S18_703

No. ______

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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JUN 21 2010
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Deputy

PARKS, ET AL.,

PLAINTIFFS AND APPELLANTS,

vs.

MBNA AMERICA BANK, N.A. (USA),

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW 2

WHY REVIEW SHOULD BE GRANTED 3

BACKGROUND AND PROCEDURAL HISTORY 5

A. The Trial Court Proceedings 5

B. The Court of Appeal's Decision 7

ARGUMENT 9

I. *ROSE* WAS CORRECTLY DECIDED AND THE COURT OF APPEAL ERRED IN ISSUING A DIRECTLY CONTRARY RULING ON THE SAME ISSUES OF FEDERAL LAW. 9

II. THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH LONGSTANDING U.S. SUPREME COURT PRECEDENT AS WELL AS NUMEROUS RULINGS BY THE LOWER FEDERAL COURTS AND BY VARIOUS STATE COURTS. 12

A. The Court of Appeal Misconstrued the Proper Test for Preemption Under the National Bank Act 12

B. There is No Case Law Supporting the Evidentiary Requirement Announced by the Court of Appeal 15

C. The Court of Appeal's Evidentiary Requirement Is At Odds With the Fundamental Purpose of Preemption and Sound Public Policy 18

III. THE COURT OF APPEAL ERRED IN HOLDING THE OCC'S DULY PROMULGATED PREEMPTION REGULATION TO BE INVALID. 20

A. The Court of Appeal's Decision Invalidating Section 7.4008 Conflicts With the Growing Body of Case Law Applying the OCC's Preemption Regulations....20

B. The Court of Appeal Ignored the Scope of the OCC's Regulatory Authority and Misinterpreted the Nature of the OCC's Preemption Regulations....22

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Aguayo v. U.S. Bank,
658 F. Supp. 2d 1226 (S.D. Cal. 2009) 21

American Bankers Association v. Lockyer,
239 F. Supp. 2d 1000 (E.D. Cal. 2002) 15, 16, 17

Anderson Nat'l Bank v. Luckett,
321 U.S. 233 (1944) 12

Augustine v. FIA Card Services, N.A.,
485 F. Supp. 2d 1172 (E.D. Cal. 2007) 20

Barnett Bank v. Nelson,
517 U.S. 25 (1996) .... *passim*

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 9

Conference of State Bank Supervisors v. Conover,
710 F.2d 878 (D.C. Cir. 1983) 23, 24

Cooper Indus., Inc. v. Aviall Servs., Inc.,
543 U.S. 157 (2004) 16

Cuomo v. Clearing House Association,
557 U.S. –, 129 S. Ct. 2710 (2009) 1, 24, 25, 26

In re Countrywide Fin. Corp. Mortgage Marketing and Sales Practices Litigation,
601 F. Supp. 2d 1201 (S.D. Cal. 2009) 21

Easton v. Iowa,
188 U.S. 220 (1903) 13

Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 23, 27

Franklin National Bank v. New York,
347 U.S. 373 (1954) 3, 10, 11, 17, 19

Fultz v. World Sav. & Loan Ass'n,
2008 WL 4131512 (W.D. Wash. Aug. 18, 2008) 21

Hines v. Davidowitz,
312 U.S. 52 (1941) 12

Inv. Co. Inst. v. Camp,
401 U.S. 617 (1971) 22

Kauinui v. Citibank (S. Dakota),
2009 WL 3530373 (D. Haw. Oct. 28, 2009) 21

Marquette Nat'l Bank v. First of Omaha Corp.,
439 U.S. 299 (1978) 14

Martinez v Wells Fargo Home Mortg., Inc.,
598 F.3d 549 (9th Cir. 2010) 4, 21

McClellan v. Chipman,
164 U.S. 347 (1896) 12

Monroe Retail, Inc. v. RBS Citizens, N.A.,
589 F.3d 274 (6th Cir. 2009) 4

Montgomery v. Bank of Am.,
515 F. Supp. 2d 1106 (C.D. Cal. 2007) 21

Nat'l Bank v. Commonwealth,
76 U.S. (9 Wall.) 353 (1869) 12

NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,
513 U.S. 251 (1995) 22

O'Donnell v. Bank of Am.,
2010 WL 934153 (N.D. Cal. Mar. 15, 2010) 21

Rose v. Chase Bank USA, N.A.,
513 F.3d 1032 (9th Cir. 2008) .... passim

Rose v. Chase Manhattan Bank USA,
396 F. Supp. 2d 1116 (C.D. Cal. 2005) 8, 11, 21

Smiley v. Citibank,
517 U.S. 735 (1996) 27

Trombley v. Bank of Am.,
– F. Supp. 2d –, 2010 WL 2202110 (D.R.I. June 3, 2010) 21

United States v. Shimer,
367 U.S. 374 (1961) 27

Wachovia Bank, N.A. v. Burke,
414 F.3d 305 (2d Cir. 2005) 23

Wachovia Bank, N.A. v. Watters,
334 F. Supp. 2d 957 (W.D. Mich. 2004) 23, 24

Watters v. Wachovia Bank, N.A.,
550 U.S. 1 (2007) .... *passim*

Weiss v. Wells Fargo Bank,
2008 WL 2620886 (W.D. Mo. July 1, 2008) 21

STATE CASES

Barrett v. Rosenthal,
40 Cal. 4th 33 (2006) 4, 10

Citibank, (S.D.), NA v. Eckmeyer,
2009 WL 1452614 (Ohio Ct. App. May 8, 2009) 4

Citibank, S.D., N.A. v. Palma,
646 S.E.2d 635 (N.C. Ct. App. 2007) 4

Etcheverry v. Tri-Ag Service, Inc.,
22 Cal. 4th 316 (2006) 9, 10

In re Farm Raised Salmon Cases,
42 Cal. 4th 1077 (2008) 18

Mech. Contractors Ass'n. v. Greater Bay Area Ass'n.,
66 Cal. App. 4th 672 (1998) 9

Miller v. Bank of Am., N.A. (U.S.A.),
170 Cal. App. 4th 980 (2009) 4, 20, 24

Patterson v. Citifinancial Mtg. Corp.,
– N.W.2d –, 2010 WL 2076774
(Mich. Ct. App. May 25, 2010) 4

People v. Bradley,
1 Cal. 3d 80 (1969) 9

Perdue v. Crocker National Bank,
38 Cal.3d 913 (1985) 1, 15, 24, 25, 26, 27

Smiley v. Citibank (S.D.), N.A.,
11 Cal. 4th 138 (1995), *aff'd*, 517 U.S. 735 (1996) 5, 13, 14, 22

Smith v. Wells Fargo Bank,
135 Cal. App. 4th 1463 (2005) 4

Spielholz v. Super. Ct.,
86 Cal.App.4th 1366, 1371 (2001) 18

STATUTES AND REGULATIONS

12 U.S.C. § 1 21

12 U.S.C. § 21 *et seq* 1, 22

12 U.S.C. § 24(Seventh) 7

12 U.S.C. § 26 22

12 U.S.C. § 43(a) 24, 26

12 U.S.C. § 81-92a 22

12 U.S.C. § 93a 21, 22, 24

12 U.S.C. § 181-200 22

12 U.S.C. § 481 22

12 U.S.C. § 484 25

12 U.S.C. § 1464(a) 23

Bus. & Prof. Code § 17200 *et seq.* 6, 8, 9, 10, 11

Civil Code § 1748.13 .... 15, 16-17

Civil Code § 1748.9 .... *passim*

12 C.F.R. § 7.4007 .... 3, 20, 25

12 C.F.R. § 7.4008 .... *passim*

12 C.F.R. § 7.4008(d)(1) 7, 21

12 C.F.R. § 7.4008(d)(2) 16

12 C.F.R. § 7.4008(d)(2)(viii) 7, 16, 20

12 C.F.R. § 7.4009 .... 4, 25

12 C.F.R. § 34.4 .... 3, 20, 25

12 C.F.R. § 560.2 16

OTHER AUTHORITIES

U.S. Const., art. VI, cl. 2 4

Cong. Globe, 38th Cong., 1st Sess. 1873 13

48 Fed. Reg. 54,319 26

48 Fed. Reg. 54,320 26

49 Fed. Reg. 28,237 26

49 Fed. Reg. 28,238 26

69 Fed. Reg. 1904 27

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Defendant and Respondent MBNA America Bank, N.A. ("MBNA") respectfully petitions this Court for review of the decision by the Court of Appeal, Fourth District, Division Three, reversing the trial court's judgment dismissing the claim against MBNA brought by Appellant Alan Parks ("Parks").[1] A copy of the Court of Appeal's decision (the "Decision"), which is reported at 184 Cal. App. 4th 652 (2010), is attached as Exhibit A hereto.

INTRODUCTION

In the Decision, the Court of Appeal explicitly rejected the directly relevant ruling of the Court of Appeals for the Ninth Circuit, in a case involving the same California statute at issue here, in the context of an identical claim against MBNA, on a question of *federal* law. *See* Decision at 8, 19 (citing *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008)). According to the Court of Appeal, the Ninth Circuit's decision in *Rose*, despite its indisputable relevance, is inconsistent with controlling authority. Rather than following *Rose*, and relying instead on a decision of this Court more than two decades ago, *Perdue v. Crocker National Bank*, 38 Cal.3d 913 (1985), as well as comments in *Cuomo v. Clearing House Association*, 557 U.S. –, 129 S. Ct. 2710 (2009) – which, like *Perdue*, is readily distinguishable from this case – the Court of Appeal reversed the trial court's ruling that Parks' claim is preempted by federal law. Specifically, the Court of Appeal held that the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq.*, and the implementing regulations of the Office of the Comptroller of the Currency ("OCC") do not preempt Parks' attempted

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

application of Civil Code § 1748.9 ("§ 1748.9") to MBNA, a national bank duly chartered under the NBA and supervised and regulated by the OCC. More particularly, the Court of Appeal held, directly contrary to *Rose*, that establishing preemption under the NBA requires an evidentiary showing. Further, the Court of Appeal declared the OCC preemption regulation upon which *Rose* relied, 12 C.F.R. § 7.4008 ("Section 7.4008"), invalid as a matter of law. *See* Decision at 15 (acknowledging that Section 7.4008 "if valid, expressly preempts section 1748.9."). The Court of Appeal thereby rejected not only *Rose* but, also, a federal regulation that has been applied and *uniformly* deemed valid by other state and federal courts since its promulgation in 2004.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeal erred in holding that § 1748.9 is not preempted on its face by the NBA under well-established principles articulated by the U.S. Supreme Court, thereby creating a direct conflict with Ninth Circuit law, which has reached precisely the opposite result on the same legal issue in a recent case involving near-identical allegations.
2. Whether the Court of Appeal erred in holding that the OCC, a federal agency within the U.S. Department of the Treasury, lacked authority to promulgate Section 7.4008 and, therefore, that Section 7.4008 does not preempt § 1748.9, even though both California and federal courts have previously applied that regulation and parallel regulations to preempt application of particular state-law limitations on the exercise by national banks of their federally granted lending powers.

WHY REVIEW SHOULD BE GRANTED

Review should be granted to secure uniformity of decision. The Court of Appeal's Decision is in *direct conflict* with the ruling of a unanimous panel of the Ninth Circuit in *Rose*. The Court of Appeal *explicitly* rejected *Rose* and its proper application of the well-established principles of NBA preemption articulated by the U.S. Supreme Court. *See* Decision at 8, 19. In so doing, the Court of Appeal misconstrued the fundamental tenets of the U.S. Supreme Court's landmark decisions in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), and *Franklin National Bank v. New York*, 347 U.S. 373 (1954), which, as the *Rose* court recognized, compel the conclusion that "the NBA preempts the disclosure requirements of Cal. Civ. Code § 1748.9, insofar as those requirements apply to national banks." *Rose*, 513 F.3d at 1038.

Unlike any other court that has addressed preemption under the NBA, the Court of Appeal held that an *evidentiary* showing is needed to demonstrate NBA preemption. *See* Decision at 14. This holding directly conflicts with the numerous decisions of both federal and state courts holding state law preempted by the NBA *on the face of the pleadings*, including decisions concerning state disclosure requirements. *See, e.g.*, *Franklin*, 347 U.S. at 377-78. The Court of Appeal's divergent holding ignores what other courts have either explitly or implicitly recognized: a state law's conflict with the Congressional objectives underlying the NBA – ensuring uniformity of regulation of national banks' banking operations – is a matter of law that can be determined without reference to evidentiary proof.

Further, the Decision is also in conflict with an entire body of federal and state court case law relying on the OCC's preemption regulations promulgated in 2004 – Section 7.4008 and its companion regulations, 12

C.F.R. §§ 34.4 (governing real estate lending), 7.4007 (governing deposit-taking), and 7.4009 (governing national bank operations generally). The Court of Appeal in *Parks* is the *only* court – out of dozens, including the Ninth and Sixth Circuits and district courts within those Circuits; appellate courts of other states; and even the California Court of Appeal in other cases – that has failed to treat the OCC's preemption regulations as valid. *See, e.g.*, *Martinez v Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555-58 (9th Cir. 2010); *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 281-83 (6th Cir. 2009); *Miller v. Bank of Am., N.A. (U.S.A.),* 170 Cal. App. 4th 980, 987 (2009); *Smith v. Wells Fargo Bank*, 135 Cal. App. 4th 1463 (2005); *Patterson v. Citifinancial Mtg. Corp.*, No. 287270, – N.W.2d –, 2010 WL 2076774 (Mich. Ct. App. May 25, 2010); *Citibank, S.D., N.A. v. Palma*, 646 S.E.2d 635, 638 (N.C. Ct. App. 2007); *Citibank, (S.D.), NA v. Eckmeyer*, No. 2008-P-0069, 2009 WL 1452614, slip op. at ¶¶ 33-39 (Ohio Ct. App. May 8, 2009).

These conflicts should not be perpetuated. The Decision affects thousands of national banks, disrupting a scheme of federal regulation upon which they and their regulators rely. It also invites pernicious consequences, including forum shopping, which this Court has recognized flow from inconsistent federal and state court rulings on a single legal question. *See Barrett v. Rosenthal*, 40 Cal. 4th 33, 58 (2006) ("Adopting a rule of liability. . . that diverges from the rule announced in [federal court] . . . would be an open invitation to forum shopping by defamation plaintiffs."). And where the question is a pure question of federal law, such as preemption under the Supremacy Clause of the U.S. Constitution, U.S. Const., art. VI, cl. 2, a divergent state appellate court decision should be reviewed by this Court.

Review also should be granted because, even absent the conflict between the Decision and both federal and other state court decisions, the

issues presented are important questions of law. The standards for assessing whether federal banking law preempts state law are determinative of the permissible practices of national banks in a myriad of circumstances, affecting virtually every aspect of the business of banking by national banks. Absent clarity and uniformity in those standards, national banks are left rudderless in a sea of regulatory uncertainy, without the predictability and bright-line principles needed to operate efficiently or effectively. The Decision thereby runs headlong into the very purpose of NBA preemption of state law: to enable national banks to operate under the "conditions for uniformity and efficiency that would otherwise obtain." *Smiley v. Citibank (S.D.), N.A.*, 11 Cal. 4th 138, 158 (1995), *aff'd*, 517 U.S. 735 (1996).

Even if preemption itself were not such an important issue, the Decision would merit review. The Court of Appeal held that the OCC lacked the power to promulgate Section 7.4008 – a regulation that, as the Court of Appeal itself expressly acknowledged, underwent all the proper rulemaking procedures required by federal law. Decision at 16. That holding implicates not only Section 7.4008, but also the other preemption regulations adopted by the OCC and, indeed, the parallel preemption regulations promulgated by the Office of Thrift Supervision ("OTS"), the sister agency of the OCC within the U.S. Department of the Treasury that regulates federal savings associations.

A decision with ramifications of this magnitude cries out for higher court review. Both to secure uniformity of decision and to settle important questions of law, the Court should grant MBNA's Petition for Review.

BACKGROUND AND PROCEDURAL HISTORY

A. The Trial Court Proceedings

On June 30, 2004, Appellant Parks filed the instant putative class action lawsuit in the Superior Court for the County of Orange against

MBNA. (AA 55.)[2] MBNA is, and has been since 1991, a federally chartered national bank. (AA 127, 1319.) In its capacity as a national bank, MBNA offers loans to its customers nationwide, including in California. The type of loan at issue in Parks' suit, a "convenience check" loan, is extended by use of a "preprinted check or draft" (a "convenience check"), which banks typically mail to credit card customers with a monthly account statement or in a separate mailing with an enclosed offer. A recipient of such a check may use the check in lieu of his or her credit card or a cash advance and, just as when using the card, incur a charge and fees against his or her credit card account. *See Rose*, 513 F.3d at 1034-35 (describing convenience checks).

With reference to these convenience check offers, Parks asserted a single cause of action against MBNA based solely upon the "unlawful" prong of California's Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* ("UCL"). (AA 63.) Specifically, Parks alleged MBNA violated the UCL by failing to include in its convenience check offers the informational disclosures mandated by § 1748.9. *Id.* Those disclosures must (i) be on the front of an attachment to the checks, (ii) be clear and conspicuous, and (iii) include: "(1) [a statement t]hat 'use of the attached check or draft will constitute a charge against your credit account[;]' (2) [t]he annual percentage rate and the calculation of finance charges . . . associated with the use of the attached check or draft[; and] (3) [w]hether the finance charges are triggered immediately upon the use of the check or draft." Civ. Code § 1748.9. Parks sued MBNA individually and purportedly on behalf of a putative California class. (AA 58-61.)

In response to Parks' suit, MBNA moved for judgment on the pleadings, based on two separate and independent grounds for federal

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

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

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

B. The Court of Appeal's Decision

The Court of Appeal expressly rejected *Rose* and reversed the trial court's judgment. Decision at 19-20. While recognizing that "[i]n all material respects, *Rose* is factually identical to the case before us," and that, even when they are not directly on point, "federal decisions may be particularly persuasive when they interpret federal law," the Court of Appeal elected its own, novel reading of the NBA, contrary to *Rose* and the U.S. Supreme Court authorities relied on in *Rose*. *Id.* at 4, 11-14.

According to the Court of Appeal, because § 1748.9 does not *forbid* the exercise of a banking power authorized by the NBA, it does not, on its face, conflict with the NBA. The Court of Appeal also found that, although a state law may be preempted by the NBA even if the state law does not have such a prohibitive effect, such preemption depends on *evidentiary* proof that the state law "*significantly impairs*" an NBA-authorized national banking power. *Id.* at 11. Despite the contrary rulings of many other courts, including *Rose*, dismissing state law claims as preempted by the

NBA based solely on the pleadings, the Court of Appeal held that MBNA would have to marshal factual evidence to prove that § 1748.9, as applied to MBNA, "significantly impairs" MBNA's power to loan money on personal security. *Id.* at 12, 14.

The Court of Appeal went on to reject the alternative basis for preemption relied on by MBNA here and by the Ninth Circuit in *Rose*: express preemption Section 7.4008.[3] The Court of Appeal explicitly acknowledged that "[i]t is clear that [Section 7.4008], if valid, expressly preempts section 1748.9." *Id.* at 15. The Court of Appeal also acknowledged that the OCC followed all of the proper procedures in adopting Section 7.4008, and that the "OCC had authority to issue regulations interpreting the preemptive effect of the NBA and other federal law on state law with regard to national banks." *Id.* at 16. Nevertheless, the Court of Appeal held that the regulation was invalid. *Id.* at 19.

In conclusion, while expressing "reluctan[ce] to creat a split of authority with the Ninth Circuit on a point of federal law," *id.*, the Court of Appeal reached a decision directly contrary to *Rose*, holding that "there is no basis for preempting section 1748.9 without a factual record." *Id.* at 20.

3 The Decision implies that the Ninth Circuit in *Rose* did not rely on Section 7.4008. *See* Decision at 7-8. In fact, the Ninth Circuit expressly held that "the district court correctly found that . . . Plaintiffs' UCL claims . . . are preempted by the NBA *and OCC regulations*." *Rose*, 513 F.3d at 1038 (citing *Rose v. Chase Manhattan Bank USA*, 396 F. Supp. 2d 1116, 1123 (C.D. Cal. 2005) (emphasis added). Although the Ninth Circuit pointed to the *Rose* plaintiffs' "unfair" and "deceptive" UCL claims in this context, rather than specifically to the "unlawful" UCL claim, it plainly found that Section 7.4008 preempted the application of § 1748.9 to a national bank.

ARGUMENT

I. *ROSE* WAS CORRECTLY DECIDED AND THE COURT OF APPEAL ERRED IN ISSUING A DIRECTLY CONTRARY RULING ON THE SAME ISSUES OF FEDERAL LAW.

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

Considering these principles, the Court of Appeal was bound to deviate from the holding in *Rose* only if controlling authority compelled a different result. As the Court of Appeal acknowledged, "[i]n all material respects, *Rose* is factually identical to the case before us." Decision at 4 (citation omitted).[4] Despite this express acknowledgment, and without pointing to any controlling authority dictating a result contrary to *Rose*, the

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

Court of Appeal proceeded to reach a decision in *direct conflict* with *Rose*. This was clear error, as *Rose* is fully consistent with the NBA preemption precedents of the U.S. Supreme Court, as well as with NBA preemption "decisions of the lower federal courts . . . [that] are 'both numerous and consistent.' " *Barrett*, 40 Cal. 4th at 58 (quoting *Etcheverry*, 22 Cal. 4th at 320-21).

In *Rose*, a unanimous panel of the Ninth Circuit, following well-established and binding U.S. Supreme Court precedent, affirmed dismissal of the plaintiffs' UCL claims, including the "unlawful" claim identical to Parks' claim here, based on preemption by the NBA and Section 7.4008. 513 F.3d at 1037-38. Relying on the U.S. Supreme Court's controlling opinions in *Watters*, *Barnett Bank*, and *Franklin*, the Ninth Circuit held the UCL could not be used to require a national bank's adherence to § 1748.9, because the NBA explicitly grants federally chartered banks the power to loan money on personal security *without limitation* by state law. *Id.* at 1037. Because the power to loan money on personal security is the power pursuant to which a national bank extends credit to its cardholders via convenience checks, and there is no indication that Congress intended that power to be subject to local restriction, "Congress is presumed to have intended to preempt state laws such as Cal. Civ. Code § 1748.9." *Id.* (citing *Barnett Bank*, 517 U.S. at 33-35; *Franklin*, 347 U.S. at 378; *Watters*, 530 U.S. at 18). Recognizing this, the *Rose* court squarely held: "[T]he NBA preempts the disclosure requirements of [§] 1748.9, insofar as those requirements apply to national banks." *Id.* at 1038.

In addition, the Ninth Circuit explicitly affirmed the trial court's decision that Section 7.4008 preempted the plaintiffs' claims. *See id.* at 1038 ("From the face of Plaintiffs' complaint, the district court correctly found that . . . Plaintiffs' UCL claims . . . are preempted by the NBA and

OCC regulations." (citing *Rose*, 396 F. Supp. 2d at 1123)) (emphasis added).

Further, the *Rose* Court expressly addressed and rejected the suggestion that an evidentiary showing is required as part of a preemption analysis. Noting the plaintiffs' request in the alternative for a remand to the district court for "discovery regarding the issue of whether the state law constitutes a 'significant' impairment or interference with the purposes of the National Bank Act," the Ninth Circuit held that the preemptive scope of the NBA is appropriate for determination on a pleading motion and that an evidentiary showing of interference or burden is not needed. *See id.* at 1038 n.4 ("Given the prior holdings of *Barnett Bank* and *Franklin*, . . . it appears that no amount of discovery would change the central holding that Congress intended for the NBA to preempt state restrictions on national banks such as Cal. Civ. Code § 1748.9 here.").

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

The Court of Appeal, however, explicitly chose to "create a split of authority with the Ninth Circuit Court of Appeals on a point of federal law." Decision at 19. National banks in California now face the prospect of liability in state court for conduct that is perfectly lawful under applicable federal court case law. The Court of Appeal expressed "reluctan[ce]" with respect to this adverse result, but stated that its "understanding of the authorities . . . require[d]" it to reject the holding of

Rose. *Id.* As discussed below, however, the authorities upon which the Court of Appeal relied, when properly analyzed, compel adherence to, not deviation from, *Rose*.

II. THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH LONGSTANDING U.S. SUPREME COURT PRECEDENT AS WELL AS NUMEROUS RULINGS BY THE LOWER FEDERAL COURTS AND BY VARIOUS STATE COURTS.

A. The Court of Appeal Misconstrued the Proper Test for Preemption Under the National Bank Act.

The Court of Appeal adopted a standard for preemption under the NBA that effectively undermines years of U.S. Supreme Court jurisprudence. The Court of Appeal observed that the NBA preempts state laws "*forbidding*, or *impairing signficantly*, the exercise of a power explicitly granted to national banks by the NBA." Decision at 11. Implicitly purporting to rely on *Barnett Bank*, which used the words "prevent or significantly interfere" in holding a Florida law preempted by the NBA (*see* 517 U.S. at 33), the Court of Appeal went on to adopt a requirement for *factual* proof of preemption that has no foundation in the case law and is at odds with both Congressional intent and sound public policy.[5] Indeed, *Barnett Bank* itself involved no such showing.

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[5] The "prevent or significantly interfere" language is one among many formulations of the standard for preemption under the NBA. *See, e.g.*, *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.") (emphases added); *Barnett Bank*, 517 U.S. at 33-34 (stating that the NBA preempts state law that "encroac[hes] on the rights and privileges of national banks," "hampe[rs] national banks' functions, "or 'interfere[s] with, or impair[s] [national banks'] efficiency in performing the[ir] functions.") (quoting *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247-52 (1944); *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)); *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance;

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No court, to MBNA's knowledge, has ever held that *evidentiary* proof is required to determine if a state law interferes with a national bank's exercise of its banking powers. And the fact that the *Barnett Bank* Court used the term "significant" hardly implies that a finding of a "significant impairment" for preemption purposes requires *factual evidence*.

What the U.S. Supreme Court has deemed critical to an NBA preemption analysis is determining if state law stands as an obstacle to Congress' intent that national banks' banking activities be subject to a *uniform* set of *federal* regulations. *See, e.g., Watters*, 550 U.S. at 13-14 ("Diverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent . . . ."); *Easton v. Iowa*, 188 U.S. 220, 229 (1903) (describing Congress' intent that national banks operate under "a system extending throughout the country, and independent . . . of state legislation which, if permitted to be applicable, *might impose limitations and restrictions as various and as numerous as the states*") (emphasis added); *see also* Cong. Globe, 38th Cong., 1st Sess. 1873 (1864) ("[A national bank must be] plac[ed] . . . above all chance of criticism, impeachment, or question from State legislation, so that no State . . can interfere in any way with its solidity, with the *uniformity of its operation, or with its completest efficiency*.") (emphasis added) (statement of Sen. Sumner).

As this Court recognized in *Smiley*, allowing a single state to dictate credit-related mandates for national banks would render the bank's lending activities "subject to the varying laws of the several states – a result that

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difference; irreconcilability; inconsistency; violation; curtailment; and interference."). The Court of Appeal, by monolithically focusing on the "significantly impair" standard, ignored these other, alternative tests.

might 'throw into confusion the complex system of modern interstate banking' and thereby undermine the conditions for *uniformity and efficiency* that would otherwise obtain." 11 Cal. 4th at 158 (emphasis added) (quoting *Marquette Nat'l Bank v. First of Omaha Corp.*, 439 U.S. 299, 312 (1978)). That is precisely the result of the Court of Appeal's Decision here.

The Court of Appeal ignored the *inherently significant* impairment a unique state disclosure mandate inflicts on a national bank's ability to function as Congress intended. Allowing one state to impose upon national banks specific credit-related disclosure requirements necessarily opens the door to 50 varying sets of requirements (indeed, potentially to many more, as municipalities and other localities may choose to adopt their own specific disclosure mandates). To comply, national banks would need to track, analyze, and establish specific compliance mechanisms for each of the myriad separate and distinct disclosure mandates, just to be able to exercise the lending power explicitly granted to them by Congress. That is the exact situation Congress intended to prevent. The "significance" of the impairment in this context, within the meaning of *Barnett Bank* and *Watters*, is not merely the degree to which any *one particular state's* disclosure requirements impede a national bank's exercise of banking activities; rather, it is also the burden of complying with *multiple and potentially contradictory* regulations imposed by as many as 50 states and many more municipalities or other localities. No factual showing is needed to recognize the *inherent significance* of the burden the Court of Appeal's Decision places on national banks' ability to exercise their lending power as intended by Congress.

B. There is No Case Law Supporting the Evidentiary Requirement Announced by the Court of Appeal.

The sole case discussed by the Court of Appeal in announcing its "evidentiary" requirement was *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002), a district court case decided prior to *Rose* and before the OCC adopted Section 7.4008. *See* Decision at 12-14.[6] To the extent that *Lockyer* could be read to suggest a need for an evidentiary showing, *Lockyer* is inconsistent with, and must yield to, the subsequent appellate decision in *Rose*. In any event, *Lockyer* provides no support for a categorical requirement for evidentiary proof to establish preemption. The court in *Lockyer* was required to analyze evidence of the impact of the state law at issue, Civil Code § 1748.13, on the national bank plaintiffs because the banks *offered* such evidence, in conjunction with their alternative argument for relief under the Dormant Commerce Clause of the U.S. Constitution, which *does* require an evidentiary showing. *See Lockyer*, 239 F. Supp. 2d at 1006.

Additionally, the plaintiff banks in *Lockyer* did *not* challenge the California law on the basis that it imposed *conditions or restrictions* on their federally authorized power to make loans, as MBNA does here and as Chase did in *Rose*. Rather, they "maintain[ed] that section 1748.13 interfere[d] with the federal power to lend money through its imposition of costly operational and administrative burdens on national banks' lending activities." *Id.* at 1016. Therefore, the *Lockyer* court had no occasion to consider whether the *only* way a plaintiff national bank may establish

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6 The Court of Appeal also cited this Court's decision in *Perdue* (*see* Decision at 14); however, *Perdue* plainly did not endorse any blanket rule requiring evidence to demonstrate preemption of state law. The *Perdue* Court merely suggested that, in a case involving allegations of "*unreasonable*" or "*unconscionable*" conduct, an undue impact on a national bank's *federally authorized* activities might not be evident on the face of the pleadings. *See Perdue*, 38 Cal. 3d at 943-44.

preemption is by an evidentiary showing that the state statute "significantly interferes" with the exercise of its federally authorized banking powers. Because a case is not authority for issues not actually litigated and decided, *see, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004), *Lockyer* does not support the Court of Appeal's holding that an evidentiary showing of "significant burden" is required to establish NBA preemption.

Moreover, any examination of *Lockyer* must be informed by the fact that the OCC had not yet promulgated Section 7.4008 at the time *Lockyer* was decided, and, thus, the *Lockyer* court did not have the benefit of Section 7.4008 in interpreting the then-existing NBA preemption law. Had Section 7.4008 been in effect at the time, the *Lockyer* court presumably would have found the California statute at issue to be *expressly* preempted from application to national banks. In particular, the "minimum payment warning" provision of the California statute at issue, referred to by the Court of Appeal here (*see* Decision at 13), would be *expressly preempted* by Section 7.4008(d)(2), because the "minimum payment warning" provision (like Section 1748.9 here) "requir[ed] specific statements . . . to be included in . . . credit-related documents" of national banks, which Section 7.4008 prohibits. 12 C.F.R. § 7.4008(d)(2)(viii).

Indeed, the *Lockyer* court *did* find the "minimum payment warning" to be expressly preempted as applied to federal savings associations, based on an OTS regulation that is substantively identical to Section 7.4008. *See Lockyer*, 239 F. Supp. 2d at 1010-11, 1020 (applying 12 C.F.R. § 560.2). Contrary to the Court of Appeal's suggestion, because the *Lockyer* court found such express preemption of the "minimum payment warning" requirement with respect to federal savings associations, it did not have to, and *ultimately did not*, decide the question of NBA preemption of that specific requirement. Instead, finding that the various provisions of Civil

Code § 1748.13 were not severable and could not be applied differently to different federally chartered financial institutions, the court held that the statute was "constitutionally inapplicable *in its entirety* to *all* federally chartered credit card issuers." *Lockyer*, 239 F. Supp. 2d at 1021 (emphasis added).

The Court of Appeal's reliance on *Lockyer* here, therefore, was misplaced. And, while citing relevant U.S. Supreme Court precedent, *see* Decision at 9-11 (citing *Franklin*, *Barnett Bank*, and *Watters*), the Court of Appeal ignored the teaching of that precedent – in particular, *Franklin*. The bank in *Franklin* did not prove that the New York law at issue – which simply prohibited the use of the word "saving" or "savings" by a national bank – imposed any particular costs on national banks. No evidence was adduced in *Franklin* to establish the magnitude of the impact on bank business of the bank's inability to use the proscribed words. Nevertheless, the Supreme Court found that the New York statute was inapplicable to national banks because Congress had granted national banks the power "to receive deposits *without qualification or limitation*," and there was "no indication that Congress intended to make this phase of national banking *subject to local restrictions*." *Franklin*, 347 U.S. at 376, 378 (emphasis added). Stated differently, the Court found the New York statute in *Franklin* was preempted because Congress did not intend to *condition* or to *restrict* national banks' receipt of deposits based on compliance with state laws. There was no discussion or suggestion of any "evidence" that this result was impermissible; yet, the Court held the New York law imposed an impermissible burden on the actual receipt of those deposits.

Preemption in this case, as in *Franklin*, is clear on the face of the pleadings. There is no support in any precedent, either controlling or not, for the Court of Appeal's self-created requirement for "evidence" to demonstrate NBA preemption.

C. The Court of Appeal's Evidentiary Requirement Is At Odds With the Fundamental Purpose of Preemption and Sound Public Policy.

Beyond departing from established law, the Court of Appeal's unprecedented "evidentiary" requirement would have multiple pernicious practical results – all at odds with the very purpose of preemption. As an initial matter, it would be impracticable, if not impossible, to extrapolate one national bank's evidentiary showing of the "significant" impairment imposed by a state law on the bank's banking operations to that law's effect on national banks as a whole. A single state law would likely have different quantitative effects from bank to bank. Therefore, the courts' assessment of the "significance" of the impact of a given state law could differ markedly from case to case, with the result of potentially conflicting judgments as to a single state law's applicability to different national banks.

The Court of Appeal's "evidentiary" requirement would thereby eviscerate any possible "bright-line" rule of law for NBA preemption, turning a pure issue of law[7] into a factual test with results that could, and likely would, vary widely from bank to bank. Under such a regimen, national banks would no longer have any reliable guidelines regarding which state laws are preempted from application to their banking activities. No national bank could know for sure in advance whether any particular state law might or might not apply to it, despite prior litigation resolving the question for one or more *other* national banks. Without itself undertaking litigation to obtain a resolution of the preemption question as to it, no national bank could confidently plan its operations to be in compliance with applicable law. Indeed, precisely because no case has required an

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[7] *See In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1099 n.10 (2008), *cert. denied*, 129 S. Ct. 896 (U.S. 2009) ("federal preemption presents a pure question of law" (citing *Spielholz v. Super. Ct.*, 86 Cal. App. 4th 1366, 1371 (2001))).

evidentiary showing, there is not even an accepted yardstick against which to measure the "significance" of the impact of particular state laws on a particular national bank.

The novel rule adopted by the Court of Appeals would thus seriously undermine national bank efficiency and economy, as well as spawn a proliferation of litigation. Each national bank would have to litigate its own individual cases, marshaling new and individual factual evidence, to demonstrate that state law applied to *it* would, in fact, cause a "signficant" impairment in its banking operations. This would impose undue, inefficient, and highly costly burdens on the courts, as well as on national banks themselves.

Finally, an evidentiary test for NBA preemption could have the perverse effect of discouraging national banks from enhancing the efficiency of their operations through modern technology. If the only way a national bank could prove that state-by-state compliance with state law constitutes a "significant" impairment were to produce evidence of high costs (whatever degree of costs a particular judge might deem "significant"), there would be an inherent incentive to *avoid* operational cost-reductions through enhancements to efficiency. Such an incentive would be flatly contrary to Congress' intent that state law not "curtail or hinder a national bank's *efficient* exercise of any . . . power, incidental or enumerated under the NBA." *Watters*, 550 U.S. at 15 (citing *Barnett Bank*, 517 U.S. at 33-34; *Franklin*, 347 U.S. at 375-379) (emphasis added).

The unprecedented requirement for evidentiary proof of preemption created by the Court of Appeal is not what Congress intended in enacting the NBA and is contrary to sound public policy. This Court should grant review to correct the Court of Appeal's misjudgment of the test for preemption under the NBA.

III. THE COURT OF APPEAL ERRED IN HOLDING THE OCC'S DULY PROMULGATED PREEMPTION REGULATION TO BE INVALID.

A. The Court of Appeal's Decision Invalidating Section 7.4008 Conflicts With the Growing Body of Case Law Applying the OCC's Preemption Regulations.

Review is also merited on the wholly independent ground that the Decision, unlike any other judicial ruling, declares invalid the OCC's non-real estate lending preemption regulation, Section 7.4008.

The Court of Appeal explicitly found that Section 7.4008, "if valid, expressly preempts § 1748.9." Decision at 15.[8] The question engaged by the Court of Appeal, therefore, was whether Section 7.4008 is valid. In answering that question in the negative, the Court of Appeal erroneously rejected the shared view of every court that has addressed the question, as well as the implicit views of the multitude of courts, federal and state, that have applied the regulation without questioning its validity.

As the Court of Appeal acknowledged, "[i]n addition to the district court in *Rose*, several other courts have applied [Section] 7.4008 . . . to invalidate state laws as applied to national banks," including the Court of Appeal itself. *Id.* at 15 (citing *Miller*, 170 Cal. App. 4th at 987; *Augustine v. FIA Card Services, N.A.*, 485 F. Supp. 2d 1172, 1175-1176 (E.D. Cal. 2007)). Indeed, even with respect to preemption of state-law disclosure requirements alone, courts have repeatedly applied Section 7.4008 and its companion preemption regulations, 12 C.F.R. § 7.4007 (governing deposit-taking and related activities) and 12 C.F.R. § 34.4 (governing real estate

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[8] Section 7.4008 provides: "A national bank may make non-real estate loans without regard to state law limitations concerning . . . [d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts or other credit-related documents . . . ." 12 C.F.R. § 7.4008(d)(2)(viii).

lending), to hold such requirements preempted. *See, e.g.*, *Martinez*, 598 F.3d at 557; *O'Donnell v. Bank of Am.*, No. C-07-04500 RMW, 2010 WL 934153, at *4 (N.D. Cal. Mar. 15, 2010); *In re Countrywide Fin. Corp. Mortgage Marketing and Sales Practices Litigation*, 601 F. Supp. 2d 1201, 1223 (S.D. Cal. 2009); *Kauinui v. Citibank (S. Dakota)*, No. 09-000258 ACK-BMK, 2009 WL 3530373, at *7 (D. Haw. Oct. 28, 2009); *Fultz v. World Sav. & Loan Ass'n*, No. C08-0343RSL, 2008 WL 4131512, at *2 (W.D. Wash. Aug. 18, 2008); *Montgomery v. Bank of Am.*, 515 F. Supp. 2d 1106, 1108, 1114 (C.D. Cal. 2007).

In applying Section 7.4008 and its companion preemption regulations, most courts have taken it as axiomatic that the regulations are valid. However, several courts, including the district court in *Rose*, have explicitly considered and confirmed the OCC's authority to issue the regulations. As these courts have recognized, "the OCC is authorized to issue rules and regulations as necessary to preserve the purpose and sound operation of the national banking system." *Aguayo v. U.S. Bank*, 658 F. Supp. 2d 1226, 1231 (S.D. Cal. 2009) (citing 12 U.S.C. § 93a). "This authority includes interpretation of state law preemption under the NBA . . . [and] OCC regulations carry the same weight as federal statutes when considering questions of state law preemption." *Id.* (citing *Rose*, 396 F. Supp. 2d at 1122 ("[T]he Court finds that Section 7.4008 is a reasonable and rational exercise of the OCC's rule making authority . . . .")); *see also, e.g.*, *Trombley v. Bank of Am.*, Civil No. 08-cv-456-JD, – F. Supp. 2d –, 2010 WL 2202110, *4 (D.R.I. June 3, 2010) ("Pursuant to [12 U.S.C. §§ 1, 93a], the OCC promulgated regulations regarding whether, and to what extent, state laws are preempted. Specifically, . . . 12 C.F.R. § 7.4008(d)(1) (2007)"); *Weiss v. Wells Fargo Bank*, No. 07-5037-CV-SW-WAK, 2008 WL 2620886, at *3 (W.D. Mo. July 1, 2008) ("The OCC is the bank's regulator and it has broad rule-making authority. Under 12 U.S.C. § 93a,

the OCC is authorized 'to prescribe rules and regulations to carry out the responsibilities of the office' . . . . [Pursuant to that authority, the OCC] amend[ed] the preemption rules in 2004 to specifically include consumer protection provisions.") (internal quotation marks and citations omitted).

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

B. The Court of Appeal Ignored the Scope of the OCC's Regulatory Authority and Misinterpreted the Nature of the OCC's Preemption Regulations.

The NBA charges the OCC with the comprehensive authority and responsibility to charter, oversee, examine, supervise and discipline national banks, including all aspects of their organization, incorporation, examination, operation, and dissolution.[9] To enable the OCC to fulfill its statutory obligations, the NBA expressly delegates *plenary* power to the OCC "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. This Court has explicitly recognized the broad regulatory authority Congress granted to the OCC under the NBA. *See Smiley*, 11 Cal. 4th at 156-57 ("[T]he Comptroller of the Currency . . . 'is charged with the enforcement of the [federal] banking laws.' ") (citations omitted), (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 627 (1971); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995)), *aff'd* 517 U.S. 735 (1996).

Congress' broad statutory delegation of power to the OCC closely parallels the delegation of rulemaking power to the OTS under the Home

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[9] *See* 12 U.S.C. §§ 21, 26, 81-92a, 181-200, 481.

Owners' Loan Act, 12 U.S.C. § 1464(a),[10] with respect to which the U.S. Supreme Court has observed: "It would have been difficult for Congress to give the [agency] a broader mandate." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 161 (1982). Such a broad delegation of regulatory authority "suggests that Congress expressly contemplated, and approved, the [agency]'s promulgation of regulations superseding state law." *Id.* at 162.

Thus, as the courts have previously concluded, "[s]o long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, . . . the *Comptroller has the power to preempt inconsistent state law*." *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983) (emphasis added); *accord Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) ("Federal courts have recognized that the OCC may issue regulations with preemptive effect."); *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957, 964-65 (W.D. Mich. 2004) ("[T]he OCC holds broad and pervasive authority to regulate national banking associations. . . . In light of this statutory authority, it was within the OCC's authority to promulgate [a regulation preempting state law]."), *aff'd in part*, 431 F.3d 556 (6th Cir. 2005), *aff'd*, 550 U.S. 1 (2007).

Indeed, as the Court of Appeal itself observed, *see* Decision at 16, the NBA not only implicitly grants the OCC authority to issue preemption regulations; it also explicitly confirms the OCC's authority to determine the statute's preemptive scope – in particular, with respect to state consumer protection laws. In amending the NBA in 1994, Congress specifically

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[10] "[T]he Director [of the OTS] is authorized, under such regulations as the Director may prescribe[,] to provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations. . . . giving primary consideration of the best practices of thrift institutions in the United States." 12 U.S.C. § 1464(a).

authorized the OCC to make determinations "that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches," so long as those determinations undergo notice-and-comment procedures. 12 U.S.C. § 43(a). This additional grant of authority plainly confirms that Congress anticipated and intended that the OCC make determinations on preemption of state law as applied to national banks.

Thus, as the Court of Appeal expressly acknowledged, the "OCC had authority to issue regulations interpreting the preemptive effect of the NBA and other federal law on state law with regard to national banks." Decision at 16. And, as the Court of Appeal also expressly acknowledged, the OCC "follow[ed] the proper procedures in enacting [Section 7.4008]." *Id.* Yet, despite this specific recognition, and the undisputed understanding that "Federal regulations may preempt state law just as fully as federal statutes," *id.* at 15 (citing *Miller*, 170 Cal. App. 4th at 984) (internal quotation marks omitted), the Court of Appeal declared Section 7.4008 invalid for lack of OCC regulatory authority. *Id.* at 19.

The Court of Appeal faulted MBNA for not being able to point to a more express statement of such authority than 12 U.S.C. §§ 43(a) and 93a. *See id.* (citing the dissent in *Watters*, 550 U.S. at 44). But the preemptive effect of the OCC's regulations "does not invalidate them unless Congress has expressed, either explicitly or implicitly, an intent that preemption is *not* within the Comptroller's power." *Conover*, 710 F.2d at 883. Congress has not acted to alter or nullify Section 7.4008 since its adoption in 2004. Thus, the Court of Appeal had no basis upon which to declare Section 7.4008 invalid.

Indeed, the sole purported basis for the Court of Appeals unprecedented ruling regarding Section 7.4008 was the U.S. Supreme Court's opinion in *Cuomo* and this Court's opinion in *Perdue*. *See id.* at

16-19. However, neither *Cuomo* nor *Perdue* involved Section 7.4008 or any of its companion preemption regulations (12 C.F.R. §§ 34.4, 7.4007, 7.4009), and both those cases and the regulations they involved are readily distinguishable.

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

Second, the fundamental purpose of the regulations in both *Cuomo* and *Perdue* was different from that of Section 7.4008. In both *Cuomo* and *Perdue*, the regulations were *interpretive* rules, and the issue was whether the OCC properly *interpreted the text* of the NBA. In *Cuomo*, the question was whether the OCC had properly interpreted, by regulatory definition, the term "visitorial powers" in the NBA, 12 U.S.C. § 484. *See Cuomo* 129 S. Ct. at 2714-15 (stating the question presented to be "whether the Comptroller's regulation . . . can be upheld as a reasonable interpretation of the National Bank Act."). In *Perdue*, the question was whether the OCC's now-superseded "interpretive" rule on preemption relating to bank service charges was "a reasonable interpretation of the controlling statutes." *Perdue*, 38 Cal. 3d at 941.

In both cases, the Courts found that the *text* of the NBA could not support the OCC's statutory interpretation. In *Cuomo*, the Court found the OCC's interpretation of the term "visitorial powers" as including *enforcement* authority was not "reasonable" in light of historical interpretations of the term. *Cuomo*, 129 S. Ct. at 2715; *see also* Decision at 17 (discussing the *Cuomo* Court's criticism of the OCC's "interpretation"

of the NBA language). Thus, the Court held the OCC's regulation was invalid to the extent that it interpreted the term "visitorial powers" in the NBA to mean state enforcement authority as well as "sovereign oversight and supervision." *Cuomo*, 129 S. Ct. at 2715-18.

Similarly, in *Perdue*, this Court rejected the *interpretation* of the OCC in a regulation expressly purporting to *interpret statutory law*. *See* Interpretive Ruling Concerning National Bank Service Charges, 48 Fed. Reg. 54,319 (Dec. 2, 1983), 49 Fed. Reg. 28,237 (July 11, 1984) (stating that the rule at issue in *Perdue* was an "interpretive rule"); *Perdue*, 38 Cal. 3d at 941 (holding that the regulation was "not a reasonable interpretation of the controlling statutes"). The *Perdue* Court, upon finding no statutory textual basis for the rule's purported "interpretation," concluded that the rule was, in effect, "legislati[ve]" in nature and could not "be enacted in the guise of statutory interpretation." 38 Cal. 3d at 941. That was fatal to the regulation, as legislative rules must undergo notice-and-comment rulemaking procedures, and the OCC rule had not undergone those procedures. *See* 48 Fed. Reg. at 54,320 ("[For] interpretive rulings such as this . . . a notice of proposed rulemaking is not required."); 49 Fed. Reg. at 28,238 (same). However, the Court in *Perdue* did *not* opine, and had no occasion to opine, on whether the rule would have been valid if it had been intended as a "legislative" rule and had been duly promulgated pursuant to notice-and-comment procedures.[11]

In contrast, Section 7.4008 does not purport to "interpret" the NBA. Unlike the OCC's interpretative regulations at issue in *Cuomo* and *Perdue*, Section 7.4008 represents an "unambiguous intent to preempt state law."

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

38 Cal. 3d. at 940 n.36; *see* 69 Fed. Reg. 1904 ("The OCC is adopting this final rule [Section 7.4008] to specify the types of state laws that do not apply to national banks' lending . . . activities . . . ."). And, as the Court of Appeal acknowledged, *see* Decision at 16, Section 7.4008 is a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley v. Citibank*, 517 U.S. 735, 741 (1996). As such, the regulation represents " 'a reasonable accommodation of conflicting policies that were committed to the agency's care by statute.' " *de la Cuesta*, 458 U.S. at 154 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

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

IV. CONCLUSION

The Court of Appeal's Decision represents a radical departure from NBA preemption precedent. It announces standards novel to courts and to litigants and is contrary to sound public policy. Moreover, it declares invalid a federal regulation numerous federal and state courts have both expressly and implicitly found valid. This Court should grant MBNA's petition to resolve the conflicts created by, and the important questions of law inherent in, the Decision of the Court of Appeal.

DATED: June 21, 2010

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CERTIFICATION OF WORD COUNT

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

As counsel for Respondent in this appeal, I certify that this Petition for Review consists of 8,396 words, including footnotes, but excluding the title page, tables, certification, date and signature block, as counted by the Microsoft "word count" tool in the Word program used to prepare this brief.

DATED: June 21, 2010

ARNOLD & PORTER LLP

By: Laurence J. Hutt /mt.

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EXHIBIT A

Filed 5/12/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALLAN PARKS, Plaintiff and Appellant, v. MBNA AMERICA BANK, N.A., Defendant and Respondent.	G040798 (Super. Ct. No. 04CC00598) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail Andrea Andler, Judge. Reversed.

Rosner & Mansfield, Michael R. Vachon; Law Office of Michael R. Vachon and Michael R. Vachon for Plaintiff and Appellant.

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Civil Code section 1748.9 (section 1748.9) requires credit card issuers engaged in extending credit to cardholders by means of a "preprinted check or draft" (known as "convenience checks" in the industry) to "disclose on the front of an attachment that is affixed by perforation or other means to the preprinted check or draft, in clear and conspicuous language, all of the following information: [¶] (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."

Alleging systematic violations of section 1748.9, plaintiff Allan Parks filed a class action lawsuit against defendant MBNA America Bank, N.A. (MBNA)[1] for its purportedly unlawful business practices under Business and Professions Code section 17200 et seq. MBNA is a national banking association, organized under the laws of the United States and regulated by the Office of the Comptroller of the Currency (OCC). (See 12 U.S.C. § 1 et seq.) The trial court granted judgment on the pleadings to MBNA, following *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032 (*Rose*) in finding section 1748.9 preempted by federal law applicable to national banks. We conclude

[1] MBNA renamed itself as FIA Card Services, N.A. Nevertheless, for the sake of simplicity, we shall follow the parties in continuing to refer to defendant as MBNA.

section 1748.9 is not, on its face, preempted and therefore reverse. Section 1748.9 does not preclude national banks from exercising their authority to lend money on personal security under section 24 of title 12 of the United States Code (Seventh). Furthermore, without a factual record, a court cannot conclude that section 1748.9 significantly impairs national banks' authorized activities.[2]

FACTS

As the court granted judgment on the pleadings to MBNA, we assume the truth of, and liberally construe, all properly pleaded factual allegations in Parks's complaint. (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 116 (*Stone Street*).)

In February 2003, MBNA issued a credit card to Parks. MBNA sent several preprinted drafts to his residence (and the residences of other similarly situated proposed class members) in late 2003. The drafts sent to Parks and the other proposed class members did not contain any of the three disclosures required by section 1748.9. Parks used two of the preprinted drafts; other proposed class members used drafts sent to them. Parks (and the other class members) incurred finance charges and interest charges for each transaction, as interest accrued as of the date of the transactions (there was no "grace period" as is typical in credit card transactions).

Parks, on behalf of himself and all others similarly situated, sued MBNA in June 2004 for its alleged violations of Business and Professions Code section 17200 et seq. Several years into the litigation, MBNA renewed a previously rejected motion for judgment on the pleadings, basing its renewed motion on subsequent case law — *Rose*,

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[2] We grant Parks's motion requesting that we take judicial notice of a conference report of the United States Congress and certain materials in the Federal Register.

supra, 513 F.3d 1032. The court granted MBNA's motion and entered judgment against Parks.

DISCUSSION

We review the judgment de novo, as it was based on the trial court's grant of MBNA's motion for judgment on the pleadings. (*Stone Street*, *supra*, 165 Cal.App.4th at p. 116.)

In all material respects, *Rose*, *supra*, 513 F.3d 1032, is factually identical to the case before us. In *Rose*, class action plaintiffs sued Chase Bank USA, N.A. (Chase) for its alleged violations of section 1748.9. (*Rose*, at pp. 1034-1035.) The convenience checks provided by Chase to its cardholders lacked disclosures required under section 1748.9. (*Rose*, at p. 1035.) The district court granted Chase's motion for judgment on the pleadings and the Ninth Circuit Court of Appeals affirmed. (*Id.* at p. 1036.) Both courts held federal law preempted section 1748.9 as applied to national banks. (*Rose*, at pp. 1037-1038; *Rose v. Chase Manhattan Bank USA* (C.D.Cal. 2005) 396 F.Supp.2d 1116, 1122-1123.)

Parks asserts *Rose* was wrongly decided. We are not bound to follow federal court precedent; however, "'numerous and consistent'" federal decisions may be particularly persuasive when they interpret federal law. (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321, overruled on another ground in *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 437, 452.) If we are persuaded federal law preempts section 1748.9 as applied to national banks, the supremacy clause (U.S. Const., art. VI, cl. 2) obligates this court to honor federal law by holding section 1748.9 inapplicable to MBNA.

Uncontroverted Legal Framework

We begin our analysis by setting forth several uncontroversial propositions. First, "federal law can preempt state law in one of three ways: (1) *expressly*; (2) by actually *conflicting* with state law; or (3) by exclusively *occupying* a legislative field." (*Miller v. Bank of America, N.A.* (2009) 170 Cal.App.4th 980, 984 (*Miller*).)

Second, federal banking law sometimes, but not always, preempts state regulation as applied to national banks. "Business activities of national banks are controlled by the National Bank Act (NBA or Act), 12 U.S.C. § 1 *et seq.*, and regulations promulgated thereunder by the [OCC]. [Citations.] As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers." (*Watters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, 6 (*Watters*).) "[F]ederal control shields national banking from unduly burdensome and duplicative state regulation. [Citations.] Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." (*Id.* at p. 11.)

Third, national banks are authorized by the NBA "to carry on the business of banking . . . by loaning money on personal security . . . ." (12 U.S.C. § 24 (Seventh).) It is uncontested that federal law authorizes MBNA to extend credit by way of convenience checks to Parks and other credit card customers. (Cf. *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146-147 ["It is clear that national banks are authorized to conduct credit card programs, to issue credit cards to holders, and to provide money thereunder to such persons and to others on their behalf in exchange for goods or services"].) But there is no reference to state law in the text of the NBA with regard to the business of loaning money on personal security. The NBA does not explicitly answer whether state law requiring particular disclosures in connection with convenience checks is preempted.

Fourth, OCC issued regulations in 2004 that purport to explain which state laws pertaining to non-real estate lending powers of national banks are preempted. In

relevant part, these regulations provide: "(1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks. [¶] (2) A national bank may make non-real estate loans without regard to state law limitations concerning: [¶] . . . [¶] (viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents." (12 C.F.R. § 7.4008(d) (2010).) "State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers: [¶] (1) Contracts; [¶] (2) Torts; [¶] (3) Criminal law; [¶] (4) Rights to collect debts; [¶] (5) Acquisition and transfer of property; [¶] (6) Taxation; [¶] (7) Zoning; and [¶] (8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section." (12 C.F.R. § 7.4008(e) (2010) fn. omitted.)[3]

Fifth, the federal Truth in Lending Act (TILA), title 15 of the United States Code section 1601 et seq., and its accompanying regulations (Regulation Z), 12 Code of Federal Regulations part 226.1 (2009) et seq., require specific disclosures by businesses offering consumer credit (including national banks issuing credit cards). TILA grants the Board of Governors of the Federal Reserve System (and not OCC) power to prescribe regulations and carry out the purposes of TILA. (15 U.S.C. §§ 1602(b), 1604(a).) MBNA is compelled by TILA and Regulation Z (not to mention contract law) to disclose

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[3] Paragraph (a) of 12 Code of Federal Regulations part 7.4008 (2010) provides: "A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the [OCC] and any other applicable Federal law."

the terms of the convenience checks it offers to consumers. But nothing in federal law specifies that such disclosures must be provided in "an attachment that is affixed by perforation or other means to the preprinted check or draft . . . ." (§ 1748.9, subd. (a).) Moreover, nothing requires use of the precise language required in section 1748.9, subdivision (a)(1) — "That 'use of the attached check or draft will constitute a charge against your credit account.'" Subject to certain exceptions, TILA does 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, and then only to the extent of the inconsistency." (15 U.S.C. § 1610(a)(1).) Neither party contends section 1748.9 is preempted by TILA or is otherwise inconsistent with TILA.

The Rose Cases Holding Section 1748.9 is Preempted

The district and circuit courts in *Rose* engaged in slightly different analyses. The Ninth Circuit observed that Congress explicitly granted national banks the power to loan money on personal security and that Chase exercised this power by extending credit via convenience checks. (*Rose*, *supra*, 513 F.3d at p. 1037.) The court distilled the following rule from Supreme Court precedent: "Where, as here, Congress has explicitly granted a power to a national bank without any indication that Congress intended for that power to be subject to local restriction, Congress is presumed to have intended to preempt state laws such as Cal. Civ. Code § 1748.9." (*Ibid.*) Given the stated legal rule and the circumstances of the case, the *Rose* court held it was required by Supreme Court precedent to conclude section 1748.9 was preempted. (*Rose*, at p. 1038.) *Rose* relied on three Supreme Court cases in support of its conclusion: *Watters*, *supra*, 550 U.S. at p. 18; *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25, 33-35 (*Barnett*); and *Franklin Nat. Bank of Franklin Square v. People* (1954) 347 U.S. 373, 378 (*Franklin*). (*Rose*, at pp. 1037-1038.)

The *Rose* district court began with a similar analysis. (*Rose v. Chase Manhattan Bank USA, supra*, 396 F.Supp.2d at pp. 1119-1120.) In addition, the district court proceeded to analyze 12 Code of Federal Regulations part 7.4008(d) (2010). (*Rose v. Chase Manhattan Bank USA, supra*, at pp. 1121-1122.) The district court found part 7.4008(d) to be compatible and consistent with prior Supreme Court decisions. (*Rose v. Chase Manhattan Bank USA, supra*, at p. 1121.) The district court further found part 7.4008(d) to be "a valid exercise of the Comptroller's power to preempt inconsistent state law" (*Rose v. Chase Manhattan Bank USA, supra*, at pp. 1121-1122) under the notice and comment rulemaking procedures prescribed by title 12 of the United States Code section 43. This regulation preempts section 1748.9 because it deems inapplicable to national banks state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers" (12 C.F.R. § 7.4008(d)(1) (2010)) and it authorizes a "national bank [to] make non-real estate loans without regard to state law limitations concerning: [¶] . . . [¶] [d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in . . . credit-related documents" (12 C.F.R. § 7.4008(d)(2)(viii) (2010); *Rose v. Chase Manhattan Bank USA, supra*, at pp. 1121-1122.)

We must affirm the judgment if we agree either that the result in *Rose, supra*, 513 F.3d at page 1037, follows from Supreme Court precedent, or that 12 Code of Federal Regulations part 7.4008(d) (2010) is a validly enacted regulation that preempts by its own force section 1748.9.

No Preemption by the NBA

As noted above, the NBA (in particular, 12 U.S.C. § 24 (Seventh)) provides little guidance on the question of whether state laws requiring disclosures in addition to those required by federal consumer protection law should be preempted when applied to

national banks. Unlike the Ninth Circuit Court of Appeals, we do not think United States Supreme Court authorities provide an easy answer either.[4]

In *Franklin*, New York passed a law prohibiting all entities other than state-chartered savings banks or savings and loan associations from making "'use of the word "saving" or "savings" or their equivalent in its banking or financial business, or use any advertisement containing the word "saving" or "savings," or their equivalent . . . .'" (*Franklin, supra*, 347 U.S. at p. 374, fn. 1.) Federal law authorized national banks to receive "'savings deposits.'" (*Id.* at p. 375.) The appellant violated the state law by using "the word 'saving' and 'savings' in advertising, in signs displayed in the bank, on its deposit and withdrawal slips, and in its annual reports." (*Id.* at p. 376.) The Supreme Court found a "clear conflict" between New York's law and federal law. (*Id.* at p. 378.) The Supreme Court held national banks must be permitted to accept savings deposits; further, national banks may not be restricted from describing or advertising its services as savings accounts because this is necessary to compete in the business of accepting deposits in the banking industry. (*Ibid.*)

In *Barnett*, the Supreme Court was presented with the question of "whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." (*Barnett, supra*, 517 U.S. at p. 27.) The Florida statute at issue stated, "in essence, that banks cannot sell insurance in Florida — except

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4 In contrast, the extent of preemption is much clearer with regard to state regulation of allowable interest rates or late fees through usury laws. (See, e.g., 12 U.S.C. § 85 [authorizing national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located"]; *Marquette Nat. Bank of Mpls. v. First of Omaha Serv.* (1978) 439 U.S. 299, 313, 318 [holding the NBA permits national banks to charge interest on any loan up to the maximum rate allowed by the single state where the bank is "located," regardless of usury laws in the state where the consumer loan is provided (the "exportation" doctrine)]; *Smiley v. Citibank (South Dakota), N.A.* (1996) 517 U.S. 735, 745-747 [deferring to reasonable OCC interpretation in concluding late fees are included in NBA's definition of "interest" and these fees are therefore exclusively regulated by the national bank's home state].)

that an *unaffiliated* small town bank . . . may sell insurance in a small town." (*Id.* at p. 29.) The court first observed there was no irreconcilable conflict between the two statutes: national banks could comply with both federal law and state law by not acting as an insurance agent in Florida. (*Id.* at pp. 31-32.) But the Court concluded the federal grant of authority — "national banks 'may . . . act as the agent' for insurance sales[(12 U.S.C. § 92)]" — was designed to grant "a broad, not a limited, permission." (*Id.* at p. 32.) The court next summarized relevant law: "[N]ormally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." (*Id.* at p. 33.) The court held the Florida statute was preempted. (*Id.* at pp. 37, 43.)

In *Watters*, the Supreme Court was faced with the question of whether national banks' "operating subsidiaries" (which are state-chartered entities) are properly regulated by state regulators via licensing schemes, reporting requirements, and visitorial powers (the last being the regulatory power to conduct audits and surveillance of the regulated entity). (*Watters, supra,* 550 U.S. at p. 7.) The court reiterated: "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." (*Id.* at p. 12.) The Supreme Court concluded that, because national banks were authorized by statute and regulation to do business through non-bank operating subsidiaries and because federal law vested visitorial powers over national banks solely to the OCC, national banks' operating subsidiaries are subject solely to the visitorial oversight of the OCC and not state regulators. (*Id.* at pp. 20-21; see 12 U.S.C. § 484(a) ["No national bank shall be subject to any visitorial powers except as authorized by

Federal law"].) The Supreme Court's interpretation comported with 12 Code of Federal Regulations part 7.4006 (2010), which provides that state laws applied to operating subsidiaries "to the same extent that those laws apply to the parent national bank" (*Watters*, at p. 20), but the court explicitly declined to clarify whether the OCC's regulation was owed any deference. (*Id.* at p. 21.)[5]

In sum, according to pertinent Supreme Court conflict preemption precedents, the NBA precludes states from *forbidding*, or *impairing significantly*, the exercise of a power explicitly granted to national banks by the NBA.

On its face, section 1748.9 does not *forbid* the exercise of a banking power authorized by the NBA. Section 1748.9 does not bar national banks from loaning money on personal security through convenience checks. Instead, section 1748.9 is a generally applicable disclosure law applying to any "credit card issuer that extends credit to a cardholder through the use of a preprinted check . . . ." (§ 1748.9, subd. (a).) Rather than forbidding the loaning of money via convenience checks, section 1748.9, subdivision (a), merely requires "clear and conspicuous" disclosures of three items of information and requires those disclosures to be attached to the convenience checks.

But the question remains whether section 1748.9 *significantly impairs* the exercise of the power to lend money on personal security. The court's grant of judgment on the pleadings precludes an examination of the factual question of how national banks are actually burdened by section 1748.9. Clearly, section 1748.9 facially imposes *some* burden (whether significant or not) on national banks. And regardless of the particular burden imposed by section 1748.9, MBNA and other national banks would prefer to avoid navigating particular regulatory regimes in each of the 50 states. Does section

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[5] Three members of the *Watters* court dissented; one point of contention was the OCC's aggressive efforts to preempt state law. (*Watters, supra*, 550 U.S. at p. 44 (dis. opn. of Stevens, J.) ["Never before have we endorsed administrative action whose sole purpose was to preempt state law rather than to implement a statutory command"].)

1748.9 (or any similar state disclosure law) amount to a significant impairment of MBNA's power to loan money on personal security *as a matter of law*?

An affirmative answer to this question would have the benefit of establishing clarity in the law. National banks could safely ignore section 1748.9 and other state disclosure laws without considering whether a particular statute will be preempted based on a trial court's factual findings. (See *Rose*, *supra*, 513 F.3d at p. 1037 ["Where, as here, Congress has explicitly granted a power to a national bank without any indication that Congress intended for that power to be subject to local restriction, Congress is presumed to have intended to preempt state laws such as Cal. Civ. Code § 1748.9"].)

But our role, of course, is not to divine the best policy. We are tasked with deciding whether the NBA (which is itself silent on the question of disclosure obligations) preempts section 1748.9, not whether Congress should have preempted all state consumer disclosure laws when it enacted TILA or the NBA. And, according to the United States Supreme Court, the preemption test is not whether the law causes "*any*" impairment of the exercise of banking powers; the test is whether such impairment is "*significant.*"

One federal district court case explored the preemption question with regard to the extensive disclosure requirements mandated by Civil Code section 1748.13. (*American Bankers Association v. Lockyer* (E.D.Cal. 2002) 239 F.Supp.2d 1000 (*American Bankers*).) A variety of federally regulated financial institutions (including but not limited to national banks chartered under the NBA) challenged the validity of Civil Code section 1748.13 on the grounds that it was preempted by various federal banking laws. (*American Bankers*, at pp. 1001-1002, 1006.) The banks introduced evidence showing estimated costs of compliance with the statute. (*Id.* at p. 1005.) The court ultimately granted summary judgment and a permanent injunction to the banks,

prohibiting California from enforcing the statute against all federally chartered credit card issuers. (*Id.* at p. 1022.)

The *American Bankers* court first explained that TILA's "savings clause" (15 U.S.C. § 1610(a)(1)) is expressly limited to TILA and does not purport to preclude other federal law from preempting state regulation of disclosures. (*American Bankers, supra*, 239 F.Supp.2d at p. 1009.)

As to the NBA, the court, reviewing the evidence and deferring to an OCC amicus brief and opinion letter, concluded Civil Code section 1748.13 imposed substantial monetary and non-monetary burdens on national banks. (*American Bankers*, at pp. 1016-1018.) The court further indicated its agreement with OCC's position (in 2002) that certain "de minimus" disclosure requirements might not be preempted by federal law. The court opined that one portion of the statute fell within the de minimus exception as its effects were salutary and its burdens were minimal. (*Id.* at pp. 1019-1020; see Civ. Code, § 1748.13, subd. (a)(1) ["A credit card issuer shall, with each billing statement provided to a cardholder in this state, provide the following on the front of the first page of the billing statement in type no smaller than that required for any other required disclosure, but in no case in less than 8-point capitalized type: [¶] (1) A written statement in the following form: 'Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance'"].) But the court ultimately concluded that Civil Code section 1748.13, subdivision (a)(1), could not be severed from the remainder of the statute in order to be enforced only against some federally chartered institutions (the national banks). (*American Bankers*, at pp. 1020-1021.)

American Bankers is a mixed bag for the parties in this case. On the one hand, the ultimate result was the preemption of Civil Code section 1748.13, a California statute that regulates disclosures provided by credit card issuers. On the other hand, the statute at issue in *American Bankers* is lengthy and detailed, and the court reached its

decision only after considering actual evidence of the burdens placed on banking institutions. Under *American Bankers*, some disclosure laws are simply not significant enough to be preempted.

Moreover, our California Supreme Court endorsed leaving some NBA preemption decisions open to factual proof in a different context 25 years ago: "Although conceivably information not contained in the pleadings might lead to a different conclusion, such information is not before us in reviewing a judgment upon demurrer. We cannot presume, without evidence, that prohibiting a national bank from setting unreasonable prices or enforcing an unconscionable contract will render that bank less efficient, less competitive or less able to fulfill its function in a national banking system." (See *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 943-944 (*Perdue*) [discussed below in detail].)

We conclude that when a state disclosure requirement does not, on its face, forbid or significantly impair national banks from exercising a power granted to it by Congress under the NBA, national banks claiming preemption must make a factual showing that the disclosure requirement significantly impairs the exercise of the relevant power or powers. Section 1748.9 does not, on its face, significantly impair federally authorized powers under the NBA. It consists of a brief disclosure requirement that applies only to convenience checks. Of course, given the procedural posture of this case, MBNA has not yet had an opportunity to submit evidence establishing a significant impairment. We need not elucidate a precise "yardstick for measuring when a state law 'significantly interferes with' . . . the exercise of national banks' powers." (*American Bankers*, *supra*, 239 F.Supp.2d at p. 1017 [noting the absence of such a yardstick, commenting that the "threshold of preemption is in some cases remarkably low," but also indicating "other burdens are insufficient to warrant preemption"].)

No Preemption by 12 Code of Federal Regulations part 7.4008

"""""Federal regulations may preempt state law just as fully as federal statutes.''''" (*Miller*, *supra*, 170 Cal.App.4th at p. 984.) A regulation issued by OCC, 12 Code of Federal Regulations part 7.4008(d) (2010), purports to preempt the application of certain state laws to national banks. In addition to the district court in *Rose*, several other courts have applied 12 Code of Federal Regulations part 7.4008 (2010) to invalidate state laws as applied to national banks. (See *Miller*, *supra*, 170 Cal.App.4th at pp. 985-988 [without examining validity of OCC regulations, holding Civ. Code, §§ 9 & 11 to be preempted by 12 C.F.R. § 7.4008(d)(2)(iv) (2010)]; *Augustine v. FIA Card Services, N.A.* (E.D.Cal. 2007) 485 F.Supp.2d 1172, 1175-1176 [claims under California unfair competition law against credit card issuer for retroactively increasing interest rates preempted by 12 C.F.R. § 7.4008(d)(2)(iv) (2010)].)

It is clear that 12 Code of Federal Regulations part 7.4008(d) (2010), if valid, expressly preempts section 1748.9. This regulation deems inapplicable to national banks state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers" (12 C.F.R. § 7.4008(d)(1) (2010)) and it authorizes a "national bank [to] make non-real estate loans without regard to state law limitations concerning: [¶] . . . [¶] [d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in . . . credit-related documents" (12 C.F.R. § 7.4008(d)(2)(viii) (2010)). In light of this clear, specific language, it would be disingenuous to claim that section 1748.9 falls within one of the general categories identified in 12 Code of Federal Regulations part 7.4008(e)(8) (2010), in which state law is not preempted (e.g., state law pertaining to contracts, torts, or "[a]ny other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section").

Parks claims 12 Code of Federal Regulations part 7.4008 (2010) is invalid insofar as it purports to preempt section 1748.9. The thrust of Parks's argument is that OCC lacked authority to essentially announce that the NBA preempted the field of disclosure law (or, more broadly, consumer protection law) with regard to national banks. As discussed above, the NBA itself has traditionally been interpreted as preempting state consumer protection legislation that conflicted with the NBA's terms by foreclosing banking activities authorized by the NBA or by imposing unreasonable burdens on national banks in their exercise of powers authorized by the NBA.

Nothing suggests OCC failed to follow the proper procedures in enacting its rule, i.e., notice and comment rulemaking procedures prescribed by title 12 of the United States Code section 43. (See *Rose v. Chase Manhattan Bank USA, supra*, 396 F.Supp.2d at pp. 1121-1122.) This statute contemplates that OCC will issue "opinion letter[s]" and "interpretive rule[s]" on the question of whether "[f]ederal law preempts the application to a national bank of . . . State law regarding . . . consumer protection [and] fair lending . . . ." (12 U.S.C. § 43(a).) Thus, OCC had authority to issue regulations interpreting the preemptive effect of the NBA and other federal law on state law with regard to national banks. And it is not disputed by Parks that OCC complied with the procedures required by title 12 of the United States Code section 43. The question before us is whether the OCC's regulation — a blanket ban on all state disclosure requirements applying to national banks — is substantively valid.

The United States Supreme Court recently concluded OCC went too far in issuing a different regulation pertaining to preemption. (See *Cuomo v. Clearing House Ass'n L.L.C.* (2009) ___ U.S. ___ [129 S.Ct. 2710] (*Cuomo*).) The pertinent regulation defines visitorial powers to include "[e]nforcing compliance with any applicable federal or state laws concerning [activities authorized or permitted pursuant to federal banking law]." (12 C.F.R. § 7.4000(a)(2)(iv) (2010); *Cuomo*, at p. 2715.) As explained in *Watters*, *supra*, 550 U.S. 1, only OCC may exercise visitorial powers over national banks

and their operating subsidiaries. (*Cuomo*, at p. 2717.) Thus, 12 Code of Federal Regulations part 7.4000(a)(2)(iv) (2010) "prohibits the States from 'prosecuting enforcement actions' except in 'limited circumstances authorized by federal law.'" (*Cuomo*, at p. 2715.) New York's Attorney General (first Eliot Spitzer, and then Andrew M. Cuomo) appealed the lower courts' determination that they were precluded by federal law from investigating national banks and bringing enforcement actions against national banks for alleged violations of state fair lending laws. (*Id.* at p. 2714.)

"Under the familiar *Chevron*[6] framework, [courts] defer to an agency's reasonable interpretation of a statute it is charged with administering." (*Cuomo, supra*, 129 S.Ct. at p. 2715.) OCC "can give authoritative meaning to the [NBA] within the bounds of . . . uncertainty [inherent in the law]." (*Ibid.*) "But the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act." (*Ibid.*) The Supreme Court found the OCC rule would produce absurd results, in that some state regulation is not preempted by the NBA but state regulators would be precluded from enforcing such regulations. (*Id.* at p. 2718.) Further, the court observed the OCC rule "attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws." (*Id.* at p. 2720.) The court vacated the portion of a lower court injunction against the New York Attorney General that precluded him from bringing judicial enforcement actions against national banks. (*Id.* at p. 2722.)

In *Perdue*, *supra*, 38 Cal.3d at pages 937-939, our Supreme Court held an OCC regulation purporting to preempt all state laws limiting bank service charges to be invalid. The regulation provided "that state laws limiting bank service charges 'are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks . . . .'" (*Id.* at p. 938.) The *Perdue* court found "no

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6 *Chevron U.S.A. Inc. v. Natural Resources Defense* (1984) 467 U.S. 837.

comprehensive federal statutory scheme governing the taking of deposits. There is one relevant statute, Section 24 of the National Bank Act, and that merely authorizes banks to accept deposits. Section 24 may by implication also authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits, but such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law." (*Ibid.*)

After construing relevant Supreme Court authority, the *Perdue* court concluded that OCC's rule was "not a reasonable interpretation of the controlling statutes. [Citation.] It is not an attempt to interpret the language of the statute, fill in the gaps in the statutory coverage, or to explain how the Comptroller will exercise his discretion. Instead, the regulation, insofar as it claims federal preemption, represents legislation of far-reaching character and effect, of a type never considered by Congress, which would radically alter the respective roles of the states and the Comptroller in the regulation of bank-depositor contracts. Such legislation cannot be enacted in the guise of statutory interpretation." (*Perdue, supra*, 38 Cal.3d at p. 941, fns. omitted.) The *Perdue* court reversed the judgment granted to defendants following a successful demurrer to contract and unfair competition claims made by plaintiffs, holding: "We cannot presume, without evidence, that prohibiting a national bank from setting unreasonable prices or enforcing an unconscionable contract will render that bank less efficient, less competitive or less able to fulfill its function in a national banking system." (*Id.* at pp. 943-944.)

The skepticism previously expressed by both the California Supreme Court and United States Supreme Court regarding some of OCC's preemption regulations is readily applied to the circumstance before us. (See also *Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal.App.4th 526, 547-548 [declining to defer to OCC's preemption regulations].) The language of 12 Code of Federal Regulations part 7.4008(d) (2010) does not suggest a reasonable attempt to describe and interpret the reach of NBA preemption. (12 U.S.C. § 43 [authorizing OCC to issue opinion letters or interpretative

rules on the scope of federal preemption].) Rather, the regulation exempts national banks from all state disclosure requirements, even though neither the NBA nor TILA expressed an intention to create this bright line exemption.

MBNA claims that greater deference should be shown to OCC because 12 Code of Federal Regulations part 7.4008(d) (2010) is allegedly not an "interpretive rule" authorized by section 43 of title 12 of the United States Code. Instead, according to MBNA, part 7.4008(d) represents "plenary" legislative rulemaking authorized by title 12 of the United States Code section 93a (the OCC "is authorized to prescribe rules and regulations to carry out the responsibilities of the office"). The premise behind this argument is that OCC, like any duly authorized federal agency, can issue substantive regulations through notice-and-comment rulemaking that, of their own force, preempt state law. We agree with MBNA that legislative rules issued by federal agencies can preempt state law, if such rules are within the power delegated to the agency by Congress. (See, e.g., *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta* (1982) 458 U.S. 141, 153-170 [agency's regulation authorizing use of "due-on-sale" clause preempts state law limiting use of such provisions].) No authority, however, is provided by MBNA for the proposition that Congress has delegated the power to OCC to take "administrative action whose sole purpose [is] to preempt state law rather than to implement a statutory command." (*Watters, supra*, 550 U.S. at p. 44 (dis. opn. of Stevens, J.).)

Although we are reluctant to create a split of authority with the Ninth Circuit Court of Appeals on a point of federal law, our understanding of the authorities discussed above requires us to do so. It is still possible MBNA may demonstrate that section 1748.9 imposes burdens on national banks that significantly impair the authority

granted to it by the NBA. But there is no basis for preempting section 1748.9 without a factual record.[7]

DISPOSITION

The judgment is reversed. Parks shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.

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[7] Interestingly, in its two-page amicus brief filed at the invitation of this court, OCC did not assert that 12 Code of Federal Regulations part 7.4008(d) (2010) requires this court to find section 1748.9 is preempted. The OCC did not mention its regulations in its brief. Instead, the OCC "fully concurs in the Ninth Circuit's analysis in its opinion" in *Rose, supra,* 513 F.3d. 1032, which did not rely on 12 Code of Federal Regulations part 7.4008(d) (2010).

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 One Embarcadero Center, 22nd Floor, San Francisco, CA 94111-3711.

On June 21, 2010, I served the foregoing document described as a PETITION FOR REVIEW 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 California Department of Justice 455 Golden Gate Ave., Suite 11000 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	

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

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

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

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

Executed on June 21, 2010, at San Francisco, California.