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 REPLY BRIEF ON THE MERITS

ARNOLD & PORTER LLP
Nancy L. Perkins*
555 Twelfth Street, NW
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999
**Admitted pro hac vice*

ARNOLD & PORTER LLP
Laurence J. Hutt (State Bar No. 066269)
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

Counsel for Respondent MBNA America Bank, N.A., now known as FIA Card Services, N.A.

SERVICE ON THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEY REQUIRED BY CAL. BUS. & PROF. CODE § 17209 AND CAL. RULES OF COURT, RULE 8.29(b)

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INTRODUCTION

In his Answer Brief on the Merits ("AB"), Appellant Allan Parks ("Parks") attempts to portray this case as involving questions neither presented to this Court nor pertinent to the decisions of the courts below. Contrary to Parks' repeated and misleading suggestions, this case is *not* about "field" preemption." Respondent MBNA America Bank, N.A. ("MBNA") has never contended that the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq.*, or regulations of the Office of the Comptroller of the Currency ("OCC"), create "field preemption." Rather, MBNA has specifically and explicitly maintained that the subject state statute, Civil Code § 1748.9 ("§ 1748.9"), is preempted because it *conflicts* with Congress' objectives for national banks under the NBA.

Nor does this case involve NBA preemption of a state law of "general application," as Parks erroneously implies. Section 1748.9 is a state disclosure statute *specifically targeted* at convenience check offers and *applicable only* to lenders making such offers. As such, it is precisely the type of law that courts consistently hold *is* preempted as applied to national banks. (See *Reyes v. Downey Sav. & Loan Ass'n, F.A.* (C.D. Cal. 2008) 541 F.Supp.2d 1108, 1114-15.) And Parks' suggestion that § 1748.9 is "nothing more than a specific State contract law" (AB at 22) is contradicted by § 1748.9's plain text.

Parks' misplaced focus on "field" preemption and state laws of "general application" presages his lack of response to MBNA's arguments on the questions that *are* relevant to a resolution of this case. Parks does not take issue, for example, with MBNA's position that the Court of Appeal erred in its myopic focus on a single test for NBA preemption and in holding that factual evidence is necessary to establish NBA preemption. Nor does Parks respond to MBNA's specific description of the *actual* impact of applying statutes such as § 1748.9 to national banks. Although

Parks glibly refers to § 1748.9 as "no more burdensome" than state laws that "unquestionably" apply to national banks (AB at 22), he provides no example of any such "unquestionably" non-preempted state law even remotely similar to § 1748.9.

Like the court below, Parks also concedes that § 1748.9 is *expressly* preempted by the clear terms of the OCC's non-real estate lending regulation, 12 C.F.R. § 7.4008 ("Section 7.4008"). And his attempt to prove Section 7.4008 "invalid" rests on the erroneous premise, contrary to established U.S. Supreme Court precedent, including *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta* (1982) 458 U.S. 141, that only an *express* Congressional delegation of preemptive authority to the OCC can support the regulation. Misconstruing the relevant precedent, and relying on inapposite case law, Parks provides no reason for this Court to reach a conclusion different from the Ninth Circuit in *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032. The judgment of the Court of Appeal should be reversed.

ARGUMENT

I. THERE IS NO PRESUMPTION AGAINST PREEMPTION IN THIS CASE.

Parks concedes that numerous federal courts have recognized there is no presumption against NBA preemption of state law governing the banking activities of national banks. (AB at 9-10.) But, he asserts, that precedent conflicts with U.S. Supreme Court precedent, citing *Barnett Bank v. Nelson* (1996) 517 U.S. 25. (*Id.* at 10.) However, Parks fundamentally ignores *Barnett Bank*'s express statement, reiterated in *Watters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, that "'grants of both enumerated and incidental "powers" to national banks [are] grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law.'" (*Id.* at 12, italics added, quoting *Barnett Bank*, 517 U.S. at 32.) The U.S. Supreme

Court has clearly articulated a presumption *in favor of NBA preemption* of state laws such as § 1748.9 – *i.e.*, state law mandates that specifically target banking activities.

Parks' only real argument is to quibble about MBNA's reliance on *United States v. Locke* (2007) 529 U.S. 89, in which the U.S. Supreme Court found there is no presumption against preemption of state law in "an area where there has been a history of significant federal presence." (*Id.* at 108; see AB at 10.) According to Parks, because the states *also* have had a history of significant presence in the regulation of banking (and a dominant role with respect to state-chartered banks), *Locke* is inapplicable in the banking context. But numerous courts, state and federal, have cited *Locke* in confirming there is no presumption against preemption by the NBA. (See, e.g., *Monroe Retail, Inc. v. RBS Citizens, N.A.* (6th Cir. 2009) 589 F.3d 274, 280; *Wachovia Bank, N.A. v. Burke* (2d Cir. 2005) 414 F.3d 305, 314; *Bank of Am. v. City of San Francisco* (9th Cir. 2002) 309 F.3d 551, 558; *Miller v. Bank of Am., N.A. (U.S.A.)* (2009) 170 Cal.App.4th 980, 985.) Indeed, in considering the NBA's presumed preemption of state law in *Smiley v. Citibank* (1995) 11 Cal.4th 138, 148, *aff'd* (1996) 517 U.S. 735, this Court expressly stated "[i]t must be recognized . . . that federal authority has . . . affected banking since before enactment of the National Bank Act in 1864." (*Id.* at 148, citing *Nat. State Bank, Elizabeth, N.J. v. Long* (3d Cir. 1980) 630 F.2d 981, 985.) Parks' argument that there is a presumption against NBA preemption of state law is baseless.

II. AS DEMONSTRATED BY LEGISLATIVE HISTORY AND CONTROLLING JUDICIAL PRECEDENT, CONGRESS INTENDED TO PREEMPT THE APPLICATION TO NATIONAL BANKS OF STATUTES SUCH AS § 1748.9.

Parks bases his argument against NBA preemption of § 1748.9 on four fundamentally erroneous premises: (1) Congress' intent regarding the preemptive scope of the NBA cannot be inferred from the statute's text and

legislative history; (2) because other federal statutes may not preempt state disclosure laws, Congress must not have intended the NBA to preempt such laws; (3) because the courts have not viewed the NBA as preempting the entire "field" of banking regulation, the NBA cannot be understood to preempt § 1748.9; and (4) under *Barnett Bank*, state law is preempted only when it "incapacitates" a national bank from exercising its banking powers. In fact, each of these premises is at odds with applicable law.

A. A Long Line of U.S. Supreme Court Decisions, As Well As Decisions of This Court, Infer Congressional Intent to Preempt State Law From the NBA's Legislative History.

"Whether federal law preempts state law 'fundamentally is a question of congressional intent.'" (*Smiley*, 11 Cal.4th at 147, quoting *English v. General Electric Co.* (1990) 496 U.S. 72, 79.) According to Parks, "[s]ince 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." (AB at 2, italics and underlining in original.) However, MBNA does *not* rely solely on what courts have said about the NBA's preemptive effect: MBNA directly quoted several examples of the numerous *express statements of preemptive intent* by the Congress that enacted the NBA. (See OB at 13-14.)

Parks refers to these express statements as "sound bites" and argues that they should be ignored because they exhibit "flowery oratory." (*Id.* at 41.) This Court, however, has relied on precisely such statements in reaching conclusions about NBA preemption. (See *Smiley*, 11 Cal.4th at 154 fn.9 [stating, in disagreement with the dissenting Justice: "He cannot overcome Senator Sherman, who, as the sponsor in the Senate of the bill that would become the National Bank Act, urged 'most favored lender' status for national banks."], citing Cong. Globe, 38th Cong., 1st Sess., p. 2126 (1864); cf. *Calderon v. City of Los Angeles* (1971) 4 Cal.3d 251, 258

fn.6 [discussing Congressional debates in 1866 and relying on the statement of Senator Johnson of Maryland as expressing Congress' intent].) The U.S. Supreme Court has likewise viewed such statements as indicative of the NBA's intended preemptive scope. (See, e.g., *Marquette Nat. Bank v. First of Omaha Corp.* (1978) 439 U.S. 299, 310, citing Cong. Globe, 38th Cong., 1st Sess., 2123-27 (1864).)

Indeed, reliance on the NBA's early legislative history to determine the statute's preemptive effect is entirely appropriate, particularly because, contrary to Parks' contention (AB at 41), the statements within that legislative history *specifically* discuss preemption of state law. (See, e.g., Remarks of Sen. Sumner, Cong. Globe, 38th Cong., 1st Sess. (1864) p. 2130 [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."].)

The NBA's early legislative history, coupled with a recognition of the purposes of Congress in light of the historical context in which the statute was enacted, are the basis for the long line of U.S. Supreme Court cases, including *Franklin National Bank v. New York* (1954) 347 U.S. 373, *Barnett Bank*, and *Watters*, that control this Court's decision in this case. Indeed, despite eschewing reliance on historical context and prior case law to ascertain Congressional intent, Parks ultimately grounds his own arguments on *Barnett Bank*. But the *Barnett Bank* Court itself illuminated the NBA's preemptive scope by reference to prior U.S. Supreme Court decisions, including *Easton v. Iowa* (1903) 188 U.S. 220, *First National Bank of San Jose v. California* (1923) 262 U.S. 366, and *Farmers' and Mechanics' National Bank v. Dearing* (1875) 91 U.S. 29, all of which considered the historical context in which the NBA was enacted to be indicative of the statute's broad preemptive scope as intended by Congress. (See *Easton*, 188 U.S. at 229-32, 238; *First Nat. Bank of San Jose*, 262 U.S.

at 369-70; *Dearing*, 91 U.S. at 33-36; see also *Smiley*, 11 Cal.4th at 150-51 [discussing the historical context of the NBA's enactment and the U.S. Supreme Court's understanding of Congress' intent as expressed in cases such as *Marquette National Bank,* 439 U.S. at 315, *Tiffany v. National Bank of Missouri* (1874) 85 U.S. (18 Wall.) 409, 413, *Davis v. Elmira Savings Bank* (1896) 161 U.S. 275, 283, and *Dearing*, 91 U.S. at 33-34].)

Parks' cavalier dismissal of this Court's and the U.S. Supreme Court's prior NBA preemption case law as an unreliable "kindergarten" game of "telephone" is patently wrong and an affront to a system of justice grounded on *stare decisis* and judicial precedent.

B. The Existence of Other Federal Statutes That Might Not Preempt § 1748.9 Has No Bearing on Congress' Intent That the NBA Preempt State Law As Applied to National Banks.

Faced with strong evidence that Congress intended the NBA broadly to preempt state law, Parks contends that because *other* federal statutes, such as the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, contain so-called "savings" clauses that provide for more limited preemption of state disclosure requirements, Congress must not have intended the *NBA* to preempt such requirements. (AB at 13.) But Congress' intent with respect to preemption of state law by *other statutes* says nothing about its intent regarding preemption of § 1748.9 by the *NBA*. TILA, for example, saves state law from preemption to the extent it is consistent with *certain provisions of TILA* – but TILA does not speak to preemption of state law by any *other* TILA provisions or by any *other* federal statute, including the NBA. (See 15 U.S.C. § 1610(a)(1) ["Except as provided in subsection (e) of this section . . . , *this part* and parts B and C of *this subchapter* do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of *this subchapter*."], italics

added.) Thus, contrary to Parks' unfounded contention, the so-called "savings" clauses in statutes such as TILA have no bearing on the preemptive scope of the NBA (which appears in a different title of the U.S. Code than TILA does).

Indeed, Parks' argument has been made before, and the courts have repeatedly rejected it on the basis that the preemptive effect of each federal statute stands on its own. (See, e.g., *Silvas v. E*Trade Mortg. Corp.*, (9th Cir. 2008) 514 F.3d 1001, 1007 ["TILA's savings clause is limited to TILA"]; *American Bankers Ass'n v. Lockyer* (E.D. Cal. 2002) 239 F.Supp.2d 1000, 1008-09 ["the express language of [TILA's] savings clause indicates that its anti-preemptive effect is limited to TILA"]; see also *City of San Francisco*, 309 F.3d at 564 ("[T]he [Electronic Funds Transfer Act]'s anti-preemption provision does not preclude preemption of state laws by . . . the National Bank Act."); *Bank One v. Guttau* (8th Cir. 1999) 190 F.3d 844, 850 [same]; *Flagg v. Yonkers Sav. & Loan Assoc.* (2d Cir. 2005) 396 F.3d 178, 185 [same with respect to Real Estate Settlement Procedures Act].) This Court should similarly reject the argument here.

C. This Case Does Not Involve "Field" Preemption or a State Law of "General Application."

Parks argues that Congress did not intend to preempt the entire "field of banking regulation or consumer credit disclosures," and suggests that, if this Court were to agree with *Rose*, it would have to hold that Congress had such intent. (AB at 12-13.) But in *Rose*, the Ninth Circuit held § 1748.9 preempted because it *conflicted* with Congressional objectives in connection with a national bank's lending power. (*Rose*, 513 F.3d at 1037.) No question of broad "field" preemption was raised in *Rose*, and none is presented here. Rather, the narrow question presented is whether § 1748.9, if applied to MBNA, "'stan[ds] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" with respect to

national banks. (*Barnett Bank*, 517 U.S. at 31, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.)

Nor does this case involve, as Parks' erroneously contends, any question about the NBA's preemption of a state law of "general application." Section 1748.9 is a *state disclosure mandate, specifically and only applicable to convenience check lenders, and requiring affirmative action on their part.* Parks' lengthy explication that the NBA generally does not preempt state laws of "general application" is, therefore, totally irrelevant.

D. The Test for NBA Preemption Is Not Whether State Law "Incapacitates" a National Bank's Exercise of Banking Powers But Whether It Interferes With Them.

As Parks acknowledges, a state law need not *forbid* a national bank from exercising its federally granted powers to be preempted; the NBA also preempts state laws that "seek to alter *how* banks exercise those powers." (AB at 16, citing *Barnett Bank*, 517 U.S. at 33; AB at 19 [acknowledging the U.S. Supreme Court's holdings that state laws are preempted because they "*effectively frustrated the federal statute's ability to achieve its Congressional purpose.*"], italics and underlining in original.)

Section 1748.9, if applied to a national bank, would effectively frustrate the NBA's ability to achieve its Congressional purpose. As MBNA argued in its Opening Brief (see OB at 15-16, 21-23), and Parks does not dispute, one of the core purposes of the NBA was to enable national banks to exercise their federally authorized banking powers, including their lending power, *efficiently across state lines*. Indeed, the U.S. Supreme Court has confirmed, in language Parks cites, that the NBA preempts even "generally applicable" state laws (*i.e.*, those that, unlike § 1748.9, are not targeted at lending or other banking or banking-related activities) to the extent such laws also may "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." (AB at 21-22, quoting *McClellan v. Chipman* (1896) 164 U.S. 347, 357, italics added.)

Parks nevertheless argues that, to constitute a sufficiently "'[s]ignificant impairment' for [NBA] preemption purposes," a state law must "incapacitate" a national bank from exercising its banking powers. (AB at 21.) As purported support for this contention, Parks quotes *Atherton v. FDIC* (1997) 519 U.S. 213, 222-23, a case that did not involve NBA preemption at all or even any national bank.[1] Contrary to Parks' misleading suggestion, the Court in *Atherton* did *not* state that a "significant impairment" exists only where state law "incapacitates" a national bank's exercise of its banking powers. Rather, the *Atherton* Court noted the reference to "incapacitates" in *National Bank v. Commonwealth* (1869) 76 U.S. (9 Wall.) 353, 362, and went on to observe that, under later-articulated standards, the NBA preempts the application to national banks of any state law that would "*tend to impair* or destroy *their efficiency*," or "*infringe*" the national banking laws or "impose an *undue burden* on the performance of the banks' functions." (*Atherton*, 519 U.S. at 223, citations omitted, italics added.)

In any event, this Court has already *expressly rejected* the contention that state law is preempted by the NBA only where it "incapacitates" national banks from exercising their banking powers. As the Court stated in *Smiley*: "That is not the case." (11 Cal.4th at 148 fn.4 [rejecting the argument that "the standard for preemption applicable here requires the invalidation of a state law *only* where it incapacitates the [national] banks

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[1] The question in *Atherton* was whether the Court should create federal common law or apply state law to judge the conduct of former officers and directors of a failed federal savings association. (See 519 U.S. at 216-18.)

from discharging their duties to the government."], internal quotation marks and citation omitted, italics in original.)

III. UNDER THE *BARNETT BANK* STANDARD, THE NBA PREEMPTS § 1748.9 AS APPLIED TO MBNA.

Section 1748.9, if applied to national banks, will "*significantly interfere*" with – as that phrase is understood by the U.S. Supreme Court – MBNA's ability to exercise its right to offer convenience check loans to customers nationwide. (*Barnett Bank*, 517 U.S. at 33, italics added.) That interference is not merely a product of § 1748.9's particular mandates and multiple, unique obligations – different from and not contemplated by federal law. (See OB at 19-21.) It is also because of the impact on MBNA of the many varying, distinct, and potentially conflicting mandates that the remaining 49 states would then also be empowered to impose on national banks. Again, as this Court observed in *Smiley*, Congress did not intend to 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' and thereby undermine the conditions for *uniformity and efficiency* that would otherwise obtain." (*Smiley*, 11 Cal.4th at 158, quoting *Marquette Nat. Bank*, 439 U.S. at 312, italics added.)

Subjecting national bank lending to different state disclosure mandates, such as § 1748.9, *necessarily* results in additional costs and burdens because, among other things, it forces national banks to (1) tailor their disclosures, on an individual, state-by-state basis, to a plethora of specific requirements for formatting, language, packaging, method and timing of delivery; (2) monitor developments continually in the lending disclosure laws of the 50 states; and (3) revise periodically, based on changes in multiple states' particular requirements, various aspects of their loan disclosures.

Such state-specific mandates "surely interfere with [national] banks' federally authorized business," which is "precisely what the NBA was designed to prevent." (*Watters*, 550 U.S. at 13-14, citing *Easton*, 188 U.S. at 229 ["Th[e] legislation has in view the erection of a system extending throughout the country, and 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."].) Thus, even if § 1748.9 were not (as it is) burdensome on its own, as the U.S. Supreme Court explained nearly a Century ago regarding preemption of a California statute limiting banks from retaining certain deposits for more than 20 years: "If California may thus interfere other states may do likewise, and, instead of 20 years, varying limitations may be prescribed – 3 years, perhaps, or 5, or 10, or 15. We cannot conclude that Congress intended to permit such results." (*First Nat. Bank of San Jose*, 262 U.S. at 370.)

Parks presents no authority to the contrary.[2] Instead, he asserts that § 1748.9 cannot be preempted because it is "nothing more than a specific State contract law . . . that is no more burdensome than State laws that unquestionably apply to the operational activities of national banks." (AB at 22.) But, § 1748.9 is *not* a state "contract" law. See, e.g., *Miller v. Bank of Am., N.A. (U.S.A.)* (2009) 170 Cal.App.4th 980, 988-89 [rejecting the contention that because "the duty to be performed that is the subject of this lawsuit is a contractual duty to make payment at a specified time, . . . the state laws at issue are on '[t]he subject' of contracts" and, as such, not

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[2] Parks' argument that "There is NO Federal Policy of "Uniformity" of Banking Laws" (AB at 39-40) cites case law either not involving NBA preemption at all (*Atherton*), or involving state laws not preempted because they prohibited conduct *not permitted by federal* law anyway. (See *infra* Section V.)

preempted], italics omitted.) And the state statutes Parks cites as "unquestionably" applying to national banks, Civil Code § 1624, Commercial Code § 9504(3), and Financial Code § 953, are readily distinguishable from § 1748.9.[3]

In sum, Parks provides no basis upon which this Court could reasonably disagree with *Rose*'s holding that any attempt to apply § 1748.9 to a national bank *conflicts* with Congressional intent and is preempted by the NBA.

IV. SECTION 7.4008 IS A VALID REGULATION.

In addition to the NBA itself, Section 7.4008 expressly preempts § 1748.9 as applied to MBNA. Parks, like the Court of Appeal, does not contest this interpretation and application of the regulation; instead, he argues that Section 7.4008 is invalid. His arguments in that regard are misguided and incorrect.

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[3] Civil Code § 1624 requires that certain contracts be in writing. It is uncontested that state contract laws *generally* are not preempted. Commercial Code § 9504(3) (recodified in 1999 as Commercial Code § 9611), is California's enactment, virtually verbatim, of § 9-611 of the Uniform Commercial Code ("UCC"). It is generally recognized, and indeed the OCC has expressly confirmed, that state law enactments of UCC provisions are not preempted, so long as they do not vary in any material way from the UCC text. (See OCC Interpr. Letter No. 1005 (June 10, 2004) 2004 WL 3465750, at 2 & fn.2 [explaining that, absent variance from the UCC, state laws implementing the UCC are not preempted precisely because they impose a "*uniform* law of general applicability"], italics added.) Finally, Financial Code § 953 is wholly irrelevant because it does not restrict or condition *bank* conduct at all – it grants banks a *right* to rely on certain *customer* conduct. (See *id.* ["When the depositor of a commercial or savings account has authorized any person to make withdrawals from the account, the bank, in the absence of written notice otherwise, may assume that any check, receipt, or order of withdrawal drawn by such person in the authorized manner . . . was drawn for a purpose authorized by the depositor and within the scope of the authority conferred upon such person."].) Thus, none of the aforementioned state statutes has any bearing on NBA preemption of § 1748.9.

A. Neither the U.S. Supreme Court Nor This Court Has Held Invalid Regulations Such as Section 7.4008.

Parks asserts that this Court, in *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, and the U.S. Supreme Court, in both *Cuomo v. Clearing House Ass'n, L.L.C.* (2009) 557 U.S.– [129 S. Ct. 2710], and *Watters*, have "held that the [OCC] does not have authority to issue regulations *solely* for the purpose of preempting State laws." (AB at 4, emphasis in original.) Parks clearly misstates the holdings in these three cases, as none includes such a sweeping conclusion.

As explained in MBNA's Opening Brief (OB at 42-44), in *Perdue*, the Court held that a now-superseded *interpretive* rule issued by the OCC that purported to construe the NBA and certain other banking laws as preempting state regulation of national bank fees was "not a reasonable interpretation of the controlling statutes." (38 Cal.3d at 941.) The *Perdue* Court opined that the OCC interpretive rule was, in effect, legislative in nature and, therefore, because it did not undergo notice-and-comment rulemaking procedures (as well as certain other administrative procedures), it was invalid. (*Id.* at 935.) The Court did not need to, nor did it, rule on whether, as a general proposition, Congress has delegated preemptive powers to the OCC or whether, if the regulation at issue in *Perdue* had been issued as a legislative regulation, it would have been valid. *Perdue* has no bearing here. (See *Chevron U.S.A., Inc. v Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [a case is not authority for a proposition not considered].)

Similarly, in *Cuomo*, the U.S. Supreme Court held that the OCC's specific regulation implementing the "visitorial powers" provision of the NBA, 12 U.S.C. § 484, contained a definition of "visitorial powers" that was not consistent with a proper understanding of that term as used in the NBA. The *Cuomo* Court examined historical interpretations of "visitorial

powers" and concluded that the OCC's definition was not a reasonable construction of the statutory text. (See 129 S. Ct. at 2716-22.) The *Cuomo* Court had no occasion to, and did not, address (much less make a holding about) the OCC's power to issue preemption regulations; it simply opined about the reasonableness of the OCC's interpretation in a different regulation of a particular statutory term.

Finally, Parks' attempt to read into *Watters* a holding about the OCC's regulatory authority to preempt is patently bogus. In *Watters*, the majority did not analyze or opine on *any* OCC regulation; it expressly held "that the NBA itself – *independent of OCC's regulation* – preempts the application of the pertinent Michigan laws to national bank operating subsidiaries." (*Watters*, 550 U.S. at 21 fn.13, italics added.) The *Watters dissent* did discuss an OCC regulation (12 C.F.R. § 7.4006, concerning national bank operating subsidiaries), but Parks cannot transform the *dissent*'s statements into a U.S. Supreme Court "holding."

B. Congress May Implicitly Delegate to a Federal Agency Authority to Preempt State Law by Declarative Regulation.

Parks argues that an agency has the power to make regulatory determinations of preemption only when Congress *expressly* delegates that power to the agency. (AB at 27.) This argument misstates the law. Although Congress in some cases does expressly grant federal agencies such preemptive authority, it may also confer such authority implicitly, as U.S. Supreme Court opinions plainly recognize.

In both *de la Cuesta* and *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, the U.S. Supreme Court upheld federal agency preemption regulations based on Congress' *implicit* intent to authorize the issuance of such regulations. In *de la Cuesta*, the Court found such intent in the provision of the Home Owners' Loan Act ("HOLA") stating that the

Director of the Office of Thrift Supervision ("OTS")[4] "is authorized, under such rules and regulations as [the Director] may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of federal savings associations, "giving primary consideration to the best practices of . . . thrift . . . institutions in the United States." (458 U.S. at 160, quoting 12 U.S.C. § 1464(a)(1), italics omitted) The U.S. Supreme Court found that this "statutory language suggests that Congress expressly contemplated, and approved, the [OTS]'s promulgation of regulations superseding state law." (*Id.* at 162.)

In reaching this conclusion, the Court specifically noted that, while certain other sections of the HOLA *expressly* preempt or incorporate state law, "these provisions do not imply that Congress intended no further pre-emption of state law. Rather, Congress invested the Board with broad authority . . . and plainly *indicated* that the Board need not feel bound by existing state law." (*de la Cuesta*, 458 U.S. at 162, italics added.) In other words, even in the absence of a provision expressly giving the agency preemptive power, the U.S. Supreme Court inferred and upheld such power based on the broad scope of the *general regulatory authority* Congress explicitly conferred. The *de la Cuesta* Court found that, in light of Congress' overall objectives for the HOLA, it was reasonable to *infer* from the HOLA's grant of broad rulemaking authority to the OTS that Congress intended the OTS to have authority to promulgate preemption regulations.

With respect to *Crisp*, Parks is similarly mistaken in arguing that the U.S. Supreme Court relied on an *express* statutory delegation of authority to the Federal Communications Commission ("FCC") to declare preemption by regulation. According to Parks, the reasoning in *Crisp* is

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[4] Previously the Federal Home Loan Bank Board.

inapplicable because Congress had already expressly granted the FCC preemption authority in 47 U.S.C. §§ 253 and 303. (AB at 30.) But 47 U.S.C. § 253 did not even *exist* when *Crisp* was decided – it was enacted more than a decade later as part of the Telecommunications Act of 1996. (Pub.L.No. 104-104, § 101(a) (Feb. 8, 1996) 110 Stat. 70.) And with respect to 47 U.S.C. § 303, it contains no express reference to preemption (or even state law) whatsoever. Rather, much like the HOLA language found to implicitly delegate preemptive authority to the OTS in *de la Cuesta*, 47 U.S.C. § 303 lists various powers and responsibilities Congress delegated to the FCC, including broad authority to issue "rules and regulations . . . as may be necessary to carry out the provisions of this chapter" – without any reference to preemption of state law. (47 U.S.C. § 303(r).)[5]

Just as with the OTS and the FCC, there is ample basis to conclude Congress granted the OCC sufficiently broad regulatory authority to issue regulations, like Section 7.4008, for the purpose of clarifying the NBA's preemptive scope. In the NBA, Congress expansively provided that the "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office," with the only stated exception to this authority being that the OCC cannot "issue such rules and regulations [that have] been expressly and exclusively granted to another regulatory agency." (12 U.S.C. § 93a.) This language, coupled with the legislative history and many provisions of the NBA granting the OCC comprehensive authority to charter, oversee, examine, supervise and

[5] Currently, 47 U.S.C. § 303 does grant the FCC exclusive jurisdiction to regulate the provision of direct-to-home satellite services (in subsection (v)), but this jurisdictional grant, like 47 U.S.C. § 253, did not exist when *Crisp* was decided. (See Pub.L.No. 104-104, § 205(b) (Feb. 8, 1996) 110 Stat. 114.)

discipline virtually all aspects of the operations of national banks,[6] is at least as indicative of a grant of broad agency authority to preempt by regulation as the statutory language relied on by the U.S. Supreme Court in *de la Cuesta* and *Crisp* to uphold agency issuance of preemption regulations. (See *Easton*, 188 U.S. at 231.)[7]

In sum, Parks has provided no basis for disagreement with MBNA's arguments about *implicit* delegations by Congress of regulatory authority to preempt. And such implicit delegations may include, as both *Crisp* and *de la Cuesta* demonstrate, a grant of authority to issue what Parks refers to as "general" preemption regulations (*i.e.*, federal regulations that by their terms expressly preempt state law, without necessarily imposing substantive federal requirements or restrictions).

For example, the OTS, when promulgating the regulation at issue in *de la Cuesta*, 12 C.F.R. § 545.6-11(f) (1982), expressly stated its intention that "the due-on-sale practices of federal savings and loans be governed 'exclusively by Federal law,'" and "that '[federal] associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements.'" (*de la Cuesta*, 458 U.S. at 147, quoting 41 Fed. Reg. 18286, 18287 (May 3, 1976).) The U.S. Supreme Court noted that the OTS's regulation provided "that a federal savings and loan

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6 12 U.S.C. §§ 21, 26, 81-92a, 93a, 181-200, 481.

7 Moreover, as MBNA previously noted (OB at 34-35), Congress' more recent enactment of 12 U.S.C. § 43(a) confirms the NBA's delegation of preemption authority to the OCC. Parks notes the legislative history of 12 U.S.C. § 43(a) states that the new provision "is not intended to confer upon the [OCC] any *new* authority to preempt." (AB at 32, quoting 1994 Conference Report on H.R. 3841, italics added.) That statement is entirely consistent with MBNA's position regarding the NBA's *preexisting* grant of preemptive authority to the OCC in 12 U.S.C. § 93a. In enacting 12 U.S.C. § 43(a), Congress imposed new *procedural* requirements on OCC preemption determinations; in so doing, Congress plainly acknowledged and thereby confirmed the OCC's *preexisting* preemptive authority.

'continues to have the power' to include a due on sale clause in a loan instrument and to enforce that clause 'at its option,'" and that the conflict with California law "does not evaporate because the [OTS]'s regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts." (*Id.* at 154-55, quoting 12 C.F.R. § 545.8-3(f) (1982).) The Court recognized and affirmed that the OTS had the authority to and "consciously [chose] not to mandate use of due-on-sale clauses 'because [it] desire[d] to afford associations the flexibility to accommodate special situations and circumstances.'" (*Id.* at 155, quoting 12 C.F.R. § 556.9(f)(1) (1982), first and third bracketed insertions added.)

Similarly, in *Crisp*, the FCC had stated it was preempting state law in the "pay cable" area because, "[a]fter considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, . . . [the agency had concluded] that, at this time, there should be *no* regulation of rates for such services at all by *any* governmental level." (*Crisp*, 467 U.S. at 703, quoting 46 F.C.C.2d 175, 199-200 (1974), italics added.) The *Crisp* Court confirmed that, by deciding *not* to regulate cable rates, the FCC had not "forsaken its regulatory power in this area;" rather, it had reasonably determined that greater access for cable subscribers "would be jeopardized if state and local authorities were now permitted to restrict substantially the ability of cable operators to provide these diverse services to their subscribers." (*Id.* at 704.) The *Crisp* Court unanimously upheld the agency's regulatory determination that "only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country." (*Id.* at 708.) As the *Crisp* Court stated: "[I]f the FCC has resolved to pre-empt an area of cable television regulation and if this determination 'represents a reasonable

accommodation of conflicting policies' . . . within the agency's domain, we must conclude that all conflicting state regulations have been precluded." (*Id.* at 700, citation omitted.)

These cases establish that Congress may implicitly delegate to an agency the authority to determine that states may not interfere with certain types of activity, *even if the agency imposes no specific federal requirements or restrictions on that activity.* As *de la Cuesta* and *Crisp* make clear, a grant of broad general rulemaking authority *is* sufficient to demonstrate, in the context of particular statutes, that Congress intended to include in that authority the power to make preemption determinations by regulation. The NBA provides just such a broad grant of rulemaking authority to the OCC, as the courts have previously concluded. (*E.g.*, *Conference of State Bank Supervisors v. Conover* (D.C. Cir. 1983) 710 F.2d 878, 885 ["the Comptroller has the power to preempt inconsistent state law"]; *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 ["it was within the OCC's authority to promulgate [a regulation preempting state law]"].)

In promulgating Section 7.4008, the OCC acted squarely within the scope of the broad rulemaking authority Congress granted to it in the NBA. The OCC utilized its experience and expertise in regulating national banks for more than 150 years, and applied traditional NBA conflict preemption principles, to determine that certain types of state laws significantly burden the exercise of national bank powers and, therefore, are not applicable to national banks. Indeed, the OCC specifically incorporated into Section 7.4008 language used by the U.S. Supreme Court in analyzing NBA preemption of state law. (See Bank Activities and Operations, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) [explaining that the regulation's standards for

preemption were "drawn directly from applicable [U.S.] Supreme Court precedents . . . [and] convey the range of effects [of state law] on national bank powers that the Court has found to be impermissible" because they are an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress"], internal citation omitted.)[8]

Adhering closely to, and drawing specifically on, U.S. Supreme Court precedent, the OCC applied its years of experience as the primary regulator of national banks to determine "whether (or the extent to which) state requirements may interfere with federal objectives" for those banks. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 506 (conc. opn. of Breyer, J.).) Because the OCC 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,'" its promulgation of Section 7.4008 was well within the scope of its statutory authority. (*Id.* at 496, quoting *Hines*, 312 U.S. at 67.)

C. *Wyeth v. Levine* Is Inapplicable To This Case.

In an attempt to undermine the validity of Section 7.4008, Parks cites *Wyeth v. Levine* (2009) 129 S. Ct. 1187. (AB at 33.) *Wyeth*, however, is plainly distinguishable from this case.

In *Wyeth*, the plaintiff filed a state common-law tort suit alleging that inadequate labeling on Wyeth's prescription drug Phenergan led to the administration of the drug via intravenous push resulting in the amputation of her arm. (129 S. Ct. at 1191.) In its defense, Wyeth asserted that the approval of Phenergan's labeling by the Food and Drug Administration ("FDA") preempted Levine's tort claim. (*Id.* at 1194-95.) To support this

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[8] Parks' characterization of the OCC's actions in promulgating Section 7.4008 (AB at 33) are directly refuted by the OCC's notices accompanying both the proposed and final versions of the regulation. (See Bank Activities and Operations, 68 Fed. Reg. 46119 (Aug. 5, 2003); 69 Fed. Reg. 1904.)

argument, Wyeth cited the preamble to a 2006 FDA regulation addressing the content and format of prescription drug labels ("FDA Preamble"), in which the agency stated that "'FDA approval of labeling ... preempts conflicting or contrary State law,'" and that "state-law actions, such as those involving failure-to-warn claims," threatened the FDA's expert role in approving drug labels and their contents. (*Id.* at 1200, quoting 71 Fed. Reg. 3922, 3934-35 (Jan. 24, 2006).)

The U.S. Supreme Court rejected Wyeth's preemption defense, for several key reasons, none of which is even remotely applicable here. *First*, it noted that when the FDA issued its notice of proposed rulemaking for the 2006 regulation, the agency explicitly stated the rule would "'not contain policies that have federalism implications or that preempt State law.'" (*Wyeth*, 129 S.Ct. at 1201, quoting 65 Fed. Reg. 81082, 81103 (Dec. 22, 2000).) In other words, the FDA had previously eschewed any preemptive intent. *Second*, the *Wyeth* Court found the FDA Preamble directly at odds with evidence of Congress' intent in enacting the underlying statute, the Federal Food, Drug and Cosmetic Act ("FDCA"), which was designed to "bolster consumer protection against harmful products." (*Id.* at 1999.) Indeed, Congress had specifically amended the FDCA in 1962 to include a state law "savings clause," which the *Wyeth* Court found to be a strong indication of Congress' purpose to *preserve* state common-law tort suits, including those asserting failure-to-warn claims. (See *id.* at 1195-96, 1999-1200.) *Finally*, the *Wyeth* Court found that the FDA Preamble was inconsistent with the FDA's own longstanding position that "state law offers an additional, and important, layer of consumer protection that complements FDA regulation." (*Id.* at 1202.) The FDA Preamble, the *Wyeth* Court found, "represents a dramatic change in position," which the agency assumed without explanation or providing the public with notice and an opportunity for comment. (*Id.* at 1203.)

Section 7.4008 is thus readily distinguishable from the FDA's announcement of preemptive intent in the FDA Preamble. First, Section 7.4008 is an express preemption regulation that underwent full and transparent notice-and-comment procedures in accordance with the Administrative Procedure Act – not an informal agency statement or mere "preamble." Second, Section 7.4008 is entirely consistent with Congress' intent for the NBA, which, as discussed above and in MBNA's Opening Brief, was specifically designed to enable national banks to exercise their federally authorized powers, including the power of lending, without regard to any state law that would "interfere with," or "impair [the] efficiency" of those powers. (*Barnett Bank*, 517 U.S. at 32-34.) Finally, contrary to Parks' assertion (see AB at 33-34), Section 7.4008 is entirely consistent with the OCC's longstanding position on preemption.

On the latter point, Parks points to an Advisory Letter issued by the OCC in 1996, Advisory Letter 96-8 ("AL 96-8"), that he *claims* is inconsistent with Section 7.4008, because it refers to state laws that "would *not* be preempted because, ordinarily, they would not prevent national banks from exercising their federally authorized powers." (AB at 33-34, quoting AL 96-8 at 3, § C, underlining added by Parks.) According to Parks, AL 96-8 demonstrates that, prior to promulgating Section 7.4008, the OCC took the position that, to "significantly interfere" with a national bank's ability to exercise its banking powers, a state law must effectively "prevent" banks from engaging in an authorized banking activity. (*Id.* at 34.)

However, Parks fails to mention that in AL 96-8, the OCC enumerated the *various* linguistic tests for NBA preemption referred to in *Barnett Bank* and the cases cited therein, such as "interfere with, or impair," "hinder[]," "infringe," "infringe or interfere," "encroach," "frustrate the purpose," "hamper[]," and "impair[] the efficiency." (AL 96-8 at 3, § C

fn.7.) Nowhere in AL 96-8 does the OCC state that either the "significantly interfere" or "effectively prevent" standard is the *only* means to identify a significant obstacle to achieving the NBA's purposes. Indeed, consistent with the opinions of the U.S. Supreme Court, the OCC has consistently used various constructs to describe the ways in which state law may conflict with the purposes of the NBA.[9] There is simply nothing "inconsistent" between Section 7.4008 and past OCC preemption positions, including AL 96-8.

Contrary to Parks' contention, neither *Wyeth* nor any other decision of the U.S. Supreme Court provides any basis for finding Section 7.4008 invalid.

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[9] (See, e.g., OCC Interpr. Letter No. 1016 (Jan. 14, 2005) 2005 WL 1939715, at 3 ["if application of the [state law] to the loans held by the [national] Banks as trustee were to *obstruct, impair, condition*, or otherwise interfere with the Banks' exercise of fiduciary powers granted to them under federal law, the state statute would be preempted."], emphasis added; OCC Corporate Decision No. 96-48 (Aug. 28, 1996) 1996 WL 547365, at *40 [state law would be preempted and "could not apply to *prohibit, restrict, limit or condition*" a national bank's ability to relocate its main office or engage in other activities governed by federal law], emphasis added; OCC Corporate Decision No. 96-40 (Aug. 2, 1996) 1996 WL 479221, at 32 [state law "could not apply to *prohibit, restrict, or condition*" national bank's main office relocation and other activities governed by federal law], emphasis added; OCC Corporate Decision No. 96-32 (June 14, 1996) 1996 WL 380649 at *36 [state law "could not apply to *prohibit, restrict, limit or condition*" national bank's ability to relocate its main office or engage in other activities authorized by federal law], emphasis added; OCC, Preemption Determination (Mar. 20, 2000) 65 Fed. Reg. 15037, 15040 [state law is preempted "[t]o the extent that [it] asserts the right to *restrict or condition* a national bank's exercise of the federally granted powers"], emphasis added; OCC Interpr. Letter No. 939 (Oct. 15, 2001) 2001 WL 1915387, at *5 ["[A] state may not *prevent, restrict or condition* a national bank's authority to establish ATM's."], emphasis added.)

D. Section 7.4008 Does Not Impose Any New Duties or Deny Any Vested Rights and Thus Is Not Being Applied in a Retroactive Manner.

Parks argues that, even if this Court finds Section 7.4008(d) preempts claims based on transactions after the regulation's 2004 effective date, the Court should not find that the regulation preempts claims based on transactions occurring before the regulation's effective date, because such a finding would give the regulation "retroactive" effect. (AB at 34-35.) Parks argues this despite the fact that he filed the lawsuit more than four months *after* Section 7.4008(d) became effective, and there were no claims pending on the regulation's effective date.

As this Court has previously stated:

> In deciding whether the application of a law is . . . retroactive, . . . [w]e consider the effect of a law on a party's rights and liabilities. . . . Does the law "change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?]" Does it "substantively affect[] existing rights and obligations[?]" If so, then application . . . is forbidden. . . . If not, then application . . . is permitted, because the application is prospective.

(*Eisner v. Uveges* (2005) 34 Cal.4th 915, 927, citations omitted.) Applying Section 7.4008(d) to preempt claims based on transactions occurring before the regulation became effective in 2004, does not raise concerns about either (1) new or different liabilities or (2) a substantive effect on *existing* rights and obligations. First, Section 7.4008(d) does not require that Parks (or any other member of the putative class) affirmatively take any action, nor does it impose any obligation or liability on Parks or any other putative class member for his or her past conduct. Second, Parks (and the members of the putative class) have no vested "right" to an unadjudicated statutory

UCL claim under either California or federal law, as they never obtained such a judgment or vested right. (See *South Coast Regional C'omm. v. Gordon* (1978) 84 Cal.App.3d 612, 619; *Ileto v. Glock, Inc.* (C.D. Cal. 2006) 421 F.Supp.2d 1274, 1299.) Parks and the putative class members are, therefore, plainly distinguishable from the plaintiffs in *Bowen v. Georgetown Univ. Hosp.* (1988) 488 U.S. 204, 205-08, in which the government sought to recover $2 million in Medicare reimbursements *already* paid to the plaintiffs for services previously provided before the government changed the Medicare reimbursement formula.

V. *Cuomo* Did Not "Nullify" *Rose.*

Finally, Parks argues that this Court should disregard the Ninth Circuit's decision in *Rose* because it has supposedly been "nullifie[d]" by the U.S. Supreme Court's decision in *Cuomo*. (AB at 38.) According to Parks, *Cuomo* and certain cases cited therein demonstrate that states may "enforce state laws *specifically aimed at banking activities*." (*Id.*, italics in original.) But this argument, like Parks' red-herring arguments about "field" preemption and state laws of "general application," says nothing about the validity of *Rose*.

Cuomo did not involve a preemption question like the one at issue here, *i.e.*, whether the NBA or OCC regulations preempt certain state laws as applied to national banks. Rather, *Cuomo* involved a quite different question: whether state laws that indisputably are *not* preempted may be *enforced by state officials* against national banks.[10] In *Cuomo*, it was

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[10] (See *Green v. Charter One Bank, N.A.* (N.D. Ill. Mar. 16, 2010) No. 08 C 1684, 2010 WL 1031907, at *3 fn.4 ["The [*Cuomo*] opinion does not address the NBA's preemptive scope generally or of the NBA's preemption of state-law limitations on a national bank's assessment of authorized fees."]; *Kilgore v. Keybank* (N.D. Cal. 2010) 712 F.Supp.2d 939, 956 fn.7 ["Since a state's visitorial powers are not at issue here, this Court does not see how *Cuomo* is controlling or even relevant."].)

undisputed that the New York fair lending laws (which like the federal Fair Housing Act, 42 U.S.C. § 3605, prohibit unfair discrimination in lending) were not preempted as applied to national banks. (See 129 S. Ct. at 2718.)[11] That was plainly not the case in *Rose*, where the issue for decision was *whether* § 1748.9 is preempted.

Like the state fair lending laws at issue in *Cuomo*, the state laws addressed in the cases referenced in the *Cuomo* excerpt Parks quotes (AB at 38-39) are plainly distinguishable from state disclosure mandates such as § 1748.9. In *First National Bank in St. Louis v. Missouri* (1924) 263 U.S. 640, the U.S. Supreme Court held that a state law prohibiting national banks from branching within the state was not preempted because, at the time, national banks had no power *even under federal law* to establish branch banks. (See *id.* at 657-58.) And in each of the other cited cases, the courts had held that state *unclaimed property laws* were not preempted because such laws typically do not interfere with a national bank's exercise of its federally granted banking-related powers. (See, e.g., *Anderson Nat. Bank*, 321 U.S. at 249 [recognizing that the duties state unclaimed property laws impose on national banks are generally "in conformity with the banking laws of the United States."]; cf. *First Nat. Bank of San Jose*, 262 U.S. at 366-68 [finding a different type of state escheat law preempted by the NBA].)

The cases cited in the *Cuomo* excerpts quoted by Parks do nothing to support his contention that the NBA does not broadly preempt banking-specific state laws like § 1748.9. Instead, these cases affirm what MBNA has argued throughout this litigation and what the trial court correctly

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[11] As this Court recognized in *Peatros v. Bank of America NT&SA* (2000), 22 Cal.4th 147, where federal law *prohibits* discrimination by a national bank, state law also prohibiting the *same* conduct is generally not preempted by the NBA.

recognized: *any* type of state law is preempted by the NBA if, as applied to a national bank, it has the effect of encroaching on, impairing, conditioning, impeding or otherwise restricting the bank's ability to exercise fully and efficiently, on a nationwide basis, its federally granted powers. (See *Watters,* 550 U.S. at 13.) Section 1748.9 has this effect, and it is, therefore, preempted by *both* the NBA and Section 7.4008.

VI. CONCLUSION

For the reasons discussed above and in MBNA's Opening Brief, the judgment of the Court of Appeal should be reversed.

DATED: April 4, 2011

ARNOLD & PORTER LLP

By: _____
LAURENCE J. HUTT
Attorneys for Respondent

CERTIFICATION OF WORD COUNT

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

As counsel for Respondent in this appeal, I certify that this Reply Brief consists of 8,398 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: April 4, 2011

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 April 4, 2011, I served the foregoing document described as a **RESPONDENT'S REPLY BRIEF ON THE MERITS** 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
Clerk of the Court California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd Santa Ana, CA 92701	Office of the Comptroller of the Currency Litigation Department Attn: Douglas Jordan, Senior Counsel 250 E Street S.W. Washington, DC 20219-4515
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	David M. Arbogast Arbogast & Berns 6303 Owensmouth Avenue 10th Floor Woodland Hills, CA 91367-2262
J. Mark Moore Spiro Moss LLP 11377 W. Olympic Boulevard, Fifth Floor Los Angeles, CA 90064-1683	

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Executed on April 4, 2011, at Los Angeles, California.

Stacie James