

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S183703

PARKS, ET AL.,
Plaintiff and Appellant,

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

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF DEFENDANT AND RESPONDENT

Bruce E. Clark*
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Tel: (212) 558-4000
Fax: (212) 558-3588

**Admitted (pending) pro hac vice*

Achyut J. Phadke (CSBN 261567)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, CA 94303
Tel: (650) 461-5600
Fax: (650) 461-5700

H. Rodgin Cohen
Michael M. Wiseman
Of counsel

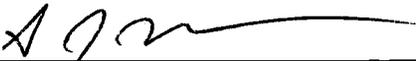
Counsel for *Amicus Curiae* The Clearing House Association L.L.C.
SERVICE ON THE ATTORNEY GENERAL AND DISTRICT ATTORNEY PURSUANT TO
CAL. BUS. & PROF. CODE §17209 AND CAL. RULES OF COURT, RULE 8.29(b)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, Rule 8.208

The following certification is made by Achyut J. Phadke on behalf of The Clearing House Association L.L.C. Mr. Phadke is not aware of any entity or person that must be listed under (e)(1) or (2) of Rule 8.208.

Dated: May 5, 2011

Respectfully submitted,



Achyut J. Phadke
SULLIVAN & CROMWELL LLP

**APPLICATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT AND RESPONDENT
MBNA AMERICA BANK, N.A.**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE:

Pursuant to Rule 8.520(f) of the California Rules of Court, The Clearing House Association L.L.C. (the “Clearing House”) respectfully requests leave to file the attached brief in support of Defendant and Respondent MBNA America Bank, N.A. (“MBNA”).¹

STATEMENT OF INTEREST

The Clearing House is an association of leading commercial banks that, through an affiliate, provides payment, clearing, and settlement services to its member banks and other financial institutions.² Eight members of the Clearing House are national banks and two are affiliates of national banks.

¹ Pursuant to Rule 8.520(f)(4) of the California Rules of Court, undersigned counsel certifies that no party or counsel for a party has authored the proposed brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. Furthermore, no person or entity other than the Clearing House has made a monetary contribution intended to fund the preparation or submission of the brief.

² The members of the Clearing House are: Banco Santander, S.A.; Bank of America, N.A.; The Bank of New York Mellon; The Bank of Tokyo-Mitsubishi UFJ Ltd.; Branch Banking and Trust Company; Capital One, N.A.; Citibank, N.A.; Comerica Bank; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; PNC Bank, N.A.; The Royal Bank of Scotland N.V.; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

The Clearing House is dedicated to protecting and promoting the interests of its members and the commercial banking industry. The Clearing House often presents the views of its members on important public policy issues affecting the commercial banking industry by, among other things, appearing as *amicus curiae* in federal and state courts in cases raising significant questions of banking law.

The Clearing House member banks have a substantial interest in the questions presented in this case and in upholding the uniform federal regulation of national banks, including national banks' lending activities. The Clearing House member national banks engage in a wide variety of lending activities in all 50 states. The application of numerous overlapping and potentially inconsistent state and local restrictions would impose substantial costs and burdens on Clearing House member banks and their customers. Because we believe that the views of the Clearing House will contribute to the Court's understanding of the issues presented in this case, we respectfully request that this application be granted.

Respectfully submitted,



Bruce E. Clark (*pro hac vice*) (*pending*)

SULLIVAN & CROMWELL LLP

125 Broad Street

New York, New York 10004

Telephone: (212) 558-4000

Facsimile: (212) 558-3588

Achyut J. Phadke (CSBN 261567)

SULLIVAN & CROMWELL LLP

1870 Embarcadero Road

Palo Alto, California 94303

Telephone: (650) 461-5600

Facsimile: (650) 461-5700

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PRELIMINARY STATEMENT

This Court should reverse the unprecedented ruling of the Court of Appeal, which is contrary to the decisions of the numerous federal courts that have considered the same questions concerning the preemptive effect of the National Bank Act in general; the very Comptroller of the Currency regulation in question; and indeed, the very California statute at issue.¹ In rejecting years of Supreme Court precedent and applying to national banks laws such as California Civil Code section 1748.9 (“Section 1748.9”) that seek directly to regulate the federally authorized activities of national banks under the National Bank Act, the ruling will necessarily result in interference with those banking activities.² The Court of Appeal’s conclusion that a duly promulgated regulation enacted by the Office of the Comptroller of the Currency (“OCC”), 12 C.F.R. § 7.4008 (“Section 7.4008”), is invalid also will create significant potential problems for the national banking system if left uncorrected. Indeed, it was the OCC’s recognition of the problems that laws such as Section 1748.9 would

¹ Although the Court of Appeal concluded that it was “not bound to follow federal court precedent,” it is, of course, bound by decisions of the United States Supreme Court. Moreover, as the Court of Appeal acknowledged, “‘numerous and consistent’ federal decisions may be particularly persuasive when they interpret federal law.” *Parks v. MBNA America Bank, N.A.*, 109 Cal. Rptr. 3d 248, 251 (2010).

² Section 1748.9 requires that credit card issuers which furnish customers with pre-printed convenience checks attach, in clear and conspicuous language on “the front of an attachment” to the checks, the following statements:

- (1) That use of the attached check or draft will constitute a charge against your credit account.
- (2) The annual percentage rate and the calculation of finance charges, as required by Section 226.16 of Regulation Z of the Code of Federal Regulations, associated with the use of the attached check or draft.
- (3) Whether the finance charges are triggered immediately upon the use of the check or draft.

pose to the ability of national banks to exercise their statutory powers under the National Bank Act that led the OCC to promulgate Section 7.4008.

The National Bank Act (the “NBA” or the “Act”), 12 U.S.C. § 1 *et seq.*, enacted during the Civil War, reflects Congress’ creation of a national system of banks subject to a uniform system of national regulation. Under the Act, national banks are seen as “instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.” *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). As a result, the U.S. Supreme Court has repeatedly confirmed that the Act preempts state laws that “encroach on,” “hamper” or “impair [the] efficiency of” the statutorily authorized banking activities of national banks. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33-34 (1996).

Congress has charged the OCC with comprehensive oversight and regulation of the uniform system of national banks created under the NBA. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996). Through ongoing monitoring, surveillance, and informal and formal enforcement, the OCC ensures that national banks comply with a variety of requirements established under federal law and OCC regulation, including federal consumer protection laws that apply to national banks’ banking activities. The OCC is empowered to promulgate rules and regulations as an essential part of its administration of the national banking system. *See* 12 U.S.C. § 93a.

In 2004, the OCC promulgated regulations, including Section 7.4008, that aimed to reduce the operational uncertainty facing national banks because of the recent attempts by state and local authorities to

impose their distinct requirements on banking activities of such banks. Based on the OCC's review of the effect of these state and local laws, and its survey of legal and administrative precedent, the OCC determined that several categories of state laws that affected national banks' exercise of their powers under the NBA were preempted. *See* "Bank Activities and Operations; Real Estate Lending and Appraisals," 69 Fed. Reg. 1904 (Jan. 13, 2004) (the "OCC Regulation").

By any measure, the OCC Regulation was a reasonable administrative action within the OCC's authority under the NBA.³ The preemption of state laws that interfered with the national banks' exercise of their statutory banking powers comported with settled judicial precedent under the Act. Moreover, the text and scope of Section 7.4008 were consistent with precedential interpretations of the NBA, limiting its preemptive scope so that state laws that had only an incidental or no impact on national banks' authorized banking activities were not preempted. Finally, the balance of policies struck in the OCC Regulation, between ensuring that national banks could exercise effectively their statutory

³ Congress has recently determined that future pre-emption of state consumer laws under the NBA should be on a case-by-case basis. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010) ("DFA") § 1044. But that policy decision, to the extent it reflects a change from the OCC Regulation, does not in any way invalidate the OCC Regulation as it applied prior to the Dodd-Frank Act. *See* DFA § 1043 (stating that the DFA or administrative action under the DFA "*shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the Comptroller of the Currency . . . regarding the applicability of State law under Federal banking law to any contract entered into on or before the date of enactment of this Act, by national banks . . . or subsidiaries thereof that are regulated and supervised by the Comptroller of the Currency[.]*") (emphasis added); *see also id.* § 1048; 75 Fed. Reg. 57,252 (Sept. 20, 2010) (designating effective date of NBA amendments as July 21, 2011).

powers and also ensuring compliance with applicable federal consumer protection laws through OCC enforcement, was also reasonable.

The Court of Appeal's holding to the contrary – that Section 7.4008 was not reasonable administrative action – is demonstrable error. Largely ignoring the significant deference that is owed the OCC in its administration of the NBA, *see NationsBank*, 513 U.S. at 256, *Smiley*, 517 U.S. at 739, the Court of Appeal did not even consider the proper scope of the OCC's responsibility for a comprehensive federal statutory scheme or the reasoned explanation that the OCC itself provided when promulgating the regulation. 109 Cal. Rptr. 3d 248, 259-60 (2010). Moreover, the Court of Appeal's reliance on *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2715 (2009), and *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 935 (1985) is misplaced, and demonstrates the absence of judicial support for its unique approach. 109 Cal. Rptr. 3d at 259-60.

Cuomo involved an interpretation of the “visitation” provisions of the NBA (12 U.S.C. § 484(a)) rather than the general preemptive approach of the NBA, and attempted a far more expansive preemption of state law than does Section 7.4008. And *Perdue* considered the validity of a regulation that was apparently promulgated without the opportunity for notice and comment or other deliberative process, *see Smiley*, 517 U.S. at 741, unlike the rulemaking process leading to the promulgation of Section 7.4008, which incorporated public comment and set forth policy considerations justifying preemption under established precedent.

Nor is there any merit to the Court of Appeal's suggestion that the OCC lacked the authority to promulgate Section 7.4008 and related

regulations preempting state law. U.S. Supreme Court authority confirms that administrative agencies may expressly preempt state law. *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982). Congress itself has enacted a statute (12 U.S.C. § 43) that contemplates that the OCC may promulgate regulations that provide that state law is preempted.

Indeed, numerous courts have applied Section 7.4008 and its companion regulations as valid and reasonable constructions of the NBA. The ruling below pits the Court of Appeal against courts around the country, including the Ninth Circuit (which ruled that Section 1748.9 itself did not apply based on straightforward NBA preemption analysis) and every district court in California. *See Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008); *Aguayo v. US Bank*, 658 F. Supp. 2d 1226, 1231-35 (S.D. Cal. 2009); *Montgomery v. Bank of Am. Corp.*, 515 F. Supp. 2d 1106, 1114 (C.D. Cal. 2007); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172, 1176 (E.D. Cal. 2007); *O'Donnell v. Bank of Am.*, No. C-07-04500, 2010 WL 934153, at *4-5 (N.D. Cal. Mar. 15, 2010). Given the NBA's guiding principle of uniformity in regulation of national banks, the uncertainty created where one court seeks to invalidate a federal regulation that all other courts have found to be a valid exercise of authority is itself a reason to reverse the Court of Appeal.

The ramifications of affirming the Court of Appeal's holding are manifest. National banks would then face a series of overlapping and inconsistent disclosure requirements from the various states and local jurisdictions.⁴ If California can impose these requirements, can New

⁴ "If California may thus interfere, other states may do likewise. . . . We cannot conclude that Congress intended to permit such results." *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923).

Mexico require the disclosures to be printed on the convenience checks themselves? Can Arizona require that they be printed in blue, or in capital letters? Can Alameda County and the City of San Diego impose their own demands which differ in the words used? The result will be to raise the cost of compliance associated with national banks' banking activities, which are in turn passed on to customers. And in a mobile society, where bank customers readily move from town to town, county to county and state to state, compliance will be a virtual impossibility. The Court of Appeal's proposed remand for a factual hearing, a procedure even Parks does not bother to support, demonstrates the Court's failure to grasp the essential objective of preemption: to avoid just such burdens.

Moreover, there is risk that application of such state-by-state laws will actually hinder regulatory oversight by the OCC. State and local requirements imposed under divergent laws would fragment what otherwise would be uniform nationwide regulation of national banks by the OCC, and require the OCC to examine for compliance under multiple statutory schemes. If the states and local jurisdictions can impose specific – and widely varying – disclosure requirements on convenience checks, why not regular checks, ATM cards and receipts, deposit slips, or any document memorializing banking arrangements between a national bank and its customers?

BACKGROUND

I. THE NATIONAL BANK ACT AND THE “BUSINESS OF BANKING”

Enacted in 1864, the NBA, 12 U.S.C. § 1 *et seq.*, has long been understood to reflect Congress' objective of uniform national regulation of national banks to the extent they engage in the “business of

banking” as authorized by the Act.⁵ *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007).

The Act created “a system of national banks as federal instrumentalities to perform various functions” related to national banking. *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 375 (1954); *accord Farmers’ & Mech. Nat’l Bank v. Dearing*, 91 U.S. 29, 33-34 (1875) (“The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of public service”). The Act achieved this end by granting national banks both enumerated and incidental “powers” to perform national banking functions as necessary to carry on the “business of banking.” *Barnett Bank*, 517 U.S. at 32 (1996); *see* 12 U.S.C. § 24 (Seventh).

The Act also subjected national banks to a uniform, national system of regulation that applied to the national banks’ use of their banking powers. That is, the Act “ha[d] 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.” *Easton v. Iowa*, 188 U.S. 220, 229 (1905) (emphasis added). Thus, as the U.S. Supreme Court recently confirmed, “[d]iverse and duplicative superintendence of national banks’ engagement in the business of banking . . . is precisely what the NBA was designed to prevent.” *Watters*, 550 U.S. at 13-14.

⁵ The Act itself was passed some forty-five years after the United States Supreme Court, in *McCulloch v. Maryland*, “held federal law supreme over state law with respect to national banking.” *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10 (2007) (citing 4 Wheat. 316 (1819)).

The Supreme Court recognized early on that the Act also protected national banks from “the hazard of unfriendly legislation by the States.” *Tiffany v. Nat’l Bank of Mo.*, 85 U.S. 409, 413 (1873). Accordingly, the U.S. Supreme Court and lower courts have “‘interpret[ed] grants of both enumerated and incidental ‘powers’ to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law.’” *Watters*, 550 U.S. at 12 (quoting *Barnett Bank*, 517 U.S. at 32)). Thus, under the NBA, states are not permitted to regulate the national banks’ use of enumerated and incidental powers necessary to carry on the “business of banking,” unless expressly provided for in the NBA. *See id.* at 14. Accordingly, under the “national banking system”⁶ created by the NBA, the regulation of national banks’ “powers” has been a matter of uniform national regulation, and restrictions and conditions placed by states on the exercise of those powers are preempted unless they are so limited that they are incidental and not inconsistent with the basic concept of uniform regulation.

II. THE OCC’S REGULATION OF NATIONAL BANKS

Under the Supreme Court’s leading expressions of the deference that judicial review should afford to administrative actions, the courts defer to an agency’s reasonable implementation of a statute it is charged with administering. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *De la Cuesta*, 458 U.S. at 154; *NationsBank*, 513 U.S. at 256-57. Under this law of the land, the OCC is entitled to deference because it has comprehensive authority under the NBA to license, regulate, supervise, examine, and discipline national banks,

⁶ *Marquette Nat’l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (citing Cong. Globe, 38th Cong., 1st Sess., 1451 (1864)).

and “bears primary responsibility for surveillance of the ‘business of banking’ authorized by” 12 U.S.C. § 24 (Seventh). *NationsBank*, 513 U.S. at 256. In exercising this authority, OCC examiners periodically conduct examinations at every national bank based on a variety of risk-based criteria that include liquidity, balance sheet, and credit risk management, as well as compliance with fair lending laws and other consumer-related laws applicable to national banks. Office of the Comptroller of the Currency, *Annual Report – Fiscal Year 2010* (“2010 OCC Annual Report”), at 10-14; *see* 12 U.S.C. § 481. To carry out this role, the OCC has the power to promulgate regulations in areas beyond those specifically enumerated in the statute. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 312 (2d Cir. 2005); *see* 12 U.S.C. § 93a.

The OCC has a variety of tools at its disposal to ensure that national banks comply with every law, rule and regulation and do not engage in any “unsafe or unsound practice” in their banking activities. *See* 12 U.S.C. § 1818. These include cease-and-desist orders, hearings, monetary penalties, forfeiture of charter, restitution or reimbursement, replacement of officers and directors, and divestiture of offending subsidiaries. *Id.*; 12 U.S.C. § 24a(g)(3)(A); 12 C.F.R. § 5.34(e)(3). In addition to these formal tools and of at least equal importance, OCC examiners can make informal requests for changes in national bank practices, to which bank managers frequently agree without the need for enforcement actions. *See* 12 U.S.C. §§ 481, 1818; *see In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 210, 218 (D.C.N.Y. 1978) (“Achieving voluntary compliance with laws, recommendations, and agreements is often the rule rather than the exception. The agencies’ potent alternative of

formal enforcement proceedings usually insures such voluntary compliance”).⁷

As part of its regulation of the banking activities of national banks, the OCC examines, monitors and enforces national banks’ compliance with a variety of federal consumer protection laws and regulations, as well as state laws made applicable to national banks under federal law.⁸ *See, e.g.*, 2010 OCC Annual Report at 13-15; 69 Fed. Reg. at 1913-14. The OCC has taken more than 100 consumer-related enforcement

⁷ As former Comptroller Dugan has noted, “[i]n the OCC’s experience, national banks usually go to great lengths to take the corrective steps necessary to achieve compliance with informal enforcement actions.” John C. Dugan, Comptroller of the Currency, Testimony Before the Committee on Financial Services of the U.S. House of Representatives (Mar. 20, 2009) at 4-5 (“Dugan Testimony”), *available at* <http://www.occ.gov/news-issuances/congressional-testimony/2009/pub-test-2009-26-written.pdf>.

⁸ The federal consumer protection laws that apply to national banks’ banking activities include the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, the Home Mortgage Disclosure Act, 12 U.S.C. § 2801 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, the Truth in Savings Act, 12 U.S.C. § 4301 *et seq.*, the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and the Homeowners Protection Act, 12 U.S.C. § 4901 *et seq.* *See also* “Bank Activities and Operations; Real Estate Lending and Appraisals,” 69 Fed. Reg. 1904, 1905 n.10, 1912 n.61 (Jan. 13, 2004) (citing applicable statutes in 2004). In addition, where appropriate, the OCC also pursues enforcement actions against national banks for “unfair or deceptive practices” under Section 5 of the Federal Trade Commission Act (“FTC Act”), as explicitly provided in the OCC regulation at issue in this case. *Id.* at 1913-14; Section 7.4008(c).

actions since 2002.⁹ A number of these actions have led to multi-million dollar restitutions or penalties.¹⁰

Furthermore, the OCC requires national banks to establish procedures to monitor consumer complaints, and itself facilitates communications of complaints between customers and national banks and provides a mechanism for resolving complaints relating to banking laws and regulations. 2010 OCC Annual Report at 16 (discussing OCC’s “Customer Assistance Group”). In 2010, the OCC opened files on approximately 80,000 consumer complaints and resolved approximately the same number. *Id.* at 2, 16.

The OCC also attempts to coordinate with state regulatory agencies as it oversees the banking activities of national banks. Its stated policy is that it “encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws, or if they seek information from national banks.” *See, e.g.*, OCC Advisory Letter 2002-9, “Questions Concerning Applicability and Enforcement of State Laws: Contacts from State Officials,” (Nov. 25, 2002), *available at* <http://www.occ.gov/static/news-issuances/memos-advisory->

⁹ Dugan Testimony at 4-10.

¹⁰ For example, in recent years, the OCC has resolved an enforcement action against a large national bank on behalf of consumers harmed by the bank’s relationships with third party payment processors for telemarketers, which led to a restitution agreement of more than \$150 million for over 740,000 consumers; has entered into a formal agreement requiring a national bank and its subsidiary to establish a \$14 million fund to reimburse consumers harmed by a mortgage lending subsidiary; and has engaged in a joint enforcement action against a leading title insurance company for misrepresentations in real estate settlement practices that led to a \$5 million civil penalty. *See* Dugan Testimony at 8-10.

letters/2002/advisory-letter-2002-9.pdf. In this connection, as of 2009, the OCC had entered into agreements with regulators of 45 states to coordinate the handling of complaints to “ensur[e] that complaints reach the right destination expeditiously.” Office of the Comptroller of the Currency, *Annual Report – Fiscal Year 2009* at 44.

ARGUMENT

Under settled precedent, the NBA preempts state restrictions on national banks’ authorized powers that could hamper the exercise of those powers. As a threshold matter, Section 1748.9 is preempted by the NBA itself. Section 1748.9 is the type of local restriction on banking powers granted under the NBA that has been found preempted over the last century and a half because it and similar state or local statutes and ordinances would subvert a uniform system of regulation for national banks. If laws such as Section 1748.9 were to be applied by multiple jurisdictions to national banks, the burdens imposed on national banks in the exercise of their permitted powers would be significant, requiring national banks to comply (and monitor compliance) with myriad state and local requirements on top of current national standards. For good reason, the application of Section 1748.9 to national banks is preempted under the NBA.

It is also preempted by the OCC Regulation. Section 7.4008 reflects the OCC’s reasoned policy that state and local interference with national banks’ exercise of their authorized powers is incongruent with the uniform supervision of national banks. This concern corresponds with the established basis for preemption under the NBA. In light of the OCC’s broad regulatory authority and the considered explanation that the OCC provided when promulgating Section 7.4008, the regulation satisfies the

standard for valid agency action. The Court of Appeal, which substituted its own judgment for that of the OCC, erred in concluding otherwise. The rationale provided in the Court of Appeal’s opinion for invalidating the regulation cannot withstand scrutiny. Indeed, the unprecedented decision is the paradigmatic example of the result that the OCC sought to avoid: duplicative and potentially inconsistent regulation of national banks’ exercise of the powers granted under the NBA. Such duplication and inconsistency would have deleterious effects on the consumer credit market by increasing costs and creating widespread operational uncertainty.

The Clearing House respectfully submits that the Court of Appeal’s decision should be reversed.

I. THE NBA PREEMPTS THE APPLICATION OF SECTION 1748.9 TO NATIONAL BANKS

A. The NBA Ordinarily Preempts Local Restrictions on a National Bank’s Exercise of Statutory Powers

As set forth above, the “history [of the NBA] is one interpreting grants of both enumerated and incidental ‘powers’ to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law.” *Barnett Bank*, 517 U.S. at 33.

Accordingly, the so-called “presumption against preemption” does not apply to the assessment of whether a law regulating banking activity is preempted under the NBA. *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005); see *Miller v. Bank of Am., N.A.*, 88 Cal. Rptr. 3d 723, 726 (Cal. Ct. App. 2009).

Since the passage of the NBA, the U.S. Supreme Court has consistently rejected state attempts at regulation of national banks’ “powers” to engage in the business of banking. See, e.g., *Farmers’ &*

Mechs. Nat'l Bank v. Dearing, 91 U.S. 29, 30-37 (1875) (holding that application of state law imposing penalty of forfeiture on national bank for charging legally impermissible interest on debt that went beyond applicable federal penalty was preempted); *Easton*, 188 U.S. at 227-39 (holding that state law imposing penalty for “fraudulent receiving of deposits” was preempted from applying to national banks where federal law imposed no such penalty); *Franklin Nat'l Bank*, 347 U.S. at 374-79 (holding that state law barring national bank from using words “saving” or “savings” in advertisement of personal deposit accounts was preempted); *Barnett Bank*, 517 U.S. at 30-37 (holding that state law that had the effect of barring national bank from providing insurance services was preempted); *see also Watters*, 550 U.S. at 13 (“Beyond genuine dispute, state law may not . . . curtail or hinder a national bank’s efficient exercise of any [power], incidental or enumerated under the NBA”).

Moreover, unless the NBA contains an “‘indication’ that Congress intended to subject [the national bank’s] power to local restriction,” a local attempt to impose “conditions” on national banks’ exercise of their banking powers must fail. *Barnett Bank*, 517 U.S. at 34-35. There is no requirement in Supreme Court precedent that the “restriction” of any single state on statutory powers must result in a specified threshold cost before preemption is appropriate; rather, the focus is on whether the type of state law, if effected against national banks, especially by several states, could impair the use of a power. Thus, for example, in *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 369 (1923), the Supreme Court held that a state law dissolving contracts of deposit after 20 years was preempted because, if states adopted “varying limitations” for dissolution, such divergent laws would tend to “impair the[] efficiency” of national banks’ use of powers. Similarly, in *Franklin Nat'l*

Bank, the Supreme Court concluded, *without* evidence of the extent of harm to national banks by the state law, that the state advertising restriction barring the use of two words would affect the national banks' use of a power. 347 U.S. at 377-78.¹¹

B. Because Section 1748.9 Expressly Regulates and Impairs the Exercise of Banking Powers Under the NBA, Its Application to National Banks Is Preempted

Section 1748.9, if applied to national banks, would facially regulate and undeniably burden their exercise of authorized powers under the NBA. Under settled authority, it is preempted – as the Ninth Circuit correctly concluded in *Rose v. Chase Bank*.

The state statute sets forth requirements that govern the manner in which a bank may make offers of convenience checks – calling for three specific disclosures that add to the mix of process and disclosure already required under federal law. *See* Section 1748.9(a) & (a)(1)-(3); *see* Respondent's Opening Brief ("Opening Br.") at 19-21 (explaining inconsistencies between Section 1748.9 and federal requirements). Because such convenience checks are extensions of personal credit, Section 1748.9 would restrict the use of the "power" to "loan[] money on personal security" if applied to national banks and thereby impair the efficient exercise of that power. 12 U.S.C. § 24 (Seventh); *Rose*, 513 F.3d at 1037. Accordingly, Parks' suggestion that Section 1748.9 is a background law of general applicability that escapes NBA preemption cannot be seriously

¹¹ In fact, much like with Section 1748.9, New York defended its law in *Franklin Nat'l Bank* as a disclosure statute, arguing that it would prevent national banks from using the words "saving" or "savings" to mislead customers into thinking they were dealing with state-chartered institutions. 347 U.S. at 374.

considered – the law is a facial restriction that only regulates a particular form of credit and is part of the state’s set of laws regulating credit cards.

The burdens are evident if this type of state law directly regulating banking activity is deemed applicable to national banks. *First*, there is the burden posed by Section 1748.9 itself. Each convenience check offer or solicitation that any national bank attempted to make to anyone in California would have to comply with Section 1748.9 and incorporate the specified disclosures in the specified manner. This would constitute a requirement superimposed by California on the NBA’s authorization of national banks to loan money through such instruments.¹²

Second, if such a local restriction was not preempted, national banks would potentially be subject to 50 separate state, and any number of additional local government, disclosure schemes that attempt to regulate national banks’ use of their authorized banking powers. Even if no single disclosure requirement impairs the efficiency of a national bank’s exercise of its powers or creates a significant obstacle or burden, the potential multiplicity certainly will. *See* OCC White Paper, *The Importance of Preserving a System of National Standards for National Banks* (Jan. 2010) at 11-15 (“OCC White Paper”).¹³

¹² This requirement would burden national banks by necessitating: the development of California-specific convenience checks; the tracking of customers to determine who moves to or from California; the implementation of a program to constantly monitor compliance with the California law; and the institution of a new, costly system for tracking mailings to California card customers and their responses.

¹³ The OCC White Paper is available as an attachment to the Statement of John C. Dugan, Comptroller of the Currency, before the Financial Crisis Inquiry Commission, Apr. 8, 2010, *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0408-Dugan.pdf (pages 54-72 of pdf).

Third, in addition to the burden of actually complying with the disparate state laws, the compliance mechanisms that national banks will have to develop to monitor the various state requirements will create a potentially even greater burden. If even a few targeted restrictions regulating banking activity are not preempted, the threat of litigation may be enough to ensure that national banks develop costly state-by-state compliance procedures to satisfy a far greater range of local restrictions, even if some of this larger set would be preempted.¹⁴

Based on these undeniable burdens, the application of Section 1748.9 to national banks is preempted by the NBA. As detailed above, state attempts at targeted regulation of national banks' exercise of statutory banking powers have long been preempted. *Farmers' & Mechs. Nat'l Bank*, 91 U.S. at 30-37; *Easton*, 188 U.S. at 227-39; *Franklin Nat'l Bank*, 347 U.S. at 374-79; *Barnett Bank*, 517 U.S. at 30-37. As the Supreme Court recognized nearly ninety years ago when discussing potential problems caused by another state banking law in *First Nat'l Bank of San Jose*, "[i]f California may thus interfere, other states may do likewise, and, instead of [California's limitations], varying limitations may be prescribed," undermining the national banking system. 262 U.S. at 370. *Barnett* and *Watters* reconfirm the long-established rule: unless Congress indicates otherwise, an attempt to impose specific local banking restrictions on the national banks' ability to exercise their powers is preempted under the NBA. *Barnett Bank*, 517 U.S. at 34-35; *Watters*, 550 U.S. at 13. This should be the case with Section 1748.9.

¹⁴ Indeed, the numerous costs and high degree of uncertainty caused by such state regulations were two of the reasons that the OCC promulgated Section 7.4008. See Section II.B(1), *infra*.

C. The Court of Appeal Provided No Basis for Departing from Settled Precedent Interpreting the NBA

The Court of Appeal’s explanation for departing from precedent and finding that NBA preemption did not apply to Section 1748.9 is erroneous for two primary reasons.

For one, rather than reviewing the range of guiding precedent laying out the boundaries of preemption under the NBA – a nearly 150-year body of law – the Court of Appeal merely summarized three cases which it said the Ninth Circuit relied on in *Rose*, embraced a single phrase describing one of many standards (“forbidding or impairing significantly”), and found that MBNA had not met the standard of that phrase in isolation. 109 Cal. Rptr.3d at 255. The Court did not note that as examples of preempted laws *Barnett Bank* specified those that unlawfully encroached on the rights and privileges of national banks, or hampered their functions, or interfered with their efficiency in performing those functions. 517 U.S. at 33-34 (citations omitted).

The Court of Appeal ignored the broad range of precedent interpreting preemption under the NBA. Indeed, as detailed in MBNA’s opening brief, the U.S. Supreme Court has used varying locutions to describe the NBA preemption standard. Opening Br. at 17-18. And as discussed above, based on the kinds of state laws that the Supreme Court has found preempted under the NBA (rather than any particular word used in a single case), Section 1748.9 is preempted under the Act.

The Court of Appeal’s second major error – inventing a novel evidentiary test for preemption out of thin air that requires factual evidence of a burden – has no basis in any Supreme Court decision. Indeed, the application of an evidentiary requirement that prevents judgment as a matter of law is particularly inappropriate for preemption determinations

under the National Bank Act, as the mere threat of protracted litigation requiring evidentiary hearings may force national banks to comply with state regulation that conflicts with or undermines the federal statutory and regulatory scheme.

II. SECTION 7.4008 REFLECTS A REASONABLE OCC DETERMINATION THAT MERITS DEFERENCE AND HAS CONTROLLING EFFECT

The Court of Appeal's decision is in error, *inter alia*, because it virtually ignored the deference that should be accorded to the OCC's determinations concerning the administration of national banks. Moreover, it fundamentally misunderstands the scope of the OCC's responsibility for national bank activity across the country. The Court's decision to remand the *Parks* case for a factual hearing on the burden of Section 1748.9 reflects that misdiagnosis. It is not only the impact of any one statute (even one which "merely requires" three disclosures to be attached to convenience checks, 109 Cal. Rptr. 3d at 255) with which the OCC must be concerned, but the prospect of multiple such statutes enacted by numerous jurisdictions that together would clearly "hamper" or "impair the efficiency" of, or even substantially impair, national bank operations. *Barnett Bank*, 517 U.S. at 33-34 (citations omitted).

Section 7.4008 addressed this very problem by preempting state statutes that impose disclosure requirements. In contrast, after the hearing envisioned by the Court of Appeal, what would be next? If Oregon enacts its own, somewhat different disclosure statute, is there to be a hearing on the impact of the California and Oregon statutes together? Could the California statute escape preemption because it was the first, but Oregon's statute be preempted? And if not Oregon, what about the third or fourth state disclosure statutes? Shall there be a series of hearings

nationwide to determine whether the statutes' cumulative effect constitutes the "significant impairment" that the Court of Appeal requires? These questions compel the answer – the prospect of multiple states' legislation interferes materially with national banks' powers.

The Court of Appeal's proposition to MBNA, that it can still demonstrate that Section 1748.9 imposes burdens on national banks that significantly impair the authority granted by the NBA, 109 Cal. Rptr. 3d at 260, poses too narrow a question. The OCC regulates the national banking system under the NBA, so it is the potential broader impact for which the OCC has responsibility. And it has long been established that preemption is to be found where a multiplicity "of state legislation, . . . if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton v. Iowa*, 188 U.S. at 229 (proposed application of state law penalizing fraudulent receiving of deposits to national banks was "*not based on a correct conception of Federal legislation creating and regulating national banks*") (emphasis added); *see First Nat'l Bank of San Jose*, 262 U.S. at 370.

The Court of Appeal concedes that the OCC has the "authority to issue regulations interpreting the preemptive effect of the NBA and other federal law with regard to national banks," 109 Cal. Rptr. 3d at 258, that federal regulations may preempt state law just as fully as state statutes, *id.* at 257, and that Section 7.4008(d), if valid, preempts Section 1748.9. *Id.* at 258. But the Court ignored the extensive investigation that preceded the OCC's rulemaking and the deference that determination deserves, and instead substituted its own judgment for that of the agency. This is not permitted. *See De la Cuesta*, 458 U.S. at 169, 170 (holding that, even if "the wisdom of [the regulator's] policy decision is not uncontroverted, . . . neither is it arbitrary or capricious," and so "[o]ur

inquiry ends there”). The Court of Appeal narrowed the focus of the issue to whether Section 1748.9 by itself constituted a significant impairment to a national bank’s ability to exercise its powers, without ever acknowledging the broader role of the OCC to evaluate the impact of such statutes nationwide, and apparently without appreciation for the OCC’s experience that informs that decision and warrants the recognized deference to OCC decision-making.

A. The OCC’s Conclusions on Matters of Federal Banking Law—Including Preemption of State Law—Have Controlling Weight If Reasonable

In line with the Supreme Court’s fundamental approach to judicial review of agency action, an action, including the promulgation of regulations, must be upheld by the courts if it “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute.” *City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988); *accord Chevron*, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”). Recognizing the central role played by the OCC and other bank regulatory agencies, the Supreme Court and lower courts have consistently applied this rule of deference. “The Comptroller of the Currency . . . is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws.” *Smiley*, 517 U.S. at 739 (citing *NationsBank*, 513 U.S. at 256-57); *see also De la Cuesta*, 458 U.S. 141 (deferring to conclusion of predecessor to Office of Thrift Supervision). With specific reference to OCC regulations, if a regulation “is reasonable in light of the legislature’s revealed design,” the OCC’s

conclusion receives “*controlling weight.*” *NationsBank*, 513 U.S. at 257 (emphasis added) (citation omitted); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 318 (2d Cir. 2005) (citing *NationsBank* and *De la Cuesta*). The Court of Appeal’s failure to observe this precedent is manifest error.

The OCC “bears primary responsibility for surveillance of the ‘business of banking’ authorized by” 12 U.S.C. § 24 (Seventh). *NationsBank*, 513 U.S. at 256. Furthermore, under 12 U.S.C. § 93a, the OCC is authorized to “prescribe rules and regulations to carry out the responsibilities of the office.” Because national banks are empowered to “loan[] money on personal security,” 12 U.S.C. § 24 (Seventh), the challenged OCC Regulation is at the heart of the agency’s administrative purview.¹⁵

That the OCC’s regulation expressly preempts certain state law does not affect the level of deference accorded it. In numerous leading preemption cases, the Supreme Court has upheld a regulation the stated intent of which was to displace contrary state law. *De la Cuesta*, 458 U.S. at 158 (quoting regulator’s statement that “*Federal loan associations shall not be bound by or subject to any conflicting State law which imposes different . . . due on sale requirements*”); see also *New York v. F.C.C.*, 486 U.S. at 65-66.¹⁶

¹⁵ Similarly, banking actions that allow the extension of personal credit, such as convenience checks offered to banking customers by MBNA, fall squarely within this enumerated “power” of national banks subject to OCC regulation. *Rose*, 513 F.3d at 1037.

¹⁶ *De la Cuesta* also explicitly rejects Parks’ suggestion that Congress must expressly grant an agency “general preemptive powers” before the agency may promulgate a regulation that preempts state law: “A pre-emptive regulation’s force does not depend on express congressional authorization to displace state law.” *De La Cuesta*, 458 U.S. at 154.

Accordingly, the OCC’s preemptive regulations have controlling effect if reasonable.¹⁷

Indeed, the OCC’s “power to preempt inconsistent state law,” provided “[it] does not authorize activities that run afoul of federal laws governing the activities of the national banks,” has long been recognized. *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983) (recognizing Comptroller’s authority to promulgate preemptive regulations under 12 U.S.C. § 93a); *see also, e.g., Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555-56 (9th Cir. 2010) (upholding companion regulation to Section 7.4008 explicitly preempting state laws that “obstruct, impair, or condition” a national bank’s use of “real estate lending powers”); Opening Br. at 39-42 (citing decisions applying OCC regulations that expressly preempt state law). Furthermore, as the Ninth Circuit has confirmed, “12 U.S.C. § 43 specifically contemplates that the OCC sometimes has authority to preempt state laws such as those here at issue” by setting forth procedural requirements for OCC regulations that conclude that any “[s]tate law regarding community reinvestment, *consumer protection*, fair lending, or the establishment of intrastate branches” is preempted. *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 962-63 (9th Cir. 2005) (emphasis added); *Burke*, 414 F.3d at 314 (“Congress has expressly recognized the OCC’s power to preempt

¹⁷ As one leading case has explained, the framework for reviewing administrative actions for reasonableness under *Chevron* and preemptive administrative regulations for reasonableness under *De la Cuesta* is “the same.” *Burke*, 414 F.3d at 314-15 & n.6 (citing cases). “Under *de la Cuesta*, which addressed preemptive regulations in a decision prior to *Chevron*,” a court “would review the OCC regulations ‘only to determine whether [the agency] has exceeded [its] statutory authority or acted arbitrarily,’” and “would enforce the regulations unless they are unreasonable or inconsistent with the statutory scheme.” *Id.* n.6 (quoting *De la Cuesta*, 458 U.S. at 154).

particular state laws by issuing opinion letters and interpretive rulings, subject to certain notice-and-comment procedures”) (citing 12 U.S.C. § 43).¹⁸

B. Section 7.4008 Reflects A Reasonable Consideration of Policies Subject to the OCC’s Authority Under the NBA

Because “the OCC generally has the authority to promulgate the regulations at issue,” a court “must defer to the regulations if they reflect a reasonable construction of the statutory scheme.” *Burke*, 414 F.3d at 318 (citing, *inter alia*, *NationsBank*, 513 U.S. at 257; *De la Cuesta*, 458 U.S. at 153-54).

Section 7.4008 and its companion regulations implemented in February 2004 were “full-dress regulation[s] . . . adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation.” *Smiley*, 517 U.S. at 741; 69 Fed. Reg. 1904. The OCC’s explanations in connection with this deliberative rulemaking (including its review and assessment of more than 2600 comments received during the rulemaking from members of Congress, industry groups, state officials and others) confirm that the agency followed comprehensive procedures and closely observed *Barnett Bank* and other established precedent before publishing the regulations, and attempted to “accommodat[e] conflicting policies that were committed to the agency’s care.” *De la Cuesta*, 458 U.S. at 154; 69 Fed. Reg. 1904 (final rule); “Bank Activities and Operations; Real Estate Lending and Appraisals,” 68 Fed. Reg. 46119 (Aug. 5, 2003) (proposed rulemaking).

¹⁸ Indeed, even the Court of Appeal recognized that the OCC complied with the procedural requirements of 12 U.S.C. § 43(a) and “had authority to issue regulations interpreting the preemptive effect of the NBA and other federal law on state law with regard to national banks.” 109 Cal. Rptr. 3d at 258.

(1) The OCC Reasonably Determined That Recent Application of State Laws to National Banks’ Banking Activities Prevented Banks from Fully Operating in the Manner Authorized by Federal Law

The regulatory aim of the OCC’s rulemaking that underpinned Section 7.4008 and its companion regulations – to provide “clarification of the circumstances when state laws or regulations apply to activities and operations of national banks” – was indisputably reasonable. 68 Fed. Reg. 46119-20. Indeed, this purpose is at the core of the OCC’s role as regulator of national banks under the NBA, as well as the NBA’s goal of ensuring the uniform regulation of “national banks’ engagement in the business of banking.” *See Watters*, 550 U.S. at 13-14. As the OCC explained, without such guidance, “national banks, particularly those with customers in multiple states, face[d] uncertain compliance risks and substantial additional compliance burdens and expense that, for practical purposes, materially impact[ed] their ability to offer particular products and services.” 68 Fed. Reg. at 46120.

The OCC’s conclusions supporting its preemptive regulation were likewise well-founded. Based on the OCC’s “experience supervising national banks,” legal inquiries made to the OCC, and “the extent of litigation in recent years over these state efforts,” the OCC concluded that “national banks’ ability to conduct operations to the full extent authorized by Federal law has been curtailed” as a result of “increasing efforts by states and localities to apply state and local laws to bank activities.” 69 Fed. Reg. at 1908. The OCC noted that state and local laws enacted in recent years, including, in particular, laws regulating fees, requiring disclosures and imposing conditions on lending and licensing, had “created higher costs and increased operational challenges.” *Id.* & n.24 (providing

examples of multi-million dollar costs for compliance with certain recently enacted state laws). Such costs and operational challenges are inevitably bad for consumers. The regulatory burden and cost from the “overlay of state and local standards and requirements on top of the Federal standards and OCC supervisory requirements” were particularly acute for those national banks that, because of the elimination of legal, technological, and other barriers to interstate banking and financial services, now operate on a multi-state or nationwide basis. *Id.*

The OCC also emphasized that even idiosyncratic regulations imposed on a national bank by a single state could have a negative effect on that bank’s customers, and could lead banks to pass costs onto other customers, withdraw from certain markets, or cease offering certain products within the state. *Id.*

Accordingly, the OCC concluded that “[t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure.” *Id.* The accompanying regulatory action – preempting the state laws regulating banking activity that caused this interference with national banks’ exercise of statutory banking powers – comports with the Supreme Court’s admonition against “[d]iverse and duplicative superintendence of national banks’ engagement in the business of banking.” *Watters*, 550 U.S. at 13-14.

**(2) The Text and Scope of the OCC Regulation
Reasonably Comported with Previous Authority
Concerning Banking Preemption**

The text and scope of the preemptive regulation that the OCC adopted also reflected a reasonable determination by the OCC within its statutory authority.

The OCC took great pains to ensure that the preemptive language of Rule 7.4008(d)(2)(a) and related regulations – preempting state laws that “obstruct, impair, or condition” a national bank’s use of designated statutory powers – tracked Supreme Court precedent governing banking preemption. 69 Fed. Reg. at 1910 & nn. 51-53; *see* Section 7.4008(d)(1).¹⁹ The OCC noted that the various formulations reflected the conclusion that “state laws do not apply to national banks if they impermissibly contain a bank’s exercise of a federally authorized power.” 69 Fed. Reg. at 1910. The OCC added that its preemptive regulations were designed to adhere to existing Supreme Court precedent, and were not intended to grant new powers to or expand existing powers of the national banks. *Id.* at 1909-10.

Furthermore, the specific types of state laws addressed by Section 7.4008(d)(2) and the related regulations were informed by the

¹⁹ *See, e.g., Barnett Bank*, 517 U.S. at 34 (“[W]here Congress has not expressly conditioned the grant of ‘power’ upon a grant of state permission, it has found that no such condition applies.”); *Davis*, 161 U.S. at 283 (state law preempted if it “frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge their duties”); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (same); *Nat’l Bank v. Commonwealth*, 76 U.S. 353, 362 (1869) (state law governing banks preempted if “interfere[s] with, or impair[s] [the banks’] efficiency”); *see also Hines v. Davidowitz*, 312 U.S. 52, 76-77 (1941) (conflict preemption applies if state statute’s “operation interferes with or obstructs” applicable federal power).

OCC’s review of court rulings and the OCC’s prior determinations as to the preemption of state laws regulating the banking activities of national banks. 69 Fed. Reg. at 1911 n.56; 68 Fed. Reg. at 46122-23. Of relevance to this case, the OCC confirmed its previous position that “state laws that interfere with a national bank’s Federally-granted power to lend and to engage in activities incidental to its lending operations” were among the various state laws that had been held to be preempted, as were state laws “requir[ing] national banks to make disclosures in connection with specified credit card repayment terms.” 68 Fed. Reg. at 46123 (summary of prior OCC positions); *see American Bankers Ass’n v. Lockyer*, 239 F. Supp. 2d 1000, 1013-15 (E.D. Cal. 2000) (same).

Finally, the OCC also explicitly provided that “certain types of state laws are not preempted and would apply to national banks to the extent that they are consistent with national banks’ Federal authority . . . because their effect on . . . lending operations of national banks is only incidental.” 69 Fed. Reg. at 1911-12 (discussing parallel provision to Section 7.4008(e)). The OCC’s exclusion of “laws that do not attempt to regulate the manner or content of national banks’ . . . lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power,” reasonably limited the regulation’s preemptive effect. 69 Fed. Reg. at 1912.

(3) The OCC’s Application of Federal Consumer Protection Standards Reasonably Balanced Relevant Policies

Lastly, in light of the OCC’s mechanisms for ensuring national banks’ compliance with applicable consumer protection laws discussed above, Section 7.4008 and its companion rules also demonstrated

the OCC's reasonable balancing of the policy goals relevant to the regulation.

This balance was evidenced both in the specific consumer-protection provisions of Section 7.4008 and by the OCC's enforcement of federal standards against predatory lending and abusive practices if informal mechanisms are unsuccessful or if the conduct is meaningfully injurious to consumers. The OCC emphasized that Section 7.4008(b)-(c) of the new regulations contained anti-predatory lending standards and applied the consumer protections of Section 5 of the FTC Act, prohibiting a national bank from engaging in "unfair or deceptive practices." *Id.* at 1912. Thus, the OCC reasonably observed that its use of Section 5 FTC actions and other enforcement proceedings to police national banks affirmed its "commit[ment] to assuring that abusive practices . . . continue to have no place in the national banking system." *Id.* at 1913-14. Furthermore, as discussed above, these provisions complemented a vast "array of Federal consumer protection standards [to] ensure that national banks are subject to consistent and uniform Federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their lending activities." *Id.* at 1912 & nn.10, 61.²⁰

C. The Court of Appeal Did Not Consider the OCC's Deliberative Process or Reasoned Considerations and Erred in Finding Section 7.4008 Invalid

In ruling that the Section 7.4008 "does not suggest a reasonable attempt to describe and interpret the reach of NBA preemption," the Court of Appeal *entirely* ignored the OCC's views as set forth in its

²⁰ See *supra* n. 8 (listing federal consumer protection laws applicable to national banks).

notices of proposed and final rulemaking. 109 Cal. Rptr. 3d at 260. Thus, the court did not mention the OCC's deliberative consideration of the problem addressed by the regulations or the agency's attempts to tailor the preemptive regulation to existing judicial and regulatory precedent and to balance relevant policies within its purview. Rather, the court relied on inapposite cases and otherwise provided only unsustainable and deficient reasons for finding the OCC's regulation invalid.

(1) *Cuomo* and *Perdue* Do Not Control

The Court of Appeal relied on a selective reading of the U.S. Supreme Court's ruling in *Cuomo v. Clearing House Ass'n, L.L.C.* and this Court's opinion in *Perdue v. Crocker Nat'l Bank* to support its conclusion that the OCC's interpretation of the NBA's preemptive scope was invalid. In light of the crucial differences between the regulations at issue in those cases and Section 7.4008, however, *Cuomo* and *Perdue* cannot provide meaningful support for the Court of Appeal's conclusion.

Cuomo involved a regulation that enforced a specific preemptive provision of the NBA, the so-called visitorial powers clause. *See* 12 U.S.C. § 484(a). The analysis in *Cuomo* and other cases interpreting that section is inapposite here, because they focus on the specific meaning of the terms of that section and not the more basic question of whether specific bank powers are impaired.

The OCC regulation at issue in *Cuomo* interpreted the exclusive grant of "visitorial powers" to the OCC to prohibit states from "prosecuting enforcement actions except in 'limited circumstances authorized by federal law.'" 129 S. Ct. at 2715. Accordingly, the U.S. Supreme Court understood the OCC to read the term "visitorial powers" to include all "ordinary enforcement of the law," and therefore to bar states

from any enforcement action of any state law against national banks. *Id.* at 2715. This interpretation of “visitorial powers,” the U.S. Supreme Court concluded, was incorrect. *Id.* at 2715-17. In contrast, as discussed above, Section 7.4008 focuses on state laws that would interfere with national banks’ exercise of banking powers and expressly leaves untouched state laws with only an incidental impact on banking activities of national banks.²¹

Furthermore, unlike the regulations at issue in *Perdue*, Section 7.4008 and its companion regulations underwent an extensive notice-and-comment rulemaking process in which the OCC “extensively developed” the policy basis for the rule, as well as its relationship to prior understandings of the scope of NBA preemption. *Burke*, 414 F.3d at 320 (discussing final 2004 rulemaking with approval). In contrast, the plaintiff attacked the regulation in *Perdue*, issued just prior to the argument before this Court, because it underwent no such deliberative process and did not contain a well-considered explanation of the burdens posed on national banks that supported preemption. 38 Cal. 3d at 935 & n.23; 49 Fed. Reg. 28237 (July 11, 1984) (final rule); 48 Fed. Reg. 54319 (Dec. 2, 1983) (prior rule). Under settled administrative law and NBA preemption principles, based on the OCC’s reasonable considerations in promulgating Section

²¹ Relatedly, Parks’ strained claim that a discussion in *Cuomo* somehow *sub silentio* abrogated *Barnett Bank* and overruled *Rose v. Chase Bank* is unfounded, as the passage in *Cuomo* does not address state regulation of authorized banking powers at all resembling Section 1748.9. *Cf.* Answer Br. at 38. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) involved a state law prohibiting an action – bank branching – that national banks were not empowered to engage in at the time, and *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 250-52 (1944) involved a standard escheat law that the Court expressly distinguished from the novel and potentially burdensome California provision it had struck down in *First Nat’l Bank of San Jose*.

7.4008, it is a valid regulation; no similar conclusion was possible in *Perdue* as the OCC had failed to provide a reasoned basis for preempting state law.

(2) No Other Reason Provided by the Court of Appeal Justifies Invalidating Section 7.4008

Even beyond its reliance on inapposite cases, the reasoning of the Court of Appeal’s decision displayed numerous shortcomings that further support reversal.

First, the Court of Appeal’s reliance on the fact that “neither the NBA nor TILA expressed an intention to create [a] bright line exemption,” is misplaced, as this observation hardly establishes that Section 7.4008 is invalid. *See* 109 Cal. App. 3d at 260. Numerous courts have recognized that the absence of preemptive effect accorded to a particular federal consumer protection statute, such as TILA, does not affect the preemption analysis under the NBA or similar statutes. *See Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1007-1008 (9th Cir. 2008) (TILA’s anti-preemption provision does not “trump” preemption under Home Owners’ Loan Act (“HOLA”) or Office of Thrift Supervision regulations); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 565-66 (9th Cir. 2002) (EFTA’s anti-preemption provision does not trump NBA or HOLA preemption).

Second, the Court of Appeal’s conclusion that the OCC had not been “delegated the power” to promulgate preemptive regulations such as Section 7.4008 is demonstrably inaccurate. 109 Cal. Rptr. 3d at 260. As discussed above, both *De la Cuesta* – which focused on a rule issued by the predecessor to the Office of Thrift Supervision (“OTS”) that had the stated purpose of preempting contrary state law – and 12 U.S.C. § 43(a) confirm

that the OCC is authorized to make explicit determinations that certain state laws are preempted. The Court of Appeal (and Parks) are wrong to focus on statements from the dissent in *Watters v. Wachovia*, 550 U.S at 44, *see* 109 Cal. Rptr. 3d at 260; Answer Brief at 25, 31, to assert that a regulation whose purpose is to preempt state law is invalid. The “purpose” of the regulatory action, as explained at length by the OCC, was not to preempt for preemption’s sake, but to provide clarity to national banks concerning the extent to which state law affects their authorized banking activities and to enable national banks to exercise fully their authorized powers. These stated goals are undeniably germane to the OCC’s duties as an administrator of the national banks under the NBA’s federal regime. Moreover, the language of the *dissent* in *Watters* cannot control, or even be persuasive, when the majority opinion in *Watters* affirmed that the preemptive regulation issued by the OCC had the same scope as preemption established under the Act.

Third, the Court of Appeal’s position that there would be no basis for preemption “without a factual record” in this litigation regarding the burden imposed by the California law overlooks the reasonable, factual, policy determination underlying the OCC’s regulation (putting to one side that the “factual record” requirement would foster the very burdens preemption is meant to prevent). *Cf.* 109 Cal. Rptr. 3d at 260.

The OCC concluded that preemption was warranted for state laws that it saw as curtailing national banks’ exercise of their authorized powers. 69 Fed. Reg. at 1908. No further “factual showing” *in litigation* is necessary to preempt the state banking laws. Cases interpreting NBA preemption do not support the Court of Appeal. For example, federal courts of appeals decisions finding state restrictions on ATM and check cashing fees to be preempted did not require any demonstration of the

extent of the impact of the state regulation on national banks. *See Bank of Am. v. S.F.*, 309 F.3d at 562-64; *Wells Fargo Bank of Tx. N.A. v. James*, 321 F.3d 488, 492-95 (5th Cir. 2003). Similarly, the U.S. Supreme Court in *Barnett Bank* did not require any evidentiary demonstration of the impact of the challenged state law on national banks in finding it preempted. 517 U.S. at 30-37. Furthermore, even the lone federal district court case that the Court of Appeal cited for its evidentiary rule confirms that the OCC's reasonable determination of the interference posed by particular regulations, and the applicability of preemption under the NBA, is controlling. In that case, the court *explicitly* "look[ed] to the OCC's [reasonable] interpretation of the NBA" in assessing each of the disclosure requirements at issue in that case. *See Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d at 1017-18 (deferring to OCC's formal conclusion that certain challenged credit disclosure laws were preempted). Indeed, Parks himself has declined to defend the Court of Appeal's position that a threshold factual or evidentiary showing is required to establish preemption in this case.

Finally, the Court of Appeal's ruling that Section 7.4008 was invalid also conflicted with the decisions of many other courts applying or approving the regulation (or its companion regulations preempting laws concerning deposit-taking and real estate lending activities). *See* Opening Br. at 39-41 (citing cases). The Court of Appeal did not seriously attempt to evaluate the reasoning of these many contrary decisions from courts around the country (including every federal district court in California). 109 Cal. App. 3d at 257-58. If the Court of Appeal's decision stands, certain state laws regulating national banks' powers will apply disparately, not just on a state-by-state basis, but on a court system-by-court system basis. Even if there were not a number of other reasons to overturn the

Court of Appeal’s decision, the policy of uniform regulation of national banks under the NBA and this Court’s general rule of uniformity of decision concerning matters of federal law, *see* Opening Br. at 11-12, would both support reversal.

D. Disclosure Laws Targeting Banking Activity Such As Section 1748.9 Clearly Interfere with the Function and Regulation of National Banks

The readily apparent problems posed to the national banks’ banking activities if the banks were subjected to state laws such as Section 1748.9 plainly confirm the reasonableness of the OCC’s regulation and the conclusion that state and local disclosure laws applying to national bank lending activities are preempted.

As a recent publication of the Comptroller’s Office explains, allowing states to apply different disclosure requirements to banking activities could lead to a thicket of inconsistent and counterproductive disclosure requirements. For example, different states could (1) “impose different disclosure requirements in connection with sales and solicitations of particular products,” (2) use “[d]isclosure requirements [to] dictate not just substantive content, but also presentation and placement of disclosures, further impeding the ability of consumers to comparison shop,” and (3) “impose different standards concerning manner of negotiation, sales and solicitation of particular financial products and services with respect to consumers in each state.” OCC White Paper at 14. As the Comptroller observed, there would be no reason to believe that any state standard for disclosures would be better than the federal disclosure standards produced through a notice-and-comment rule-writing process. *Id.* at 15.

And not only would the differences among states’ disclosure requirements affect national bank operations, but they would “ha[ve] real

downsides for consumers” by increasing costs of compliance – which could be passed on to consumers. *Id.* For it nearly goes without mentioning that the potential for inconsistent state requirements will necessarily lead to a greater compliance burden for national banks. This burden would be for little potential gain in terms of consumer protection, in light of the existing federal consumer protection laws that apply to national banks and the OCC’s monitoring and enforcement of national banks’ compliance with these consumer protection standards.

Section 1748.9, which became effective in 2000, is the kind of recent state law regulating the banking activities of national banks that caused the OCC to propose Section 7.4008 and its companion regulations in 2003. *See* 69 Fed. Reg. at 1908; 68 Fed. Reg. at 46119-20. Parks has not pointed to a single other court holding that Section 7.4008 is invalid or enforcing a similar state banking disclosure requirement against national banks. This is scarcely surprising, because were such targeted state regulations aimed at bank-lending products to be deemed applicable to national banks, they could lead to exactly the types of burdensome results that the Comptroller describes, with no discernible benefit (but rather, probable harm) to the national banking system and consumers.

CONCLUSION

For the foregoing reasons, the Clearing House respectfully submits that the Court of Appeal's decision should be reversed.

Dated: May 5, 2011

Respectfully submitted,



Bruce E. Clark (*pro hac vice*) (*pending*)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Achyut J. Phadke (CSBN 261567)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

Of counsel:

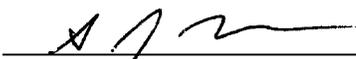
H. Rodgin Cohen
Michael H. Wiseman

CERTIFICATION OF WORD COUNT

As counsel for *amicus curiae* The Clearing House Association L.L.C., I certify pursuant to Rules 8.520(b) and 8.204 of the Cal. Rules of Court that this brief consists of 10,430 words, including footnotes, but excluding the title page, tables, certification, date, and signature block, as calculated by the “word count” tool in the word processing program (Microsoft Word) that was used to prepare this brief.

Dated: May 5, 2011

Respectfully submitted,



Achyut S. Phadke
SULLIVAN & CROMWELL LLP

CERTIFICATE OF SERVICE

I, Jennifer Tekiel, declare:

I am employed in the City of Palo Alto, State of California. I am over the age of eighteen years and am not a party to this action. My business address is Sullivan & Cromwell LLP, 1870 Embarcadero Road, Palo Alto, California 94303.

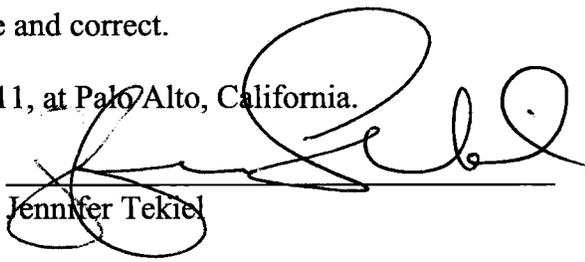
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 5, 2011, at Palo Alto, California.


Jennifer Tekiel

SERVICE LIST

Counsel for Plaintiff/Appellant

Michael Raymond Vachon
Law Offices of Michael R. Vachon
16935 W. Bernardo Drive, Suite 175
San Diego, CA 92127

Counsel for *Amicus Curiae* the Attorney General

Sheldon H. Jaffe
Office of the Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

Courtesy Copy

District Attorney for the County of
Orange
401 Civic Center Drive
Santa Ana, CA 92701

Courtesy Copy

Clerk of the Court
California Court of Appeal
Fourth Appellate District
Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Counsel for Defendant/Respondent

Nancy L. Perkins
Arnold & Porter, LLP
555 Twelfth Street
Washington, DC 20004

Laurence Jeffrey Hutt
Arnold & Porter, LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017

Counsel for *Amicus Curiae* Consumer Attorneys of California

James Mark Moore
Spiro Moss LLP
11377 W. Olympic Boulevard, 5th Fl
Los Angeles, CA 90064

David Mills Arbogast
Arbogast & Berns, LLP
6303 Owensmouth Avenue, 10th Fl
Woodland Hills, CA 91367

Courtesy Copy

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230

Courtesy Copy

Clerk of the Court
California Superior Court
County of Orange
Civil Complex Center
751 W. Santa Ana Blvd.
Santa Ana, CA 92701