

Nos. 99-17590, 99-17591

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BANK OF AMERICA, N.A.; WELLS FARGO BANK, N.A.; and
CALIFORNIA BANKERS ASSOCIATION,

Plaintiffs and Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO et al.
and
CITY OF SANTA MONICA et al.,

Defendants and Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. CV 99-4817 VRW
Honorable Vaughn Walker, Judge

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INTRODUCTION

In response to public concern over ever-escalating bank fees, the cities of Santa Monica and San Francisco recently passed consumer protection laws whose message is clear: Unrestrained bank fees are hurting consumers and harming competition. The laws protect consumers from a clever yet unfair and anti-competitive new practice in the banking industry, the ATM surcharge. The surcharge targets persons who use automated teller machines, or ATMs, through the now ubiquitous ATM networks, but who do not hold an account at the bank that owns the particular machine they use. This group is uniquely vulnerable to excessive banking charges.

Without the surcharge, banks already are more than compensated for the cost of each ATM transaction, through contractual agreements with their ATM networks and through other fees imposed on consumers. The surcharge allows banks to charge consumers multiple times for the same transaction, while also hindering competition.

California's two largest banks, who enjoy a near monopoly on ATMs in the two cities, not surprisingly seek to protect this predatory and lucrative fee. In this lawsuit they misguidedly argue that federal law preempts the cities from protecting consumers against excessive ATM fees. However, the banks could not be more wrong. The ordinances are not only compatible with federal law; they represent the very kind of consumer protection measures that Congress encourages states and cities to pursue. Far from manifesting the required clear intent to preempt, Congress has consistently voiced its desire that states and cities be allowed to protect

consumers from unfair practices by national banks. The ATM surcharge ordinances are fully consistent with Congressional intent, as well as with the letter and spirit of federal law.

STATEMENT OF JURISDICTION

The Banks filed suit for declaratory and injunctive relief in the district court, alleging federal jurisdiction under 28 U.S.C. §1331. The district court's order granting the preliminary injunction was entered on November 16, 1999. The district court's supplemental order modifying the injunction was entered on November 30, 1999. The Cities filed their respective Notices of Appeal on December 10, 1999. Since this appeal is from the granting of a preliminary injunction, this Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1).

ISSUE PRESENTED

Did the district court err as a matter of law in ruling that the Banks are likely to prevail on their claim that the Ordinances are preempted by the National Bank Act?

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STATEMENT OF THE CASE

A. Procedural Background

On November 3, 1999, Bank of America, Wells Fargo, and the California Bankers Association (collectively “the Banks”) filed this lawsuit against the cities of San Francisco and Santa Monica and their respective elected representatives (collectively “the Cities”) in the United States District Court for the Northern District of California, claiming that the two ATM surcharge ordinances (“the Ordinances”) could not be enforced against nationally chartered banks. [ER 1] The complaint sought injunctive and declaratory relief, and was based on the sole legal theory that the Ordinances are preempted by the National Bank Act. [ER 11 ¶ 43]¹

B. Disposition Below

On November 15, 1999, in an oral ruling from the bench, the district court granted a preliminary injunction against both Cities prohibiting them from enforcing the Ordinances during the pendency of the case. [RT 11/15/99 at 76:21-77:1, ER 76-77]² The ruling was premised on the court’s holding that the Banks are likely to

¹ The Cities have filed a Joint Excerpts of Record, references to which are designated herein as “ER [page number].” References to the reporters’ transcripts of the oral proceedings below are designated as “RT [date] at [page:lines].”

² At the request of the Banks, and over the Cities’ objections, the district court modified the preliminary injunction by written order dated November 24, 1999. This supplemental order forbade the Cities to take any action “to place into effect, make effective, or otherwise implement or permit any person to enforce or implement” the Ordinances. [ER 112-113] This modification only affected San Francisco, whose election results had not yet been certified.

succeed on the merits of their federal preemption argument. [RT 11/15/99 at 70:19-71:1, ER 70-71] Although the preemption claim only applied to national banks, the court extended the injunction to cover all financial institutions in the two cities, on the ground that the Ordinances were not severable. [RT 11/15/99 at 72:24-75:1, ER 72-75]

STATEMENT OF FACTS

A. The ATM Networks and Fee Structure

Banks began using ATMs in the 1970s to perform work formerly done by human tellers. Soon thereafter the banking industry formed ATM networks, to provide a mutually beneficial arrangement where banks would share ATM resources and all customers would benefit by having easier access to their accounts. [ER 38 ¶ 4]

As a result, banks began providing ATM services to persons who do not hold an account with them. The costs of these “foreign” transactions are allocated between the ATM-owning bank and the customer’s “home” bank, through the ATM network’s fee agreements. The actual cost of each ATM transaction to the owner of the machine is about 27 cents. [ER 47] However, pursuant to the network agreements, each home bank pays the ATM-owning bank an “interchange” fee of approximately 50 cents per transaction. [ER 38-39 ¶ 5, ER 46] Thus, the interchange fee pays the ATM-owning banks approximately twice their cost for

each ATM transaction by a non-account holder.³

Most home banks pass the cost of the interchange fee on to their account holders, with a profit margin, in the form of a “foreign” fee. [ER 39 ¶ 5] For example, Bank of America and Wells Fargo each assess their own account holders \$2.00 for each transaction at another bank’s ATM. [ER 40 ¶ 13]

In short, without the surcharge in dispute here, banks are compensated for their costs on each ATM transaction, through mutually agreed network fee arrangements and “foreign” fees collected from their own account holders. In addition, all banks enjoy the mutual benefits of the shared electronic networks, as evidenced by the consistent growth in the deployment of ATMs long before the advent of the surcharge: The number of ATMs nationwide has increased consistently, every year, since the machines were first introduced. [ER 41 ¶ 16, ER 45]⁴

B. The ATM Surcharge

For more than twenty years, the major ATM network agreements prohibited ATM-owning banks from imposing a second charge, or “surcharge,” on non-account holders using their ATMs. The reason was to prevent an unfair advantage for the banks with the most ATMs, and to assure that all banks had fair access to the network. [ER 39 ¶ 6] In April 1996, the two main ATM networks, Plus and Cirrus,

³ For an overview of the pre-surcharge ATM network fee arrangements, see Southtrust Corp. v. Plus System, Inc., 913 F. Supp. 1517, 1519-20 (N.D.Ala. 1995).

⁴ Also, the banking industry has recorded record profits for seven consecutive years, four of which predated the 1996 advent of the ATM surcharge. [ER 41 ¶ 16]

lifted their long-standing ban on the surcharge. [Id.] As a result, banks began imposing the ATM surcharge on non-account holders, while continuing to receive interchange fees for each transaction. By April 1999, the surcharge was nearly universal; approximately 99 percent of bank ATMs in California imposed the double fee on non-account holders. [Id.] Bank of America and Wells Fargo currently assess a surcharge on non-account holders in the amount of \$1.50. [ER 40 ¶ 13]

C. The Effects of the Surcharge on Consumers

With the advent of the surcharge, consumers using ATMs owned by banks where they do not have an account now pay two separate fees for the same transaction: a foreign fee to their home bank, and a surcharge to the ATM-owning bank. Elderly, disabled, and lower-income consumers are disproportionately affected by the surcharge, due to their lower mobility and relative lack of choice over which ATMs to use. [ER 40 ¶ 12] These consumers also tend to withdraw lower amounts from ATMs. On a twenty-dollar withdrawal, the combined double fees at Wells Fargo or Bank of America total \$3.50, an amount equal to a 17.5 percent charge. [ER 40 ¶ 13]

The surcharge also undermines competition in the local banking industry. In most industries, the largest businesses win customers by lowering prices, improving services, or both. The ATM surcharge allows California's two largest banks, Bank of America and Wells Fargo, to attract depositors by raising prices: to avoid the surcharge at most ATMs, users must transfer their accounts to one of those two banks. In Santa Monica, Bank of America and Wells Fargo control 72 percent of

bank ATMs in the city; in San Francisco the figure is 86 percent. [ER 32 n.12]⁵ The result is that smaller banks and credit unions, since they have fewer ATMs to offer to consumers, lose depositors and market share. [ER 39-40 ¶ 9] The smaller institutions are an important resource for consumers since they charge “significantly” lower fees than national banks. [ER 48]

Moreover, because the ATM surcharge is imposed only on a bank’s non-account holders, it is not subject to the normal market forces that help to keep prices reasonable. Fees that a bank assesses on its own customers, such as the “foreign” ATM fee, are subject to these forces: If the fees get too high, the customers can move their accounts to other banks. The surcharge has no such accountability. Since the vast majority of ATMs are owned by just two banks, consumers’ main recourse to avoid a high surcharge is to move their funds to the bank that charges it. [ER 39 ¶ 8-9]

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The banking industry has seen a large number of mergers and acquisitions in

⁵ Both banks use on-screen messages to non-account holders at their ATMs, combined with the \$1.50 surcharge, to gain further market share. During the course of a single cash withdrawal at a Bank of America ATM in Santa Monica, non-account holders receive the following messages on the screen at various times during the transaction:

Did you know your bank may charge you to use this ATM? . . . If you switch to B of A you can get free access to this cash at nearly 7000 Bank of America or Seafirst Bank ATMs . . . We offer more ATMs to access your cash at NO CHARGE! . . . To move your checking account to Bank of America, see a branch representative . . . Switch to Bank of America today.

[ER 42-43 ¶¶ 4-5]

recent years. [ER 40 ¶ 10] The ATM surcharge, by allowing the largest banks to gain an even stronger market position against their competitors, further harms consumer choice and the ability of the smaller institutions to compete. [Id.]

D. The Ordinances

On October 12, 1999, the Santa Monica City Council gave final approval to an ordinance prohibiting financial institutions from imposing the surcharge on non-account holders using their ATMs. [ER 21] On November 2, 1999, the voters of San Francisco adopted a virtually identical ordinance by ballot initiative. [ER 16] The legislative findings of both measures recognized the detrimental impacts of the ATM surcharge on consumers described above. [ER 17-19, 21-22]

SUMMARY OF ARGUMENT

To prevail in this lawsuit, the Banks must overcome the strong presumption against federal preemption and show “clear and manifest” Congressional intent to preempt local ATM fee laws. However, far from preempting, Congress specifically authorized local governments to enact laws that protect consumers in their ATM transactions. The express intent in the federal Electronic Fund Transfer Act (“EFTA”) is to encourage states and cities to craft stronger ATM consumer protections than those contained in the federal law itself, which was intended only as a starting point. The Ordinances, by prohibiting an unfair business practice that harms consumers, are precisely this sort of law.

The National Bank Act (“NBA”), upon which the Banks rely, does not

address ATMs or ATM fees in any capacity. Neither the NBA, its regulations, nor the Congressional intent behind them, support the Banks' claim of preemption of local ATM fee regulation. In fact, Congress has made clear its intent not to preempt state laws regulating national bank fees in other contexts. The Banks cannot come close to meeting their burden of proving preemption by the NBA.

The EFTA and the NBA coexist harmoniously since they cover different subjects, and neither preempts the Ordinances. To the extent of any potential conflict between them, the NBA is trumped by the far more specific and recent EFTA.

Since the Banks' lawsuit hinges on their claim of federal preemption, on which they cannot have a likelihood of success, the preliminary injunction must be reversed. In addition, since there are no remaining issues necessary to litigate, the Court should remand with instructions to enter judgment in favor of the Cities.

STANDARD OF REVIEW

The appellate courts review de novo any "legal issues underlying a decision to grant an injunction . . . as well as the conclusion that plaintiffs are likely to succeed on the merits of those issues." Coalition for Economic Equity v. Wilson, 122 F.3d 692, 701 (9th Cir. 1997). Federal preemption is a question of law that is reviewed de novo. See, e.g., Contract Services Network, Inc. v. Aubry, 62 F.3d 294, 297 (9th Cir. 1995).

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ARGUMENT

To obtain a preliminary injunction, the moving party has the burden of proving either “a combination of probable success on the merits and the possibility of irreparable injury,” or that “serious questions are raised and the balance of hardships tips sharply in his favor.” Associated General Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991). Under either standard, the moving party must show some likelihood of success.

The Banks’ case is premised on the theory that the Ordinances are preempted by the National Bank Act and its regulations. [ER 11 ¶ 43] As explained below, as a matter of law, federal law does not preempt the Ordinances. Consequently, the Banks cannot show any likelihood of success on the merits, and the district court erred in granting the preliminary injunction.⁶

I

IN CLAIMS OF FEDERAL PREEMPTION, CONGRESSIONAL INTENT IS PARAMOUNT AND LOCAL LAWS ARE PRESUMED VALID

All preemption cases begin with the assumption that the police powers of the states are not superseded by federal law “unless that was the clear and manifest

⁶ Since the Banks have no likelihood of success, this Court need not address the district court’s findings regarding irreparable harm and the public interest, although these findings were erroneous. See San Francisco Appellants’ opening brief.

purpose of Congress.” Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996).⁷ Thus, preemption analysis begins with “the starting presumption that Congress does not intend to supplant state law.” New York Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 654 (1995). See also Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (displacement of a state law is “an extraordinary power . . . that we must assume Congress does not exercise lightly”). In determining whether a state law is preempted by federal statute, the court’s “sole task” is to “ascertain the intent of Congress.” California Federal Savings and Loan Assn. v. Guerra, 479 U.S. 272, 280 (1987). This Court has noted two reasons for the presumption against federal preemption:

First, Congress has the power to make preemption clear in the first instance. Second, if the court erroneously finds preemption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem.

Chemical Specialties Manufacturers Assn. v. Allenby, 958 F.2d 941, 943 (9th Cir. 1992).

In areas that traditionally have been regulated by the states, the presumption against federal preemption is even stronger. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The Ordinances, by prohibiting an excessive and unfair practice of the banking industry for the benefit of consumers, address two such areas: consumer protection and banking. Consumer protection has long been recognized as an area of state police power regulation. See California v. ARC America Corp., 490 U.S. 93,

⁷ For purposes of federal preemption analysis, municipal ordinances are treated identically to statewide laws. See, e.g., Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605, 607-08 (1991).

101 (1989) (citing “long history of state common-law and statutory remedies against monopolies and unfair business practices”); General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) (“consumer protection law is a field traditionally regulated by the states”).

The courts likewise have noted the strong local interest in the regulation of banking. As the Supreme Court stated in Lewis v. BT Investment Managers, 447 U.S. 27, 38 (1980):

[B]anking and related financial activities are of profound local concern. . . . [S]ound financial institutions and honest financial practices are essential to the health of any State’s economy and to the well-being of its people.

See also Valley Bank v. Plus System, Inc., 914 F.2d 1186, 1195 (9th Cir. 1990) (“States have a legitimate interest in regulating banking”). In California, state regulation of banking is extensive. See, e.g., Cal. Fin. Code §§99-3904; Cal. Com. Code §§4101-4504.

In short, to prevail on their federal preemption claim, the Banks must overcome the strong presumption against preemption and demonstrate clear and manifest Congressional intent to preclude local ATM fee regulation.

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II

THE ORDINANCES ARE NOT PREEMPTED BECAUSE CONGRESS HAS AUTHORIZED THE LOCAL REGULATION OF NATIONAL BANKS' ATMS

In this case, far from manifesting a clear intent to preempt state law, Congress has expressly authorized states and cities to enact laws such as the Ordinances that protect consumers using ATMs.

A. The EFTA Expressly Allows Cities to Enact ATM Laws to Protect Consumers.

In 1978, as ATMs and related technologies were beginning to emerge in the United States, Congress enacted a federal statute to promote the fair treatment of consumers using these new machines: the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. §§1693-1693r. The EFTA provided “a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.” 15 U.S.C. §1693(b). The goal of the EFTA was plain: “The primary objective . . . is the provision of individual consumer rights.” *Id.* (emphasis added). The EFTA expressly includes ATMs within its purview. 15 U.S.C. §1693a(6).

To address its goal of protecting consumers, Congress did two things. First, it established certain basic rules governing electronic fund transfers. These include the terms and conditions of transactions (15 U.S.C. §1693c); documentation requirements (§1693d); error resolution (§1693f); and liability of financial institutions for certain problems (§§1693h, 1693m).

Second, Congress made it clear that these rules only establish minimum protections, and that states and cities are encouraged to enact their own laws to protect consumers in the area of electronic fund transfers. Hence, the EFTA includes an express anti-preemption provision:

This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

15 U.S.C. §1693q (emphasis added).⁸ Congress intended that this broad grant of authority apply to municipalities as well as the states. See 15 U.S.C. §1693a(10) (the term “State” as used in the EFTA includes all political subdivisions of states).

This Court has already recognized that Section 1693q codifies the Congressional intent to encourage local regulation of ATMs. In Valley Bank v. Plus System, Inc., 914 F.2d 1186 (9th Cir. 1990), the Court upheld a Nevada law that allowed banks to charge ATM transaction fees at a time when the ATM network agreements still prohibited the surcharge. In rejecting an ATM network’s Commerce Clause challenge to the law, the Court explicitly recognized the Congressional intent in the EFTA to allow local governments wide latitude in regulating ATM fees. Id., 914 F.2d at 1195. As the Court pointed out, “Congress specifically has declined to restrict state regulation in the ATM context.” Id. (emphasis added). The Court’s recognition of the EFTA’s grant of local authority to regulate ATMs and ATM fees

⁸ The full text of Section 1693q is set forth in the attached Appendix, along with the other statutes and regulations analyzed in this brief.

is dispositive of the Banks' preemption argument in this case.⁹

This Court based its finding in Valley Bank on the legislative history of the EFTA, which demonstrates the Congressional intent to “permit[] the States to enact legislation affording greater consumer protection” than federal law. Id., 914 F.2d at 1195, quoting S. Rep. No. 915, 95th Cong. 18 (1978). The Court noted that in enacting the EFTA, Congress expressly rejected the idea of requiring national uniformity in ATM laws:

While annulling all State EFT [electronic fund transfer] laws would produce the benefit of uniform EFT standards in all 50 States, the committee rejected this approach because it would contravene Congress' longstanding policy of deferring to those States which choose to provide more stringent consumer safeguards.

Id. (emphasis added).

Thus, Congress intended that states and cities be the primary source of ATM regulation; the EFTA itself was intended mainly as an adjunct to local regulation of ATMs. See City of New York v. Department of Transportation, 539 F.Supp. 1237, 1256 (S.D.N.Y. 1982) (EFTA “supplements” laws of any state relating to electronic fund transfers, except to extent those laws are inconsistent with the EFTA). The legislative history of the EFTA makes clear this intent: “The prudent course would be to go slow with Federal legislation and to permit the States to move forward with experimentation in the area.” S. Rep. No. 915, 95th Cong. 21 (1978) (emphasis

⁹ The fact that the Nevada law in Valley Bank (which was openly intended to aid the casino industry, a strong state interest there) permitted the ATM surcharge, is immaterial on the question of federal preemption.

added).¹⁰

There is no indication that Congress intended to exempt national banks from this state and local regulation. In fact, the opposite is true. The EFTA provides that all ATMs are regulated equally, regardless of whether they are owned by national banks, federal savings associations, or other institutions. 15 U.S.C. §1693a(8).

B. The Ordinances are Consistent With the EFTA and Therefore Are Not Preempted.

The EFTA provides that a local ATM law is preempted only if it is “inconsistent” with the EFTA. 15 U.S.C. §1693q. A local law is not inconsistent if it provides greater consumer protection than the federal law. Id. This savings clause in the EFTA defines the parameters for determining federal preemption in this case. See Cippollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted”).

The Ordinances in this case are in no way inconsistent with the EFTA. By

¹⁰ Congress’s delegation of power in the area of electronic fund transfers even goes so far as to allow states and cities to supplant the substantive provisions of the federal EFTA, as long as consumers are assured proper enforcement:

The Board shall by regulation exempt from the requirements of this subchapter any class of electronic fund transfers within any State if the Board determines that under the law of that State that class of electronic fund transfers is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

15 U.S.C. §1693r.

prohibiting the ATM surcharge altogether, they provide greater protection to consumers than the EFTA itself, which currently prohibits the surcharge only if it is not disclosed at the ATM. 15 U.S.C. §1693b(d)(3). Thus, by the very terms of the EFTA, the Ordinances are not preempted. 15 U.S.C. §1693q.

The district court disagreed, stating “it is doubtful that ATM fee regulation . . . is permissible” under the EFTA, on the ground that it goes beyond the types of consumer protections contained in the EFTA itself. [RT 11/15/99 at 70:4-18, ER 70] This conclusion misinterprets the EFTA’s preemption clause, which only prohibits those state laws that are “inconsistent” with the EFTA. 15 U.S.C. §1693q. The court’s conclusion also runs counter to the stated Congressional intent to encourage experimentation in local consumer protection laws as the primary form of ATM regulation. S. Rep. No. 915, 95th Cong. 21 (1978).¹¹

Furthermore, Congress’s most recent actions confirm that ATM fee regulation is very much within the scope of the EFTA itself, and not the NBA as the Banks contend. Just last year Congress amended the EFTA to provide consumers increased protection against the new ATM surcharge on non-account holders. On November

¹¹ The district court implied that the Ordinances were not consumer protection measures, as envisioned by the EFTA. Nothing could be further from the truth. The bans on the ATM surcharge protect consumers from excessive double fees, and from an anti-competitive business practice that undermines consumer choice and access to the favorable rates of smaller financial institutions. See Southtrust Corp. v. Plus System, Inc., 913 F. Supp. 1517, 1524-25 (N.D.Ala. 1995) (prohibiting the surcharge “enhances consumer welfare” and “is pro-competitive”). Both of these goals are at the heart of traditional consumer protection legislation. See, e.g., Cal. Bus. & Prof. Code §§17200 et seq. (unfair competition statute); Cal. Civil Code §1748.1 (prohibiting retail businesses from imposing a surcharge on credit card purchases).

4, 1999, Congress gave final approval to the ATM Fee Reform Act of 1999, P.L. No. 106-102, §§701-705, 113 Stat. 1338, 1463 (1999), since signed into law and codified within the EFTA. One portion of the new law prohibits ATM surcharges against non-customers unless they are clearly disclosed at the time of the transaction, on both the machine itself and its screen. 15 U.S.C. §1693b(d)(3). The law also requires banks to disclose all ATM fees at the time customers open an account. 15 U.S.C. §1693c(a).¹² In amending the EFTA Congress left intact the law's express anti-preemption provision, 15 U.S.C. §1693q.

These recent amendments to the EFTA remove any doubt about which law Congress intended to govern ATM transactions and fees, including regulation of the ATM surcharge. When Congress examines ATM fees and their effect on consumers, Congress looks to the EFTA. Moreover, the fact that Congress felt compelled to strengthen the ATM consumer protections of the EFTA, while leaving untouched the ability of local governments to enact stronger measures, cannot be ignored. The fact that the Ordinances go farther than Congress did in protecting consumers' rights—by outlawing the surcharge altogether—does not undermine the Cities' authority under the EFTA. To the contrary, stronger consumer protection laws at the local level are precisely what Congress intended.¹³

¹² Three separate bills currently pending before Congress further confirm that the Ordinances are within the scope of the EFTA. The three bills each contain a prohibition against surcharges on non-account holders at ATMs. H.R. 1575 (106th Cong. 1999); H.R. 3229 (106th Cong. 1999); H.R. 3503 (106th Cong. 1999). Significantly, all three measures are proposed as amendments to the EFTA.

¹³ The district court also opined that the Ordinances are not “necessary to protect consumers.” [RT 11/15/99 at 70:12-15, ER 70] This improperly interjects

C. States Have Exercised Their Power to Regulate National Bank ATMs Through Similar Laws.

Pursuant to the EFTA's broad grant of authority, states and cities have the power to regulate the ATMs of national banks along with all other institutions that operate the machines. 15 U.S.C. §§1693a(8), 1693q. Since the EFTA was enacted in 1978, many states have exercised this power and enacted consumer protection laws covering ATM transactions and fees, and have applied these laws equally to national banks. At least three different states—Arkansas, Mississippi and Wyoming—already have imposed statutory limits on the amount of the ATM surcharge. These laws apply equally to national and state banks that operate ATMs within each state. See Ark. Code §23-48-810(a)(2); Miss. Code §81-5-100(c)(4); Wyo. St. §13-1-502(f). Santa Monica is aware of no legal challenges to these laws.¹⁴

In addition, California has enacted a number of ATM consumer protection laws. Financial Code Section 13080 (like the recent amendment to the EFTA)

the court's own opinion of the value of the Ordinances, into a preemption analysis that should look only to Congressional intent. It is settled law that the court may not substitute its own opinion of the wisdom of a law for that of the elected body that enacted the law. See Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239 (1984) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation”).

¹⁴ Neither in the ATM Fee Reform Act of 1999 nor in any other context has Congress disapproved of these laws, or questioned the states' power to apply them to national banks.

prohibits any ATM surcharges that are not disclosed at the machine. California's ATM User Safety laws set forth rules governing the location, installation, and lighting at ATMs. Cal. Fin. Code §§13000-13070. These laws likewise apply to all ATMs, including those owned by national banks.

Like the state laws discussed above, the Ordinances in this case fall within the broad range of ATM consumer protections envisioned by Congress when it enacted the EFTA.

III

THE NATIONAL BANK ACT DOES NOT PREEMPT THE ORDINANCES

Congressional intent to preempt can be found in one of three ways. First, Congress can expressly preempt state law in the text of a federal statute. Cipollone v. Liggett Group, Inc. 505 U.S. 504, 516 (1992). Second, preemption may be inferred "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." California Federal Savings and Loan Assn. v. Guerra, 479 U.S. 272, 280 (1987). Third, federal law may preempt a state law if the two actually conflict. Id.

In this case, it is agreed that Congress has not expressly preempted local ATM fee laws in any federal statute. Likewise, Congress has not comprehensively occupied the field of ATM fee regulation to the exclusion of the states. See 15 U.S.C. §1693q; Perdue v. Crocker National Bank, 38 Cal. 3d 913, 938, 941 (1985), appeal dismissed 475 U.S. 1001 (1986). The Banks' only preemption theory, then,

is that the Ordinances conflict with the National Bank Act (“NBA”), 12 U.S.C. §§21 et seq., and its regulations. [ER 11 ¶ 43]

A. The Ordinances Do Not Conflict With the NBA.

To support a finding of conflict preemption, the Supreme Court requires either that “compliance with both federal and state regulations is a physical impossibility,” or that the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” California Federal Savings and Loan Assn. v. Guerra, 479 U.S. 272, 280 (1987). Since the Banks do not claim any physical impossibility, they must establish that the Ordinances obstruct the Congressional intent manifested in the NBA. They cannot meet this burden.

1. The Ordinances do not obstruct the Congressional purpose in the NBA.

The NBA was originally enacted in 1863. Its purpose was “providing for federal chartering of private commercial banks and empowering the newly created national banks to issue and accept a uniform national currency.” United States National Bank v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 449 (1993). The NBA has been amended over the years to define the various duties and powers of national banks as they have evolved. Most recently, for example, the Gramm-Leach-Bliley Financial Modernization Act, P.L. No. 106-102 (1999), amended the NBA to expand the powers of national banks to engage in the insurance, financial services, and other businesses.

However, more than twenty years after ATMs were first deployed by national

banks, the NBA still contains no provisions whatsoever pertaining to ATMs, or national banks' ability to charge ATM fees. Indeed, the NBA's only potential connection to ATMs was severed in 1996, when the definition of national bank branches was amended to exclude ATMs. 12 U.S.C. §36(j). Nor do the administrative regulations of the Office of the Comptroller of the Currency ("OCC"), the agency charged with interpreting the NBA, contain any rules governing ATMs, ATM transactions, or ATM fees. Far from the requisite "clear and manifest" intent to preempt, there is no evidence at all that Congress intended the NBA to have any bearing on ATMs or ATM fees.

The Banks' only theory for conflict preemption in this case, which was accepted by the district court, is that one of the NBA's administrative regulations broadly permits national banks to assess "charges and fees." Hence, the Banks reasoned, the Ordinances—by prohibiting a particular type of fee—conflict with federal law. This is a critical misinterpretation of the regulation, which expressly does not preempt state bank fee regulation.

2. Congress has demonstrated its intent that the NBA not preempt state bank fee regulation.

The regulation relied on by the Banks, 12 C.F.R. §7.4002(a), states in relevant part:

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Customer charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges. For example, a national bank may impose deposit account service charges that its board of directors determines to be reasonable on dormant accounts. A national bank may also charge a borrower reasonable fees for credit reports or investigations with respect to a borrower's credit.

The district court cited this regulation as the basis for federal preemption of state and local attempts to regulate the fees of national banks. [RT 11/15/99 at 67:23-68:2, ER 67-68] This conclusion directly contradicts the express Congressional intent to permit state regulation of bank fees, as demonstrated in the legislative history of Section 7.4002.

The predecessor to Section 7.4002 was the former 12 C.F.R. §7.8000, since repealed, which stated in relevant part:

(c) A national bank may establish any deposit account service charge pursuant to paragraphs (a) and (b) of this section notwithstanding any state laws which prohibit the charge assessed or limit or restrict the amount of that charge. Such state laws are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks.

(Emphasis added.) Under this rule, which became effective in 1984, state laws could not limit or prohibit national bank fees as long as the fees complied with certain minimal requirements. Interestingly, this 1984 regulation already had been modified to clarify the “misperception,” identical to the district court's in this case, that the regulation itself had preemptive power:

There is a misunderstanding on the part of some that [12 C.F.R. §7.8000] itself preempts state laws regarding national bank service charges on deposit accounts. One of the purposes of this amendment is to make clear that this is not the case.

49 Fed. Reg. 28237 (OCC 1984).

In 1994, Congress expressed its concern that Section 7.8000 misstated the law, since state regulation of national bank fees was not preempted by federal occupation of the field. The House Conference Report to the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 urged the OCC to review Section 7.8000 to determine if it should be withdrawn or revised. The conferees stated that the OCC had applied preemption principles in an overly broad manner with respect to state laws prohibiting or restricting national bank fees. H.R. Conf. Rep. No. 651, 103rd Cong., 2d Sess. 54 (1994). Congress also cited in this report Perdue v. Crocker National Bank, 38 Cal. 3d 913, 938, 941 (1985), appeal dismissed, 475 U.S. 1001 (1986), which held that Section 7.8000 was not a valid finding of federal preemption.

In 1996, in response to this direction from Congress, the OCC repealed Section 7.8000 and replaced it with the current 12 C.F.R. §7.4002, which does not contain the preemption clause. 61 Fed. Reg. 4849, 4859 (OCC 1996). The new regulation contains a provision to ensure that Section 7.4002(a) not be misconstrued to preempt state law regulation of national bank fees:

(d) State law. The OCC evaluates on a case-by-case basis whether a national bank may establish non-interest charges or fees pursuant to paragraphs (a) and (b) of this section notwithstanding a contrary state law that purports to limit or prohibit such charges or fees. In issuing an opinion on whether such state laws are preempted, the OCC applies preemption principles derived from the Supremacy Clause of the United States Constitution and applicable judicial precedent.

12 C.F.R. §7.4002(d).

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Meanwhile, Congress took additional action to prevent improper claims by the OCC of federal preemption of state banking laws. In 1994, as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act, Congress installed new formal requirements that the OCC must follow in order to claim federal preemption over state consumer protection laws. These include publication in the Federal Register of notice that it is considering the preemption issue; solicitation of written comments; consideration of all comments received; and publication in the Federal Register of the final opinion. 12 U.S.C. §§43(a), (b).

Congress enacted these requirements specifically because of its long-standing concern about the OCC over-stepping its authority and improperly claiming federal preemption over state laws designed to help consumers. Prior to enactment of the new requirements, the House Committee members were

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

House Conf. Rep. No. 651, 103rd Cong., 2d Sess. 53-54 (1994).

In 1997, in response to its continued concern about the OCC's improper proclivity toward federal preemption, Congress installed an additional safety valve in the Amendments Act that calls for an annual review of the OCC's preemption of state law as to national banks. 12 U.S.C. §36(f)(1)(C). In introducing this bill, Senator Sarbanes referred to concerns about the OCC still being "unnecessarily expansive" in its preemption interpretations. 143 Cong. Rec. S5638 (1997). Senator D'Amato explained that the 1997 amendment was "especially important now

because of the efforts of the Comptroller of the Currency to preempt State laws and promote the national bank charter at the expense of the States and other Federal regulators.” Id. at S5637. The purpose of the new annual review was clear:

The information yielded by this preemption reporting requirement . . . will assist oversight of the Comptroller’s use of preemptive authority. In my judgment, in recent years the OCC has used his authority over national banks to thwart traditional areas of State regulation—such as . . . consumer protection.

Id. at S5637-38.

Currently, the NBA and its regulations address state bank fee laws as follows. Under 12 C.F.R. §7.4002(a), national banks are authorized to impose deposit account service charges on their customers. State and local governments may regulate and even prohibit these fees. 12 C.F.R. §7.4002(d). The OCC can evaluate the state fee laws on a case by case basis for possible federal preemption (id.); but its opinion in such cases must comply with the rulemaking requirements of 12 U.S.C. §43.¹⁵

In this case, the OCC has not rendered any official opinion regarding the potential preemption of a local ban on the ATM surcharge pursuant to 12 U.S.C. §43. Rather, the Banks have attempted to bolster their case by soliciting and obtaining informal letters from the OCC condoning the practice of the ATM surcharge on non-account holders. [ER 24, 28] These letters carry no legal weight, since they are solely creatures of this litigation and do not comply with the rulemaking requirements of 12 U.S.C. §43(a) or (b). In any case, the OCC’s letters

¹⁵ This only addresses the NBA’s approach to state bank fee regulation in general. In the separate area of ATMs, the EFTA is the controlling federal statute, and therefore governs the preemption analysis in this case. See infra at pp. 38-39.

are irrelevant, since they do not address the preemption issue directly.¹⁶

The district court erred when it relied on 12 C.F.R. §7.4002(a) for its conclusion that the Ordinances conflict with federal law. Congress compelled the OCC to amend and clarify that regulation to avoid precisely this result.

Finally, Section 7.4002(a) by its own terms is inapplicable in the context of the ATM surcharge. First, it mentions neither ATMs nor ATM fees. Second, it merely confirms, in general terms, the obvious fact that national banks may charge fees to their own depository customers for certain services they receive. The Ordinances, on the other hand, only prohibit ATM surcharges, and only those imposed on non-customers of the ATM-owning bank. They do not infringe in any way on national banks' relations with their own account holders. Thus, the Ordinances do not even cover the same subject matter as the bank fee regulation.

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¹⁶ This same tactic by the OCC—informally claiming preemption of state laws without following the required procedure—has been rejected in the past. In American Deposit Corp. v. Schacht, 887 F.Supp. 1066, 1080 (N.D.Ill.1995), affirmed 84 F.3d 834 (7th Cir. 1996), cert. denied 519 U.S. 870 (1996), the court held that the OCC's "no objection" letter did not preempt Illinois' regulatory authority over the Retirement CD. The court stated:

[A] federal agency acting within its delegated authority can preempt state regulation, but that is not what the OCC did here. In order to preempt state authority, the OCC must establish rules with the force of law, such as a regulation adopted after notice and comment rulemaking. . . . The OCC's 'no-objection' letter . . . simply cannot be accorded preemptive effect.

Id., 887 F. Supp at 1080.

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3. Case law confirms that states may regulate national banks' fees.

The cases interpreting the NBA further belie the Banks' argument that national bank fees cannot be regulated by the states.

The Supreme Court has held consistently for more than a century that national banks are bound by state law. In Atherton v. FDIC, 519 U.S. 213, 222-23 (1997), the Court repeated the long-held rule that national banks

are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. . . . It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

Id., quoting National Bank v. Commonwealth, 9 Wall. 353, 362 (1869). As the Supreme Court noted in Anderson National Bank v. Lockett, 321 U.S. 233, 248-49 (1944), “an inseparable incident of a national bank’s privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business.” (Emphasis added.)¹⁷

The Supreme Court recently affirmed that national banks are subject to state law, unless the law stands in “irreconcilable conflict” with federal law. Barnett Bank

¹⁷ In California, state law is applied to national banks in a wide range of contexts. In Kates v. Crocker National Bank, 776 F.2d 1396, 1398 (9th Cir.1985), this Court applied California’s unfair competition statute (Bus. & Prof. Code §17200) to a national bank. California’s banking statutes (Fin. Code §§99-3904) expressly apply to national banks, as long as they do not conflict with federal law. Cal. Fin. Code §100. Numerous sections of the California Commercial Code, regulating various banking activities, likewise have been applied to national banks. See, e.g., Fireman’s Fund Insurance Co. v. Security Pacific National Bank, 85 Cal. App. 3d 797 (1978) (applying Cal. Com. Code §4401 to national bank, regarding when bank may charge customer’s account for overdrafts).

v. Nelson, 517 U.S. 25, 31 (1996). Such a conflict will be found if the state law would “forbid, or . . . impair significantly, the exercise of a power that Congress explicitly granted.” Id.¹⁸

No such conflict exists in the area of state regulation of bank fees. In the leading case of Perdue v. Crocker National Bank, 38 Cal. 3d 913 (1985), appeal dismissed, 475 U.S. 1001 (1986), the California Supreme Court ruled that the NBA does not preempt California state law governing unfair bank service charges. In Perdue, a consumer challenged as unconscionable a national bank’s six-dollar insufficient fund fee, under California law. The bank argued (as here) that it was exempt from the state law due to federal preemption. The court in Perdue noted that state regulation of national bank fees created no conflict with the NBA, since “no provision of federal law discusses bank service charges in general or bank charges for NSF checks in particular.” Id., 38 Cal. 3d at 942. Consequently, the court held that California law prohibiting unreasonable fees and unconscionable contract terms is not preempted by the NBA as to national banks. Id., 38 Cal. 3d at 942-44.

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¹⁸ In Barnett, the Court found an example of such a conflict: A Florida law prohibited banks from selling insurance, while the National Bank Act expressly permitted national banks to sell insurance in small towns (12 U.S.C. §92). In light of this clear conflict, the Court held that the NBA preempted the state law. Similarly in Franklin National Bank v. New York, 347 U.S. 373 (1954), the Court relied on an explicit power of national banks granted in the NBA to find preemption. In Franklin, a New York statute prohibited banks from using the term “savings” in their advertising. The court held that the statute interfered with the bank’s federally authorized power to receive deposits (12 U.S.C. §24). Unlike this case, both Barnett and Franklin involved conflicts with specific national bank powers contained in the NBA. Also, neither Barnett nor Franklin involved ATM regulation, which Congress intended be done primarily by states and cities.

4. The ATM surcharge is not an “incidental power” necessary to the business of banking.

The NBA lists various activities in which national banks are authorized to engage, such as taking deposits and making contracts. 12 U.S.C. §24. This section also states that national banks may “exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.” 12 U.S.C. §24 (Seventh). The district court stated that the ATM surcharge on non-account holders is an example of these necessary incidental powers, and that the Ordinances are therefore preempted. [RT 11/15/99 at 67-68, ER 67-68] Here again, the court erred.

The ATM surcharge is far from “necessary” to the business of banking. For more than twenty years the banking industry self-regulated and prohibited the double fee because of its harmful effect on competition. During those years, without the extra income of the surcharge, ATM deployment grew steadily and banks recorded record profits. [ER 41 ¶ 16, ER 45]

Moreover, other than the general depository-fee provision of 12 C.F.R. §7.4002(a), which adds nothing to their argument, the Banks can point to no section of the NBA or its regulations relating to national banks’ ability to charge fees. See Perdue v. Crocker National Bank, 38 Cal. 3d 913, 938 (1985), appeal dismissed 475 U.S. 1001 (1986).¹⁹

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The Congressional intent in the EFTA, to create a separate body of law

¹⁹ The Banks also argued below that 12 C.F.R. §7.1019 confirms national banks’ power to operate ATMs generally. The point is unopposed, but irrelevant. That regulation says nothing about bank fees, or state laws that restrict them.

protecting consumers at all ATMs and regulated primarily by the states and cities, further undermines the Banks' logic. The very existence of the EFTA precludes a finding of "clear and manifest" Congressional intent to include ATM fees among the non-enumerated national bank powers.

The incidental powers argument is also belied by the nature of the ATM surcharge on non-account holders. Bank ATMs, when used by non-account holders of the bank, are only tangentially related to the business of banking as contemplated by the NBA. In this context the machines merely function as conduits to a shared electronic network in which account holders use their own bank's ATM card to withdraw cash from another bank's machine. Also, there is no privity of contract between the bank that owns the ATM and an individual who is not the bank's depository customer. All the non-depositor does through the ATM is access his or her own account, at his or her own bank.

B. The *Bank One* Decision is Inapplicable and is Not Persuasive Authority.

The district court erred in relying on Bank One v. Gutttau, 190 F.3d 844 (8th Cir. 1999) to support its finding of NBA preemption. That case is inapplicable, as it relies on portions of the NBA unrelated to ATM fees; and, in any event, it should not be followed.²⁰

In Bank One, a national bank claimed that it was exempt from two provisions

²⁰ Santa Monica is aware of no case in which a court found preemption of a state or local ATM fee law. The only case relating to ATM fees, Burke v. Fleet National Bank, 252 Conn. 1 (1999), did not address the question of preemption. In Burke, the court held that Connecticut state law, as interpreted by the court, does not prohibit the ATM surcharge on non-account holders.

of Iowa state law dealing with the placement and operation of ATMs: one law required banks with ATMs in Iowa to maintain an office in the state; the other law limited advertising on ATMs. The court held that the geographical requirement was preempted in light of changes to federal branch banking rules in the NBA, codified at 12 U.S.C. §36(j). 190 F.3d at 849-50. The court also held that the advertising restriction was impermissible in light of national banks' explicit power to attract deposits under the NBA (12 U.S.C. §24). 190 F.3d at 850. The portions of the NBA relied on to preempt the Iowa laws are in no way related to ATM fees; they add nothing to the Banks' argument of conflict preemption of the Ordinances. Consequently, Bank One is inapplicable here, and a finding of no preemption in this case will not create any conflict among the Circuits.

In any event, to the extent Bank One suggests that other forms of local ATM regulation are preempted by the NBA, it is incorrect and should not be followed by this Court. For example, the court in Bank One stated: "Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation." 190 F.3d at 850. This is plainly wrong. The statement cannot be reconciled with this Court's contrary finding in Valley Bank v. Plus System, Inc., 914 F.2d 1186, 1195 (9th Cir. 1990): "Congress specifically has declined to restrict state regulation in the ATM context." (Emphasis added.) Also, Congress has consistently recognized the states' authority to regulate ATMs, through the EFTA; and the states have exercised that authority. Bank One cites no authority to indicate any deviation in that longstanding policy.²¹

²¹ The court in Bank One dismissed the relevance of the EFTA with a stroke of the pen, stating that its savings clause (15 U.S.C. §1693q) "is specifically limited

Moreover, the Bank One court’s basis for concluding that Congress intended to preclude all state ATM regulation is unpersuasive. The court cited only a 1996 amendment to the NBA that removed ATMs from the definition of bank branches. 12 U.S.C. §36(j). As the court conceded, the only purpose for this amendment was to clarify that ATMs are “not subject to prior approval requirements or geographic restrictions,” thereby eliminating the need for national banks to apply to the OCC for the authority to install remote ATMs. 190 F.3d at 849, quoting S. Rep. No. 185, 104th Cong. 24 (1996). Moreover, the title of the amendment, “Elimination of Branch Application Requirements for Automatic Teller Machines,” indicates a specific, narrow intent; there is no reason to believe that Congress intended to preempt all state or local ATM regulation. In light of Congress’s perennial concern over preserving state consumer protections and reining in excessive preemption by the OCC, the Bank One court’s interpretation of the intent behind the 1996 amendment is misguided.

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C. The OCC’s Informal Position Regarding Preemption in This Case is Not Entitled to Deference.

to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks.” 190 F.3d at 850. This statement ignores the stated purpose of the EFTA, which was to delegate the primary regulatory authority over ATMs to the states and cities.

The district court improperly gave “great weight” to the opinion of the OCC, expressed through an amicus brief below, that the Ordinances are preempted by the NBA. [RT 11/15/99 at 69:6-11, ER 69] There are several reasons why the court’s deference to the OCC was inappropriate.

1. Congress empowered the FRB, not the OCC, to render opinions as to whether local ATM laws are preempted.

As a matter of law, courts do not owe deference to an agency’s interpretation of a statute outside its special charge to administer, especially where Congress has given a different federal agency the authority to regulate the area. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990). In the area of ATM consumer protections, Congress authorized the Federal Reserve Board (“FRB”), and not the OCC, to promulgate the administrative regulations. 15 U.S.C. §1693b(a). Thus, the FRB has exclusive regulatory power over all ATMs, including those of national banks. See 15 U.S.C. §1693a(8) (national banks included within scope of EFTA). Congress acknowledged in the EFTA the OCC’s general regulatory authority over national banks. See 15 U.S.C. §1693b(a)(1) (in formulating ATM regulations, FRB shall “consult with” OCC, among others). This acknowledgment shows that Congress deliberately chose the FRB, and not the OCC, to regulate all ATMs, despite the OCC’s other general powers over national banks.²²

²² Not surprisingly, the OCC has never issued a regulation governing ATMs or ATM fees. The FRB, on the other hand, has issued numerous regulations on the subject. See 12 C.F.R. Part 205. For example, the FRB has regulated the content of fee disclosures of ATMs, including interchange fees, 12 C.F.R. Part 205, Supp. I, ¶ 7(b)(5)(3), and set forth rules and liabilities for electronic fund service providers to

Congress also gave the FRB the exclusive authority to address questions of federal preemption in the ATM field. See 15 U.S.C. §1693q (FRB “shall . . . determine whether a State requirement is inconsistent or affords greater protection”). In its regulations the FRB sets forth a detailed process for this preemption determination. 12 C.F.R. §205.12(b). Thus, even if there were an administrative question whether the Ordinances are inconsistent with the EFTA, and therefore preempted (which the Banks do not allege), that question would have to be posed in the first instance to the FRB, not the OCC.

The only area in which the OCC’s opinions are entitled to deference, is in interpreting the meaning of ambiguous terms in the NBA. See, e.g., Smiley v. Citibank, 517 U.S. 735 (1996) (deferring to OCC’s interpretation of the term “interest” as used in NBA). But where, as in this case, there are no ambiguous terms to decipher, there is no legal basis for administrative deference. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (if Congress has unambiguously addressed an issue, both the court and the agency must adhere to congressional intent).

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2. The OCC’s opinion is solely a litigation stance and fails to comply with Congressional rulemaking requirements.

In general, litigating positions of administrative agencies, in the absence of regulations or other official administrative actions, are not entitled to deference by

non-account holders. 12 C.F.R. §205.14.

the courts; in fact, they are “suspect.” Smiley v. Citibank, 517 U.S. 735, 741 (1996). The rule is especially apt in the area of bank fee regulation, since Congress went to great lengths to assure that the OCC comply with formal procedure before arguing preemption. However, the OCC in this case presented its views solely in the role of a litigant, through an amicus brief in the district court. Thus, it attempted to do by brief what it must do by rulemaking and formal notice. The district court nevertheless gave great weight to the OCC’s preemption position. Here the court erred.

Finally, the OCC’s position on preemption here adds no legal force to the Banks’ case. The OCC’s amicus brief below simply repeated the Banks’ legal arguments, with no additional evidence of Congressional intent to support a finding of federal preemption of the Ordinances.²³

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IV

UNDER BASIC PRINCIPLES OF STATUTORY CONSTRUCTION,
THE EFTA AND THE NBA MUST BE HARMONIZED AND TO THE EXTENT

²³ The OCC’s position in this case is not surprising, given its penchant for over-aggressive claiming of federal preemption. In addition to Congress, the courts have long recognized this problem. See, e.g., National Retailers Corp. v. Valley National Bank, 604 F.2d 32, 34 (9th Cir. 1979) (“the Comptroller exceeded his authority in rendering the interpretive ruling” that defined NBA incidental powers to include electronic data processing services); Perdue v. Crocker National Bank, 38 Cal. 3d 913, 941 (1985), appeal dismissed 475 U.S. 1001 (1986) (holding that former 12 C.F.R. §7.8000 was an attempt by the OCC to enact preemptive legislation “in the guise of statutory interpretation”).

OF ANY CONFLICT BETWEEN THEM THE EFTA CONTROLS

The district court decided that the NBA, not the EFTA, controls the preemption analysis in this case. [RT 11/15/99 at 69:18-70:3, ER 69-70] This ruling conflicts with basic rules of statutory construction.

A. The EFTA Does Not Conflict With the NBA.

It is a cardinal rule of statutory construction that “when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.” Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976). There is no conflict between the EFTA and the NBA; the two laws have coexisted peacefully for more than twenty years. The EFTA gives primary regulatory authority over ATMs and ATM fees to the states and cities. The NBA makes no mention whatsoever of ATMs or ATM fees. Nor do the OCC’s regulations, interpreting the NBA, discuss ATMs or ATM fees.

By interpreting the NBA expansively, without any evidence of Congressional intent to preempt, and thereby creating an unnecessary conflict between the statutes, the district court violated this rule and eviscerated a key element of the EFTA.

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B. To the Extent of Any Overlap Between the Federal Statutes, the EFTA Controls the Preemption Analysis In This Case.

To the extent of any arguable overlap between the two federal statutes in the area of ATM fee regulation, the EFTA is clearly the statute that controls, and not the

NBA. It is a settled rule of statutory construction that where two statutes conflict, the more specific statute controls. See, e.g., Crawford Fitting Co. v. J.T. Gibbons, 482 U.S. 437, 445 (1987); see also Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment”). The EFTA protects consumers using ATMs, and it specifically addresses the ATM surcharge. 15 U.S.C. §1693b(d)(3). The NBA, on the other hand, only covers bank fees in the most general terms; and it does not deal with ATMs in any capacity.

Also, the EFTA is a much more recent law. It was enacted in 1978, and was intended to address the specific issue of consumer concerns with ATMs and other electronic fund transfers. The NBA was enacted more than one hundred years earlier, to provide the nation with a stable system of currency during the Civil War. In general, the more recent of two conflicting statutes will govern. See Watt v. Alaska, 451 U.S. 259, 266 (1981); see also United States v. Estate of Romani, 523 U.S. 517, ---, 118 S.Ct. 1478, 1486 (1998) (“generalities [of earlier statute] should not lightly be construed to frustrate a specific policy embodied in a later federal statute”). Although the NBA has been amended many times to reflect the evolving duties and powers of national banks, it still contains no provisions regulating any aspect of ATMs. The EFTA, as the more specific and recent law, controls.

Moreover, Congress chose to include the ATMs of all financial institutions, including national banks, under the EFTA’s ambit. 15 U.S.C. §1693a(8). When it enacted the EFTA in 1978, Congress was well aware of the NBA. Thus, there can be no denying that Congress intended the EFTA, and not the NBA, to govern the

preemption analysis of state ATM laws as applied to national banks.

CONCLUSION

In order to meet their burden of proof and overcome the strong presumption against preemption, the Banks must demonstrate “clear and manifest” Congressional intent to preempt the Ordinances. They cannot do so, since the overwhelming weight of authority—legislative history, case law, and the federal statutes and regulations themselves—all supports the validity of the Ordinances.

Far from preempting, Congress in the EFTA authorized state and local consumer protection laws that seek to rein in excessive and abusive practices by the banking industry such as the ATM surcharge. Moreover, there is nothing in the NBA or its regulations to suggest any intent to preempt local ATM fee regulation. Rather, the most recently expressed Congressional concern in the NBA has been to avoid improper claims of preemption exactly like the one in this case.

The Banks have premised their lawsuit on the legal theory that the Ordinances are preempted as to national banks by the NBA. This theory is incorrect as a matter of law. Therefore, the Banks cannot meet their burden of proving a likelihood of success on the merits, and the district court erred in granting the preliminary injunction.

Besides federal preemption, there are no additional issues to be litigated in the case. Therefore it is appropriate that the Court remand with instructions to enter judgment in favor of the Cities. See Coalition for Economic Equity v. Wilson, 122 F.3d 692, 710 (9th Cir. 1997) (reversing preliminary injunction where no likelihood

of success on invalid legal arguments; remanding to district court “for further proceedings consistent with this opinion”), on remand 1998 WL 61215 (N.D. Cal. 1998) (granting defendants judgment on the pleadings).

Dated: January 27, 2000

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, counsel for the Santa Monica Appellants certifies that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,681 words.

STATEMENT OF RELATED CASES

The Santa Monica Appellants are not aware of any related cases pending in this Court.

Dated: January 27, 2000

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