

No 00-16355

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

**PROPOSED BRIEF OF AMICI CURIAE
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP (CALPIRG),
CALIFORNIA REINVESTMENT COMMITTEE,
CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION, FOUNDATION FOR TAXPAYER AND
CONSUMER RIGHTS, AND U.S. PUBLIC INTEREST RESEARCH
GROUP (USPIRG)
IN SUPPORT OF APPELLANTS**

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INTEREST OF AMICI CURIAE

Amici curiae are state and national consumer and community groups that represent millions of American consumers, many of whom use ATMs as non-customers and are subject to the fees associated with such use. The Amici have a significant interest in the issues presented in this case because they involve important consumer banking protections and the continuing ability of states to enact such protections. The decision in this case could have an impact on all current and future state consumer laws that involve deposit services and charges.

These groups believe that authorities, arguments and policy considerations exist that have not yet been thoroughly addressed by the parties. Amici will demonstrate why the Electronic Fund Transfer Act (“EFTA”), through its savings clause, is the controlling authority and specifically authorizes consumer protections such as those contained in the Ordinances. Amici groups will also show that the clear intent of Congress is not to preempt state consumer protection laws in this area.

This proposed brief is submitted pursuant to Federal Rules of Appellate Procedure 29(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

The field of financial services is undergoing rapid change. The advent of e-commerce, electronic banking and plastic money has presented not only

opportunities for consumers but also challenges for lawmakers. The increased risk of financial loss in today's marketplace means lawmakers must use their respective authority to protect consumers from harm while preserving the ability of banks to operate and compete.

The cities of Santa Monica and San Francisco understood the harm to consumers from excessive or double fees charged by banks, which have been experiencing seven years of record profits. The Ordinances at issue in this case prohibit banks from charging surcharges on ATM transactions of non-customers. This protects consumers against being charged twice for the same transaction and promotes competition by limiting the ability of big banks, which own a vastly disproportionate number of ATM machines, to force themselves on customers and to engage in anti-competitive fee setting.

Under well-established judicial principles, Congressional intent to preempt must be clear and manifest, and the presumption is against preemption. In areas traditionally regulated by states such as consumer protection and banking, the presumption against preemption is even stronger. The District Court, relying on the general authority of banks to collect fees under the NBA to preempt the Ordinances, erred in finding preemption in this case.

The National Bank Act 12 U.S.C. § 21 et seq ("NBA") and the Electronic Funds Transfer Act 15 U.S.C. § 1693 ("EFTA") do not preempt local governments

from enacting consumer protection laws, but rather, invite and encourage such action. Since the passage of the NBA in 1863, the banking regulatory structure has been a dual federal-state system, allowing states to identify and address local problems. The EFTA's savings clause specifically authorizes local governments to enact laws that afford consumers "greater" protection in their ATM transactions than provided in the EFTA. Since Congress' intent not to preempt is clear, the burden to show clear and manifest intent to preempt has not been met.

STATEMENT OF FACTS

Amici adopts the Statement of Facts contained in Appellants' Opening Briefs.

ARGUMENT

I. THE CONSUMER PROTECTION ORDINANCES ARE NOT PREEMPTED BY FEDERAL LAW

The United States Supreme Court has repeatedly and unmistakably held that Congress must express a "clear and manifest" desire to preempt state laws in areas of historic police power of the states. *Cipollone v. Liggett Group, Inc.* 505 U.S. 502, 516 (1992). The Supreme Court recently reaffirmed that a party seeking preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law cause of action." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), *citing Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947).

This Court recently stated that it “has echoed the [Supreme] Court’s focus on Congress’ purpose: Congressional intent to preempt state law must be clear and manifest.” *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1150(9th Cir. 2000), citing *Cipollone v. Liggett Group, supra*, at 516.

The presumption against preemption is “even stronger” when the issues involve areas traditionally regulated by the states. *National Warranty Insurance Co., v. Greenfield*, 214 F.3d 1073, 1077 (9th Cir. 2000) quoting *Medtronic v. Lohr, supra* at 485. States have had a long history of regulating in the areas of consumer protection and banking. As the Supreme Court stated in *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989):

Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States.

490 U.S. at 230. *See also Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1205(5th Cir. 1985)(“Consumer protection law is an area that has traditionally been regulated by states”); *General Motors Corp. v. Abrams* 897 F.2d 34, 41 (2nd Cir. 1990)(“[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area”).

As the Supreme Court recognized in *Lewis v. BT Investment Management, Inc.*, 447 U.S. 27 (1980) “both as a matter of history and as a matter of present

commercial reality, banking and related financial activities are of profound local concern.” *Id.* at 38. The California Supreme Court has also spoken to the presumption against preemption in the consumer rights and banking contexts.

Perdue v. Crocker National Bank, 38 Cal.3d 913, 937 (1985) *appeal dismissed* 475 U.S. 1001 (1986)(National Bank Act did not preempt application of California unfair competition laws to unconscionable charges by banks for not sufficient funds (NSF) charges).

Globalization, e-commerce, consolidation and electronic banking may bring greater convenience to consumers, but they also present more risks as consumers are subject to more price gouging, and have less choice, less control over the decision-making process and less direct contact with the decision-maker. Consumers need protection now more than ever because they have less power to control the terms of their transactions.

Despite the “globalization” of banking, this case exemplifies how profoundly local these issues still are today. The proliferation of mergers and consolidation at the national and international levels can wreak havoc in local markets, as it has in this case. In cities where two banks own as much as 86% of the bank-owned ATMs, consumers need protection from excessive and unfair fee practices as well as unfair competition. They should not be forced to pay twice for the same transaction.

Since the Ordinances seek to protect consumers from excessive surcharges, the burden falls on Appellee banks to present “compelling evidence” of a “clear and manifest” intention by Congress to preempt. The Appellees failed to meet their burden. Since Congress did not intend to preempt state laws that protect consumers, the District Court’s ruling should not be upheld.

A. The Electronic Funds Transfer Act Specifically Preserves State Authority to Enact Consumer Protection Laws for ATMs

The “primary objective of the EFTA “is the provision of individual consumer rights” “in [the] electronic fund transfer systems.” 15 U.S.C § 1693(b). The EFTA defines “electronic fund transfers” to include automatic teller machine (ATM) transactions. 15 U.S.C. § 1693a(6). The EFTA specifically authorizes states and cities to enact laws that provide greater protection than that provided in the Act. Congress’ intent not to preempt is expressed in the savings clause of the EFTA:

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 provision 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.

This Court, in rejecting an ATM network's Commerce Clause challenge to a Nevada ATM fee law, recognized that "*Congress specifically has declined to restrict state regulation in the ATM context.* Congress intended the Electronic Fund Transfer Act to permit[] states to enact legislation affording greater consumer protection." (emphasis added) *Valley Bank v. Plus System, Inc.*, 914 F.2d 1186, 1195 (9th Cir. 1990).

Further, as this Court indicated in *Valley Bank*, legislative history shows that Congress specifically considered preempting state ATM fee laws and *rejected* this notion under the EFTA when it *rejected* a national uniform system of regulation of electronic fund standards. In explaining the savings clause, the Senate Committee on Banking, Housing, and Urban Affairs stated:

This formula is intended to eliminate minute deviations in state EFT laws and thereby foster the development of national standards, while also permitting the states to enact legislation affording greater consumer protection. While annulling all state EFT 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.* Moreover, the Committee regards this legislation as setting only minimum national standards.

S. Rep. No. 95-915 at 19, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9273, 9403, 9420 (emphasis added). Thus, the statute itself expresses Congress'

intent that its provisions act as a floor, and not a ceiling, in the protections afforded consumers regarding ATM regulation.

ATM Fee Ordinances are Within the Scope of and Not Inconsistent with the EFTA: In addition to the inclusion of ATMs in the definition of electronic fund transfers, Congress' recent enactment of the ATM Fee Reform Act, P.L. No.106-102, §§701-705, 113 Stat. 1338, 1463 (1999), which amended the EFTA, represents a further expression of Congressional intent to include ATM fees within the scope of the EFTA. The law prohibits surcharges unless consumers are notified of the fees at the time of the transaction. 15 U.S.C. § 1693b(d)(3).

The ATM fee disclosure law was viewed by lawmakers as a compromise to a federal ban on surcharges, which was supported by several members and advocated by consumer and community groups. *See generally*, House Banking and Financial Services Committee, Transcript of Consideration of H.R. 10, Amendment #29 (Rep. Sanders, I-VT) March 4, 1999, at pp. 271-282 and March 10, 1999, at pp. 1-30. The proposed bans on surcharges also involved amending the EFTA, *see, e.g.*, H.R. 1575 (106th Cong.1999); H.R. 3503 (106th Cong. 1999). The debate surrounding these measures did not revolve around assertions that the EFTA could not be amended to include a prohibition against surcharges or that the NBA prohibited such a ban. Rather, certain members expressed reluctance to go as far in protecting consumers as a ban because of ideological tenets or because

banks, which lobbied heavily against the surcharge, were so adamantly opposed to the ban. *See, e.g.*, House Banking Comm., Transcript, March 10, *supra* at 7 (in explaining his support for the “alternative” disclosure approach, Chairman Leach (R-IA), noted that while a case for a ban on fees had to be respected, given the nature of our market system, disclosure was a better way to go at that time.)

Congress left the savings clause in tact, however, allowing states to go further and enact a ban if needed.

The savings clause specifies that state laws are consistent with the EFTA if they provide “greater” protection than that provided under the EFTA. The EFTA provides minimum standards for the regulation of transactions including the terms and conditions of the transactions (15 U.S.C. §1693c); disclosure of fees (15 U.S.C. §1693c(a)); and error resolution (15 U.S.C. §1693f). The Ordinances are consistent and do not conflict with the basic rules established by the EFTA. They provide greater protection, a ban on double charging, than in the EFTA.

The Ordinances are precisely the type that should be upheld and what Congress had in mind to “save” because they address a local problem -- unfair and oligopolistic pricing -- for California’s banking consumers in the two cities. The two banks in this case own 72 percent of the bank-owned ATMs in Santa Monica and 86 percent in San Francisco. Santa Monica and San Francisco were responding to a local problem having an adverse impact on consumers, particularly low-

income consumers. The fee surcharge represents an excessive, double charge for one transaction. For lower amounts withdrawn, non-customer consumers have to pay a higher percentage to access their money.

Further, the ATM surcharge is anti-competitive. Rather than serving to decrease prices and increase choice for consumers, the surcharge represents an example of reverse competition, extremely harmful to consumers. To avoid the surcharge fee (increased price to access money) charged at most ATMs (72 percent of all bank-owned ATMs in Santa Monica and 86 percent of all bank-owned ATMs in San Francisco are owned by the two banks), non-customers would have to open an account at the banks. If the banks succeed in forcing themselves on most of the residents of these two cities, customers can expect even higher prices as competition is brought to a screeching halt and fewer banks can gain entry into the market.

The purpose of consumer banking laws such as the EFTA is to protect consumers. Limiting competition does not help consumers or the marketplace. Congress would not intend a consumer protection law to lead to higher prices and less competition. The savings clause helps foster competition by ensuring the ability of states to respond to local problems.

B. Congress did not Express A Clear and Manifest Intent to Preempt State Law in The National Bank Act

As noted by the District Court, “[f]ederal law will preempt state law when: (1) federal law expressly preempts state law; (2) federal law occupies the field of regulation; or (3) federal law conflicts with state law.” (citing *Fidelity Fed. Sav. and Loan Ass’n v. de la Cuesta*, 458 US 141, 152-53 (1982)). The banks agree that the NBA does not expressly preempt state law.¹

Proponents of conflict preemption must establish that the state law either makes it impossible for a party to comply with both state and federal requirements or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *California Federal Savings and Loan v. Guerra*, 479 U.S. 272, 280 (1987). Courts generally use a rule of construction that avoids finding a conflict between state and federal law where possible.

The NBA contains no provisions at all with regard to ATMs or the ability of national banks to charge ATM fees. The 1996 amendment to the NBA eliminated

¹ The District Court relied on the banks’ argument that *Bank One v. Gutttau* 190 F.3d 844 (8th Cir. 1999), *cert. denied* 120 S.Ct. 1718 (2000) was dispositive. However, that case involved the location of ATMs and advertising placed upon them. These are not the issues in this case. The court in *Bank One* found that the NBA preempted the state law at issue and that the EFTA savings clause was not controlling because it was limited to the EFTA provisions. If the EFTA savings clause was limited to only the specific provisions in the EFTA, the savings clause would hold little meaning for consumers, a result contrary to Congress’ stated intent. That case also was decided prior to the enactment of the ATM Fee Reform

the only reference to ATMs in that statute when it excised ATMs from the definition of national bank branch. 12 U.S.C. §36(j). Nowhere in the NBA does Congress express its intent to preempt state laws that deal with ATM fees.

Virtually all state consumer banking laws would be at risk if the District Court's interpretation of bank powers under 12 U.S.C. §24 (Seventh) is upheld, contrary to Congressional intent expressed in the savings clauses contained in most, if not all, Federal consumer banking laws. *See discussion infra* at pp. 17-19. See also *Perdue v. Crocker Nat'l Bank, supra*, 38 Cal.3d at 938 ("Under the Comptroller's interpretation, any banking matter related to deposits would be exempt from state law. The result would be far reaching and disruptive.").

The authority of states to regulate national as well as state banks is longstanding and clear. Though Congress could have chosen to regulate national banks to the exclusion of state control, it did not. A statement by the Court in *National State Bank v. Long*, 630 F2d 981, 985 (3rd Cir. 1980) aptly describes the relationship between the federal government and the states in the regulation of banking:

Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the First National Bank Act in 1863...in the exercise of its commerce power Congress could regulate national banks to the exclusion

Act, which makes it clear that Congress intended the scope of the EFTA to include ATM fees.

of state control. And unquestionably, as in other businesses, federal presence in the banking field has grown in recent times. But congressional support remains for dual regulation. In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly it has been left to the courts to delineate the proper boundaries of federal and state supervision.

National State Bank v. Long, *supra*, 630 F2d at 985. *See also Atherton v. Federal Deposit Insurance Corp.*, 519 U.S. 213, 222 (1997)(“Federal 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 the nation.’” quoting *National Bank v. Commonwealth*, 76 U.S. 353, 362 (1870))

In *Perdue v. Crocker Nat’l Bank*, *supra*, 38 Cal. 3d at 938, the California Supreme Court held that Section 24 does not preempt state bank laws protecting consumers against exorbitant charges for insufficient-fund checks. As the Court noted that “Congress has declined to provide an entire system of federal law to govern every aspect of national bank operations.” *Id.* at 932. The Court found that:

Section 24 may by implication...authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits, but such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law.

Id. at 938.

The District Court wrongly relied on 12 C.F.R. § 7.4002 in finding the Ordinances were preempted. The regulation states, in relevant part:

(a) *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.

12 C.F.R. §7.4002(a)

An intent to preempt ATM fees by Congress cannot be gleaned from a regulation interpreting a silent NBA that merely states an obvious general authority of banks to charge customers fees, particularly in light of the legislative history of this regulation. The OCC is trying to read into the regulation their interpretation of a prior regulation, 12 C.F.R. §7.8000, that was discredited and withdrawn.²

Expressing concern that former section 7.8000 represented an “inappropriately aggressive” preemption interpretation by the OCC, Congress in 1994 urged the OCC to revisit the regulation under proper application of recognized preemption standards in the Conference Report on the Riegle-Neal Act H.R. Conf. Rep. No. 651, 103rd Cong., 2nd Sess. 54 (1994)(Riegle-Neal Conf.Rep.)

² Section 7.8000, replaced by 12 C.F.R. §7.4002, 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 functions of banks. (*repealed*)

See also, Perdue v. Crocker Nat'l Bank, supra, 38 Cal.3d at 938, 941 (finding section 7.8000 was not a valid preemption determination). The OCC in 1996 withdrew section 7.8000 and replaced it with section 7.4002(a), which does not include the preemption language.³

Further evidence of the importance to Congress of preserving state authority in the area of consumer protection unless the intent to preempt is clear and manifest is the special protection against unwarranted preemption given such laws (one of four areas of state law) in the Riegle-Neal Act.⁴ 12 U.S.C. §43. Because of “Congressional concern regarding preemption of State law,” Congress imposed procedural requirements, including a notice and comment rulemaking process, on bank agency preemption determinations. Riegle-Neal Conf.Rep. at 54. In discussing the importance of this preemption protection, the Conferees stated that

³ To clarify that the regulation should not be interpreted as a blanket preemption of state law, 12 C.F.R. §7.4002(d) states:

(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.

⁴ The Riegle-Neal Act established an approval process and authorized for the first time interstate banking and branching, permitting banks with a main office in one state to acquire banks in any other state and to establish branches in states outside their “home” state.

[the] public notice and openness provided by the new procedures will be a vital safeguard to ensure that an agency applies the recognized principles of preemption...in a balanced fashion.⁵

Riegle-Neal Conf. Rep. at 54.

The Conferees stressed that in the four areas of State law carved out in the Act -- consumer protection, community reinvestment, fair lending and intrastate branching -- preemption should be found “only when the agency has determined that the federal policy interest in preemption is clear.” Conf. Rep. at 53. No federal policy interest is served by preempting in this case, especially when the EFTA specifically authorizes state action. As discussed *infra*, the OCC did not comply with the procedural requirements in issuing its opinion that the banks were free to ignore the Ordinances.

If the District Court’s ruling stands, the OCC would be able to use the regulation to eviscerate state consumer laws that relate to charges and fees as they apply to national banks. Such a situation is precisely what the Conferees wanted to prevent when they admonished the OCC for its overly broad and unsupported interpretations of authority.

⁵ The Conferees emphasized that “States have a strong interest in the activities and operations of depository institutions doing business within their jurisdiction, regardless of the type of charter an institution holds” and reiterated the three principles of traditional preemption: conflict with Federal law; Congressional intent for federal law to occupy of the field; and the state law is an obstacle to accomplishing objective of Federal law. Riegle-Neal Conf. Rep. at 53.

C. In the Area of Consumer Banking Laws, Congress has Repeatedly Expressed its Intent NOT to Preempt State Laws

The EFTA is one of several laws referred to as consumer banking or consumer finance laws, *see, e.g.*, the *Truth in Lending Act*, 15 U.S.C. §1601 et seq.; the *Truth in Savings Act*, 12 U.S.C. § 4301 et seq.; the *Equal Credit Opportunity Act*, 15 U.S.C. §1691 et seq.; the *Fair Credit Reporting Act*, 15 U.S.C. §1681 et seq.; the *Fair Debt Collection Practices Act*, 15 U.S.C. §1692 et seq. These laws have as their goal and purpose to protect consumers from certain unfair, deceptive or unconscionable practices in the area of deposit and credit services -- core functions of banks.

To ensure that states can address the needs and problems of their residents with respect to deposit, lending and fair credit practices, these laws all include savings clauses similar to the one in the EFTA. *See, e.g.*, 15 U.S.C. §1610; 12 U.S.C. §4312; 15 U.S.C. §1691d(f); 15 U.S.C. §1681t; 15 U.S.C. §1692n. In some instances, Congress specified that certain provisions preempt state law and clearly delineated those as exceptions to the savings clause. Therefore, if Congress wanted to preempt state ATM fee laws in either the EFTA or the NBA, it could have expressly done so. Instead, Congress highlighted the importance of state regulation and expressed a clear and manifest intent *not* to preempt in the area of consumer protection and banking.

A recent example of Congress' intent not to preempt in the area of consumer protection and banking is in the area of financial privacy. The Gramm-Leach-Bliley Act, Pub. Law 106-102, §§501-510 (1999) includes provisions dealing with the rights and responsibilities of financial institutions vis-à-vis personal customer financial information. *See generally* 15 U.S.C. §6801 et seq. The privacy provisions in the GLB act, which provide mostly disclosure requirements, were far weaker than amendments offered by several members of Congress from both sides of the aisle and supported by consumer, privacy and other groups.

It was acknowledged that the provision that was passed represented a first step and a compromise to appease certain members, financial institution and other interests. *See generally* Cong. Rec., May, 6 1999, pp. S4865-4866. The Conferees inserted a savings clause, however, to ensure that stronger state privacy measures are not preempted. 15 U.S.C. §6807. *See* H.R. Conf. Rep. No. 434, 106th Cong., 1st Sess. at 172 (1999). Similar to that of the EFTA, the provision makes clear that state laws providing greater protection are not inconsistent with the federal law and therefore not subject to preemption. §6807 (b). The debate revealed a strong interest in giving consumers greater control over their privacy. *See generally* Cong. Rec., May, 6 1999, pp. S4865-4866.

The District Court's reasoning that the EFTA only allows "consumer protection" regulations, such as regulations "regarding lighting, hours of

operations, locations...” [Dist.Ct.Op. at 5] is ludicrous. Consumer banking laws address “core functions,” e.g., the Truth in Lending Act prohibits banks from certain behavior in their lending activity; the Truth in Savings Act mandates certain disclosures in deposit services. What would the purpose of consumer protection be if not to protect consumers from unfair or deceptive practices when banks are engaging in their core functions?

This argument mistakenly equates “consumer safety” with “consumer protection”. If the cities are limited to providing a “safe” place where bank customers can be assessed unfair surcharges, the heart of consumer protection law has been gutted. The danger to consumers should such an erroneous interpretation of “consumer protection” be permitted to stand is obvious.

II. THE INFORMAL OPINION OF THE OCC SHOULD NOT BE GIVEN DEFERENCE IN THIS CASE

The banks offer as support for their position informal opinion letters from the OCC, in anticipation of this litigation, informing the banks that they do not have to comply with the Ordinances. For several reasons, the opinion letters of the OCC should not be given deference by the Court.

First, Congress disfavors reliance on informal OCC opinions. In response to OCC’s penchant for issuing informal, non-published letters or opinions regarding the preemptive scope of the NBA, Congress required the agency to promulgate formal opinions subject to a notice and comment period. *See* 12 U.S.C. § 43. The

NBA now requires the OCC to publish any “opinion” finding that national banks do not have to follow state law in the federal Register, conduct a 30 day notice and comment period and publish the final rule or decision in the Federal Register. Ironically, the OCC failed to comply with the very law (the NBA) that it is urging this Court to find dispositive in this case. Instead, it opted to issue interpretative letters in time to support the banks’ litigation position.

Second, the EFTA authorizes the Federal Reserve Board to “determine whether a State requirement is inconsistent or affords greater protection” to consumers regarding electronic fund transfers. 15 U.S.C. §1693q. It is not unusual for the Board, rather than the OCC, to be given responsibility for determining preemption questions; several of the consumer banking laws authorize the Board to make determinations as to whether a State law is inconsistent. The Board has not issued any decisions with regard to whether the Ordinances are inconsistent with the EFTA.

This court should not give weight to the informal letters issued by the OCC to the banks in anticipation of this litigation. The banks have failed to rebut the strong presumption against preemption of the Ordinances with a published ruling from the agency, the Board, with authority over the matter.⁶

⁶ The letters themselves do not express the Comptroller’s opinion as to the ability of the Cities to enact the Ordinances, only that the Banks may assess these surcharges as part of their “incidental powers” under the NBA. ER at 76, 80.

Third, courts, not federal agencies, have the ultimate authority to determine whether a state or local law is preempted by federal law. As discussed above, well-established judicial principles dictate a presumption against preemption unless Congress has made its intent to preempt clear. Where the law involves areas traditionally regulated by the states, such as consumer protection and banking, the burden to overcome the presumption is even greater.

The judiciary's longstanding authority to decide whether federal law preempts state law serves as an important check on the legislative and executive branches. In a regulatory system that allows the regulated entity to decide under which regulatory scheme it will operate, a state or a federal "charter", it is essential that the Judiciary maintain the Congressionally intended balance of power between the two. It is incumbent upon the courts to prevent the subversion of congressional intent by federal agencies with a political agenda.

In an attempt to attract banks to their "charter," bank regulatory agencies have thoroughly undermined important state consumer banking protections by permitting national banks to ignore those safeguards. Rather than raising the bar of consumer protection, the bank agencies have participated in an open and destructive "race to the bottom" to secure more regulatory power for their agencies by attracting more banks to their charter. This problem was discussed on many occasions by lawmakers during the debate in Congress last year over the Gramm-

Leach-Bliley (GLB) law. Members of Congress cited the federal bank agencies' unauthorized campaign to expand bank powers and the need to create a legislative structure to clearly delineate the authority of the various financial regulators as reasons to enact the GLB law.

The OCC's Overly Aggressive Preemption Determinations are Unwarranted and Harmful to Consumers

Complaints about the OCC's aggressive and suspect "preemption" activity are not new. As mentioned above, in response to several interpretive letters issued by the OCC "preempting" state consumer laws, Congress took the agency to task for what they referred to as the "inappropriately aggressive" application of traditional preemption principles "resulting in preemption of State law in situations where the federal interest did not warrant it." Riegle-Neal Conf. Rep., *supra* at 53.

In the Report, the Conference Committee highlighted two examples of the OCC's "inappropriately aggressive" application of preemption principles. In 1992, the OCC permitted national banks in the state of New Jersey to ignore a landmark law governing basic banking even though there was no federal law providing consumers the same protections. Office of the Comptroller of the Currency, Interpretive Letter No.572, March 1992. Thrown overboard was a worthy effort to extend low-cost banking to low and moderate income consumers. The Report states, in relevant part, that:

[t]he fact the Congress has acknowledged the benefits of more widespread use of lifeline accounts through the enactment of the Bank Enterprise Act did not indicate that Congress intended to override State basic banking laws, or occupy the area of basic banking services to such an extent as to displace state laws, or that the existence of State basic banking laws frustrated the purpose of Congress.

Riegle-Neal Conf. Rep. at 54.

The New Jersey law involved deposit services and charges, similar to this case. In response to the intense criticism of the OCC's decision and at the request of the New Jersey banking department, the OCC issued a notice and request for comment on the reconsideration of the case in February 1996. Fed. Reg. Vol. 61, No. 25, Feb. 6, 1996, p. 4515. However, after more than four years, the OCC has yet to issue an official ruling on the matter.

The second example of an OCC opinion the Conferees found inappropriate, "which broadly asserts that federal law ... preempts any State law that attempts to prohibit, limit or restrict deposit services,"⁷ involved former 12 C.F.R. 7.8000, discussed *infra* at pp. 13-16.

The letter issued to the banks in this case is part of a pattern and practice of OCC issuing interpretive letters and opinions based on overly broad interpretations of federal law. Other than protecting the OCC's regulatory power, it is difficult to discern the federal policy interest in preemption in many of these cases.

For example, while federal law restricts the ability of states to impose caps on interest rates, the OCC's expansive interpretation of the definition of interest has further tied the hands of state legislators who want to protect their residents from onerous charges and fees connected with credit extension or availability.⁸ Based on OCC's opinions, certain prepayment fees for home equity loans (OCC Interpretive Letter #744 (October 1996)) and various home equity loan fees (account opening fees, fees for exercising a fixed rate option, fees for early closure of the account and certain rejected item fees) (OCC Interpretive Letter #803 (October 1997)) can be imposed on borrowers even when their state prohibits such fees.

The OCC's interpretation of the law has also undermined state application of consumer protections to exorbitantly priced "payday lending" schemes. Payday lenders make payday loans at unconscionable interest rates of 300% or more to consumers to borrow against personal checks held until "payday." Payday lending, or check cashing, outlets have hooked up with national banks (a relationship some have termed "rent-a-bank") to circumvent state laws such as bans on cashing postdated checks for a fee, small loan rate caps and/or state usury laws that would otherwise apply to them. The OCC has failed to act to curb such abuses. Indeed, it

⁷ Riegle-Neal Conf. Rep. *supra* at 54.

⁸ A state has limited ability to set interest rate ceilings for its citizens. National banks, through 12 U.S.C. §85 and interstate banks, through the Riegle-Neal Act are able to export the interest rates allowed by the state in which they are located. Therefore, the scope and interpretation of the definition of interest become critical.

has made such abuses even easier by its overly broad interpretation of where a loan is “made”, which would allow an interstate bank to apply the law of its “home” state rather than its “host: state (e.g., the borrower’s state). *See* OCC Interpretive Letter #822 (March 1998).⁹

The chilling effect of the OCC’s activity is exemplified in a statement recommending settlement to plaintiffs in a payday lending case: “We were also concerned, frankly, that the OCC would likely weigh in on the defendants’ side with respect to interpretation of ‘interest ...’”¹⁰ Such an interpretation would support the banks’ affiliating with check cashing outfits for the purpose of making payday loans under terms that would be unlawful if the loans were being made directly by check cashers.

These decisions and activities harm consumers because they, in effect, eviscerate safeguards that states or cities deemed necessary and important enough to enact. The preemption activity also tramples on the rights of states to protect their residents. It also affects the public trust because the federal agency charged with enforcing bank law and regulating banks appears to take positions against the consumer and public interest with little or no clear statutory support. As Senator

⁹ This letter is clearly in contravention to the directive in the Riegle-Neal Act to honor the consumer protection laws in the host state. See discussion *infra* at pp. 15-16.

Bryan (D-NV) stated in a letter to the OCC urging it to reverse the New Jersey preemption decision:

If the actions taken by the OCC involve state laws for which there were federal counterparts that provide the same protections for consumers, the effect on consumers would not be so harmful. But where Congress has not acted and state laws are preempted, a dangerous precedent is created. . . . In addition, state legislatures are reluctant to enact laws that they fear, based on overly aggressive OCC statements, will be rendered irrelevant. Banks will have little reason to come to the table when states consider consumer protection laws, confident that they will be free to avoid them.

Letter to Eugene Ludwig, Comptroller of the Currency, from Senator Richard Bryan, October 1997.

Many of these decisions go unappealed because states or consumer and other interested groups do not have the resources to wage a litigation battle with the OCC, which relies on the argument of “deference” at every turn. Rather than pushing forward consumer banking measures, in some instances state legislators have withdrawn proposals, voicing their concern about the OCC’s “preemption” activity. This “chilling” effect is harmful to consumers.

The OCC is an arm of the Executive Branch and as such is not immune from political influences. The more banks it attracts to its charter, the more banks will

¹⁰ Notice of Settlement, *Josh R. Phanco v. Dollar Financial Group, Inc. et al.* Case No. CV 99-1281 DDP (C.D. Cal. 1999) at para. 14.

be regulated by the OCC.¹¹ If the OCC continues to allow banks to ignore state consumer protection laws, banks will continue to lend political support to the Administration. The relationship between banks and the OCC has become a symbiotic one, resulting in a negative impact on consumer protection and advocacy efforts. Rather than giving weight to OCC's opinions, the courts should remind the agency of its duty to uphold, rather than find ways for banks to avoid, the law.

III. THE CONSUMER AND THE PUBLIC ARE SERVED BY UPHOLDING THE CLEAR AUTHORITY OF STATES TO PROTECT THEM

As more and more power gets aggregated in the hands of fewer financial institutions because of mergers, global commerce and technological changes, securing needed consumer protections at the federal level has become a Herculean task. The political power of financial institutions is overwhelming and dangerous to the legislative process, especially for consumers. The enactment of the Gramm-Leach-Bliley law, which eliminated depression-era barriers to ownership by banks of securities and insurance firms, not only opens the way to the creation of huge

¹¹ See Bizar, Miller, and Harnell, "Introduction to the 2000 Annual Survey of Consumer Financial Services Law," 55 Bus.Law. 1255, 1259 (May, 2000)(in discussing the absence of a movement to reform state consumer credit laws, noted that "unlike federal agencies that may view preemption of state laws as an integral part of an empire-building strategy to expand their clout and jurisdiction, there is no centralized regulatory constituency at the state level that inherently benefits from legal reform.")

financial conglomerates, but also eliminates competition for political influence among previously competing industries.

A recent debate in the House Banking Committee over an amendment to the Gramm-Leach-Bliley bill that gave privacy protections to consumers provides an example of the political power of financial institutions. The Chair expressed his concern that if the Committee voted for the amendment, which included stronger safeguards for consumers than the one that was ultimately included in the GLB Act, the banks would give up their support for the overall bill. *See* House Banking Committee, Transcript of Consideration of H.R. 10, Amendment offered by Rep. Inslee, D-WA, March 10, 1999 at pp. 174-271 and March 11, 1999 at pp. 203-282. He urged his colleagues to oppose consideration of the amendment. Similar concerns were expressed about a requirement that banks offer low-cost basic bank accounts, which was deleted from earlier versions of the bill.

Without the ability of states to address the problems it faces in the area of financial services, consumers will be exposed to more harm and have little hope of protection by the federal government. The Ordinances represent a balance among interests – banks, consumers, the public, state and federal regulation. Responding to a problem of excessive, double charges and anti-competitive fee-setting, Santa Monica and San Francisco determined that a ban on surcharges would protect consumers from an unfair practice and foster competition beneficial to consumers.

The ban is fair to banks because they still make a sizable profit on ATM transactions.¹² The cities were acting well within their traditional right to regulate in the area of consumer protection and banking. Federal regulation is not harmed because the Ordinances do not conflict with Federal law. The public is served by preserving the longstanding balance between federal and state regulation and ensuring political influences do not subvert the clear intentions of Congress.

Courts have agreed that no-surcharge rules protect the consumer and the public interest. Prior to the lifting of the no-surcharge ban by the ATM networks in 1996, a federal district court ruled that the no-surcharge rule was *pro-consumer and pro-competitive*. *SouthTrust Corp. v. Plus System, Inc.* 913 F.Supp. 1517 (N.D. Ala. 1995). *SouthTrust* involved an antitrust challenge to the Plus (an ATM network) surcharge ban by an Alabama bank. *Id.* The court found that the no-surcharge rule was not a violation of antitrust laws and held that:

¹² Far from being a losing venture, ATMs, even without the exorbitant surcharges, are a very profitable source of revenue for banks. The average ATM transaction for non-customers costs only \$.27 to complete. ER at 110. Without the surcharge for non-customers, the average fee assessed for this \$.27 transaction is \$.50, a profit of nearly twice the cost. ER at 101-102, 109. This fee is assessed against the customer's home bank. ER at 101-102, 109. In turn, the customer's home bank will charge the customer a "foreign fee" to cover the cost of this charge. ER at 102.

Profitability of the ATMs *without* the additional surcharge is clear. Before the lift of the no-surcharge rule, revenues from these transactions alone totaled \$269 million in 1996. Accordingly, the number of ATMs increased from 72,000 in 1988 to 122,000 in 1995. ER at 108.

The no-surcharge rule challenged by SouthTrust poses no identifiable threat of injury to competition. On the contrary, it *enhances consumer welfare* by limiting prices consumers will pay for ATM services and restricting the ability of acquiring banks to opportunistically profit in situations where consumers are less able to protect themselves.

Id. at 1522. (emphasis added).

Though originating this time in the public rather than the private sector, the ban continues to be pro-consumer and pro-competitive. Consumers and the public interest will be served by upholding the ban.

CONCLUSION

The Ordinances should not be preempted because they are authorized by and do not conflict with Federal law. If the District Court's ruling is upheld, consumers will be harmed by being forced to pay twice for the same transaction unless they switch their accounts to Appellees' banks. The District Court's sweeping interpretation of the National Bank Act -- that virtually any law that interferes with any authorized banking activity -- puts all state consumer banking laws at risk. Such a result is completely contrary to the stated intent of Congress to preserve the authority of states to enact greater consumer protections and the longstanding history of federal-state dual control over bank regulation. The EFTA specifically permits states to enact such laws. The District Court's decision should be reversed.

DATED: November 6, 2000

Respectfully submitted,
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**Certificate of Compliance Pursuant to
Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case No. 00-16355**

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 6,438 words.

Date

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