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May 15, 2012

Via Overnight Delivery

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Supplemental Letter Brief in *Parks v. MBNA National Bank, N.A.*
(Supreme Court Case No. S183703)

Justices of the Supreme Court:

In response to the Supreme Court's request, Plaintiff/Appellant Allan Parks submits this letter brief addressing the significance of (1) the Dodd-Frank Wall Street Reform and Consumer Protection Act, and (2) the Office of the Comptroller of the Currency's regulatory response thereto.

I.
SUMMARY

The Dodd-Frank Wall Street Reform and Consumer Protection Act does not change the outcome of this case because it merely codified (but did not change) the applicable standard for National Bank Act ("NBA") preemption of State laws. The Dodd-Frank Act confirms: (1) that State laws are not preempted by the NBA unless they discriminate against national banks or "significantly interfere" with national bank powers; (2) that there is no "bright line" rule preempting State laws specifically intended to regulate the business of banking; and (3) that Office of the Comptroller of the Currency ("O.C.C.") preemption regulations are not entitled to *Chevron* deference.

Because these provisions of the Dodd-Frank Act merely codify existing legal standards, rather than creating new law, they may be applied to this case without being impermissibly retroactive.

Although the Dodd-Frank Act did not change the applicable standards for NBA preemption, it was however specifically intended to force the O.C.C. to

change the standards it uses for preemption determinations. The Act prohibits the O.C.C. from attempting to preempt categories of State laws (instead requiring that any preemption determinations be made on a "case by case" basis), and requires that any preemption opinion or regulation be supported by "substantial evidence" demonstrating a discriminatory effect or "significant interference" in accordance with the *Barnett Bank* standard.

The O.C.C.'s July 21, 2011 regulatory amendments in response to the Dodd-Frank Act ignored the Congressional directive to revise its preemption standards. The O.C.C. refused to amend or repeal 12 C.F.R. § 7.4008(d) (a regulation which purports to preempt *all* types of State advertising or financial disclosure laws). Because the O.C.C.'s actions do not comply with the Dodd-Frank Act's requirements (1) that the O.C.C. refrain from attempting to preempt categories of State laws, and (2) that the O.C.C. provide an evidentiary record to support its preemption determinations, the O.C.C.'s current version of 12 C.F.R. § 7.4008(d) is invalid and beyond the agency's Congressionally delegated authority.

Finally, the Dodd-Frank Act's requirement that courts assess the "thoroughness and persuasiveness" of O.C.C. preemption determinations requires this Court to reject the O.C.C.'s suggestion (made in support of both its 2004 and 2011 regulations) that the burden of complying with the various laws of multiple states - by itself - constitutes a "significant interference" under the *Barnett Bank* standard. This is a fundamental misunderstanding of the "significant interference" test. Complying with the laws of the States in which national banks do business is an integral part of the Congressional grant of powers to national banks, and the O.C.C. does not have the authority to alter the fundamental nature of the powers that Congress granted in the NBA.

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II.
THE DODD-FRANK ACT CODIFIES THE PRE-EXISTING STANDARD FOR NBA PREEMPTION OF STATE LAWS

A. The Dodd-Frank Act Codifies the *Barnett Bank* NBA Preemption Test

12 U.S.C. § 25b (Section 1044 of the Dodd-Frank Act) is titled "State Law Preemption Standards for National Banks Clarified." It mandates that "State Consumer Financial Laws" (as that term is defined in the Act) are preempted by the NBA ***only*** if they either (i) have a discriminatory effect on national banks, or (ii) prevent or significantly interfere with national bank powers under the test set forth in *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996). 12 U.S.C. § 25b(b)(1). 12 U.S.C. § 25b also expressly states that the NBA "does not occupy the field of any area of State law." 12 U.S.C. § 25b(b)(5).

These provisions of the Dodd-Frank Act do not change the NBA preemption standard because (as pointed out in Parks's Answer Brief on the Merits) even before Dodd-Frank's enactment field preemption did not exist and *Barnett Bank* provided the applicable standard for NBA preemption determinations.

B. The Dodd-Frank Act Makes Clear That There is No Bright-Line Rule Preempting State Banking Laws

In this case, Defendant/Respondent MBNA America Bank, N.A. ("MBNA") and the *amicus curiae* who filed briefs in support of MBNA attempted to argue that there is a bright-line rule that the NBA preempts all State laws that are specifically intended to regulate lending. However, the Dodd-Frank Act conclusively refutes this argument.

The Dodd-Frank Act's definition of "State Consumer Financial Laws" includes State laws specifically intended to regulate banking:

> "State consumer financial law" means a State law that does not directly or indirectly discriminate against national banks and ***that***

> ***directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto,*** with respect to a consumer. [emphasis added].

12 U.S.C. § 25b(a)(2).

Because "State Consumer Financial Laws" are preempted by the NBA ***only*** if they discriminate against national banks or significantly interfere with national bank powers, States are clearly permitted to apply their non-discriminatory banking laws to national banks so as long such laws do not significantly interfere with national bank powers. 12 U.S.C. § 25b(1). Thus, the Dodd-Frank Act makes clear that there is no "bright-line" prohibition on States applying their fair lending laws to national banks.

This provision of the Dodd Frank Act is also not new. Pre-Dodd-Frank case law recognized that States may apply their non-discriminatory banking laws to national banks. *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2720 (2009). ("States, on the other hand, have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years").

1. The Dodd-Frank Act Demonstrates That *Rose v. Chase Bank USA* Was Wrongly Decided

Rose v. Chase Bank USA, N.A., 513 F. 3d 1032 (9th Cir. 2008) is one of the decisions upon which MBNA attempts to rely, and which erroneously concluded that there was a bright-line rule preempting State banking laws. *Id.*, at 1037-1038. By rejecting a bright-line rule, the Dodd-Frank Act makes clear that *Rose* was wrongly decided.

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C. The Dodd-Frank Act Confirms That O.C.C. Preemption Determinations Are Not Entitled to *Chevron* Deference - And Must be Supported by an Evidentiary Record

The Dodd-Frank Act states that O.C.C. preemption determinations are not entitled to *Chevron* deference. Section 1044(b)(5)(A) of the Dodd-Frank Act (12 U.S.C. § 25b(b)(5)(A)) states:

> A court reviewing any determinations made by the Comptroller regarding preemption of a State law by [the NBA] or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.

This provision of the Dodd-Frank Act is also not new law, but merely a codification of the existing standard of deference applicable to O.C.C. preemption determinations. Because Congress has never directly granted the O.C.C. authority to preempt State laws, O.C.C. preemption determinations are not binding on courts, and are entitled only to weight commensurate with their thoroughness, consistency, and persuasiveness. *See Wyeth v. Levine*, 555 U.S. 555, 576-577 (2009) (where Congress has not directly granted an agency the power to preempt State laws, the agency's determination of whether a State law interferes with a federal statute's objective is not binding, but instead only entitled to deference according to the thoroughness, consistency, and persuasiveness of the agency's determination).

Section 1044(c) of the Dodd-Frank Act (12 U.S.C. § 25b(c)) also requires that any O.C.C. regulation or order finding that the NBA preempts a State Consumer Financial Law must be supported by "substantial evidence, made on the record of the proceeding, [that] supports the specific finding regarding the ... in accordance with the ... *Barnett Bank* [standard]." This also does not appear to be a new requirement, but rather a codification of existing U.S. Supreme Court decisions. *See Wyeth*, 555 U.S. at 579-581 (contrasting its rejection of the Food and Drug

Administration's unsubstantiated preemption determination in that case with *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861 (2000), in which the Supreme Court deferred to the Department of Transportation's detailed and substantiated findings that a state law frustrated a federal statutory purpose).

An obvious corollary of the Act's mandatory evidentiary showing requirement is that the O.C.C. is not permitted to issue an order or regulation preempting State law based *solely* on its own analysis of applicable legal precedents - an evidentiary showing is mandatory. 12 U.S.C. § 25b(c).

III.
THE DODD-FRANK ACT CAN BE APPLIED HERE BECAUSE IT MERELY CLARIFIES EXISTING NBA PREEMPTION STANDARDS

While it is a basic cannon of statutory construction that that statutes do not operate retrospectively unless intended to do so, it is also true that statutes do not operate retrospectively simply because their application depends on facts existing before their enactment. *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 243 (1997). In particular, when a statute merely clarifies existing law it can be applied to facts pre-dating the statute without being impermissibly retroactive:

> [A] statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [citation] Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. [citation] Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.[1]

Id.

[1] Even if a court does not accept that a statutory enactment is merely a clarification (as opposed to a change in law), the Legislative declaration that the statue is merely a clarification may reflect an intent that the statute operate prospectively. *Western Security Bank*, 15 Cal. 4th at 244.

The legislative history of the Dodd-Frank Act demonstrates that Congress intended Section 1044 to clarify the *existing* standard of NBA preemption of State banking laws. It is worth noting that the version of the Dodd-Frank Act passed by the House of Representatives stated that State laws are preempted by the NBA only if they discriminate against national banks or "prevent, significantly interfere with, or materially impair" the ability of national banks to engage in the business of banking. *See* Request for Judicial Notice in Conjunction With Supplemental Letter Brief ("Jud. Not."), at Ex. 4, § 4044(b)(1). The version passed by the Senate did not specifically mention the "significantly interfere" standard, but directly referenced the *Barnett Bank* decision as the appropriate preemption standard. *Id.*, Ex. 3, § 1044(b)(1). The Conference Committee combined the House and Senate versions to create 12 U.S.C. § 25b(b)(1), which states that "State consumer financial laws are preempted, only if ...[they] would have a discriminatory effect on national banks, ... [or] in accordance with [*Barnett Bank v. Nelson*] the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1). Thus, the House and Senate versions, along with the Conference Committee's resulting final text for 12 U.S.C. § 25b, leave no doubt that Congress intended to codify the *Barnett Bank* standard for NBA preemption. The Conference Committee even stated this to be the case in its joint report:

> [Section 1044] codifies the standard in the 1996 Supreme Court case *Barnett Bank of Marion County, N.A. v. Nelson* to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national banks' exercise of their powers.

Jud. Not., Ex. 1 (Joint Explanatory Statement of the Committee of Conference, H.R. 111-517 (June 29, 2012)).

The floor debate in the Senate further confirms that the Dodd-Frank Act is a codification of the *Barnett Bank* preemption standard. On July 15, 2010, one of the co-authors of the Act had the following exchange:

> Senator Carper: One change made by the conference committee was to restate the preemption standard in a

> slightly different way, but my reading of the language indicates that the conference report still maintains the *Barnett* standard for determining when a State law is preempted.
>
> Senator Dodd: The Senator is correct. That is why the conference report specifically cites the *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner*, 517 U.S. 25 (1996) case. There should be no doubt the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case.

156 Cong. Rec. S5902 (daily ed. July 15, 2010).

Because Congress intended the Dodd-Frank Act to codify the pre-existing *Barnett Bank* preemption standard, and because the U.S. Supreme Court has never overruled or disavowed its holding in *Barnett Bank*, 12 U.S.C. § 25b is plainly intended to be a clarification of existing law, rather than new law. This is confirmed by its title: "State Law Preemption Standards for National Banks ***Clarified***" [emphasis added]. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1997) (noting that the "the title of a statute and the heading of a section are tools available for resolution of doubt about the meaning of a statute"). Because the Dodd-Frank Act's NBA preemption provisions are merely a clarification of existing law, they may be applied to this case without being impermissibly retroactive. *Western Security Bank*, 15 Cal. 4th at 243.

Indeed, recent cases applying the Dodd-Frank Act have interpreted it to be a clarification of existing law, and ruled that it can be applied to cases predating its enactment. *Cline v. Bank of America, N.A.*, 823 F. Supp. 2d 387, 396 (S.D. W.Va. 2011) ("The recent [Dodd-Frank] amendments [to the NBA] are better understood as clarifications of the law as opposed to substantive changes thereof. As such, their application here does not work an impermissible retroactive effect."); *In re Moore*, 2012 WL 872239 at p. 3 (S.D. W. Va. 2012) (the Dodd-Frank Act's NBA preemption provisions are "best understood as a clarification of existing law, as

opposed to representing a substantive change thereto, such that provisions could be applied in a cause of action brought prior to the Dodd-Frank Act's effective date. Thus, application of the Dodd-Frank Act in the present case is appropriate, and does not work an impermissible retroactive effect").

IV.
THE DODD-FRANK ACT REQUIRES THE O.C.C. TO CHANGE ITS NBA PREEMPTION STANDARDS & PROHIBITS THE O.C.C. FROM ATTEMPTING TO PREEMPT CATEGORIES OF STATE LAWS

Although the Dodd-Frank Act was intended to codify existing U.S. Supreme Court standards for NBA preemption, Congress specifically intended to change the preemption standards that the O.C.C. uses in its preemption opinions and regulations. The Conference Committee made this point explicitly in the Conference Report, stating that the Dodd-Frank Act "***revises*** the standard the OCC will use to preempt state consumer protection laws." [emphasis added]. Jud. Not., Ex. 1, at 875.

The Dodd-Frank Act also specifically prohibits the O.C.C. from attempting to preempt *categories* of State laws in a single preemption determination. More specifically, the Act mandates that the O.C.C. may only attempt to preempt State laws on a "case by case basis." 12 U.S.C. § 25b(b)(1)(B). The Act defines "case by case basis" to mean:

> a determination pursuant to this section made by the Comptroller concerning the impact of a ***particular*** State consumer financial law on any national bank that is subject to that law, ***or the law of any other State with substantively equivalent terms.*** [emphasis added].

Id.

The effect of this requirement is that an O.C.C. preemption determination may only assert that a *single* State law is preempted by the NBA along with any materially identical laws enacted by other States. But the O.C.C. may not

attempt to preempt multiple laws from the same State (or categories of laws in multiple states) in a single preemption determination. *Id.*

V.
THE O.C.C.'S JULY 21, 2011 REGULATORY RESPONSE IGNORED THE DODD-FRANK ACT REQUIRMENTS

A. The O.C.C. Did Not Have Congressional Authority to Promulgate its July 21, 2011 Regulatory Amendments

A federal agency's authority to promulgate regulations is strictly limited to the authority granted by Congress. *See Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988). However, the O.C.C.'s July 21, 2011 regulatory amendments (which were enacted the same day that 12 U.S.C. § 25b became effective) plainly ignored the Congressional limitations imposed by the Dodd-Frank Act on O.C.C. rulemaking.

The O.C.C.'s stated purpose from promulgating its July 21, 2011 amendments to 12 C.F.R. § 7.4008 was to make "conforming changes to the 2004 preemption rules at ... 12 C.F.R. § 7.4008 (non-real estate lending) ... to reflect the [Dodd Frank] Act's provisions concerning preemption of state consumer financial laws." 76 FR 43549, at 43552 (July 21, 2012). But despite this stated purpose, the O.C.C. did not make any material changes to 12 C.F.R. § 7.4008. Rather, it simply deleted a subparagraph asserting that the NBA preempted all State laws that "obstruct, impair, or condition" a national bank's ability to exercise its federal powers, and reorganized and renumbered other provisions. 76 FR at 43565-43566. The O.C.C. left intact the provisions of 12 C.F.R. § 7.4008(d) that purport to broadly preempt categories of State law, including all State law disclosure requirements of any kind - without regard to whether or not such laws discriminate against national banks or significantly interfere with their powers. 12 C.F.R. § 7.4008(d).

In explaining its decision to retain the broad categories of State law preemption, the O.C.C. asserted that the Dodd-Frank Act's "case by case" requirement supposedly "allows categorical determinations where multiple state

laws are identified." 76 F.R. at 43557. Respectfully however, that is plainly incorrect. As stated above, the Dodd-Frank Act's "case by case" requirement only permits the O.C.C. to make determinations regarding a "particular" State law, and then to also conclude that materially identical laws enacted by ***other*** States are also preempted. 12 U.S.C. § 25b(b)(1)(B). The Dodd-Frank Act prohibits the O.C.C. from enacting regulations purporting to preempt categories of State laws. *Id.*

The O.C.C. also attempted to justify its July 21, 2011 regulation by asserting that it had reviewed its previously enacted regulations, and concluded that they did not need to be changed because they are consistent with Dodd-Frank's preemption standards. 76 F.R. at 43557 ("We have re-reviewed these rules ... to confirm that the specific types of laws cited in the rules are consistent with the standard for conflict preemption"). But this conclusion is untenable – it ignores the fact that Dodd-Frank "***revises*** the standard the OCC will use to preempt state consumer protection laws." [emphasis added]. Conf. Report, at 875.

Because the O.C.C.'s position was so at odds with the Congressional purpose of the Dodd-Frank Act, the Department of the Treasury (which encompasses the O.C.C.) even took the unprecedented step of submitting written comments to the O.C.C. in opposition to the proposed regulations. Jud. Not., Ex. 2. The Department of the Treasury made clear that:

> The [O.C.C.'s proposed] rule seems to take the positions that the Dodd-Frank standard has no effect ... [but] [t]he notion that the new standard does not have any effect runs afoul of basic canons of statutory construction: it is also contrary to the legislative history, which states that Congress sought to "*revise* the standard the OCC will use to preempt state consumer laws." [emphasis in original].

Id.

Given the facts that Congress intended the Dodd-Frank Act to (1) force the O.C.C. to revise its NBA preemption standards, and (2) prohibit the O.C.C. from preempting categories of State laws, the O.C.C.'s affirmation of its prior NBA

preemption standards (including a regulation purporting to preempt broad categories of State consumer protection laws) is without any Congressional authority.

B. The O.C.C. Failed to Provide an Evidentiary Record for Its Conclusion That All State Financial Disclosure Laws Significantly Interfere With National Bank Powers

In its July 21, 2011 amendments, the O.C.C. asserted that 12 C.F.R. § 7.4008(d) (which purports to broadly preempt all State financial disclosure laws) remained valid notwithstanding the Dodd-Frank Act's amendments to the NBA. 76 FR at 43557. The O.C.C. argued that the U.S. Supreme Court had previously declared that the categories of State laws listed in 12 C.F.R. § 7.4008(d) all significantly interfere with national bank powers. *Id.* Specifically, the O.C.C. argued:

> [D]isclosure laws that impose requirements that predicate the exercise of national banks' deposit-taking or lending powers on compliance with state dictated disclosure requirements clearly present a significant interference within the meaning of the *Barnett* decision, notably the *Franklin Nat'l Bank* decision specifically discussed and relied upon in *Barnett Bank.*

Id.

The O.C.C.'s attempt to justify 12 C.F.R. § 7.4008 was based ***solely*** on this (erroneous) interpretation of applicable legal standards, without any citation to an evidentiary record.[2] Accordingly, the O.C.C. violated the Dodd-Frank Act's

[2] The O.C.C.'s assertion that State law disclosure requirements fall "squarely within" the holding in *Franklin National Bank v. New York*, 347 U.S. 373 (1954) is incorrect, as that case did not deal with State law disclosure requirements, but rather a discriminatory State law that permitted State-chartered banks to engage in advertising that was prohibited for national banks. The O.C.C. provided no explanation of why it believes the *Franklin* case applies to and supposedly preempts non-discriminatory State disclosure laws.

requirement that it make preemption determinations only when supported by an evidentiary record. 12 U.S.C. § 25b(c).

As stated above, under the Dodd-Frank Act O.C.C. preemption determinations must include "substantial evidence" presented on the record in support of its determination that a State law "significantly interferes" with national bank powers. 12 U.S.C. § 25b(c). Under the Act:

> No regulation or order of the Comptroller of the Currency [finding that a State law significantly interferes with national bank powers] shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in [*Barnett Bank v. Nelson*].

Id.

Because the O.C.C. did not provide an evidentiary record supporting its regulation purporting to preempt all State financial disclosure laws (*i.e.*, 12 C.F.R. § 7.4008(d)) it failed to comply with the procedural restrictions of the Dodd-Frank Act. 12 U.S.C. § 25b(c).

MBNA (or the O.C.C.) might attempt to argue that the Dodd-Frank Act's "substantial evidence" requirement in 12 U.S.C. § 25b(c) does not apply to the O.C.C.'s refusal to repeal 12 C.F.R. § 7.4008(d) because a refusal to repeal a regulation is not a "preemption determination" under 12 U.S.C. § 25b(b)(1). But that argument ignores the Congressional directive of the Dodd-Frank Act - where (as here) a Congressional statute is specifically intended to force an agency to revise its preemption standards, the agency should not be able to claim that it acted within its authority by doing nothing.

C. The O.C.C. Does Not Have the Discretion to Conclude That the Expense and Burden of Complying With Multiple State Laws Amounts to a Significant Interference

In both its 2004 and 2011 versions of 12 C.F.R. § 7.4008(d), the O.C.C. has attempted to suggest that the burden and expense of complying with the varying laws of numerous states - by itself - can amount to a "significant interference" within the meaning of the *Barnett Bank* standard. Under the Dodd-Frank Act, a court reviewing this determination must assess the "thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." 12 U.S.C. § 25b(b)(5)(A). Applying these standards, this Court should reject the O.C.C.'s argument because it relies on a fundamental misunderstanding of what the "significant interference" test entails.

Under *Barnett Bank*, a State law is not displaced because it interferes in a *general sense* with a bank's ability to operate; rather, NBA preemption exists only if the state law interferes with the national bank's ability to *exercise its federally granted powers*. *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996) (state laws are not preempted unless they "prevent or significantly interfere with the national bank's ***exercise of its powers***" [emphasis added]). In enacting the NBA, Congress did not simply grant national banks the power to lend money - the NBA granted national banks the powers to lend money and engage in the business banking "subject to law." 12 U.S.C. 24 Seventh. The Congressionally-granted power at issue in this case is the following:

> [A] national banking association ... shall have the power -- ...[t]o exercise by its board of directors or duly authorized agents, ***subject to law***, all such incidental powers as shall be necessary to carry on the business of banking. [emphasis added].

Id.

Because Congress created national banks to exercise their powers subject to the laws of the States in which they do business, complying with State laws is not an "interference" with federally granted powers - it is the very essence of the Congressionally-granted power conferred by the NBA. Any regulation exempting national banks from broad categories of State laws would be, in reality, a fundamental change the nature of the powers expressly granted by Congress.

NBA preemption has always focused on whether there is an interference with national bank powers, and the O.C.C. does not now and has never had the authority to change the nature of the powers that Congress granted to national banks. This has been confirmed in numerous U.S. Supreme Court decisions. *McClellan v. Chipman,* 164 U.S. 347 (1896) ("in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank ... but the question which we determine is whether it is such a regulation as violates the act of congress."); *First National Bank v. Dickinson,* 396 U.S. 122, 138 (1969) ("Nor is the congressional policy of competitive equality [between national and State-chartered banks] with its deference to State standards open to modification by the Comptroller of the Currency"); *Cuomo v. Clearing House Ass'n, L.L.C.,* 129 S. Ct. 2710, 2720 (2009) (holding that O.C.C. preemption opinion is invalid because it "attempts to do what Congress declined to do: exempt national banks from all state banking laws.").

IV.
CONCLUSION

The Dodd-Frank Act codifies the pre-existing standard for NBA preemption of State laws. In so doing, it confirms that: (1) State laws are not preempted by the NBA unless they discriminate against national banks or "significantly interfere" with national bank powers; (2) that there is no "bright line" rule preempting State laws specifically intended to regulate banking; and (3) that O.C.C. preemption regulations are not entitled to *Chevron* deference. The Dodd-Frank Act's standards may be imposed in this case without being retroactive because they are merely a clarification of existing law.

One of the central purposes of the Dodd-Frank Act was to force the O.C.C. to revise its preemption regulations, to bring them into line with the applicable *Barnett Bank* standard. It also imposed procedural requirements to prevent future inappropriate preemption determinations, which include (1) requiring that O.C.C. preemption determinations be made solely on a "case by case" basis, and (2) requiring the O.C.C. to support any preemption opinion with "substantial evidence."

Notwithstanding the Act's requirements, in its July 21, 2011 regulatory amendments the O.C.C. refused to amend or repeal 12 C.F.R. § 7.4008(d), a regulation that clearly runs afoul of the Dodd-Frank Act's prohibition on O.C.C. attempts to preempt categories of State laws. In addition, the O.C.C. seeks to preserve 12 C.F.R. § 7.4008(d) even though it has not and cannot provide an evidentiary record supporting that preemption determination. Because the O.C.C. has failed to comply with the Dodd-Frank Act's requirements, 12 C.F.R. § 7.4008(d) is not a valid exercise of rule-making authority, and it invalid.

Lastly, the O.C.C.'s attempts to suggest (in its current and former regulations) that the burden of complying with the various laws of multiple states - by itself - constitutes a "significant interference" under the *Barnett Bank* standard. But this is a misunderstanding of the "significant interference" test. Under *Barnett Bank,* the NBA only preempts State laws that significantly interfere with national bank *powers.* Complying with the laws of the States in which national banks do business is a component of the NBA's Congressional grant of powers. And it is beyond the authority of the O.C.C. to attempt to alter the nature of powers granted by Congress.

Respectfully submitted,

Michael R. Vachon, Esq.
Attorney for Appellant Allan Parks

PROOF OF SERVICE

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

I am over the age of 18 and not a party to the within action. My business address is: 17150 Via Del Campo, Suite 204, San Diego, California 92127. On the date shown below, I served the foregoing document(s) described as:

LETTER TO SUPREME COURT RE:
SUPPLEMENTAL LETTER BRIEF IN *Parks v. MBNA National Bank, N.A.*

on the interested parties in this action as follows:

ARNOLD & PORTER, LLP Attn.: Laurence J. Hutt, Esq. 777 South Figueroa Street, 44th Floor Los Angeles, CA 90017-5844 *(Attorneys for MBNA America Bank, N.A.)*	Sheldon H. Jaffe, Esq. Deputy Attorney General State of California Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 Fax: (415)703-5480
Comptroller of the Currency Litigation Department Attn.: Douglas Jordan, Senior Counsel 250 E Street SW Washington, DC 20219 Fax: (202) 874-5279	Clerk of the Court California Superior Court County of Orange Civic Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701
District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701	Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230
Clerk of the Court California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd. Santa Ana, CA 92701	

[X] **(BY MAIL):** The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the facts stated in this Proof of Service are true.

Date: May 15, 2012

Svetlana Morozovskaya