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 fn.10 (2008), cert. den. *sub nom. Albertson's Inc. v. Kanter* (2009) 129 S.Ct. 896, citing *Spielholz v. Super. Ct.* (2001) 86 Cal.App.4th 1366, 1371.) The Court of Appeal's view that factual evidence is needed to "prove" preemption runs directly contrary to that well-recognized principle. Further, the practical consequences of the Decision are wholly at odds with the objectives of federal preemption. If the NBA's preemptive effect can be determined only by requiring each individual national bank to produce evidentiary proof of costs and related burdens, NBA preemption rulings would have virtually no precedential value. This is hardly what Congress intended in seeking federal regulation of national banks to ensure they operate under "conditions for uniformity and efficiency." (*Smiley*, 11 Cal.4th at p. 158.)

The Court of Appeal's errors regarding the interpretation and application of the NBA's preemptive effect are not the only reason this Court should reverse the Decision. The Court of Appeal also held, in conflict with a very substantial body of federal and state court case law, that the OCC lacked the power to promulgate Section 7.4008 – despite the fact that, as the Court of Appeal itself expressly acknowledged, Section 7.4008 underwent all of the proper rulemaking procedures required by federal law to promulgate a regulation. That holding implicates not only Section 7.4008, but also the other preemption regulations adopted by the OCC (12 C.F.R. §§ 7.4007, 7.4009, and 34.4). The *Parks* court is the *only* court – out of dozens, including the Ninth and Sixth Circuits, appellate courts of other states, and even the California Court of Appeal in other cases – that has failed to treat those regulations as valid. (See, e.g., *Miller v. Bank of*

Am., N.A. (U.S.A.) (2009) 170 Cal.App.4th 980, 987-88; *Smith v. Wells Fargo Bank*, N.A. (2005) 135 Cal.App.4th 1463, 1481-83; *Martinez v. Wells Fargo Home Mortg., Inc.* (9th Cir. 2010) 598 F.3d 549, 555-58; *Monroe Retail, Inc. v. RBS Citizens*, N.A. (6th Cir. 2009) 589 F.3d 274, 281-83; *Patterson v. Citifinancial Mtg. Corp.* (Mich. Ct. App. May 25, 2010, No. 287370) , –N.W.2d– [2010 WL 2076774]; *Citibank v. Eckmeyer* 2009-Ohio-2435, *appeal not allowed* (2009) 123 Ohio St.3d 1424 [914 N.E.2d 1064]; *Citibank v. Palma* (N.C.Ct.App. 2007) 184 N.C.App. 504, 507 [646 S.E.2d 635, 638].)

The conflicts between the Decision and *Rose*, and NBA preemption precedent before and after *Rose*, should not be perpetuated. The Decision affects thousands of national banks, disrupting a scheme of federal regulation upon which they and their regulators rely. It also invites pernicious consequences, including forum shopping, which this Court has recognized flow from inconsistent federal and state court rulings on a single legal question. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 ["Adopting a rule of liability. . . that diverges from the rule announced in [federal court] . . . would be an open invitation to forum shopping by defamation plaintiffs"].) For all of these reasons, the Decision should be reversed.

BACKGROUND AND PROCEDURAL HISTORY

A. The Trial Court Proceedings

On June 30, 2004, Parks filed the instant putative class action against MBNA in the Superior Court. (AA 55.)[3] MBNA is, and has been since 1991, a federally chartered national bank. (AA 127, 1319.) In its capacity as a national bank, MBNA offers loans to its customers nationwide,

[3] "AA" refers to the Appellant's Appendix.

including in California. Parks sued MBNA individually and purportedly on behalf of a putative California class of MBNA customers. (AA 58-61.)

Parks asserted a single cause of action against MBNA, alleging that MBNA violated the "unlawful" prong of the UCL by failing to include in its "convenience check" loan offers the informational disclosures uniquely mandated by § 1748.9. (AA 63.) Parks never alleged any deceptive or fraudulent conduct on the part of MBNA.

A "convenience check" loan is extended by use of a "preprinted check or draft" (a "convenience check"), which banks typically mail to credit card customers with a monthly account statement or in a separate mailing with an enclosed offer. (See *Rose*, 513 F.3d at pp. 1034-35 [describing convenience checks].)

Under § 1748.9, a convenience check offer made in California by a credit card issuer must include all of the following disclosures, in "clear and conspicuous" language, on "the front of an attachment to the checks":

1) that "use of the attached check or draft will constitute a charge against your credit account;"
2) the annual percentage rate and the calculation of finance charges associated with the use of the attached check or draft; and
3) whether the finance charges are triggered immediately upon the use of the check or draft.

(Civ. Code § 1748.9.)

Parks alleged that MBNA's convenience check offers failed to conform to all of these California law requirements and, thus, that MBNA engaged in "unlawful" conduct in violation of the UCL. (AA 63.) Parks relied solely on the "unlawful" prong of the UCL, which incorporates other laws and treats violations of those laws as independently actionable under the UCL.

In response, MBNA moved for judgment on the pleadings based on federal preemption. First, MBNA asserted Parks' suit was *expressly* preempted by Section 7.4008, which provides state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers," including those "requiring *specific statements, information, or other content*" in "*credit solicitations*," are "not applicable to national banks." (12 C.F.R. § 7.4008(d)(1), (d)(2)(viii), italics added.) Second, MBNA contended Parks' suit was *impliedly* preempted by the NBA, because Parks sought to *condition* MBNA's exercise of its power to "loan[ ] money on personal security," (12 U.S.C. § 24[Seventh]), upon compliance with § 1748.9. (AA 114-17.)

B. The Ninth Circuit's Decision in *Rose*

While Parks' claims were pending in the trial court, the Ninth Circuit decided *Rose*. The Ninth Circuit affirmed the *Rose* district court's judgment in favor of Chase Manhattan Bank USA, N.A. ("Chase") with respect to an identical claim of violation of the "unlawful" practices prong of the UCL as Parks asserted in this case (as well as claims under the UCL's "unfair" and "deceptive" practices prongs). (*Rose*, 513 F.3d at pp. 1037-38.)

Relying on the U.S. Supreme Court's controlling opinions in *Watters*, *Barnett Bank*, and *Franklin*, the Ninth Circuit held the UCL could not be used to require a national bank's adherence to § 1748.9, because the NBA explicitly grants federally chartered banks the power to loan money on personal security *without limitation* by state law. (*Rose*, 513 F.3d at p. 1037.) In so doing, the Ninth Circuit expressly addressed and rejected the suggestion that an evidentiary showing is required as part of a preemption analysis. Noting the *Rose* plaintiffs' request for a remand to the district court for "discovery regarding the issue of whether the state law constitutes a 'significant' impairment or interference with the purposes of

the National Bank Act," the Ninth Circuit held that the preemptive scope of the NBA is appropriate for determination on a pleading motion and that an evidentiary showing of interference or burden is not needed. (See *id.* at p. 1038 fn.4 ["Given the prior holdings of *Barnett Bank* and *Franklin*, . . . it appears that no amount of discovery would change the central holding that Congress intended for the NBA to preempt state restrictions on national banks such as Cal. Civ. Code § 1748.9 here"].)

The Ninth Circuit also explicitly affirmed the district court's decision that Section 7.4008 preempted the plaintiffs' claims. (See *id.* at p. 1038 ["from the face of Plaintiffs' complaint, the district court correctly found that . . . Plaintiffs' UCL claims . . . are preempted by the NBA and *OCC regulations*"], citing *Rose v. Chase Manhattan Bank USA* (C.D. Cal. 2005) 396 F.Supp.2d 1116, 1123, italics added.)

Following *Rose*, the trial court below granted MBNA's motion for judgment on the pleadings, holding that, on its face, § 1748.9 is preempted as applied to MBNA. (AA 1562-63.) Parks timely appealed.

C. The Court of Appeal's Decision

The Court of Appeal expressly rejected *Rose* and reversed the trial court's judgment for MBNA. (109 Cal.Rptr.3d at p. 260.) While recognizing that "[i]n all material respects, *Rose* is factually identical to the case before us," and that, even when they are not directly on point, "federal decisions may be particularly persuasive when they interpret federal law," the Court of Appeal constructed its own, novel reading of the NBA, contrary to *Rose* and the U.S. Supreme Court authorities relied on in *Rose*. (*Id.* at p. 251, 253-57.)

According to the Court of Appeal, because § 1748.9 does not *forbid* the exercise of a banking power authorized by the NBA, it does not, on its face, conflict with the NBA. The Court of Appeal also found that, although a state law may be preempted by the NBA even if the state law does not

have a prohibitive effect, such preemption depends on *evidentiary* proof that the state law "*significantly impairs*" an NBA-authorized national banking power. (*Id.* at p. 257.) Despite the contrary rulings of many other courts (including *Rose*) dismissing state law claims as preempted by the NBA based solely on the pleadings, the Court of Appeal held that MBNA would have to marshal factual evidence to prove that § 1748.9, as applied to MBNA, "significantly impairs" MBNA's power to loan money on personal security. (*Id.* at p. 255-56, 257.)

The Court of Appeal went on to reject the alternative basis for preemption relied on by MBNA and by the Ninth Circuit in *Rose*: express preemption by Section 7.4008. The Court of Appeal explicitly acknowledged: "It is clear that [Section 7.4008], if valid, expressly preempts section 1748.9." (*Id.* at p. 258.) The Court of Appeal also explicitly acknowledged the "OCC had authority to issue regulations interpreting the preemptive effect of the NBA and other federal law on state law with regard to national banks." (*Id.*) Further, the Court of Appeal expressly acknowledged that the OCC "follow[ed] the proper procedures in enacting [Section 7.4008]." (*Id.*) Yet, despite this specific recognition, and the undisputed understanding that " 'Federal regulations may preempt state law just as fully as federal statutes,' " (*id.* at p. 257, quoting *Miller*, 170 Cal.App.4th at p. 984), the Court of Appeal declared Section 7.4008 invalid for lack of OCC regulatory authority. (*Id.* at p. 260.)

While expressing "reluctan[ce] to create a split of authority with the Ninth Circuit on a point of federal law," the Court of Appeal reached a decision directly contrary to *Rose*, holding that "there is no basis for preempting section 1748.9 without a factual record." (*Id.*)

ARGUMENT

I. THE COURT OF APPEAL ERRED IN FAILING TO FOLLOW THIS COURT'S DIRECTIVES IN FAVOR OF UNIFORMITY OF DECISION.

As the Court of Appeal explicitly recognized, under this Court's well-settled precedent, the courts of California may – and in certain cases should – follow relevant Ninth Circuit precedent on issues controlled by federal law. (See 109 Cal.Rptr.3d at p. 251, citing *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321, rev'd on another ground *sub nom. Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 437, 452; see also *People v. Bradley* (1969) 1 Cal.3d 80, 86.) Where a California state court is faced with a question of federal law in a factual setting *identical* to one already addressed by the Ninth Circuit, as is the case here, the policy reasons for adherence to the federal court's decision are exceptionally compelling. (See, e.g., *Mech. Contractors Ass'n v. Greater Bay Area Ass'n* (1998) 66 Cal.App.4th 672, 683 ["were we to adopt a rule different from the Ninth Circuit, we would encourage California litigants to forum shop between California's federal and state courts . . . . This is a relevant and important consideration that supports adopting the [Ninth Circuit's] rule"].)

The trial court was presented with a set of facts and a claim premised, like *Rose*, entirely upon the purported failure of a national bank, here MBNA, to include in its convenience check offers the disclosures set forth in § 1748.9. The trial court was asked to interpret and apply federal preemption principles based on the same statute, regulation, and binding U.S. Supreme Court authority already addressed by the Ninth Circuit. By following *Rose*, the trial court adhered to the well-established principles articulated by this Court regarding the optimal uniformity of federal and state court rulings.

The Court of Appeal, however, expressly declined to adhere to these principles. The Court of Appeal acknowledged that "[i]n all material respects, *Rose* is factually identical to the case before us." (109 Cal.Rptr.3d at p. 251.)[4] Nevertheless, and without pointing to any controlling authority dictating a result contrary to *Rose*, the Court of Appeal proceeded to reach a result in *direct conflict* with *Rose*. This was clear error: *Rose* is fully consistent with the NBA preemption precedents of the U.S. Supreme Court, as well as with NBA preemption " 'decisions of the lower federal courts . . . [that] are "both numerous and consistent." ' " (*Barrett v. Rosenthal*, 40 Cal.4th at p. 58, quoting *Etcheverry*, 22 Cal.4th at p. 320-21.) The Court of Appeal should have followed *Rose* instead of "creat[ing] a split of authority with the Ninth Circuit Court of Appeals on a point of federal law." (109 Cal. Rptr.3d at p. 260.)

II. THE NBA PREEMPTS § 1748.9 AS APPLIED TO A NATIONAL BANK.

Under the Supremacy Clause of the United States Constitution, "state law that conflicts with federal law is 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *Smiley*, 11 Cal.4th at p. 147.) A "conflict" with federal law arises, *inter alia*, whenever a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) In the presence of any such conflict, federal law prevails and the state law is preempted.

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[4] The only significant difference between this case and *Rose* is that in *Rose*, the plaintiffs asserted two additional UCL claims, one for "unfair" conduct and the other for "fraudulent" conduct. The Ninth Circuit held all three claims, including the "unlawful" claim identical to Parks' claim here, were preempted under the NBA. (See *Rose*, 513 F.3d at p.1038.)

Rose rests firmly on U.S. Supreme Court precedent elucidating how and when state law "stands as an obstacle" to the accomplishment of Congress's purposes and objectives for the NBA. Congress' objectives regarding the preemptive scope of the NBA, while not expressly declared in the statute's text, are readily ascertainable from the history surrounding the NBA's enactment in 1864. As that history reveals, Congress intended the statute broadly to preempt any state law that would interfere with the exercise of a national bank's banking powers, including the power to engage in lending and activities incidental to lending.

A. Congress Intended the NBA to Preempt Any Application of State Law That Would Obstruct the Exercise by National Banks of Their Banking Powers.

"It must be recognized . . . that federal authority has . . . affected banking since before enactment of the National Bank Act in 1864." (*Smiley*, 11 Cal.4th at p. 148, citing *Nat'l State Bank, Elizabeth, N.J. v. Long* (3d Cir. 1980) 630 F.2d 981, 985.) Indeed, it was the states' attempts to interfere with Congress' objective of centralizing banking in the federal government that led to the U.S. Supreme Court's landmark decision in *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 405, emphatically confirming the supremacy of federal over state law. Congress was keenly aware of the federal preemption principles articulated in *McCulloch* when passing the NBA. As one Senator reminded his colleagues, *McCulloch* confirmed, with respect to acts of Congress, that " 'it is of the very essence of supremacy to remove all obstacles to its action within its own sphere.' " (Remarks of Sen. Sumner, Cong. Globe, 38th Cong., 1st Sess. (1864) p. 1893, quoting *McCulloch*, 17 U.S. (4. Wheat) at p. 427.)

Consistent with this understanding, Congress declared its intent for a national banking system that "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively

under that Government from which it derives its functions." (*Id.*) As one Congressman stated, "the whole purpose and object and scope and tendency of the bill is to prostrate State power and put it at the control of the great centralized power to be established here." (Remarks of Rep. Mallory, Cong. Globe, 38th Cong., 1st Sess. (1864) p. 1413.)

To effectuate this intent, Congress established a banking system "made to operate directly upon the people independently of State boundaries or State sovereignty," and "wholly independent of State authority." (Remarks of Rep. Spaulding, Cong. Globe, 37th Cong., 3d Sess. (1863) p. 1115; see also S. Misc. Doc. 100, 39th Cong., 1st Sess. (1866) [Pursuant to the NBA, the federal government "assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments"].) The new national banking system would be "free from all State hostility or even State rivalry, that it may become in reality as in name, national in all respects." (Remarks of Sen. Sumner, Cong. Globe, 38th Cong., 1st Sess. (1864) p. 2130.) To that end, the NBA would "take from the States . . . all authority whatsoever over . . . [national] banks, and to vest that authority here in Washington, in the . . . Secretary of the Treasury." (Remarks of Rep. Brooks, Cong. Globe, 38th Cong., 1st Sess. (1864) p. 1267.)

B. The U.S. Supreme Court Has Repeatedly Confirmed That the NBA Broadly Preempts State Law.

Because "Congress has legislated in the field [of banking] from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," it is clear that "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." (*United States v. Locke* (2007) 529 U.S. 89, 108.) Indeed, over the past 140 years, the U.S. Supreme Court has time and time again confirmed that the NBA has broad preemptive effect.

In one of its earliest interpretations of the NBA, the Court described it as specifically designed to protect national banks' exercise of federally authorized powers from "the hazard of unfriendly legislation by the States." (*Tiffany v. Nat'l Bank of Mo.* (1873) 85 U.S. (18 Wall.) 409, 413.) In a decision reached one year later, the U.S. Supreme Court further declared that, in light of Congress' broad preemptive intent with respect to regulation of national banks, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." (*Farmers' & Mechs.' Nat'l Bank v. Dearing* (1875) 91 U.S. 29, 34.) Further, the Court subsequently explained:

> National banks are . . . subject to the paramount authority of the United States. It follows that *an attempt by a state to define their duties or control the conduct of their affairs is absolutely void*, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.*

(*Davis v. Elmira Sav. Bank* (1896) 161 U.S. 275, 283, italics added; see also *Talbott v. Bd. of County Comrs.* (1891) 139 U.S. 438, 443 ["The[ ] various provisions, scattered through the entire body of the statute respecting national banks, emphasize . . . an intent to create a national banking system co-extensive with the territorial limits of the United States, and with *uniform* operation within those limits," italics added].) Because the NBA "provide[s] a symmetrical and complete scheme for the banks to be organized under the provisions of the statute," national banks must be held to be "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations

and restrictions as various and as numerous as the states." (*Easton*, 188 U.S. at pp. 231, 229.)

On this basis, the U.S. Supreme Court has consistently " 'interpret[ed] grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law.' " (*Watters*, 550 U.S. at p. 12, italics added, quoting *Barnett Bank*, 517 U.S. at p. 32.) Accordingly, "the usual presumption against federal preemption of state law is inapplicable to federal banking regulation. " (*Wells Fargo Bank N.A. v. Boutris* (9th Cir. 2005) 419 F.3d 949, 956, citing *Bank of Am. v. City of San Francisco* (9th Cir. 2002) 309 F.3d 551, 558-59; see also *Monroe Retail*, 589 F.3d at p. 280 ["In the context of national banking, . . . the Supreme Court has held that the general presumption against preemption does not apply"]; *Miller*, 170 Cal.App.4th at p. 985 [same].)

This is true even for those state laws that address areas traditionally subject to the police powers of the states, such a consumer protection laws. As this Court stated in *Smiley*: "We cannot, and do not, ignore the immanent threats to efforts by sister states to provide such protection as they deem fit to consumers who reside therein. But . . . displacement of [state law] has always been implicit in the structure of the National Bank Act, . . . [and] is an issue of policy committed to Congress." (*Smiley*, 11 Cal.4th at p. 163; see also *Franklin*, 347 U.S. at p. 379 ["However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy"]; *City of San Francisco*, 309 F.3d at p. 559 [consumer protection not listed as area where "states retain some power to regulate national banks"]; *Ass'n of Banks in Ins., Inc. v. Duryee* (6th Cir. 2001) 270 F.3d 397, 404 ["Where state and federal laws are inconsistent, the state law is pre-empted even if it was enacted by the state to protect its citizens or consumers"].)

C. Under Any of the Various Tests for NBA Preemption Suggested by the U.S. Supreme Court, the NBA Preempts the Application of § 1748.9 to MBNA.

No single test has been adopted for determining when a state law is preempted on grounds that it obstructs accomplishment of Congress' objectives. (See *Hines*, 312 U.S. at p. 67.) Rather, the U.S. Supreme Court has articulated a variety of tests. In the NBA context, the central focus of all the various tests has been the impact of state law on the *powers* Congress granted to national banks. That is because, as stated in *Barnett Bank*, "[i]n using the word 'powers,' the [NBA] chooses a legal concept that . . . has a history. That history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally *limited* by, but rather ordinarily *pre-empting* contrary state law." (517 U.S. at p. 32, italics added.).

In *Barnett Bank*, the U.S. Supreme Court recognized that "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." (*Id.* at p. 33.) Lending, of course, is among the powers Congress explicitly granted to national banks. (12 U.S.C. § 24[Seventh].) However, the "forbid or impair significantly" test was just one among several referred to by the *Barnett Bank* Court as applicable for NBA preemption purposes. The Court also stated that the NBA preempts any state law that would "interfere with," "encroac[h]" upon, "hampe[r]," "condition," "restrict," "limit" the exercise of, or "impair [the] efficiency" of a national bank's federally authorized powers. (*Id.* at pp. 32-34, italics added.) Additional formulations for determining NBA preemption are evident from other U.S. Supreme Court decisions. (See, e.g., *Watters*, 550 U.S. at p. 13 ["Beyond genuine dispute, state law may not . . . *curtail or hinder* a national bank's efficient exercise of any . . . power, incidental or enumerated under the NBA," italics added]; *Franklin*,

347 U.S. at p. 376 ["The [NBA] authorizes national banks to receive deposits without qualification or limitation" by state law].) Underlying all of these different formulations of the test for NBA preemption is the central inquiry as to whether the state law, directly or indirectly, creates an impediment to the achievement of Congress' goals.

Under *Barnett Bank* and *Watters*, and applying any of the numerous, mutually reinforcing, and independently applicable tests for NBA preemption articulated in those and other U.S. Supreme Court cases, it is clear that Parks may not attempt to enforce § 1748.9 against MBNA. This conclusion is underscored by the U.S. Supreme Court's 1954 decision in *Franklin*, upon which the Court relied heavily in *Barnett Bank*. The question in *Franklin* was whether the NBA preempted a New York State statute that forbade banks to use the words "saving" and "savings" in advertising. (*Franklin*, 347 U.S. at p. 374.) The New York statute did not prohibit banks from taking deposits – *i.e.*, exercising savings-related banking powers – rather, it *conditioned the exercise of those powers* by restricting the use of a particular word in bank signage and disclosures. The *Franklin* Court held New York could not impose that condition, even though the state had made clear it "does not object to national banks taking savings deposits or even to their advertising that fact so long as they do not use the word 'savings.' " (*Id.* at p. 378.)

The *Franklin* Court held that, nevertheless, a state's requirement with respect to even a *single word* in disclosures by a national bank may itself significantly burden the exercise of the national bank's banking powers. As there was "no indication that Congress intended to make this phase of national banking [*i.e.*, deposit-taking] subject to local restrictions," the disclosure limitation was preempted. (*Id.* at pp. 378-79; see also *Monroe Retail*, 589 F.3d at p. 283 ["We have found that the level of 'interference' that gives rise to preemption under the NBA is not very

high"]; *Duryee*, 270 F.3d at 409 [rejecting an "attempt to redefine 'significantly interfere' as 'effectively thwart' "].)

By its terms, § 1748.9 *restricts* national banks' right to exercise their lending powers free from *interference* by state law. The statute imposes detailed, specific requirements directly targeted at lending, that are different from any in federal law. Plainly, therefore, § 1748.9 "conditions" MBNA's ability to exercise its power to make loans via convenience checks on the terms of state law: if the application of the statute to MBNA is not displaced by preemption and MBNA fails to comply, under the UCL, MBNA could be required to return finance charges it collected on convenience check loans originating from non-compliant offers. Moreover, application of § 1748.9 to MBNA would destroy the uniformity of regulation Congress created for national banks. Under *Barnett Bank* and other controlling cases, Parks' attempted enforcement of § 1748.9 is consequently preempted on its face.

1. On Its Face, Section 1748.9 Imposes A "Significant Impairment."

The Court of Appeal made no apparent effort to consider the evident burdens of the disclosure requirements in Section 1748.9 on the exercise of MBNA's lending powers. In fact, § 1748.9 imposes significant burdens, by mandating specific disclosures *in addition to* and *inconsistent with* federal law.

For example, under § 1748.9(a), the disclosures required by the rest of the statute must appear on "the front of an attachment that is affixed by perforation or other means to the preprinted check or draft, in clear and conspicuous language." No federal law or regulation requires national banks to include disclosures on each and every convenience check offer, on the front of an attachment to the check. (Regulation Z, referred to in § 1748.9, merely mandates "written notice." [12 C.F.R. § 226.9(c)(1).].) In addition,

§ 1748.9(a)(1) arguably directs that a bank use the exact language contained in the statute – that is, the language that "use of the attached check or draft will constitute a charge against your credit account." Nothing in federal law requires national banks to use this specific language or even language that is similar to it; rather, national banks may design their *own language* to convey the disclosures Regulation Z requires. (See 12 C.F.R. pt. 226, Supp. I [interpreting 12 C.F.R. § 226.9(b)(1)].)

Similarly, § 1748.9(a)(3) requires issuers to include on *every convenience check offer* they make "whether the finance charges are triggered immediately upon use of the check." There is no federal counterpart to this requirement. Although federal law does require convenience checks issuers to disclose *certain* terms that may be associated with their offers, the requirement is limited to particular situations in which the terms of the offer differ from the terms previously governing the recipient's credit account; otherwise, unlike § 1748.9, federal law may require only a statement that the previously disclosed account terms continue to apply. (See 12 C.F.R. 226.9(b)(1), (2).) Section 1748.9 contains no such limitation and requires instead that the issuer make the requisite disclosure in each and every convenience check offer, even if the offer terms are the same as those previously applicable to the recipient's account.

Finally, § 1748.9(a)(2) imports and makes mandatory for convenience check offers the disclosure requirements specified in 12 C.F.R. § 226.16, including "the annual percentage rate and the calculation of finance charges." Although it may appear this requirement imposes no requirements beyond those already in federal law, that is not the case: 12 C.F.R. § 226.16 relates to *advertising* – not to disclosures in credit *solicitations*. Further, although Regulation Z does require, upon *issuance of a credit card*, disclosure of the annual percentage rate associated with the

use of a credit card and the calculation of finance charges applicable to the use of the card, it says nothing about such disclosures in *offers for use* of convenience checks. (See 12 C.F.R. § 226.6(a).)

In short, contrary to the Court of Appeal's unelucidated conclusion, Section 1748.9 *on its face* purports to impose on national banks a mandate to disclose detailed statements regarding terms of lending that are different from and in addition to any disclosure required by federal law. Section 1748.9 thereby both *conditions* MBNA's exercise of its lending power upon compliance with state law and *burdens* the exercise of that power by demanding compliance with new disclosure requirements.[5]

2. Section 1748.9 Also Undermines The Congressional Purpose In The NBA Of Uniform Nationwide Regulation Of National Banks.

Moreover, even if the conflict between the terms of § 1748.9 and federal law were not so pronounced, such a state disclosure statute inflicts an *inherently significant* impairment on a national bank's ability to function as Congress intended. Allowing one state to impose upon national banks

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[5] The facts of this case therefore stand in stark contrast to both *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, and *Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal.App.4th 526. In both of those cases, as the court in *Hood* emphasized, the facts alleged supported "a legal theory of liability for false and misleading advertising based on the predicate act(s) of *violation of federal law regarding required disclosures and prohibited misleading or misrepresentative advertising.*" (*Hood*, 143 Cal.App.4th at p.544; see also *id.* at p.545 [noting that the *Smith* court concluded that the UCL cause of action there was not preempted because "in effect [it] was 'a tort cause of action based on alleged violations of federal disclosure requirements applicable to Bank regardless of the UCL' " (quoting *Smith*, 135 Cal.App.4th at p.1483], italics added.) In this case, however, Parks makes no allegation of "false or misleading" advertising; nor does he allege any predicate acts of violation of federal law. Thus, holding § 1748.9 preempted in this case is fully consistent with the ruling in *Hood* that the causes of action *there* were "not preempted because they do not impose any substantial limitations upon, or 'obstruct, impair, or condition' a bank's actions" otherwise permissible under federal law. (*Id.* at p.546, quoting *Smith*, 135 Cal.App.4th at pp.1483-1487.)

specific, unique, credit-related disclosure requirements, including requirements for content, form, and manner of disclosure, necessarily opens the door to 50 varying sets of requirements (indeed, potentially to many more, as municipalities and other localities may choose to adopt their own specific disclosure mandates). To comply, national banks would need to track, analyze, and establish specific compliance mechanisms for each of the myriad separate and distinct disclosure mandates, just to be able to exercise the lending power explicitly granted to them by Congress. That is the exact situation Congress intended to prevent. (See *Smiley*, 11 Cal.4th at p. 158 [recognizing that allowing a single state to dictate credit-related mandates for national banks would render the bank's lending activities "subject to the varying laws of the several states – a result that might 'throw into confusion the complex system of modern interstate banking' and thereby undermine the conditions for *uniformity and efficiency* that would otherwise obtain"], quoting *Marquette Nat'l Bank*, 439 U.S. at p. 312, italics added; see also *Easton*, 188 U.S. at p. 231 [noting the NBA provides "a symmetrical and complete scheme for the banks to be organized under the provisions of the statute"].)

This is not a case in which a state law of "general application" is sought to be applied against a national bank. Although Parks sued MBNA under the UCL, his sole claim is that MBNA's engaged in "unlawful" conduct by failing to comply with § 1748.9. This distinction can be highly material. Although claims centrally premised upon fraud or deception are generally not preempted, claims that seek to enforce state laws specifically aimed by banks and requiring affirmative conduct on their part are preempted. Parks' claims seeking to enforce § 1748.9 against MBNA fall into the latter category and are preempted. (See, e.g., *Reyes v. Downey Sav. & Loan Ass'n, F.A.* (C.D. Cal. 2008) 541 F.Supp.2d 1108, 1114-15 [distinguishing between use of the UCL to require a federal savings and

loan association to "'disclose all finance charges,'" which "would have required affirmative action by the bank and regulated behavior specific to lending activity" (and thus was preempted), from use of the UCL to challenge alleged misrepresentation of contract terms and breach of contract, which would, if successful, "require no affirmative action or type of representation by a lending institution" (and thus was not preempted)]; *In re: Ocwen Loan Servicing, LLC Mortg. Servicing Litig.* (7th Cir. 2007) 491 F.3d 638, 646-47 [opining that misrepresentation and breach of contract claims usually are not preempted, but that claims seeking to alter a federal savings and loan association's business practices would be preempted].)

Because Parks' attempted enforcement of § 1748.9 against MBNA would, on its face, impose state-specific, lending-specific, affirmative disclosure requirements on MBNA, it would "impair [the] efficiency" of the exercise of a national bank's federally granted lending powers and is, therefore, preempted by the NBA. (*Barnett Bank,* 517 U.S. at pp. 32-34.)

III. THE COURT OF APPEAL FAILED TO FOLLOW CONTROLLING CASE LAW AND CREATED ITS OWN ERRONEOUS TEST FOR NBA PREEMPTION.

A. The Court of Appeal Created an Erroneous Test for Preemption Under the National Bank Act.

Beyond its misguided and superficial analysis of § 1748.9, the Court of Appeal seriously erred in its analysis of the NBA. Perhaps most egregiously, the Court of Appeal used the "forbid or impair significantly" test to impose on national banks a requirement that has no foundation in NBA preemption case law and is fundamentally inconsistent with both Congressional intent and sound public policy. According to the Appellate Court, in order to demonstrate NBA preemption, a national bank must make a "*factual showing*" that state law "significantly impairs the exercise

of the relevant power or powers." (109 Cal.Rptr.3d at p. 257, italics added.) This purported requirement would bind the NBA in a figurative straightjacket and effectively render invalid years of NBA preemption case law, in which, time and time again, the courts have found the NBA to preempt state law as a matter of law and without reference to factual proof of a "significant impairment" of a national bank's exercise of its banking powers.

Indeed, in *Barnett Bank* itself, where U.S. Supreme Court used the "prevent or significantly interfere" language, the Court demanded no such factual showing. (See *Barnett Bank*, 517 U.S. at pp. 32-37; see also, e.g., *Watters*, 550 U.S. at pp. 12-15; *Franklin*, 347 U.S. at pp. 377-79; *First Nat. Bank of San Jose v. California* (1923) 262 U.S. 366, 368-69; accord, *Monroe Retail*, 589 F.3d at pp. 282-84; *City of San Francisco*, 309 F.3d at pp. 562-64; *Duryee*, 270 F.3d at pp. 409-10.) Clearly, the U.S. Supreme Court does not consider factual evidence of a "significant impairment" a prerequisite to a finding of NBA preemption. Rather, what the U.S. Supreme Court does deem critical to an NBA preemption analysis is determining if state law stands as an obstacle to Congress' intent that national banks' banking activities be subject to a *uniform* set of *federal* regulations. (See supra Part II.B.) Proper application of the "forbid or impair significantly" test reveals that § 1748.9 is preempted on its face, irrespective of any "factual" evidence of impairment.

The "significance" of the impairment in this context, within the meaning of *Barnett Bank*, is not merely the degree to which any *one particular state's* disclosure requirements impede a national bank's exercise of banking activities; rather, it is also the burden of complying with *multiple and potentially contradictory* regulations imposed by as many as 50 states and many more municipalities or other localities. No factual showing is needed to recognize the *inherent significance* of the burden

§ 1748.9 would place on national banks' exercise of their lending power, just as no such showing has been required in any of the other cases in which the courts have found NBA preemption. (See, e.g., *Abel v. KeyBank USA, N.A.* (N.D. Ohio 2004) 313 F.Supp.2d 720, 727 [finding NBA preemption on a pleadings motion based solely on a "review of the [state law] provisions at issue . . . as well as the relevant preemption law"].) As the Ninth Circuit recognized in *Rose*: "Given the prior holdings of *Barnett Bank* and *Franklin,* . . . it appears that no amount of discovery would change the central holding that Congress intended for the NBA to preempt state restrictions on national banks such as Cal. Civ.Code § 1748.9 here." (*Rose*, 513 F.3d at p. 1038 n.4.) No decision, other than the Court of Appeal's here, suggests otherwise.

The sole case discussed by the Court of Appeal in announcing its "evidentiary" requirement was *American Bankers Association v. Lockyer* (E.D. Cal. 2002) 239 F.Supp.2d 1000 (*Lockyer*), a district court case decided prior to *Rose* and before the OCC adopted Section 7.4008. [6] To the extent *Lockyer* could be read to suggest a need for an evidentiary showing,

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[6] The Court of Appeal also cited in this context this Court's decision in *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913; however, *Perdue* plainly did not endorse any blanket rule requiring evidence to demonstrate preemption of state law in every instance. The *Perdue* Court merely suggested that, in a case involving allegations of "*unreasonable*" or "*unconscionable*" conduct, an undue impact on a national bank's *federally authorized* activities might not be evident on the face of the pleadings. (See *id.* at pp.943-44.) Parks' attempted application of California law to MBNA in this case, however, has nothing to do with alleged "unreasonable" or "unconscionable" conduct. Parks claims only that MBNA acted *unlawfully* in failing to comply with § 1748.9, a state statute *directly targeting and specifically regulating bank lending* – one of the core banking powers of a national bank. Because the application of state law disclosure requirements such as those in § 1748.9 (which could be "as various and as numerous as the states," *Easton*, 188 U.S. at p.229) to national banks would *categorically* render the banks less efficient, less competitive, and less able to exercise their lending power, claims that such requirements apply to national banks are preempted as a matter of law *on their face*.

Lockyer is inconsistent with, and must yield to, the subsequent appellate decision in *Rose*. In any event, *Lockyer* provides no support for a categorical requirement for evidentiary proof to establish preemption. The court in *Lockyer* analyzed evidence of the impact of the state law at issue, Civil Code § 1748.13, on the national bank plaintiffs, because the banks themselves *offered* such evidence, in conjunction with their alternative argument for relief under the Dormant Commerce Clause of the U.S. Constitution, which *does* require an evidentiary showing. (See *id.* at p. 1006.)

Additionally, the plaintiff banks in *Lockyer* did *not* challenge the California law on the basis that it imposed *conditions or restrictions* on their federally authorized power to make loans, as MBNA does here and as Chase did in *Rose*. Rather, they "maintain[ed] that section 1748.13 interfere[d] with the federal power to lend money through its imposition of costly operational and administrative burdens on national banks' lending activities." (*Id.* at p. 1016.) Therefore, the *Lockyer* court had no occasion to consider whether the *only* way a plaintiff national bank may establish preemption is by an evidentiary showing that the state statute "significantly interferes" with the exercise of its federally authorized banking powers. Because a case is not authority for issues not actually litigated and decided, (see, e.g., *Cooper Indus., Inc. v. Aviall Servs., Inc.* (2004) 543 U.S. 157, 170), *Lockyer* does not support the Court of Appeal's holding that an evidentiary showing of "significant burden" is always or generally required to establish NBA preemption of state disclosure requirements.

Moreover, any examination of *Lockyer* must be informed by the fact that the OCC had not yet promulgated Section 7.4008 at the time *Lockyer* was decided, and, thus, the *Lockyer* court did not have the benefit of Section 7.4008 in interpreting the then-existing NBA preemption law. Had Section 7.4008 been in effect at the time, the *Lockyer* court presumably

would have found the California statute at issue to be *expressly* preempted from application to national banks. In particular, the "minimum payment warning" provision of the California statute at issue in *Lockyer*, referred to by the Court of Appeal here (see 109 Cal.Rptr.3d at pp. 256-57), would be *expressly preempted* by Section 7.4008(d)(2), because the "minimum payment warning" provision (like Section 1748.9 here) "requir[ed] specific statements . . . to be included in . . . credit-related documents" of national banks, which Section 7.4008 prohibits. (12 C.F.R. § 7.4008(d)(2)(viii).)

Indeed, the *Lockyer* court *did* find the "minimum payment warning" to be expressly preempted as applied to federal savings associations, based on an OTS regulation that is substantively identical to Section 7.4008(d)(2)(viii). (See *Lockyer*, 239 F.Supp.2d at p. 1010 ["the Minimum Payment Warning clause . . . directly conflicts with OTS regulation [12 C.F.R. § 560.2(b)(9)"].) Contrary to the Court of Appeal's suggestion, because the *Lockyer* court found such express preemption of the "minimum payment warning" requirement with respect to federal savings associations, it did not have to, and *ultimately did not*, decide the question of NBA preemption of that specific requirement. Instead, finding that the various provisions of Civil Code § 1748.13 were not severable and could not be applied differently to different federally chartered financial institutions, the court held that the statute was "constitutionally inapplicable *in its entirety* to *all* federally chartered credit card issuers." (*Id.* at 1021, italics added.)

The Court of Appeal's reliance on *Lockyer*, therefore, was misplaced. There is no supporting precedent, either controlling or not, for the Court of Appeal's self-created categorical requirement for "evidence" to demonstrate NBA preemption.

B. The Court of Appeal's Evidentiary Requirement Is At Odds With Sound Public Policy.

Beyond departing from established law, the Court of Appeal's unprecedented "evidentiary" requirement would have multiple deleterious practical results – all at odds with the purpose of preemption. As an initial matter, it would be impracticable, if not impossible, to extrapolate one national bank's evidentiary showing of the "significant" impairment imposed by a state law on the bank's banking operations to that law's effect on national banks as a whole. A single state law would likely have different quantitative effects, monetary and non-monetary, from bank to bank. Therefore, even a single court could find the "evidence" of burden on one national bank to be sufficiently "significant" to support a preemption ruling as to that national bank, while finding the evidence of burden on another national bank not sufficiently "significant" to support preemption as to that national bank.

The Court of Appeal's "evidentiary" requirement would thereby eviscerate any possible "bright-line" rule of law for NBA preemption, turning a "pure issue of law"[7] into a factual test with results that could, and likely would, vary widely from bank to bank. Under such a regimen, national banks would no longer have any reliable guidelines regarding which state laws are preempted from application to their banking activities. And no national bank could know for sure in advance whether any particular state law might or might not apply to it, despite prior litigation resolving the question for one or more *other* national banks. Indeed, precisely because no case has required an evidentiary showing, there is not even an accepted yardstick against which to measure the "significance" of the impact of particular state laws on a particular national bank.

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[7] (*In re Farm Raised Salmon*, 42 Cal.4th at p.1089 fn.10.)

The novel rule adopted by the Court of Appeals would thus seriously undermine national bank efficiency and economy, as well as spawn a proliferation of litigation. Each national bank would have to litigate its own individual cases, marshaling new and individualized factual evidence, to demonstrate that application of a state law to *it* would, in fact, cause a "signficant" impairment in its banking operations. This would impose undue, inefficient, and highly costly burdens on the courts, as well as on national banks themselves. Yet, the U.S. Supreme Court has repeatedly criticized the onerous toll that the discovery process can impose upon litigants, including the reality that the mere "threat of discovery expense will push cost-conscious defendants to settle even anemic cases." (*Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 559; see also *id.* at 558 [citing a memoranda from the Chair of the Advisory Committee on Civil Rules indicating that the cost of discovery can account for up to 90% of litigation costs]; *Ashcroft v. Iqbal* (2009) 556 U.S.– [129 S.Ct. 1937, 1953] ["Litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources . . ."]; *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526 [explaining that defendants asserting certain defenses, such as immunity, are "entitled to dismissal before the commencement of discovery" to avoid "the costs of trial or . . . burdens of broad-reaching discovery"]; accord, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004) [citing "the extent of litigation" over the applicability to national banks of state and local laws (including disclosure requirements), and the "costly and burdensome" impact of such litigation, as reasons for adopting the "uniform, consistent, and predictable standards" for preemption provided in the OCC's 2004 preemption regulations, including Section 7.4008].)

The unprecedented requirement for evidentiary proof of preemption created by the Court of Appeal is not what Congress intended in enacting

the NBA and is contrary to sound public policy. This Court should firmly reject Court of Appeal's misguided test for preemption under the NBA.

IV. SECTION 7.4008, WHICH EXPRESSLY PREEMPTS THE APPLICATION OF § 1748.9 TO MBNA, IS A VALID REGULATION WITH THE FULL FORCE OF FEDERAL LAW.

Arising from the Supremacy Clause of the United States Constitution, express preemption is one of the primary theories of federal preemption. (See *Barnett Bank*, 517 U.S. at p. 31; *Smiley*, 11 Cal.4th at p. 147.) Express preemption occurs when Congress "enacts an explicit statutory command that state law be displaced," (*Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1135), or otherwise "define[s expressly] the extent to which its enactment [is to] pre-empt state law." (See *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations* (2007) 41 Cal.4th 929, 936.) In such cases "the courts' task is an easy one." (*English v. Gen. Elec. Co.* (1990) 496 U.S. 72, 79.) Any state law falling within the ambit of such an enactment should be held to be preempted and any claim based on that law should be dismissed.

Express preemption may be prescribed not only by Congress itself, but also by federal agencies acting on Congressional delegation of authority. (*Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta* (1982) 458 U.S. 141, 153-54.) "Federal regulations have no less preemptive effect than federal statutes." (*Id.* at 153.) And a " 'pre-emptive regulation's force does not depend on express congressional authorization to displace state law.' " (*City of New York v. F.C.C.* (1988) 486 U.S. 57, 64 (*NYC v. FCC*), quoting *de la Cuesta*, 458 U.S. at p. 154.) If a federal agency makes clear that it is preempting state law by regulation, as the OCC expressly did in promulgating Section 7.4008, it is inapposite whether *Congress* intended the specific preemption set forth in the regulation. (*Id.*) "Instead, the

correct focus is on the *federal agency* that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action." (*Id.*)

A. Section 7.4008 Expressly Preempts Section 1748.9.

Section 7.4008 expressly provides that state laws regarding "[d]isclosure and advertising" are preempted, including "laws requiring specific statements, information, or other content, to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit related documents." (12 C.F.R. § 7.4008(d)(2)(viii).) Section 1748.9 mandates the use of specific statements (see § 1748.9(a)(1)) and the inclusion of specific information and content (see § 1748.9(a)(2) & (3)) in convenience check offers. Thus, as the Court of Appeal acknowledged, "[i]t is clear that [Section 7.4008], if valid, expressly preempts § 1748.9." (109 Cal.Rptr.3d at p. 258.)

The question engaged by the Court of Appeal, therefore, was whether Section 7.4008 is valid. In answering that question in the negative, the Court of Appeal departed from the shared view of every court that has addressed the question. Further, in declaring Section 7.4008 to be invalid, the Court of Appeal set itself apart from the multitude of courts, both state and federal, that have applied the regulation (either to find it preempts a particular state law or does not) without questioning its validity.

B. Section 7.4008 Is A Duly Promulgated and Valid Regulation.

1. The NBA Grants Plenary Authority to the OCC, Including the Power to Preempt State Law by Regulation.

The NBA and its legislative history amply confirm the OCC's regulatory authority to adopt Section 7.4008. The NBA expressly grants the OCC comprehensive authority and responsibility to charter, oversee, examine, supervise and discipline national banks, including all aspects of

their organization,[8] incorporation,[9] examination,[10] operation,[11] and dissolution.[12] Further, the NBA expressly delegates *plenary* power to the OCC "to prescribe rules and regulations to carry out the responsibilities of the office." (12 U.S.C. § 93a.) As its legislative history states, the NBA " . . . place[d] in the hands of one individual, who, at the time, for one or many generations, shall be the Comptroller of the Currency. It . . . give[s] him the custody and control of the securities for all the banking capital of the country, and consequently of all its business of every form and character in all its varied and minute ramifications throughout the length and breadth of the land." (Remarks of Rep. Baker, Cong. Globe, 37th Cong., 3d Sess. (1863) p. 1142.)

In addition, through amendments to the NBA in 1994, Congress *expressly authorized the OCC to make preemption determinations*. As so amended, the NBA vests in the OCC the power to determine "that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches," so long as those determinations undergo notice-and-comment procedures. (12 U.S.C. § 43(a).) This

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[8] See 12 U.S.C. § 26 ("[After receiving a certificate of incorporation by a bank applicant,] the Comptroller shall examine into the condition of such association. . . to determine whether the association is lawfully entitled to commence the business of banking.").

[9] See *id.* §§ 21, 26 (outlining the process of forming a "national bank" through an association with documentation submitted to the OCC).

[10] See *id.* § 481 (giving the OCC power to appoint bank examiners and to control and regulate banks through such examiners).

[11] See, e.g., *id.* §§ 81-92a (setting limits on lending, interest rates, and other operational aspects of banking, subject to the prescriptive and administrative authority of the OCC).

[12] See, e.g., *id.* §§ 181-200 (describing, *inter alia*, the OCC's involvement in a national bank's dissolution process, receivership, and distribution of assets).

additional grant of authority plainly confirms that Congress anticipated and intended that the OCC make determinations on preemption of state law as applied to national banks.

Both this Court and the U.S. Supreme Court have explicitly recognized the broad regulatory authority Congress granted to the OCC under the NBA. (See *Smiley*, 11 Cal.4th at pp. 156-57 ["the Comptroller of the Currency . . . 'is charged with the enforcement of the [federal] banking laws' "], quoting *Inv. Co. Inst. v. Camp* (1971) 401 U.S. 617, 627, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.* (1995) 513 U.S. 251, 256-57].) Similarly, the Ninth Circuit very recently confirmed that, "[a]s the agency charged with administering the Act, the [OCC] has the primary responsibility for the surveillance of the 'business of banking' authorized by the Act. To carry out this responsibility, the OCC has the power to promulgate regulations . . . . [and] OCC regulations possess the same preemptive effect as the Act itself." (*Martinez*, 598 F.3d at p. 555, citations omitted.)

Thus, as numerous courts have concluded, "[s]o long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, . . . the *Comptroller has the power to preempt inconsistent state law*." (*Conference of State Bank Supervisors v. Conover* (D.C. Cir. 1983) 710 F.2d 878, 885, italics added; accord *Wachovia Bank, N.A. v. Burke* (2d Cir. 2005) 414 F.3d 305, 314 ["Federal courts have recognized that the OCC may issue regulations with preemptive effect"]; *Wachovia Bank, N.A. v. Watters* (W.D. Mich. 2004) 334 F.Supp.2d 957, 964-65 ["the OCC holds broad and pervasive authority to regulate national banking associations. . . . In light of this statutory authority, it was within the OCC's authority to promulgate [a regulation preempting state law]"].)

2. The Court of Appeal Erred In Demanding An Explicit Congressional Delegation of Preemptive Authority to the OCC.

The Court of Appeal faulted MBNA for not pointing to some explicit authority by which Congress delegated to the OCC the power to issue preemptive regulations such as Section 7.4008. (See 109 Cal.Rptr.3d at p. 260.) However, as the U.S. Supreme Court has confirmed, Congress may *implicitly* delegate such authority, including the authority to preempt an entire *field* of regulation (which the OCC has not purported to do), by agency declaration. This principle has been articulated in a series of cases, including the landmark case of *de la Cuesta*, in which the Court upheld the authority of the Office of Thrift Supervision[13] to declare preemption of state law as applied to federal savings associations.

In *de la Cuesta*, the Court examined the source of the OTS's authority to preempt as evidenced in the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq. As *de la Cuesta* reveals, the HOLA's broad statutory delegation of power to the OTS closely parallels the delegation of rulemaking power to the OCC under the NBA. Indeed, the statutes are strikingly similar in their respective grants of regulatory power. (Compare 12 U.S.C. § 93a ["the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"] with 12 U.S.C. § 1463(a)(2) ["The Director [of the OTS] may issue such regulations as the Director determines to be appropriate to carry out the responsibilities of the Director or the Office"].) Likewise, just as the NBA grants the OCC comprehensive authority to charter, oversee,

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[13] At the time *de la Cuesta* was decided, the OTS was titled the Federal Home Loan Bank Board.

examine, supervise and discipline national banks,[14] the later-enacted HOLA grants the OTS the very same scope of authority. (See 12 U.S.C. § 1464(a)(1) ["the Director [of the OTS] is authorized, under such regulations as the Director may prescribe[,] to provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations. . . . giving primary consideration of the best practices of thrift institutions in the United States"].)

The Court in *de la Cuesta* observed, with specific reference to the HOLA's delegation of authority, that it "expresses no limits on the [OTS]'s authority to regulate the lending practices of federal savings and loans." (*de la Cuesta*, 458 U.S. at p. 161.) From the above-quoted statutory language and relevant legislative history, the U.S. Supreme Court drew the reasonable inference that "Congress expressly contemplated, and approved, the [agency]'s promulgation of regulations superseding state law." (*Id.* at p. 162.)

The same conclusion flows directly from the text of the NBA and its legislative history. Indeed, the NBA explicitly grants the OCC authority to make preemption determinations, 12 U.S.C. § 43(a), while the HOLA does not. Even absent any such explicit grant of authority in the HOLA, the Court in *de la Cuesta* found an *implicit* delegation to this effect. The same was true in *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, in which the U.S. Supreme Court upheld regulations of the Federal Communications Commission ("FCC") which, by declaration of the agency, " 'pre-empted jurisdiction of any and all [state or local] signal carriage regulation,' " as well as any regulation whatsoever of the rates of cable television services. (*Id.* at 702-03, citing 46 F.C.C.2d 175, 178

[14] 12 U.S.C. §§ 21, 26, 81-92a, 93a, 181-200, 481.

(1974).) The Court found the agency had authority to declare that, with respect to the cable industry, "there should be no regulation of rates for such services at all by any governmental level," and that "we are pre-empting the field and have decided not to impose restrictive regulations." (46 F.C.C.2d at pp. 199-200; see *Crisp*, 467 U.S. at p. 703 fn.9.)

There was no express delegation by Congress to the FCC of any authority to declare such preemption; nevertheless, the *Crisp* Court found the delegation had been made. (See *Crisp*, 467 U.S. at pp. 699-700, citing § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a));[15] see also *NYC v. FCC*, 486 U.S. at pp. 66-67 [upholding regulations the FCC declared were intended to "pre-empt state and local regulation," regardless of an "actual conflict between federal and state law," based on the Cable Communications Policy Act of 1984's statement that the FCC may " 'establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise' "], quoting 47 U.S.C. § 544(e).)

Simply put, the U.S. Supreme Court does not consider an express delegation of authority to declare state law preempted to be a prerequisite to a finding that such delegation exists. Quite the contrary: "[I]n the area of pre-emption, if the agency's choice to pre-empt represents a reasonable

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[15] Section 2(a) of the Communications Act provides: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone." (47 U.S.C. § 152(a).) Much like the NBA, the statute grants the FCC rulemaking power "as may be necessary to carry out the provisions of this chapter." (*Id.* § 303(r).)

accommodation of conflicting policies that were committed to the agency's care by the statute," the Court will "not disturb it unless it appears from the statute or its legislative history that the accommodation is *not* one that Congress would have sanctioned." (*NYC v. FCC*, 486 U.S. at p. 64, italics added, internal quotations omitted; see also *Crisp*, 467 U.S. at p. 700; *Lopez v. World Sav. & Loan Ass'n* (2003) 105 Cal.App.4th 729, 737.) There is nothing in the NBA or its legislative history suggesting that Congress disapproves of Section 7.4008; moreover, there is ample indication that the regulation represents precisely the type of action Congress would have expected the OCC to take. (See 12 U.S.C. §§ 43(a), 93a.)

If Congress delegates to an agency authority to administer a statute, the agency may – and should – exercise that authority to implement the statute using its particular expertise and policymaking judgment, consistent with the statute's underlying objectives.[16] The agency may apply that expertise to interpret particular statutory terms or phrases that Congress left ambiguous, or it may do so to declare state law preempted where Congress did not speak directly to preemption.[17] Thus, as the Court unanimously held in *NYC v. FCC*, federal agencies properly effectuate preemption of state law not only because "[t]he statutorily authorized regulations of an

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[16] *See Geier v. Am. Honda Motor Co., Inc.* (2000) 529 U.S. 861, 883 ["Congress has delegated to [the federal agency] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements"], quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 496.)

[17] (See *de la Cuesta*, 458 U.S. at p.154 ["[I]f [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned"].)

agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof," but also because, "[b]eyond that, . . . in proper circumstances, the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in [a particular] area." (*NYC v. FCC*, 486 U.S. at p. 64, citing *Crisp*, 467 U.S. at p. 700; see also *Lopez*, 105 Cal.App.4th at p. 744 ["the statutory authorization to adopt regulations governing the operations of federal savings associations is broad enough to encompass a regulation prohibiting state limitations on their lending practices . . . *even if the federal agency does not consider it necessary to impose limitations of its own*"].)

The history of the OCC's regulatory process in adopting Section 7.4008 demonstrates that the agency undertook precisely the form of " 'reasonable accommodation of conflicting policies that were committed to the agency's care by the [NBA].' " (*de la Cuesta*, 458 U.S. at p. 154, quoting *United States v. Shimer* (1961) 367 U.S. 374, 383.) As "the federal agency to which Congress has delegated its authority to implement the provisions of the [NBA], the agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Medtronic, Inc.*, 518 U.S. at p. 496, quoting *Hines*, 312 U.S. at p. 67.) The OCC's responsibility for administering the NBA "means informed agency involvement and, therefore, special understanding of . . . whether (or the extent to which) state requirements may interfere with federal objectives." (*Id.* at p. 506 [Breyer, J., concurring].)

In formulating Section 7.4008, the OCC relied on its special experience with national bank operations to identify the types of state laws that, under the U.S. Supreme Court's well-established preemption constructs, materially affect and constrain the full exercise of national banks' lending powers and, hence, should be categorically displaced as

conflicting with those powers. (See 69 Fed. Reg. at 1911.) Considering the impact of such state laws on the exercise by national banks of their federally authorized powers, the OCC took into account the views expressed in more than 2,500 comments on the proposed version of the regulation, including comments from community and consumer advocates and state officials. (See *id.* at 1906-07.) The OCC also took careful steps to "adhere[] to the fundamental Federalism principles and the Federalism policymaking criteria." (*Id.* at 1915.) Those steps included, *inter alia*, consulting with state and local officials, summarizing the concerns of those officials, and formulating a statement of the extent to which those concerns were addressed in the regulations. (*Id.*) It was not until this process was complete that the OCC issued its final version of the regulation detailing which types of state laws are (or are not) preempted as applied to national banks.

Under *de la Cuesta*, *NYC v. FCC*, and like cases, the OCC's resulting preemption regulations embody deliberative administrative determinations the courts " 'should not disturb.' " (*de la Cuesta*, 458 U.S. at p. 154, quoting *Shimer*, 367 U.S. at p. 383; *NYC v. FCC*, 486 U.S. at pp. 64, 69.)

3. The Court of Appeal's Decision Invalidating Section 7.4008 Conflicts With A Growing Body of Case Law.

Recognizing the well established principles discussed above, most courts have taken it as axiomatic that Section 7.4008 and its companion preemption regulations are valid. Moreover, several courts, including the district court in *Rose*, have explicitly considered and confirmed the OCC's authority to issue the regulations. (See *Rose*, 396 F.Supp.2d at p. 1122 ["the Court finds that Section 7.4008 is a reasonable and rational exercise of the OCC's rule making authority . . ."]; *Frye v. Bank of Am.* (N.D. W.Va.

Aug. 16, 2010, No. 3:10-CV-47) 2010 WL 3244879, at *5 ["The National Bank Act . . . empowers the Office of the Comptroller of the Currency . . . to regulate real estate loans made by national banks," and "[u]nder this authority, the OCC promulgated a preemption regulation, 12 C.F.R. § 34.4 . . . which is entitled to no less pre-emptive effect than federal statutes"]; *Trombley v. Bank of Am. Corp.* (D.R.I. June 3, 2010, No. 08-cv-456-JD) – F.Supp.2d – [2010 WL 2202110, *4] ["Pursuant to [12 U.S.C. §§ 1, 93a], the OCC promulgated regulations regarding whether, and to what extent, state laws are preempted. Specifically . . . 12 C.F.R. § 7.4008(d)(1)(2007)"]; *Aguayo v. US Bank* (S.D. Cal. 2009) 658 F.Supp.2d 1226, 1231 ["the OCC is authorized to issue rules and regulations as necessary to preserve the purpose and sound operation of the national banking system"], appeal docketed (9th Cir. 2010) No. 09-56679, citing 12 U.S.C. § 93a; *Young v. Wells Fargo & Co.* (S.D. Iowa 2009) 671 F.Supp.2d 1006, 1019-20 ["The NBA authorizes OCC to prescribe rules and regulations to carry out the responsibilities of the office, 12 U.S.C. § 93a, and . . . [p]ursuant to its statutory authority, OCC has promulgated [12 C.F.R. § 34.4] that describe[s] the scope of federal preemption of banking law"]; *Zlotnik v. U.S. Bancorp.* (N.D. Cal. Dec. 22, 2009, No. C 09-3855) 2009 WL 5178030, at *6 ["The OCC is authorized to issue rules and regulations as necessary to preserve the purpose and sound operation of the national banking system. Included in this authority is the power to interpret state law preemption under the NBA. OCC regulations carry the same weight as federal statutes when considering questions of state law preemption"], citations omitted; *Weiss v. Wells Fargo Bank* (W.D. Mo. July 1, 2008, No. 07-5037) 2008 WL 2620886 ["The OCC is the bank's regulator and it has broad rule-making authority. Under 12 U.S.C. § 93a, the OCC is authorized to prescribe rules and regulations to carry out the responsibilities of the office . . . [Pursuant to that authority, the OCC]

amend[ed] the preemption rules in 2004 to specifically include consumer protection provision"], citations and quotations omitted.)[18]

These and numerous other courts have *applied* Section 7.4008, as well as its companion preemption regulations, 12 C.F.R. § 7.4007 (governing deposit-taking and related activities) and 12 C.F.R. § 34.4 (governing real estate lending and related activities), to preempt state law in various contexts, including to hold state law disclosure requirements preempted. (See, e.g., *Martinez*, 598 F.3d at p. 557; *Larin v. Bank of Am., N.A.* (S.D. Cal. July 22, 2010, No. 09cv1062) –F.Supp.2d– [2010 WL 2889111]; *O'Donnell v. Bank of Am.* (N.D. Cal. Mar. 15, 2010, No. C-07-04500) 2010 WL 934153, at *4; *Aguayo*, 658 F.Supp.2d 1at p. 1232; *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.* (S.D. Cal. 2009) 601 F.Supp.2d 1201, 1223; *Zlotnik*, 2009 WL 5178030 at *6-7; *Kauinui v. Citibank* (D. Haw. Oct. 28, 2009, No. 09-000258) 2009 WL 3530373, at *7; *Fultz v. World Sav. & Loan Ass'n* (W.D. Wash. Aug. 18, 2008 No. C08-0343) 2008 WL 4131512, at *2; *Weiss*, 2008 WL 2620886, at *2; *Montgomery v. Bank of Am. Corp.* (C.D. Cal. 2007) 515 F.Supp.2d 1106, 1114; *Augustine v. FIA Card Services* (E.D. Cal. 2007) 485 F.Supp.2d 1172.)[19]

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[18] The courts have found the same regarding the parallel OTS preemption regulations, which are even more expansive than the OCC regulations in purporting to preempt the entire *field* of regulation of federal savings associations. (See, e.g., *Weiss v. Washington Mut. Bank* (2007) 147 Cal.App.4th 72, 75-76; *Lopez*, 105 Cal.App.4th at p. 744; *Washington Mut. Bank v. Super. Ct.* (2002), 95 Cal.App.4th 606, 618; *Silvas v. E*Trade Mortg. Corp.* (9th Cir. 2008) 514 F.3d 1001, 1005; *In re: Ocwen Loan Serv., LLC Mortg. Serv. Litig.*, 491 F.3d at p.692; *Flagg v. Yonkers Sav. & Loan* (2d Cir. 2005) 396 F.3d 178, 183.)

[19] See also, e.g., *Miller*, 170 Cal.App.4th 980; *Jelsing v. MIT Lending* (S.D. Cal. July 9, 2010, No. 10CV416) 2010 WL 2731470; *Simon v. Bank of Am., N.A.* (D. Nev. June 23, 2010, No. 10-CV-00300) 2010 WL 2609436; *Deming v. First Franklin* (W.D. Wash. Apr. 23, 2010, No. C09-5418) 2010 WL 2194830; *Eckmeyer*, 2009-Ohio-2435.

The courts have thereby both expressly and implicitly recognized the OCC's authority to adopt Section 7.4008 and its companion preemption regulations. In ruling to the contrary, the Court of Appeal departed from a growing and consistent body of federal and state court case law.

C. The Court of Appeal Looked to Inapposite Case Law and Misinterpreted the Nature of the OCC's Preemption Regulations.

The sole stated basis for the Court of Appeal's unprecedented ruling regarding Section 7.4008 was the U.S. Supreme Court's opinion in *Cuomo v. Clearing House Ass'n, L.L.C.* (2009) 557 U.S.– [129 S. Ct. 2710], and this Court's opinion in *Perdue*. However, neither *Cuomo* nor *Perdue* involved Section 7.4008 or any of its companion preemption regulations (12 C.F.R. §§ 34.4, 7.4007, 7.4009), and both of those cases and the regulations they involved are readily distinguishable.

First, the regulation in *Cuomo* did not purport to preempt state substantive law at all; rather, it concerned state supervisory and *enforcement* authority over national banks with respect to state laws that *indisputably* are *not* preempted by federal law. (See *Cuomo*, 129 S. Ct. at p. 2718 ["the Comptroller's rule says that the State may not *enforce* its valid, non-pre-empted laws against national banks"].) Any reliance on *Cuomo*, therefore, is wholly misplaced.

Second, the fundamental purpose of the regulations in both *Cuomo* and *Perdue* was different from that of Section 7.4008. In both *Cuomo* and *Perdue*, the regulations were *interpretive* rules, and the issue was whether the OCC properly *interpreted the text* of the NBA. In *Cuomo*, the question was whether the OCC had properly interpreted, by regulatory definition, the term "visitorial powers" in the NBA, 12 U.S.C. § 484. (See *Cuomo*, 129 S. Ct. at pp. 2714-15 [stating the question presented to be "whether the Comptroller's regulation . . . can be upheld as a reasonable interpretation of

the National Bank Act"].) In *Perdue*, the question was whether the OCC's now-superseded "interpretive" rule on preemption relating to bank service charges was "a reasonable interpretation of the controlling statutes." (*Perdue*, 38 Cal.3d at p. 941.)

In both cases, the Courts found that the *text* of the NBA could not support the OCC's statutory interpretation. In *Cuomo*, the Court found the OCC's interpretation of the term "visitorial powers" as including *enforcement* authority was not "reasonable" in light of historical interpretations of the term. (*Cuomo*, 129 S. Ct. at p. 2715; see also *Parks*, 109 Cal.Rptr.3d at p. 259 [discussing the *Cuomo* Court's criticism of the OCC's "interpretation" of the NBA language].) Thus, the *Cuomo* Court held the OCC's regulation was invalid to the extent that it interpreted the term "visitorial powers" in the NBA to mean state enforcement authority as well as "sovereign oversight and supervision." (*Cuomo*, 129 S. Ct. at pp. 715-18.)

Similarly, in *Perdue*, this Court rejected the *interpretation* of the OCC in a regulation expressly purporting to *interpret statutory law*. (See 38 Cal.3d at p. 941 [holding that the regulation was "not a reasonable interpretation of the controlling statutes"]; Interpretive Ruling Concerning National Bank Service Charges, 48 Fed. Reg. 54,319 (Dec. 2, 1983), 49 Fed. Reg. 28,237 (July 11, 1984) [stating that the rule at issue in *Perdue* was an "interpretive rule"].) The *Perdue* Court, upon finding no statutory textual basis for the rule's purported "interpretation," concluded that the rule was, in effect, "legislati[ve]" in nature and could not "be enacted in the guise of statutory interpretation." (38 Cal.3d at p. 941.) That was fatal to the regulation, as legislative rules must undergo notice-and-comment rulemaking procedures, and the OCC rule had not undergone those procedures. (See 48 Fed. Reg. 54,319, 54,320 ["[For] interpretive rulings such as this . . . a notice of proposed rulemaking is not required"]; 49 Fed.

Reg. 28,237, 28,238 [same].) However, the Court in *Perdue* did *not* opine, and had no occasion to opine, on whether the rule would have been valid if it had been intended as a "legislative" rule and had been duly promulgated pursuant to notice-and-comment procedures.[20]

In contrast, Section 7.4008 does not purport to "interpret" the NBA. Unlike the OCC's interpretative regulations at issue in *Cuomo* and *Perdue*, Section 7.4008 represents an "unambiguous intent to preempt state law." (*Perdue,*38 Cal.3d. at p. 940 fn.36; see 69 Fed. Reg. 1904 ["The OCC is adopting this final rule [Section 7.4008] to specify the types of state laws that do not apply to national banks' lending . . . activities . . . ."].) And, as the Court of Appeal acknowledged, (see 109 Cal.Rptr.3d at p. 258), Section 7.4008 is a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." (*Smiley*, 517 U.S. at p. 741.) As such, the regulation represents " 'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.' " (*de la Cuesta*, 458 U.S. at p. 154, quoting *Shimer*, 367 U.S. at p. 383.)

Given the well-established precedent confirming the OCC's authority under the NBA to issue preemptive regulations, and the lack of any authority to the contrary, the Court of Appeal had no ground for declaring Section 7.4008 invalid.

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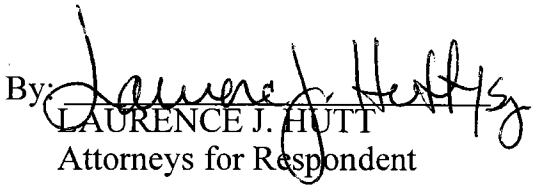
[20] As noted, pursuant to 12 U.S.C. § 43(a) – enacted eleven years after *Perdue* was decided – OCC "interpretive" rulings on preemption involving state laws that address consumer protection or bank branching now must, like all "legislative" rules, undergo notice-and-comment rulemaking.

V. CONCLUSION

The Court of Appeal's Decision represents a radical departure from NBA preemption precedent. It announces novel and unsupported standards and is contrary to sound public policy. Moreover, it declares invalid a federal regulation numerous federal and state courts have both expressly and implicitly found valid. The judgment of the Court of Appeal should be reversed.

DATED: November 1, 2010

ARNOLD & PORTER LLP

By: 
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CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d))

As counsel for Respondent in this appeal, I certify that this Petition for Review consists of 13,891 words, including footnotes, but excluding the title page, tables, quotation of issues for review, certification, date and signature block, as counted by the Microsoft "word count" tool in the Word program used to prepare this brief.

DATED: November 1, 2010

ARNOLD & PORTER LLP

By: _____
LAURENCE J. HUTT
Attorneys for Respondent

PROOF OF SERVICE

Parks, et al. v. MBNA America Bank, N.A. (USA)

I am employed in the County of San Francisco , State of California. I am over the age of 18 and not a party to the above-entitled action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017

On .October 29, 2010, I served the foregoing document described as a **RESPONDENT'S OPENING BRIEF** by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Michael Vachon Law Office of Michael Vachon 16935 West Bernardo Drive, Suite 175 San Diego, CA 92127-1100 *Counsel for Plaintiffs and Appellants*	District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701
Sheldon H. Jaffe Deputy Attorney General Department of Justice 455 Golden Gate Ave., Suite 1000 San Francisco, CA 94102-7004	Clerk of the Court California Superior Court, County of Orange Civil Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701
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Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	

☒ **By U.S. mail**. I enclosed the document in a sealed envelope or package addressed to the persons at the addresses above and

☑ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☒ ☑ **STATE**: I, Stacie James, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 29, 2010, at Los Angeles, California.

Stacie James