Case No. S183703

SUPREME COURT OF THE STATE OF CALIFORNIA

ALLAN PARKS

Plaintiff and Appellant,

vs.

MBNA AMERICA BANK, N.A.,

Defendant and Respondent

After Decision by Fourth District - Division Three Court of Appeal (Case No. G040798) Reversing Judgment by Orange County Superior Court (Case No. 04CC00598), The Honorable Gail S. Andler Presiding

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PLAINTIFF/APPELLANT'S ANSWER BRIEF ON THE MERITS

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I.
SUMMARY

The decision in this case is of utmost constitutional importance. Despite controlling California and U.S. Supreme Court decisions stating that field preemption does not exist in the regulation of national banks, MBNA is now attempting to obliquely achieve its functional equivalent. Quite simply, if (as MBNA argues) States are not permitted to impose any conditions whatsoever on national bank lending activities, that ***will be*** field preemption - and California will be without authority to protect its residents from predatory lending and other unfair banking practices.

Despite the repercussions that will flow from giving MBNA what it now seeks, the Court will notice that there is one thing conspicuously missing from MBNA's brief: ***it contains no direct evidence whatsoever of a Congressional intent to preempt State banking laws***. MBNA fails to quote a single federal statute showing a clear intent to preempt State lending laws. The reason for this is simple: Congress never intended this type preemption.

Rather than presenting direct evidence of *Congressional* intent, what MBNA has done instead is attempt to overwhelm this Supreme Court with a barrage of quotations (many of which are either *dicta* or misleadingly taken out of context) from *other courts* in an attempt to argue that Congress intended the National Bank Act ("NBA") to preempt State lending laws.

Every child in kindergarten has played the game of "telephone," in which the teacher whispers a message into one student's ear, then that student whispers it to someone else, who whispers it to someone else, and so on. Ultimately, the final recipient of the message announces what he or she was told, only to

reveal (often with comic results) that it is nothing like the teacher's original statement.

For the past decade, the banking industry has successfully (at least so far) convinced lower federal and State courts to engage in a game of "telephone" in which, one after another, the courts issued decisions regarding NBA preemption that failed to look for direct evidence of Congressional intent. The banking industry convinced these courts to issue decisions based *solely* on the edited statements of *other courts*. This is not evidence of Congressional intent.

Like any game of "telephone," the message becomes distorted. In this case, the original message came from the California and the U.S. Supreme Courts - both of which unequivocally rejected the argument that field preemption exists in the field of national banking. However, MBNA is now attempting to argue (citing numerous cases decided based on the "telephone" method) that States may not impose *any conditions whatsoever* on a national bank's exercise of its powers. This is the practical equivalent of field preemption.

Since the question of federal preemption requires a finding of *Congressional* intent, the legal analysis must not consist *solely* of examining what *other courts* have said. Once courts cease looking to Congressional actions as the basis for inferring Congressional intent, the "telephone" effect begins, and over time the analysis becomes distorted. This has the most sinister constitutional implications.

If courts cease looking to Congressional acts as the basis for inferring Congressional intent, this could permit an industry with sufficient financial and legal resources to overwhelm courts with a barrage of misleading quotations from previous preemption decisions that would, over time (as a result of the "telephone" effect),

create a fabricated myth of Congressional intent where none actually existed. Financially well-heeled defendants could gradually, but effectively, place themselves above the law.

Moreover, if Congress actually intended a federal statute to preempt State laws, then there is no reason why a preemption proponent would be unable to cite directly to Congressional actions demonstrating the preemptive intent.

The established test for NBA preemption was enunciated in *Barnett Bank v. Nelson.* That test asks whether or not the State law prohibits or effectively frustrates a bank's ability to conduct lending operations. The statute at issue here, Civil Code Section 1748.9 is nothing more than a specific State contract law that prescribes the format of offers to enter into certain types of credit contracts. It neither prohibits nor frustrates a bank's ability to lend - in fact, it imposes no restrictions whatsoever on the credit terms that banks can offer via their "convenience checks." It merely requires that those terms (whatever they are) be prominently disclosed.

MBNA's brief goes too far when it attempts to suggest: (1) that Congress intended to create a "uniform" set of national bank laws; (2) that the Office of the Comptroller of the Currency (the "O.C.C.") was granted "plenary" power to preempt State laws; and (3) that the NBA prohibits any State law "conditions" of any kind on national bank powers. The contentions are refuted by controlling Supreme Court decisions.

Finally, MBNA's attempt to rely on 12 C.F.R. 7.4008(d) (a regulation that was promulgated *solely* for the purpose of preempting all State disclosure laws) is unavailing because the California and U.S. Supreme Court decisions in *Perdue v. Crocker*

National Bank, Cuomo v. Clearing House Ass'n, LLC, and *Watters v. Wachovia* have held that the O.C.C. does not have authority to issue regulations *solely* for the purpose of preempting State laws.

II.
DEFINITIONS OF TERMS USED HEREIN

As stated above, a primary issue addressed in this case is whether the O.C.C. possesses authority to promulgate 12 C.F.R. §7.4008(d), a regulation which purports to define the types of State laws that are preempted by the NBA. To avoid confusion, this Answer Brief on the Merits will use the term "*General* Preemptive Authority" (or alternatively "General Preemptive Power") to describe an agency power to delineate which State laws are preempted, and which are not, in a regulation issued solely for that purpose (such as 12 C.F.R. 7.4008(d)). A General Preemptive Power is distinguishable from Congressional authority to perform a specific task (*e.g.*, interpreting a term in an enabling statute) which will have the *effect* of preempting contrary State laws. While an agency doing the latter could be said to have "preemptive power," that would not constitute a General Preemptive Power, as that term is used herein.[1]

III.
FACTS

A. Nature of the Trial Court Action

1. Parks Alleges That MBNA Has an Unlawful Practice of Sending Consumers "Convenience Checks" Without the Disclosures Required by Civil Code Section 1748.9

Defendant and Respondent MBNA America Bank, N.A. ("MBNA") is a national banking association organized under the

[1] Cases discussing whether an agency has General Preemptive Authority are distinguishable from and should not be confused with decisions holding that properly promulgated regulations may have a preemptive *effect*. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 40 n. 24 (2007) (Stevens dissent).

laws of the United States. It is the largest credit card issuing bank in the United States. Vol. 1, APL 00057, ln. 7-8.[2] Plaintiff and Appellant Allan Parks ("Parks") is one of MBNA's millions of California credit cardholders. Vol. 1, APL 00061, ln. 17-18.

Parks alleges that MBNA has a practice of sending its California cardholders so-called "convenience checks" (*i.e.*, pre-printed drafts that cardholders can use like checks, with all purchases being charged to their credit card accounts). Vol. 1, APL 00061, ln. 19-23. Under California Civil Code Section 1748.9, convenience checks sent to California cardholders must contain the following three disclosures:[3]

1. whether or not finance charges will begin to incur immediately upon use of the checks (*i.e.*, without the interest-free "grace period" typically applicable to credit card transactions) (Civil Code §1748.9(a)(3));
2. the statement "Use of the attached check or draft will constitute a charge against your credit account" (Civil Code §1748.9(a)(1)); and
3. the disclosures required by 12 C.F.R. §226.16, regardless of whether 12 C.F.R. §226.16 would otherwise apply (Civil Code §1748.9(a)(2)).[4]

Civil Code Section 1748.9 does not expressly mention national banks. Rather, it applies to ***all*** credit card issuers, regardless of whether they are national banks, banks organized under California

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[2] Herein, citations to Parks's Appendix will be in the format Vol. x, APL 00xx. Thus, Vol. 1, APL 00057, ln. 7-8, means Volume 1 of Appellant's Appendix, page APL 00057, at lines 7 - 8.

[3] Specifically, the disclosures must appear on the front of an attachment to the check, that may be joined to the check by a perforation. Civ. Code 1748.9(a).

[4] 12 C.F.R. 226.16 is contained in "Regulation Z," which was promulgated under the federal Truth in Lending Act (12 U.S.C. §1601 *et seq.*). 12 C.F.R. 226.16 describes the consumer credit disclosures that must accompany various types of credit advertisements.

law, or banks organized under the laws of another State. Civ. Code. §1748.9.

Parks is one of millions of Californians who received MBNA convenience checks that failed to comply with Civil Code Section 1748.9, and who incurred undisclosed finance charges as a result. Vol. 1, APL 00061, ln. 19 - APL00062, ln. 27.

Parks's complaint contains a single Business & Professions Code Section 17200 cause of action alleging that MBNA has an "unlawful" practice of mailing convenience checks to California cardholders that fail to comply with Civil Code Section 1748.9. Vol. 1, APL 00063, ln. 7-17. He asserts this claim as a class action on behalf of all Californians who received and used MBNA convenience checks since June 1, 2001. Vol. 1, APL 00058, ln. 7-11.

2. The Trial Court Granted MBNA's Motion for Judgment on the Pleadings Because it Erroneously Concluded that the NBA Preempts Civil Code Section 1748.9

On March 19, 2008, MBNA served a motion for judgment on the pleadings, in which it argued that Civil Code Section 1748.9 is preempted by the NBA. Vol. 1, APL 00067-00085. This motion was initially scheduled for April 24, 2008, but was subsequently continued to May 8, 2008.

At the May 8, 2008 hearing, the trial court ordered the parties to provide supplemental briefing, and then continued the matter for a further hearing on May 15, 2008, at which time it took the matter under submission.

On May 29, 2008, the trial court issued a Minute Order stating that MBNA was entitled to judgment on the pleadings because the NBA and its enabling regulations preempt Civil Code Section 1748.9. Vol. 6, APL 001536-001537.

3. The Court of Appeal Reversed

On August 5, 2008, Parks filed a notice of appeal. Vol. 6, APL 001564. The appeal was subsequently briefed (including a supplemental round of briefing to address the impact of the recently decided U.S. Supreme Court decision in *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S.Ct. 2710 (2009)), and on May 12, 2010 the Court of Appeal for the Fourth Appellate District, Division Three, reversed. *Parks v. MBNA America Bank, N.A.*, 184 Cal.App.4th 652 (2010).

The Court of Appeal ruled that under controlling U.S. Supreme Court decisions, including *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the preemption test is not whether the law causes "any" impairment of the exercise of banking powers; the test is whether such impairment is "significant." *Parks*, 184 Cal.App.4th at 663. The Court of Appeal further ruled:

> [W]hen a state disclosure requirement does not, on its face, forbid or significantly impair national banks from exercising a power granted to it by Congress under the NBA, national banks claiming preemption must make a factual showing that the disclosure requirement significantly impairs the exercise of the relevant power or powers. Section 1748.9 does not, on its face, significantly impair federally authorized powers under the NBA. It consists of a brief disclosure requirement that applies only to convenience checks.

Id., at 665.

The *Parks* Court of Appeal also analyzed the issue of whether 12 C.F.R. 7.4008(d) is substantively valid. *Parks*, 184 Cal.App.4th at 665-669. It ruled that it was not, reasoning:

> The language of [12 C.F.R. 7.4008(d)] does not suggest a reasonable attempt to describe and interpret the reach of NBA preemption. ... Rather, the regulation exempts national banks from all state disclosure requirements,

> even though neither the NBA nor TILA expressed an intention to create this bright-line exemption.
> ...
> [Accordingly, although] legislative rules issued by federal agencies can preempt state law, if such rules are within the power delegated to the agency by Congress ... [n]o authority, however, is provided by MBNA for the proposition that Congress has delegated the power to OCC to take administrative action whose sole purpose is to preempt state law rather than to implement a statutory command.

Parks, 184 Cal.App.4th at 668.

Accordingly, the Court of Appeal reversed. It is the review of that appellate decision that is currently before the Supreme Court in this proceeding.

IV.
POINTS & AUTHORITIES

A. Standard of Review and Controlling Law

1. *De Novo* Review is Appropriate

An order granting a motion for judgment on the pleadings is reviewed *de novo*. *Stone Street Capital, LLC v. California State Lottery Commission*, 165 Cal. App. 4th 109, 116 (2008). On appeal from a judgment on the pleadings, an appellate court assumes the truth of, and liberally construes, all properly pleaded factual allegations in the complaint. *Id.* The reviewing court may consider evidence outside of the pleadings that was considered by the trial court without objection, and it may consider matters subject to judicial notice. *Id.*

2. MBNA Bears the Burden of Demonstrating "A Clear and Manifest Purpose of Congress" to Preempt State Laws Such as Civil Code Section 1748.9

A party claiming that a statute is preempted by federal law bears the burden of demonstrating preemption. *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 956-957 (2004). Further, where (as here) Congress legislates in a field traditionally occupied by the States, the analysis begins with the assumption that the historic police powers of the States should not be superseded unless that was the "clear and manifest" purpose of Congress. *Id.*, at 957. The "historic police powers of the States" include both consumer protection and banking regulation. *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 148 (1995). The presumption against preemption of State police powers applies both to the existence of preemption and to the scope of preemption. *Bronco Wine Co.*, 33 Cal. 4th at 957.

(a). MBNA's Argument That There Exists a Presumption in Favor of Preemption is Wrong

MBNA's brief cites to *United States v. Locke*, 529 U.S. 89, 108 (2007) for the purported quotation "Congress has legislated in the field [of banking] from the earliest days of the Republic." MBNA Opening Brief, pg. 14. But the *Locke* case does not say this. MBNA (presumably unintentionally) altered the quotation by inserting the parenthetical "[of banking]" into a sentence in which it is inappropriate to do so. In the cited passage, the U.S. Supreme Court was referring to the field of *maritime shipping* - not banking. *Locke*, 529 U.S. at 108. Accordingly, *Locke* is not the authority MBNA seeks.

That being said, Appellant acknowledges that some lower federal courts (which are not controlling here) have applied the

rationale in *Locke* to the field of banking. However, those authorities should not be followed because they conflict with U.S. Supreme Court precedent. Specifically, the seminal modern NBA preemption case, *Barnett Bank,* did not mention any "special preemption rules" for the field of banking; rather, it explicitly stated that the NBA preemption analysis utilizes "ordinary legal principals of preemption." *Barnett Bank,* 517 U.S. at 37.

Moreover, *Locke* cannot reasonably be applied to the field of banking because it is factually wrong to claim that Congress has extensively legislated the field of banking since "the earliest days of the Republic." In fact, from 1776 to 1863 (*i.e.,* the first 87 years), Congress had only a *de minimus* involvement in banking regulation. State-chartered banks dominated banking during this period.[5] Murray N. Rothbard, A HISTORY OF MONEY AND BANKING IN THE UNITED STATES: THE COLONIAL ERA TO WORLD WAR II (2002), Part 1, pp. 62-90. In 1811, there were a total of 117 State-chartered banks in the United States, and only one federal bank (*i.e.,* the Second Bank of the United States, which ceased operations that same year). *Id.,* at 70. By 1818, there were 348 State-chartered banks, compared to only one federal bank. *Id.* at 87.

In addition, at the time the NBA was enacted, and until the early 19th Century, the operational activities[6] of *all* banks (including national banks) were regulated entirely by State law - because no

[5]During the first 87 years of the Republic, from 1776 to 1863, only three federal banks were chartered. Rothbard, HISTORY OF MONEY AND BANKING IN THE UNITED STATES, pp. 62-90. These were: (1) the Bank of North America, which was chartered in 1782, but which converted to a State of Pennsylvania charter in 1783 (*Id.,* pp. 62-63); (2) the First National Bank of the United States, which was chartered in 1791 for 20 years, and which ceased operations in 1811 when Congress refused to renew its charter (*Id.,* pp. 68-72); and the Second National Bank of the United States, which had a dubious history and lasted only from 1816 to 1833 (*Id.,* pp. 82-90).

[6] As utilized herein, "operation activities" refers to a bank's formation of contracts and transactions with its customers, including the rights, obligations, and remedies attached to the formation of those agreements and execution of those transactions.

federal laws of the sort existed. *See* Plaintiff/Appellant's Request for Judicial Notice No. 1 ("Jud. Not. No. 1") (which shows that the NBA, as originally enacted, contained no provisions whatsoever regulating the operational activities of national banks); Plaintiff/Appellant's Request for Judicial Notice No. 2 (showing that no federal laws existed regulating operational activities of national banks for at least 50 years after passage of the NBA); *see also McClellan v. Chipman*, 164 U.S. 347, 357 (1896) ("National banks are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation").

Because the operational activities of banks (both State and national) have always been regulated primarily by the States, the ordinary presumption against preemption applies.

3. U.S. Supreme Court Decisions (But Not Lower Federal Court Decisions) are Controlling

Lower federal court decisions (*i.e.,* all decisions other than those issued by the U.S. Supreme Court) regarding federal law are not binding on California State courts. *Etcheverry v. Tri Ag Serv. Inc.,* 22 Cal.4th 316, 320 321 (2000). Accordingly, citations to authority herein consist primarily of California and U.S. Supreme Court decisions.

B. Under *Barnett Bank,* the NBA Does Not Preempt Civil Code Section 1748.9

The U.S. Supreme Court's seminal modern NBA preemption decision is *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996). In *Barnett Bank,* the Supreme Court analyzed whether or not the NBA preempted a Florida statute that sought to give State banks greater privileges than national banks with regard to selling insurance (*i.e.,* the State law prohibited national banks from selling

insurance in towns with less than 5,000 people, but permitted State banks to do so). *Barnett Bank,* 517 U.S. at 28-29.

The Supreme Court held that the test for NBA preemption is ultimately a question of congressional intent - *i.e.* "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Barnett Bank,* 517 U.S. at 30.

Barnett Bank began its analysis by noting that Congressional intent to preempt is often revealed by an explicit preemption statement in the federal statute; but where an explicit statement is not present, courts must analyze whether the statute's "structure and purpose" demonstrate a "clear but implicit" preemptive intent. *Barnett Bank,* 517 U.S. at 31. An "implicit preemptive intent" exists if (1) the federal statute creates a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (*i.e.,* what is often referred to as "field preemption") or (2) the federal law is in "irreconcilable conflict" with the State law. *Id.*

1. The NBA Does Not "Occupy the Field"

(a). The NBA Expressly States That National Banks May Exercise Their Powers "Subject to Law"

There is nothing in the NBA's text suggesting an intent to "occupy the field." *See* Jud. Not. No. 1. Indeed, the NBA section that MBNA cites as supposed authority for federal preemption merely states that national banks "shall have the power ... to exercise ... ***subject to law***, all such incidental powers as shall be necessary to carry on the business of banking ... by [in addition to other listed activities] loaning money based on personal security" [emphasis added]. 12 U.S.C. §24 Seventh. In *Atherton v. FDIC,* 519 U.S. 213

(1997), the U.S. Supreme Court interpreted a similar phrase in the NBA (*i.e.,* "other applicable law" as it appears in 12 U.S.C. §1821(k)) to mean *both* federal *and* State laws. *Atherton*, 519 U.S. at 227-228. Accordingly, text of the NBA itself suggests that State laws were intended to apply to national banks, and that federal law does not occupy the field.

(b). Congressional Lending Statutes *Expressly Permit* State Laws Like Civil Code Section 1748.9

In 1968, Congress passed the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) ("TILA"). TILA created a statutory scheme of mandatory disclosures that must accompany all offers of consumer credit (including the "convenience checks" at issue in this case). In determining what effect TILA would have on State laws like Civil Code Section 1748.9, Congress included a preemption savings clause that expressly permits additional State disclosure requirements.[7] 15 U.S.C. §1610(a).

Congress has also, without exception, inserted preemption savings clauses into federal banking statutes requiring information disclosures to consumers. *See* 15 U.S.C. §1693q (savings clause protecting State consumer disclosure laws in Electronic Funds Transfer Act); 12 U.S.C. §4312 (savings clause protecting State consumer disclosure laws in Truth in Savings Act); 15 U.S.C. §6870 (savings clause protecting State consumer disclosure laws in Grahmm-Leach Bliley Act).

These statutes demonstrate that Congress does not intend to occupy the field of banking regulation or consumer credit disclosures.

[7] 15 U.S.C. §1610(a) permits States to impose additional disclosure requirements, as long as they are not inconsistent with TILA. MBNA does not contend that Civil Code Section 1748.9 is inconsistent with or preempted by TILA.

(c). "Field Preemption" Has Been Rejected by Supreme Court Decisions

The California Supreme Court has previously rejected the contention that the NBA "occupies the field" of national bank regulation. *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 938 (1985) (describing assertion of NBA field preemption as "palpably erroneous"). The U.S. Supreme Court has also expressly rejected "field preemption" of national banking. *First National Bank v. Missouri*, 263 U.S. 640, 665 (1924).

2. There is No "Irreconcilable Conflict" Between Civil Code Section 1748.9 and Federal Law

Because Congress did not intend to "occupy the field" of banking regulation, preemption can exist only if there is an "irreconcilable conflict" between the NBA and Civil Code Section 1748.9. *Barnett Bank,* 517 U.S. at 31. In *Barnett Bank*, the U.S. Supreme Court explained that an "irreconcilable conflict" exists between federal and State law when (i) complying with both statutes is a "physical impossibility," or (ii) the State law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Id.*

(a). It is Not "Physically Impossible" to Comply With the NBA and Civil Code Section 1748.9

The term "physical impossibility," as utilized by the Supreme Court in the *Barnett Bank*, means a strict logical impossibility that a person can simultaneously comply with both the federal and the State rule. *Barnett Bank,* 517 U.S. at 31 (noting that it is not impossible to simultaneously comply with a statute that says "you *may* sell insurance" and another statute that states "you *may not* sell insurance").

It is not "physically impossible" for a bank to comply with both Civil Code Section 1748.9 and the NBA. A bank complies with both statutes either (1) by not issuing convenience checks at all, or (2) by issuing convenience checks that contain the disclosures required by Civil Code Section 1748.9. Simultaneous compliance is easy because Civil Code Section 1748.9 imposes *no restrictions whatsoever* on the credit terms that banks may offer via their "convenience checks." It merely requires that those credit terms (whatever they are) be prominently disclosed.

(b). Civil Code Section 1748.9 is Not "An Obstacle to Congress's Objectives"

In *Barnett Bank,* after noting that there was no "physical impossibility" of simultaneous compliance, the Supreme Court analyzed whether the Florida law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." In so doing, the Supreme Court stated that:

> Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to "stand as an obstacle to the accomplishment" of one of the Federal Statute's purposes -- unless, of course, that federal purpose is to grant the bank only a very ***limited*** permission, that is, permission to sell insurance ***to the extent that state law also grants permission to do so.*** [emphasis in original].

Barnett Bank, 517 U.S. at 31.

In this passage, the Supreme Court introduced a concept that it referred to as a "limited permission" *i.e.,* a federal grant of power to do something ***only if*** State law expressly grants permission to engage in the activity. When Congress has granted only a "limited permission" then State law may forbid any and all exercise of that

power without being preempted. *Barnett Bank,* 517 U.S. at 31. The Court then went on to hold that a "limited permission" should be found to exist ***only*** when Congress has ***expressly*** conditioned the grant of power upon a grant of State permission. *Id.,* at 34. Specifically, the Supreme Court stated:

> [W]here Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done *by express language* in several other instances." [emphasis in original].

Id.

Of course, in many instances, State laws do not entirely forbid banks from exercising their powers; rather, they seek to alter ***how*** banks exercise those powers. The *Barnett Bank* Supreme Court discussed three such cases: *Franklin National Bank v. New York,* 347 U.S. 373 (1954), *Fidelty Federal Savings & Loan Assn. v. De la Cuesta,* 458 U.S. 141 (1982), and *Lawrence County v. Lead-Deadwood School Dist. No. 40-1,* 469 U.S. 256, (1985). *Barnett Bank,* 517 U.S. at 33. ***The common denominator in these three decisions is that the State laws at issue did not explicitly forbid any and all exercise of the federally granted bank power - but they nonetheless effectively prevented the national banks from engaging in that type of business.***

In *Franklin*, the purpose of the federal statute was to permit national banks to accept savings deposits. *Franklin*, 347 U.S. at 376. However, a New York State law prohibited national banks (but not

New York State chartered banks) from using the word "savings" in their advertising. *Id.*, at 374. The Supreme Court ruled that the New York statute was preempted because it substantially impaired the national banks' power to accept savings deposits. Specifically, the Supreme Court stated:

> [We cannot] construe the two Federal Acts [*i.e.*, the NBA and the Federal Deposit Insurance Act] as permitting only a passive acceptance of deposits thrust upon them. ***Modern competition for business finds advertising one of the most usual and useful of weapons***. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. ***It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.***
>
> Appellee 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." ... [But] the fact is that Congress has given a particular label to this type of account ... it is a word which aptly describes, in a national sense, the type of business carried on by these national banks. They do accept and pay interest on time deposits of people's savings, and ***they must be deemed to have the right to advertise that fact by using the commonly understood description which Congress has specifically selected.*** [emphasis added].

Franklin, 347 U.S. at 377-378.

Thus, the Supreme Court emphasized that the holding in *Franklin* was not merely a result of a State attempting to regulate national banks - rather, the holding was based upon *the substantial impact* that the New York law had upon the national banks' ability to

exercise their powers (*i.e.*, preventing national banks from using "the most usual and useful" method of attracting savings deposits).

Similarly, in *De La Cuesta* the Supreme Court stated that the purpose of the federal statute at issue (which Congress had enacted during the Great Depression) was to propagate Savings & Loan associations to provide a readily available source of financing for home purchasers. *De La Cuesta*, 458 U.S. at 159-160. However, the federal statute was at odds with a California law prohibiting "due on sale" clauses in mortgage contracts. *Id.*, at 148-149. The Supreme Court's decision noted that "due on sale" clauses were ***necessary*** in order to permit the federal Savings & Loans to sell their California mortgages in the secondary market. *Id.*, at 154 n. 10. As a result, the California statute was preempted because it substantially impaired the congressional purpose of increasing the amount of readily-available home financing. Specifically, the Supreme Court ruled:

> [Eliminating "due on sale" clauses] will have an adverse effect on the earning power and financial stability of Federal associations, will impair the ability of Federal associations to sell their loans in the secondary markets, will reduce the amount of home-financing funds available to potential home buyers, and generally will cause a rise in home loan interest rates.
>
> ...
>
> Moreover, the Board has determined that [elimination of due on sale clauses will] lengthen the expected maturity date of a lender's mortgages, thus reducing their marketability in the secondary mortgage market. As a result, the Board fears, "the financial stability of Federal associations in California will be eroded and the flow of home loan funds into California will be reduced.

De La Cuesta, 458 U.S. at 168-169.

Thus, the Supreme Court's decision in *De La Cuesta* was again not based merely upon the fact that a State was regulating a national bank's lending activities, but instead on the fact that the State law would effectively frustrate and prevent the federal statute from achieving its purpose.

Finally, in *Lawrence County*, the Supreme Court considered a federal statute that was intended to pay federal funds directly to municipalities, and to permit the municipalities to use such funds for any governmental purpose they chose - without interference from the State government. *Lawrence County*, 469 U.S. at 264-267. This was at odds with a South Dakota statute that required municipalities to allocate these federal funds in the same manner that the municipalities allocated their other spending (*e.g.*, if 60% of the municipalities' other revenues were spent on education, then 60% of the federal funds were required to be spent on education). *Id.*, at 259. Again, the Supreme Court ruled that the State law was preempted because it effectively frustrated the Congressional purpose - which was to give the municipalities *unfettered* discretion over how to spend the federal payments. *Id.*, at 268-269.

Thus, in the three cases cited in Barnett Bank, the Supreme Court did not hold that the State laws were preempted merely because they attempted to regulate national bank activities - rather, they were preempted because the impact of the State regulation effectively frustrated the federal statute's ability to achieve its Congressional purpose. Immediately after citing the *Franklin*, *De la Cuesta*, and *Lawrence County* decisions, the *Barnett Bank*

Supreme Court made this point explicitly. The Supreme Court said that:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, ***these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted***. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. [emphasis added].

Barnett Bank, 517 U.S. at 33.

(i). Civil Code Section 1748.9 Does Not "Forbid" the Exercise of National Bank Powers

In this case, MBNA contends that Civil Code Section 1748.9 is preempted by 12 U.S.C. §24 Seventh, which grants banks the power "subject to law ... [to loan] money based on personal security." But, it is beyond reasonable dispute that Civil Code Section 1748.9 does not "forbid" national banks from loaning money. National banks remain free to loan money in ways other than conveniences checks. Moreover, Civil Code Section 1748.9 does not even prevent ***any*** convenience check loans from being made - it merely requires that the terms of those loans (whatever they are) be prominently disclosed to consumers.

(ii). Civil Code Section 1748.9 Does Not "Significantly Impair" NBA Powers

Because Civil Code Section 1748.9 does not "forbid" national banks from loaning money, preemption can only exist under the *Barnett Bank* standard if there is a "significant impairment" of the ability to loan money.

"Significant impairment" for conflict preemption purposes is a high threshold. *Atherton v. FDIC,* 519 U.S. 213, 222-223 (1997). It requires that the State law "incapacitate" the federal law from achieving its purpose. *Id.* (stating that "[i]t is only when the State law ***incapacitates*** the banks from discharging their duties to the government that it becomes unconstitutional" [emphasis added]). Further, the "incapacitating effect" must be clearly demonstrated - not merely hypothetical:

> Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be irreconcilable. ***The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.*** [citations] ***The teaching of this Court's decisions enjoins seeking out conflicts between state and federal regulation where none clearly exists.*** [emphasis added].

Gade v. National Solid Wastes Management Association, 505 U.S. 88, 110 (1992) (Kennedy concurring).

In this case, MBNA cannot meet the "high threshold" of "clearly demonstrating" that Civil Code Section 1748.9 incapacitates national banks from lending money. As stated above, Civil Code Section 1748.9 does not prevent *any* convenience check loans from being made (regardless of the terms) - it merely requires that the terms be disclosed.

Barnett Bank is one in a long line of U.S. Supreme Court's decisions holding that non-discriminating, non-incapacitating State laws apply to the operational activities of national banks. *See also McClellan v. Chipman,* 164 U.S. 347, 357 (1896) (stating that Supreme Court decisions establish "a rule and an exception, the rule being the operation of general State laws upon the dealings and

contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States"); *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to State laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 290, 16 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating State laws on the contracts of national banks").

In essence, Civil Code Section 1748.9 is nothing more than a specific State contract law that prescribes the format of offers to enter into certain types of credit contracts. It is no more burdensome than State laws that unquestionably apply to the operational activities of national banks such as: Civil Code Section 1624 (requiring promises to extend credit in an amount greater than $100,000 to be in writing); Commercial Code Section 9504(3) (requiring secured creditor to provide specific written notice to debtor upon repossession of collateral);[8] Fin. Code Section 953 (requiring that any notice by a depositor limiting bank's ability to honor checks to otherwise authorized persons be in writing).[9]

[8] Commercial Code Section 9504(3) was recently applied to a national bank (without protest) in *Bank of America v. Lallana*, 19 Cal.A.4th 203 (1998).

[9] Finance Code Section 953 was applied (without protest) to a national bank in *Torrance National Bank v. Enesco Federal Credit Union*, 134 Cal.App.2d 316 (1955).

Because Civil Code Section 1748.9 does not "significantly impair" national banks' abilities to lend money, U.S. Supreme Court decisions (including *Barnett Bank*) requires a finding that it is not preempted by the NBA.

C. The O.C.C. Does Not Have Authority to Promulgate 12 C.F.R. §7.4008(d)

MBNA attempts to argue that 12 C.F.R. §7.4008(d) preempts Civil Code Section 1748.9. But that could only be true if 12 C.F.R. §7.4008(d) was validly enacted, and the O.C.C. does not have the authority to promulgate this type of regulation.

More specifically, 12 C.F.R. §7.4008(d) reads as follows:

> (d) Applicability of state law. (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.
>
> (2) A national bank may make non-real estate loans without regard to state law limitations concerning:
>
> ...
>
> (viii) Disclosure and advertising, 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).

It is clear from its text that the O.C.C. promulgated this regulation solely for the purpose of defining the scope of NBA preemption, and not in the course of performing a specific task delegated to it by Congress. The O.C.C.'s "Final Rule" publication describing its actions in promulgating 12 C.F.R. §7.4008 confirms that it was done solely for this purpose. *See* 2004 Fed. Reg. Vol. 69 at 1904 ("The OCC is adopting this final rule to specify the types of

State laws that do not apply to national banks' lending activities *and* the types of State laws that generally do apply to national banks"). Accordingly, the O.C.C. was attempting to exercise a "general preemptive power."

1. Supreme Court Decisions Hold That the O.C.C. Does Not Have General Preemptive Powers

"An administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). In *Perdue v. Crocker National Bank*, 38 Cal. 3d 913 (1985) California's Supreme Court addressed a previous attempt by the O.C.C. to issue regulations that purported to delineate the scope of NBA preemption. The Supreme Court struck down the O.C.C.'s regulation, holding that:

> [I]nsofar as it claims federal preemption, represents legislation of far reaching character and effect, ***of a type never considered by Congress***, which would radically alter the respective roles of the states and the Comptroller in the regulation of bank depositor contracts. [emphasis added].

Id., at 941.

Accordingly, California's Supreme Court has previously ruled that Congress has not granted general preemptive powers to the O.C.C.

In addition, in the recent case of *Cuomo v. Clearing House Ass'n, LLC,* 129 S.Ct. 2710 (2009), the U.S. Supreme Court considered the validity of 12 C.F.R. §4.000, an O.C.C. regulation which purported to preempt States from prosecuting enforcement actions against national banks under State laws. The Supreme Court invalidated the O.C.C. regulation in a ruling that suggested that the

O.C.C.'s authority to preempt State laws ***is limited to reasonable interpretations of the NBA.*** *Cuomo,* 129 S. Ct. at 2715. Specifically, the Supreme Court ruled that "[t]he Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty. But the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act." [emphasis added]. *Id.*

Finally, the decision of the dissenting U.S. Supreme Court Justices in *Watters v. Wachovia Bank N.A.*, 550 U.S. 1 (2007), which analyzes the O.C.C.'s authority to preempt State laws (and which was not contradicted by the majority, who decided the case on other issues) is also worth noting. The *Watters* dissent (authored by Justice Stevens, with whom Chief Justice Roberts and Justice Scalia joined) forcefully asserted that the O.C.C. does not possess general preemptive powers. *Id.*, at 39-40. The Justices stated:

> Nor does [12 U.S.C. § 24 Seventh] expressly or implicitly grant the OCC the power to immunize banks or their subsidiaries from state regulation. For there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation. ... But that lesser power does not imply the far greater power to immunize banks or their subsidiaries from state laws regulating the conduct of their competitors. As we said almost 40 years ago, "the congressional policy of competitive equality with its deference to state standards" is not "open to modification by the Comptroller of the Currency."

Id.

The *Watters* dissent also cautioned that while administrative agencies may have subject matter expertise, they are not experts in federalism, "unlike Congress [they] are clearly not designed to represent the interests of the States," and permitting them to

determine the scope of federal preemption could potentially "disrupt the federal-state balance." *Watters*, 550 U.S. at 41.

2. MBNA Claims that the O.C.C. Has "Plenary" Regulatory Power - But Cannot Identify the Source of That Supposed Authority

MBNA attempts to argue that Congress granted the O.C.C. "plenary" power to issue regulations preempting State laws. But an administrative agency can preempt State laws only if Congress has granted the power to do so. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (a federal agency "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it"). MBNA's argument fails because it has not (and cannot) cite to any Congressional acts granting the supposed "plenary" power.

MBNA cites to only two statutes as potential sources of general preemptive powers, namely 12 U.S.C. §93a and 12 U.S.C. §43(a). However, neither the text of those statutes nor applicable case law supports MBNA's claim.

(a). 12 U.S.C. §93a is Limited to the "Responsibilities of the Office"

Congress' grant of regulatory power in 12 U.S.C. §93a states that:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office.

Thus, the O.C.C.'s rule-making authority is limited to "carrying out the responsibilities of the office." Because this authority was conferred in the context of a framework of dual State and federal

regulation of national banks,[10] "the responsibilities of the office" presumptively means operating within that existing framework. There is simply nothing in the language of 12 U.S.C. §93a suggesting that the O.C.C. has the power to alter the otherwise existing scope of NBA preemption.

(b). When Congress Grants General Preemptive Powers, It Typically Does So *Expressly*

As set forth above, 12 U.S.C. §93a contains no reference whatsoever to preemption or the ability to displace State laws. However, when Congress has granted other federal agencies general preemptive power it has done so *expressly*. *See, e.g.*, 47 U.S.C. §§ 253(a), (d) (authorizing the Federal Communications Commission to pre-empt "any [State] statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 30 U.S.C. § 1254(g) (pre-empting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 49 U.S.C. § 5125(d) (authorizing the Secretary of Transportation to decide whether a State or local statute that conflicts with the regulation of hazardous waste transportation is pre-empted). The absence of *any* reference to preemption in 12 U.S.C. §93a suggests that Congress did not intend it as a grant of general preemptive power.

[10] Although MBNA is arguing that the specific statute at issue in this appeal (*i.e.*, Civil Code Section 1748.9) is preempted, it is beyond dispute that national banks are generally subject to state laws. *See e.g., McClellan v. Chipman*, 164 U.S. 347, 357 (1896) ("National banks are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation").

(c). MBNA is Wrong in Contending that the O.T.S. and the F.C.C. are Examples of Congress *Implicitly* Granting General Preemptive Powers

MBNA tries to argue that Congress has previously made *implicit* grants of general preemptive authority to other agencies, namely the Office of Thrift Supervision (the "O.T.S.") and the Federal Communications Commission (the "F.C.C."), and cites to *Fid. Fed. Sav. & Loan Ass'n. v. de la Cuesta,* 458 U.S. 141 (1982) and *Capital Cities Cable Inc. v. Crisp,* 467 U.S. 691 (1984) as supposed authority for that proposition. But that is wrong. Congress *explicitly* granted general preemptive powers to both agencies.

(i). The O.T.S.'s Rule-Making Authority is *Very Different* from 12 U.S.C. §93a

MBNA claims that 12 U.S.C. §93a is "strikingly similar" to the statute granting the O.T.S. rule-making authority under the Home Owners Loan Act ("HOLA") (12 U.S.C. 1462 *et seq.*). But the supposed "similarity" is due to the fact that *MBNA has edited out the relevant provisions of the HOLA.* Specifically (although it does not appear in MBNA's brief), the HOLA states that:

> [T]he Director is authorized, under such regulations as the Director may prescribe--
>
> (1) to provide for the organization, incorporation, examination, ***operation***, and ***regulation*** of associations to be known as Federal savings associations (including Federal savings banks), and
>
> (2) to issue charters therefor,
>
> ***giving primary consideration of the best practices of thrift institutions in the United States.*** The lending and investment powers conferred by this section are intended to encourage such

> institutions to provide credit for housing safely and soundly. [emphasis added].

12 U.S.C. §1464(a)(1).

In the *de la Cuesta* case, the U.S. Supreme Court analyzed this provision of the HOLA, and noted that "it would have been difficult for Congress to give the [O.T.S.] a broader mandate." *de la Cuesta,* 458 U.S. at 161. The *de la Cuesta* Supreme Court paid particular attention to the language granting authority to prescribe the "operation" and "regulation" of federal savings associations "giving primary consideration of the best practices of thrift institutions in the United States." Because thrift institutions were, at the time of HOLA's enactment, primarily regulated by State law, the *de la Cuesta* Supreme Court ruled that "Congress *expressly* contemplated, and approved, the [OTS's] promulgation of regulations superseding state law" [emphasis added]. *de la Cuesta,* 458 U.S. at 162.

Thus, contrary to MBNA's claim, in *de la Cuesta* the U.S. Supreme Court ruled that Congress *expressly* granted general preemptive powers to the O.T.S.

(ii). 12 U.S.C. §93a Does Not Contain the Language That the Supreme Court Found Relevant in *de la Cuesta*

The statutory language that the *de la Cuesta* Supreme Court based its finding upon does not appear in the NBA. Specifically, 12 U.S.C. §93a: (1) does not state that the O.C.C. can issue rules prescribing the "operation" and "regulation" of national banks; (ii) does not direct the O.C.C. to consider the best practices (including State laws) in issuing such rules; and (iii) is not as "as broad a Congressional mandate as can be imagined." Thus, utilizing the

analysis employed by the *de la Cuesta* Supreme Court, 12 U.S.C. §93a does not constitute an grant of general preemptive power.

(iii). 12 U.SC. 93a is Very Different Than the F.C.C.'s Rule-Making Authority

MBNA's contentions that Congress *implicitly* granted the F.C.C. the power to preempt State laws, and that the U.S. Supreme Court condoned this in *Capital Cities Cable v. Crisp* are uninformed and wrong. First, Congress has *expressly* granted the F.C.C. authority to promulgate regulations governing all aspects of the telecommunications industry, including the preemption of State laws. *See e.g.,* 47 U.S.C. §§253(a),(d), 303. Second, the *Crisp* case never analyzed the source of the F.C.C.'s rule-making authority, because the authority to issue the regulations at issue was conceded and not in dispute. *Crisp,* 467 U.S. at 698 (noting that the respondent's argument was that the Twenty-first Amendment permitted the State's ban on alcohol advertising, even though that type of a State-imposed content regulation would otherwise by preempted by F.C.C. regulations). *Crisp* is not an example of the U.S. Supreme Court finding *implicit* delegation of Congressional power - it is a case of the Supreme Court not needing to analyze the source of that authority because it was not in dispute.

(d) 12 U.S.C. §43 Merely Imposes Additional Procedures on Any Regulator Making a Ruling That Has a Preemptive Effect

The other statute cited by MBNA as a supposed grant of general preemptive power is 12 U.S.C. §43 (a provision of the Interstate Banking and Branching Efficiency Act of 1994 (hereafter the "IBBEA")). But this statute is not a grant of power at all.

12 U.S.C. §43 imposes procedural requirements that apply to any "Federal banking agency" (which is defined in to include the O.C.C., the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, and the O.T.S.) before it issues an "opinion letter" or "interpretive rule" that concludes that a State consumer protection, fair lending, community reinvestment, or intrastate branch law is preempted. 12 U.S.C. §43(a). However, it does not *grant* any authority to issue such opinion letters or interpretive rules. *Watters,* 550 U.S. at 39 n. 22 (Stevens dissent) ("By its own terms, however, [12 U.S.C. §43] *granted* no pre-emption authority to the OCC" [emphasis in original]). Although MBNA could argue that 12 U.S.C. §43 implicitly recognizes that the O.C.C. possesses *some* power to preempt State laws, that does not mean it is implicitly recognizing a general preemptive power - it could just as likely be recognizing the O.C.C.'s ability to issue regulations with preemptive *effect. See Watters,* 550 U.S. at 39 n. 24 (Stevens dissent) (distinguishing between general preemptive authority and an agency's authority to issue regulations with preemptive *effect,* and stating that presence of the latter does not equate to the former).

In any event, the legislative history confirms that 12 U.S.C. §43 is solely a procedural hurdle, and not a grant of authority. Specifically, the August 2, 1994 Conference Report for the IBBEA stated that:

> [T]he Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result. ....

> In view of the Congressional concern regarding preemption of State law regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, ... the title imposes certain procedural requirements on agency preemption opinion letters and interpretive rules in connection with [these subjects]. ...
>
> ***This process is not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent in the four areas described, or to change the substantive theories of preemption as set forth in existing law.*** [emphasis added].

See August 2, 1994 Conference Report on H.R. 3841 (a copy of which is included in Volume 5 of Appellant's Appendix), V. 5, APL 01238.

Accordingly, 12 U.S.C. §43 is <u>not</u> a grant of rule-making authority, and MBNA will have to look elsewhere to support its claim that Congress delegated general preemptive powers to the O.C.C.

D. Even if 12 C.F.R. §7.4008(d) Was an Attempt to Determine How State Laws Could "Pose an Obstacle" to Congress' Objectives (Which it is Not) It Would Still <u>Not</u> be Entitled to Significant Weight

Unless Congress has expressly delegated general preemptive authority to an agency, courts do not defer to the agency's conclusion regarding whether a State law obstructs the enabling statute's Congressional purpose. *Wyeth v. Levine,* 129 S.Ct. 1187, 1201 (2009). However, where an agency without expressly-delegated authority has made such a determination, a court may nonetheless give it "some weight" depending on the "thoroughness, consistency, and persuasiveness" of the explanation of the impact on the federal scheme. *Id.*

MBNA has not cited to *Wyleth,* or asserted that it is relevant to the determination of this proceeding.

Indeed, the *Wyneth* analysis is not applicable because in promulgating 12 C.F.R. §7.4008(d) the O.C.C. did not purport to analyze and determine the effect of State laws on national banks. *See* 2004 Fed. Reg. Vol. 69 at 1904 (*i.e.,* the Final Rule publication for 12 C.F.R. §7.4008(d)). It merely listed which States laws are supposedly preempted, and which are not. *Id.*

Even if the *Wyneth* analysis was applicable (which it is not), the O.C.C. "determination" would be entitled to no weight. The O.C.C.'s promulgation of 12 C.F.R. §7.4008(d) cannot be considered "thorough" or "persuasive" because the O.C.C. provided no explanation whatsoever for adopting a standard preempting *all* State disclosure requirements - a standard directly at odds with NBA jurisprudence holding that only "significantly interfering" laws are preempted. Further, the O.C.C.'s stance on this issue has not been consistent. On October 8, 1996, the O.C.C. issued Advisory Letter 96-8 ("A.L. 96-8"). In A.L. 96-8, the O.C.C. discussed NBA preemption and the application of State law to national bank insurance and annuity sales. A.L. 96-8 advised that:

> If a state law only interferes with a national bank's powers in an insignificant way, the state law would *not* be preempted and would be applicable.
>
> In practice, these principles should mean that most **state laws that apply generally to regulate insurance agents and agencies and do not discriminate against or have a disparate impact on banks would *not* be preempted because, ordinarily, they would not prevent banks from**

exercising their federally authorized powers.
[italics in original, boldface and underling added]

A.L. 96-8, p.2, at § C.

Thus, as recently as 1996 the O.C.C. took the positions (1) that only "significantly interfering" State laws are preempted by the NBA, and (2) that in order to amount to a significant interference the law must effectively prevent banks from engaging in the authorized activity.

A.L. 96-8 confirms the NBA preemption analysis set forth in this Answer Brief on the Merits. It also demonstrates that 12 C.F.R. §7.4008(d) is not entitled to any weight because the O.C.C. has not taken a consistent stance on this issue.

E. Even If It Were Valid (Which It Is Not) 12 C.F.R. §7.4008(d) Is Not Retroactive

Even if the O.C.C. were empowered to issue regulations defining the scope of federal preemption of State laws (which it is not), 12 C.F.R. 7.4008(d) became effective on February 12, 2004. Since Parks's class action seeks relief for all consumers who received convenience checks after June 1, 2001, the regulation would not apply to a substantial portion of the class (*i.e.*, those who used convenience checks prior to February 12, 2004).

It is axiomatic that retroactivity is not favored in the law. *Bowen*, 488 U.S. at 208. Thus, "administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Id.* "Even where

some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Id.*

Accordingly, even if it were validly enacted, 12 C.F.R. §7.4008(d) is presumptively not retroactive, and would not apply to a portion of the class.

F. MBNA Erroneously Argues That States May Not Impose Any "Conditions" on National Bank Powers

MBNA attempts to argue that States may not impose any "conditions" upon a national bank's exercise of its powers. But this argument is based solely on an out-of-context and misinterpreted quotation from the *Barnett Bank* decision.

As set forth above, in *Barnett Bank,* the Supreme Court noted that there are three types of federal preemption: (1) express preemption, (2) field preemption, and (3) irreconcilable conflict preemption. *Barnett Bank,* 517 U.S., at 31. Since neither field preemption nor express preemption apply to national banking,[11] the Supreme Court stated that its task was to analyze whether conflict preemption existed. *Id.*

The Supreme Court began this analysis by noting that conflict preemption may exist where either (i) complying with both the federal and the State statutes is a physical impossibility, or (ii) the State statute is an obstacle to the accomplishment of Congress's objectives. *Barnett Bank,* 517 U.S. at 31.

"Physical impossibility" for conflict preemption purposes means a strict and literal impossibility. *Barnett Bank,* 517 U.S. at 31.

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[11] *See e.g., Purdue v. Crocker National Bank,* 38 Cal. 3d 913, 938 (1985) and *First National Bank v. Missouri,* 263 U.S. 640, 665 (1924), both of which reject the argument that field preemption applies to national banking.

In *Barnett Bank,* the federal statute at issue authorized (but did not require) national banks to sell insurance, while the State law prohibited national banks from selling insurance. Accordingly, the Supreme Court found that there was no physical impossibility of complying with both statutes (*i.e.,* since the federal law did not require banks to sell insurance, the banks could comply with both statutes by not selling insurance). *Id.*

The Supreme Court then analyzed the question of whether the State law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." In so doing, it stated:

> Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to "stand as an obstacle to the accomplishment" of one of the Federal Statute's purposes -- unless, of course, that federal purpose is to grant the bank only a very ***limited permission***, that is, permission to sell insurance to the extent that state law also grants permission to do so. [emphasis in original].

Barnett Bank, 517 U.S. at 31.

Thus, in the above-cited passage, the Supreme Court introduced a concept that it referred to as a "limited permission" *i.e.,* a federal grant of power to do something *only if* State law expressly grants permission to engage in the activity. The Court then went on to hold that a "limited permission" should be found to exist only when Congress has expressly conditioned the grant of power upon a grant of State permission. Specifically, the Supreme Court stated:

> [W]here Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies.

Barnett Bank, 517 U.S. at 34.

This is the quotation from Barnett Bank that MBNA attempts to rely upon for its erroneous argument that States may not impose any "conditions" whatsoever on national banks' lending powers. But taken in context, the Supreme Court is analyzing whether an irreconcilable conflict exists between a federal statute that says "national banks may sell insurance" and a State law that says "national banks may never sell insurance." The Supreme Court did not mean that States could impose no conditions *whatsoever* on a national bank's exercise of its powers.

Indeed, if the Supreme Court ***had*** meant that States could impose no conditions at all on national banks' powers, that itself would have been outcome determinative, and the rest of the Supreme Court's decision would have been unnecessary and redundant.

G. The *Rose v. Chase Manhattan Bank* Decision is Not Controlling, Inconsistent With U.S. Supreme Court Decisions, And Should Not Be Followed Solely in the Interests of "Uniformity of Decision"

MBNA attempts argue that this Supreme Court should adopt the decision in *Rose v. Chase Manhattan Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008) out of a commitment to "uniformity of decision." However, *Rose* is an anomalous case - not an example of a uniform rule. Specifically, *Rose* concluded that *all* State laws that attempt to regulate national bank activities are preempted, while other federal decisions hold that State laws are preempted by the NBA ***only if*** they "prohibit or significantly interfere" with national bank activities. *See e.g., Barnett Bank,* 5417 U.S. at 33; *Atherton v. FDIC,* 519 U.S. 213, 222-223 (1997) (holding that "[i]t is only when

the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional").

1. *Cuomo* Overruled Decisions (Like *Rose*) That Held That State Laws Specifically Aimed at "Banking Activities" are Preempted

Additionally, the U.S. Supreme Court's recent *Cuomo* decision nullifies the *Rose* Court of Appeal's conclusion that State laws that specifically attempt to regulate "banking activities" are preempted. Indeed, the State laws at issue in *Cuomo* were New York's "fair lending" laws. *Cuomo,* 129 S. Ct. at 2714. **The Supreme Court held that States are not limited to enforcing only State laws of "general application;" rather, States may also enforce State laws *specifically aimed at banking activities.*** The *Cuomo* Supreme Court held:

> States, on the other hand, have always enforced their general laws against national banks -- ***and have enforced their banking-related laws against national banks for at least 85 years***, as evidenced by *St. Louis*, in which we upheld enforcement of a state ***anti-bank-branching law***, 263 U.S., at 656, 44 S. Ct. 213, 68 L. Ed. 486. See also *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 237, 248-249, 64 S. Ct. 599, 88 L. Ed. 692 (1944) (state commissioner of revenue ***may enforce abandoned-bank-deposit law against national bank*** through "judicial proceedings"); *State by Lord v. First Nat. Bank of St. Paul*, 313 N.W.2d 390, 393 (Minn. 1981) (***state treasurer may enforce general unclaimed-property law with "specific provisions directed toward" banks against national bank***); *Clovis Nat. Bank v. Callaway*, 69 N. M. 119, 130-132, 364 P.2d 748, 756 (1961) (State treasurer may enforce unclaimed-property law against national bank deposits); *State v. First Nat. Bank of Portland*, 61 Ore. 551, 554-557, 123 P. 712, 714 (1912) (***State attorney general may enforce bank-***

specific escheat law against national bank). [emphasis added].

Cuomo, 129 S. Ct. at 2720-2721.

This passage in *Cuomo,* along with its endorsement of the previous decisions in *First National Bank of St. Louis v. Missouri,* 263 U.S. 640 (1924), *Anderson National Bank v. Luckett,* 321 U.S. 233 (1944), *State by Lord v. First Nat. Bank of St. Paul,* 313 N.W.2d 390 (Minn. 1981), and *State v. First Nat. Bank of Portland,* 61 Ore. 551 (1912) - all of which upheld State laws that *specifically regulated "banking activities"* - overrules lower court decisions purporting to assert that State laws specifically aimed at banking activities are preempted by the NBA.

H. There is NO Federal Policy of "Uniformity" of Banking Laws

MBNA also attempts to argue that there exists a federal policy that national banks should be subject to single, uniform set of laws regulating their operations. But that is completely untenable.

First, a supposed policy of "uniformity" would be the *de facto* equivalent of field preemption, since any State law would be invalid solely by virtue of the fact that identical laws were not enacted by all of the other States. As stated above, controlling authority has definitively rejected the argument that field preemption exists in the field of national banking. *Purdue v. Crocker National Bank,* 38 Cal. 3d at 938; *First National Bank,* 263 U.S. at 665.

Second, both the California Supreme Court and the U.S. Supreme Court have categorically rejected arguments that a policy of "uniformity of banking laws" exists or should be adopted. *Peatros v. Bank of America,* 22 Cal.4th 147, 175 (2000) (stating that "[t]he

national uniformity desired, however, is a will-o'-the-wisp. It is incompatible generally with the fact that, since before the passage of the National Bank Act, regulation of national banking has been one of dual federal-state control."); *Atherton v. FDIC*, 519 U.S. 213, 219-220 (1997) (rejecting argument that courts should attempt to create uniformity of banking laws by stating "[t]o invoke the concept of 'uniformity,' however, is not to prove its need"); *First National Bank v. Dickinson*, 396 U.S. 122, 138 (1969) (upholding State law by holding that "Florida's policy is not open to judicial review any more than is the congressional policy of 'competitive equality.' Nor is the congressional policy of competitive equality with its deference to State standards open to modification by the Comptroller of the Currency").

Finally, a bit of historical context reveals why MBNA's "uniform bank laws" argument cannot be seriously maintained. Although modern national banks have branches nationwide, when the NBA was originally enacted national banks were required to conduct all of their operations out of a single office location. *See First Nat'l Bank v. Missouri*, 263 U.S. 640, 659 (U.S. 1924) (discussing prohibition against national bank branches that existed since the NBA's enactment, and Congressional intent to prohibit branches). The "unit banking" period lasted until the 1927 McFadden Act, which permitted national banks to open offices at multiple locations if, *and only if*, it was legal to do so under the laws of the State in which the national bank was located. *See* McFadden Act (44 Stat. 1228), §§7, 8. Accordingly, the Congress that enacted the NBA could not have intended to create a system of "uniform operational rules" across State lines. Indeed, it must be remembered that in 1863 there were no federal statutes of any kind applicable to

banking operations. *See* Jud. Not. No. 1; Jud Not. No. 2. Since the 1863 Congress obviously intended that national banks be subject to *some* laws under which they could operate, form contracts, engage in transactions, *etc.,* Congress must have intended the laws of the States in which the banks were located to apply (at least with regard to the banks' operational activities).

I. MBNA's Edited "Sound Bites" From Congressional Speeches Do Not Evidence Congressional Intent

Throughout its brief, MBNA cites to several 19th Century Congressional speeches, claiming that they demonstrate an early Congressional intent to create a "uniform set of banking laws" and a regulatory agency with "plenary" authority. Apparently, MBNA is hoping that this Supreme Court will be persuaded by the sweeping generalizations in the rhetoric (*e.g.,* "the NBA ... placed in the hands of one individual, who, at the time, for one or many generations, shall be the Comptroller of the Currency. It ... gives him custody ... of all the banking capital of the county, and ... all of its business .. in all its varied and minute ramifications throughout the length and breadth of the land"). MBNA Opening Brief, pg. 32. But that type of flowery oratory was merely the fashion of 19th Century America. *See e.g., Graves v. New York,* 306 U.S. 466, 489 (1939) (cautioning against a literal interpretation of the decision in *McCulloch v. Maryland,* 17 U.S. 316 (1819) because the "intellectual fashion of the time indulged in the free use of absolutes" and the "flourish of rhetoric"). The 19th Century sound bites that MBNA has presented do not demonstrate Congressional intent because (1) they do not *actually* mention State laws or preemption, and (2) the views of a single orator do not constitute Congressional intent - especially (as in this case) where no evidence of the supposed "intent" can be

found in Congressional enactments. It is untenable for MBNA to suggest that the sweeping generalizations in these speeches are anything more than the "flourish of rhetoric" that was common during that era.

V.
CONCLUSION

MBNA's preemption argument fails because ***MBNA has not and cannot cite to <u>any</u> direct evidence of Congressional intent to preempt State laws regulating the operations of national banks.*** MBNA's endless stream of out-of-context quotations from non-controlling court decisions is not a substitute for evidence of Congressional intent.

Moreover, the applicable test for preemption under the NBA was enunciated by the U.S. Supreme Court in *Barnett Bank v. Nelson*. It asks whether the State law "prohibits or significantly interferes" with national bank lending powers. Civil Code §1748.9 does not attempt to prescribe the terms of convenience check transactions in any way - it merely requires that certain transaction terms be prominently disclosed. Accordingly, it neither prohibits or significantly interferes with MBNA's ability to lend money.

MBNA's brief tries to assert sweeping generalizations about NBA preemption (*e.g.*, that Congress intended a "uniform" set of banking law, and that States may impose no conditions whatsoever on national bank lending) - but these are pure rhetoric. The fact remains that in the 147 years since the NBA was enacted, the U.S. Supreme Court <u>never</u> once found that a State lending law was preempted unless it (1) unfairly discriminated against national banks in favor of local institutions, (2) was in direct conflict with a federal statute, a policy evidenced by a federal statute, or a validly enacted

regulation, or (3) effectively *prevented* national banks from engaging in the lending activity being regulated.

Contrary to MBNA's contentions, history shows that for the Republic's first 100 years, the operational aspects of banking were regulated *solely* by State laws - which were the only contract and lending laws in existence under which banks could do business. The fact that Congress originally required national banks to conduct business out of a single office location also debunks any argument that Congress intended national banks to conduct operations in several States under "uniform" rules.

Even as recently as 1996, in A.L. 96-8, the O.C.C. took the position that in order to amount to a "significant interference" a State law must effectively prevent national banks from exercising their powers. Civil Code Section 1748.9 plainly does not prevent banks from doing anything.

For these reasons, Parks submits that MBNA has not shown a Congressional purpose to preempt State banking laws, and it is imperative that MBNA not be permitted to place itself (and the entire banking industry) above California law based solely on such shoddy evidence of Congressional intent.

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT

I certify that this Answer Brief on the Merits consists of 11,824 words, excluding the title page and tables, according to the "word count" feature of Microsoft Word 2007 (the word processor that was used to produce this document).

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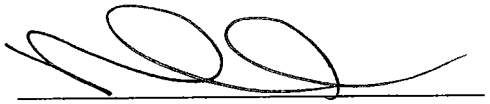

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PROOF OF SERVICE

Parks v. MBNA America Bank, N.A.
Supreme Court of California Case No. S183703

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on the interested parties in this action as follows:

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Svetlana Morozovskaya