

INTEREST OF *AMICI CURIAE*

Amici file this brief in support of Appellants and Defendants California Attorney General Bill Lockyer and California Department of Consumer Affairs Director Kathleen Hamilton pursuant to Federal Rule of Appellate Procedure 29. All parties have graciously given their consent.

Amici are deeply interested in both the California credit card minimum payment warning statute and the larger policy issues of the application, or preemption, of state consumer protection laws to national banks. *Amici* believe that the California-mandated credit card payment warning would be valuable to consumers. It is not reasonable to expect consumers to know how costly it is or how extraordinarily long it takes to pay off a credit card balance by making only the minimum monthly payment. For most credit products, responsible consumer behavior is to pay the amount billed. For credit cards, responsible consumer behavior requires the counterintuitive step of paying more than the amount billed. The statutory generic warning with examples tells consumers that paying only the minimum payment (the amount billed) on a credit card balance will increase the cost of the debt and extend the debt for decades: on a \$5,000 balance, making the minimum payment will extend the debt for 40 years and two months, at a cost of \$16,305.34. This credit card balance will take even longer to pay off than a 30-year home mortgage.

Amici also are interested in this case because the type of preemption analysis applied by the District Court will stifle future state consumer protection efforts in financial services, where, as with credit cards, national banks hold large market shares. Three aspects of the opinion are especially likely to thwart future consumer protections. First, the District Court gave “great weight” to the OCC on whether the factual predicate for preemption was satisfied. Second, the Court described a very low preemption standard in some parts of its opinion, suggesting that any statute that “impairs the efficiency,” “hampers,” or “encroaches on,” activities of a national bank is preempted. Third, the severance analysis holds that a part of the statute otherwise enforceable as applied to national banks and federally chartered credit unions will not be severed because that part was held to be preempted as to thrifts under a broader thrift-only “field” preemption.

Finally, *amici* are interested in this case because an unduly strict view of preemption is likely to stymie the development of consumer protection law for customers of banks and other financial institutions. Protections for financial services consumers can develop first at the state level and migrate to Congress, as shown in two examples offered by *amici*. A standard which unduly favors preemption of state consumer protection statutes will not simply move the debate about consumer protections in financial services from the state legislatures to

substantive legislative proposals.

DESCRIPTION OF

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California consumers for decades. Consumers Union is a non profit membership organization chartered in 1936 under the laws of the State of New York to provide

and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers

orted the passage of the California credit card payment warning statute at issue in this case.

AARP is a non-profit membership organization representing of AARP's more than 35 million members live in California. As the largest

public policies to protect consumer rights in a broad range of marketplace transactions.

The Consumer Federation of America (CFA) is a non profit association organized in 1967 to advance the interests of consumers through advocacy and

education. CFA's current membership is comprised of almost 300 national, state, and local consumer groups throughout the United States.

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969. NCLC provides assistance to legal services attorneys, governmental agencies, and private attorneys in advancing the interests of their low-income and elderly clients in the area of consumer law.

The U.S. Public Interest Research Group (U.S. PIRG) serves as the national lobbying office for state Public Interest Research Groups. PIRGs are non-profit, non-partisan consumer, environmental and government reform organizations active in 37 states. CalPIRG is the consumer PIRG in California. Consumer Action is a national non-profit consumer education and advocacy organization founded in San Francisco and serving California consumers since 1971.

SUPPLEMENTAL STATEMENT OF FACTS

Amici will rely upon the statement of facts of the California Attorney General, but wish to emphasize a few particularly relevant facts. Plaintiffs, credit card issuers and their trade associations, offered evidence that nationally chartered banks hold 94.2% of credit card debt. ER Vol. 5 Tab 41 Staten Declaration No. 1 ¶ 3. Plaintiffs also claimed that at least 17.4 million California credit card holders do

business with the six largest credit card issuers.¹ s' data about

the alleged costs of ongoing compliance with the statute and Plaintiffs' claimed

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irst six

months was 11¢ per cardholder per month. ER Vol. 8 Tab 83 Curran Dec. No. 2 ¶

The California Legislature wanted consumers to know that it can take 17

30 years and 3 months and \$7,733.49 to pay off a \$2,500 credit card balance, and

\$16,305.34 and 40 years and 2 months to pay off a \$5,000 credit card balance.

Cal. Civ. Code § 1748.13. The California Legislature intended for the credit card

minimum payment warning statute to give consumers “information to make sound

financial decisions about the use of minimum payments to pay off outstanding

¹ The 17.4 million number is a conservative tally from Plaintiffs' own declarations. The number of cards issued to Californians by these issuers may be higher, since some of the declarations give an estimated number of statements mailed, which may be smaller than the number of accounts if some accounts are not used in that statement period. The 17.4 million figure is the sum of the number from these declarations. ER Vol. 1 Tab 9 Morrison Decl. ¶ 3, stating that approximately 6.6 million Citibank credit card accounts are held by persons who receive a monthly billing statement at a California address; ER Vol. 1 Tab 10 Walden Decl. ¶ 3, stating that First USA has approximately 4.7 million credit card accounts held by persons in California; ER Vol. 1 Tab 7 Fimby-Dukhart Decl. ¶ 3, stating that approximately 1.1 million of Household's bank credit card holders receive monthly statements in California; ER Vol. 1 Tab 6 Christie Decl. ¶ 8, stating that MBNA mailed approximately 2 million statements to customers with a California mailing address in April 2002. ER Vol. 1 Tab 5 Weber Decl. ¶ 8, stating that Fleet sends 500,000 monthly statements to card holders with California addresses (approximately 10% of its 5 million total card holders); ER Vol. 1 Tab 3 Keitz Decl. ¶ 4, stating that 2.5 million Chase USA credit cardholders live in California.

credit card debt” and to “give consumers some simple examples to help them understand credit card debt and to help them make ER Vol. 2 Tab 14 Legislative History Exhibit 104. The legislative history also discusses rising consumer credit card debt levels and record family debt loads, . ER Vol. 2 Tab 14 Leg. Hist. Exh. 21, 97 99, 201. The California Legislature intended that consumers could use the statutory disclosure to consider changes in future paying

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consumer protections to its residents who do business with nationally chartered banks and other nationally chartered financial institutions. ask this Court to reverse the grant o of whether each of the parts of the California statute would so significantly interfere with the exercise of a national bank power that each must be preempted

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weight” to the opinion of an administrative agency on the presence of the factual predicate for preemption under the National Bank Act (NBA); 2) suggesting that

the standard for NBA preemption is lower than the *Barnett Bank* standard; 3) declining to sever a non-preempted portion of the state statute because severance would apply a requirement to national banks and credit unions that was held preempted as to thrifts; and 4) declining to consider Congress' intent to permit state credit card billing disclosure requirements, as manifested in the Truth in Lending Act, when evaluating whether this particular state disclosure requirement substantially interfered with the exercise of a national bank power. Finally, *amici* offer a policy perspective on the ways that preemption can harm the development of consumer protection law in financial services.

ARGUMENT

I. The District Court's Erred in Giving "Great Weight" to the Opinion of the Office of Comptroller of the Currency (OCC) on Whether the Predicate for Preemption Had Been Satisfied

Amici will focus on the preemption issues under the National Bank Act, which affects most credit card consumers. According to Plaintiffs' own expert, national banks held 94.2% of U.S. credit card debt as of Dec. 31, 2001. ER Vol. 5 Tab 41 Staten Decl. No. 1 ¶ 3. A state credit card disclosure law will have little effect if it cannot apply to national bank credit card issuers.

Instead of determining what facts were undisputed, then weighing those facts under the applicable standard, the District Court appears to have deferred to

the OCC on the key question of whether the state statute significantly interfered with the exercise of a national banking power

OCC's assessment "that the burdens imposed under each option, both monetary and non monetary, are 'substantial,'" and concluded: "In light of the evidence and controlling precedential authority, the OCC's opinion is a *and thus*

-monetary costs identified by plaintiffs constitute a

Supp. 2d 1000, 1018 (E.D. Cal. 2002).

and apply the legal standard for preemption. The Court, not the agency, should determine whether the factual

proposition that the Court could give "great weight" to a federal agency's opinion

agency opinion on the interpretation of the NBA itself. When a federal regulatory agency interprets , then that opinion is

Bank of America v. City and County of San Francisco,

on whether the incidental bank powers granted under the NBA included the power to as

bank power, so there is no issue in this case of the interpretation of the scope of

powers conferred by the NBA. Instead, the issues involve the legal standard for preemption and whether the factual predicate for that standard was met in a manner appropriate for summary judgment. The Supreme Court has cautioned against “confus[ing] the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive.” *Smiley v. Citibank*, 517 U. S. 735, 744 (1996). Since preemption necessarily involves the relationship between federal and state power, it seems particularly inappropriate to defer to a federal agency on the existence of the factual predicate for preemption.

The District Court cited no authority for “great weight” deference to the OCC on the existence of NBA preemption. The Supreme Court has given “some weight” to a federal agency’s opinion about preemption when the subject matter is technical and the agency opinion addresses a complex, extensive history and background of a federal statute and regulations. *Geier v. American Honda Motor Co.*, 529 U. S. 861 (2000). The *Geier* court, however, noted that it would have reached the same result on preemption “even without giving DOT’s own view special weight.” *Id.* at 886.

The sole Ninth Circuit case citing *Geier* on the issue of deferral to a federal agency’s opinion about preemption concerns a deferral only to an agency’s position that its own regulation did not impose field preemption, and even then, gives the agency view only “some weight.” *Skysign International v. City and*

County of Honolulu, 276 F. 3d 1109, 1117 (9th Cir. 2002). Another case in this Circuit treated *Geier* as involving an interpretation of the federal air-bag regulation, then reviewed preemption *de novo* without discussing deferral. *Leipart v. Guardian Industries*, 234 F. 3d 1063, 1069 (9th Cir. 2000).² Contrast *Sherz v. South Carolina Insurance Co.*, 112 F. Supp. 2d 1000, 1009 (C.D. Cal. 2000) (giving “some weight” to an agency opinion), and *Idaho v. Security Pacific Bank Idaho*, 800 F. Supp 922, 923 (D. Idaho 1992) (same), with *Davis v. Travelers Property and Casualty Co.*, 96 F. Supp. 2d 995, 999 (N.D. Cal. 2000) reprinted as amended 2000 U.S. Dist. LEXIS 11034 (rejecting, based on *Smiley*, a request to defer to an agency’s view that the statute it administered impliedly preempted state law).

Giving great weight, or indeed any weight, to the OCC’s conclusion of NBA preemption is inconsistent with the principle that preemption determinations must be reviewed *de novo*. *Bank of America*, 309 F. 3d at 557. If a Circuit Court does

² One pre-*Geier* case in this Circuit defers to an official interpretation of the Secretary of Education on whether the Secretary’s regulations preempt inconsistent state law on the same topic as the regulation. *Brannan v. United Student Aid Funds*, 94 F. 3d 1260, 1263 (9th Cir. 1997). The decision deferred to the agency for its interpretation of the scope of its regulation. When the issue is whether a regulation imposes field preemption, the issue of preemption is inextricably linked with the interpretation on the regulation itself. This is not true for conflict preemption under the NBA, which turns on the effects of the particular state statute on the exercise of a bank power. *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996).

not defer even to a District Court on the issue of preemption, it should not defer, nor countenance deferral, to a non-judicial body on the issue.

In vacating a preliminary injunction against a California initiative statute in *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692, 699 (9th Cir. 1997), this Court discussed the importance of the accuracy of a federal decision to invalidate a state law, noting that invalidating a state law for any reason not based in the U. S. Constitution “tests the integrity of our constitutional democracy.” *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Placing great weight on the opinion of a non-judicial decisionmaker, the OCC, about whether the standard for preempting a state law has been met raises those same constitutional concerns. Federal agencies have expertise in interpreting the statutes they administer, but not in making judgments about whether the Supremacy Clause requires a federal court to interfere with the policy decisions of a state’s Legislature and Governor. *Amici* therefore ask this Court to reverse and remand for a redetermination of the preemption issue under the NBA without giving “great weight” to the OCC’s opinion.

Exercise of a National Bank Power Remains the Standard for NBA Preemption

The opinion below includes several descriptions of the standard for NBA preemption: a state law is not preempted if it “does not prevent or significantly interfere with the national bank power” (citing *Bank of America*, 309 F. 3d at 558-59 (quoting *Barnett Bank v Nelson*, 25 F. 3d 33 (1996))). However, the opinion below also equates this standard with other phrases from *Barnett Bank* removed from their context, as if these other phrases were the standard of a national bank power which triggers preemption.

The opinion provides a yardstick for measuring when a state law ‘significantly interferes with,’ the exercise of a national bank power. This language is taken from the cases cited in *Barnett Bank* and applied to the exercise of national bank powers upon the national banking system than a simple interference with a national bank power. Treating this as the standard for preemption, the opinion states that a state law is not preempted if it does not prevent or significantly interfere with the exercise of national bank powers.

by the cases in which they arose. For example, a state statute is not preempted merely because it “impairs the efficiency” of a national bank’s exercise of a banking power. Instead, under *Davis v. Elmira*, 161 U.S. 275, 283 (1896), a state law is preempted if it “impairs the efficiency of these agencies of the Federal government [national banks] to *discharge their duties*, for the performance of which they were created.” (emphasis added).

Later that same year, the Supreme Court stated that the general rule is one of applicability of state law, with an exception. *McClellan v. Chipman*, 164 U.S. 347, 357 (1896). Substituting “powers” for “duties” as the object of an impaired efficiency standard would radically expand the scope of NBA preemption. An Eighth Circuit case, decided a few years after *Davis* and *McClellan*, describes the logical fallacy of an assertion that any state law which impairs national bank efficiency is invalid. In *Dolley v. Abilene Nat’l Bank*, 179 F. 461, 465 (8th Cir. 1910), *aff’d* 228 U.S. 1 (1913), the court noted that an impairment of efficiency standard would preclude even state laws permitting the existence of state-chartered banks, because state-chartered banks compete with national banks, thus impairing national bank efficiency.

The District Court opinion also uses the terms “hampers” and “encroaches on,” both of which were used by the Supreme Court in cases holding that a state statute did not rise to the level of interference with national banking that would

require preemption. *Barnett* _____, 164

U.S. 347, 358 (1896) and _____ 321 U.S. 233, 249

(1944)). Turning a conclusion that a state law is not preempted when it does not

encroaching warrants preemption would expand NBA preemption far beyond the

“significantly interfere” _____ standard.

some cases remarkably low.” 239 F. Supp. 2d at 1017 (*citing Franklin National*

Bank v. New York, _____ -79 (1954)). *Franklin*, however, involved

discrimination against national banks. The statute in *Franklin*

banks from an advertising activity open to state chartered entities. 347 U.S. at 374,

378. The California statute, by contrast, is designed to apply equally to state and

Because of the variety of descriptions of the NBA preemption standard and

_____, discussed *supra*

Court below determined that undisputed facts showed that the California statute

would significantly interfere with the exercise of a national bank power.³ The opinion below recites many of the facts alleged, but it does not include findings about which facts were undisputed. The opinion does state that Plaintiffs “have submitted evidence” that the California statute “will impose significant monetary and non-monetary costs on national banking institutions,” 239 F. Supp. 2d at 1016, but the Court apparently made no finding as to whether some or all of this evidence was uncontroverted. The Court characterized the cost of including the generic examples as “significant,” but did not discuss whether or how an absolute dollar cost in a large industry equates to a significant interference with the exercise of a banking power. Plaintiffs’ asserted a level of ongoing costs for the six largest credit card issuers, all national banks, after the first six months of the statute, which when examined by *amici* on a per-cardholder basis, came to just 11 cents per cardholder per month. ER Vol. 8 Tab 83 ¶ 9.

³ The lack of clarity is exacerbated by the fact that Plaintiffs’ Statement of Undisputed Facts did not assert an absence of a material fact with respect to a significant interference with national bank powers. Instead, Plaintiffs contended below that they would incur start-up and ongoing costs “in a **more than insignificant amount** to comply with the Statute.” ER Vol. 5 Tab 37 Ps’ Statement of Undisputed Facts ¶¶ 9, 10. Plaintiffs also contended that the “Statute interferes **more than insignificantly** with Federal Institutions credit card lending operations...” ER Vol. 5 Tab 37 ¶ 11. “More than insignificant” cost or interference is *not* the *Barnett Bank* standard for federal preemption of a state law under the National Bank Act due to interference with a bank power.

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preemption remains the significant interference standard of _____, reverse the grant of summary judgment, and remand for a determination of what monetary _____ which significantly interferes with the exercise of a national banking power.

Statute Not Preempted as to National Banks (Which Hold over 94% of Credit Card Debt) and Federally Chartered Credit Unions Because that Held Preempted as to Thrifts

The Court’s opinion suggests that only a sliver of the California statute _____ unions. That sliver is the bare statement: “Minimum Payment Warning: Making _____ to repay your balance.” 239 F. Supp. 2d at 1019. The California Legislature wanted to warn consumers about the financial hazards of making only minimum _____ t card debt. ER Vol. 2 Tab 14 Leg. Hist. Exh. 21, 31, 128, 131. The Legislature could value giving even a limited warning, in a prominent place on _____ risk of making only the minimum monthly payment. However, the legislative _____ 14 Leg. Hist. Exh. 21, 31, 97-

The Court declined to sever on a basis quite different from the fact that only a small part of the statute would survive, and a basis quite unfounded in law. The Court held that severance would be “judicially inappropriate” because with severance, the minimal warning statement would apply to national banks and nationally chartered credit unions but it would not apply to thrifts, which the Court found to enjoy a broader “field” preemption. 239 F. Supp. 2d at 1021. This “appropriateness” doctrine would stymie state legislatures from regulating a marketplace in which thrifts participate, even where, as with credit cards, thrifts have only a small part of the market.

Severability is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Under California law, an invalid portion of a statute should be severed if it is grammatically, functionally, and volitionally severable. *Calfarm Insurance Co. v. Deukmejian*, 48 Cal. 3d 805, 821, 258 Cal. Rptr. 161, 170, 771 P. 2d 1247, 1256 (1989). The Court found the statute grammatically and functionally severable, and characterized volitional severability as the most important of the three tests. The Court then relied on a federal case where the lack of a severability clause suggested an intent for non-severability, but that case has no relevance to severability under California law. 239 F. Supp. at 1021 (*citing People v. Reyes*, 910 F. 2d 611 (9th Cir. 1990)). Under California law, volitional severability depends upon whether the valid portion of the statute “would have been adopted by

the Legislature had that body foreseen the partial invalidity of the statute.”

Manning v. Municipal Court, 132 Cal. App. 3d 825, 830, 183 Cal. Rptr. 458, 460 (Cal. App. 1982) (severing without any discussion of a severability clause). In *Calfarm*, although the statute included a severability clause, the California Supreme Court still described the question of severability as whether the remainder of the statute “would likely have been adopted” if the legislative body had “foreseen the invalidity” of part of the statute. 48 Cal. 3d at 822, 258 Cal. Rptr. at 170, 771 P. 2d at 1256.

This Court should reverse the grant of summary judgment on the grounds that it was error to refuse to sever the portion of the statute held to be valid as “judicially inappropriate.” The fact that the basic warning was held preempted as to thrifts does not answer the question relevant to a determination about severance under California law – would the Legislature have enacted this part of the statute, applying it to national banks which hold 94.2% of credit card debt, ER Vol. 5 Tab 41 ¶ 3, if the Legislature had foreseen the invalidity of other parts of the statute, or the alleged invalidity of this part of the statute to thrifts?

The holding that the part of the statute which was held to be preempted as to thrifts cannot be severed as to national banks and credit unions expands the effect of thrift field preemption far beyond thrifts. Congress and the federal banking regulatory agencies have not given field preemption of state laws to national banks

or to federally chartered credit unions. A court should not extend the thrifts' field preemption to national banks and credit unions by declining to apply a valid part of a law to non-thrifts simply because that part of the law is held not to apply to federally chartered thrifts.

Proper application of severability principles will become even more crucial if this Court remands for a factual determination of whether, without deferral to the OCC, the NBA standard for preempting and displacing a state legislative judgment was met with respect to various aspects of the statute. Ordinary California principles of volitional severability and the legislative history, which describes the benefits of the three generic examples, ER Vol. 2 Tab 14, Leg. Hist. Exh. 21, 31 131, strongly favor severance of the three generic examples if that portion of the statute is upheld on remand as not constituting a significant interference with the exercise of a national banking power.

IV. The Court Should Consider Congress' Decision under the Truth in Lending Act to Permit State Credit Card Billing Statement Disclosures in Deciding Whether Such a Disclosure Requirement Significantly Interferes with the Exercise of a National Bank Power

Amici ask the Court to consider an issue that might first appear to be foreclosed by *Bank of America*, 309 F. 3d 551. The issue is the effect on the NBA preemption analysis of Congress' express preservation of state authority to require

disclosures on credit card billing statements under the federal Truth in Lending Act (T *et. seq.*

Amici ask the Court to harmonize TILA and the NBA by considering

with the exercise of a national bank power when Congress itself authorized state

Amici acknowledge that TILA's

Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693, which *Bank of America*

ient to avoid preemption of local ATM fee restrictions. However,

the two statutes are very different in terms of how directly they contemplate the

that the EFTA "savings clause" did not save the local ordinances from preemption

Bank of America held that the ATM fee prohibition at issue was

under the EFTA, 309 F. 3d at 564.⁴ contrast, explicitly permits state

credit card billing statement disclosures.

⁴ An Eighth Circuit decision preceded *Bank One v. Guttan*. *Bank One v. Guttan*, 309 F. 3d 844, 850 (8th Cir. 1999), *cert. denied sub. nom. Foster v. Bank One*, 531 U.S. 1087 (2000). That case involved not only the general powers section of the National Bank Act, § 24, but also the more specific § 36, which preserves certain

outside the definition of a bank branch. 190 F. 3d 848 50; 12 U.S.C. § 36(f), (j).

In *Bank of America*, it was not necessary to harmonize the NBA and the EFTA; once the Court held that the type of consumer protection addressed by EFTA did not include ATM fees, there was nothing to harmonize. Here, by contrast, TILA directly addresses credit card disclosures, and does not expressly preempt state requirements for credit card billing statements as long as those requirements are not inconsistent with TILA's own requirements.

The intent of Congress is the ultimate touchstone of preemption. *Graham v. The Balcor Co.*, 146 F. 3d 1052, 1055 (9th Cir. 1998), *clarified* as to the effect on subsequent state law claims, 241 F. 3d 1246 (9th Cir. 2001), *Wisconsin Public Intervenor v. Ralph Mortier*, 501 U.S. 597, 605 (1991), *Accord: Bank of America*, 309 F. 3d at 558 (“...our sole task is to determine the intent of Congress.”) This Court should consider whether Congress intended the peculiar result that a state credit card billing statement disclosure significantly interferes with the exercise of a national bank power even though Congress chose to permit most state credit card billing statement disclosures under TILA, 15 U.S.C. § 1610(a) and (e).

The purpose of TILA is to strengthen competition by promoting the informed use of credit. The Act states: “The informed use of credit results from an awareness of the cost thereof by consumers.” 15 U.S.C. § 1601(a). TILA permits additional state consumer credit disclosure requirements except to the extent that

the state requirements are “inconsistent” with TILA. TILA § 1610(a)(1) reads in part:

Except as provided in subsection (e), of this section this part and parts B and C of this subchapter do not annul, alter, or affect the laws of credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the

ined narrowly by regulation:

disclosures or take actions that contradict the requirements of the Federal law.

12 C.F.R. § 226.28(a).

The Federal Reserve Board’s Official Staff Commentary

Generally, state law requirements that call for the disclosure of items detailed disclosures, do not contradict the Federal requirements.

Official Staff Commentary, Regulation Z, 46 Fed. Reg. 50288 (Oct. 9, 1981).

Federal banking regulators have acknowledged that TILA anticipates both federal and state regulation of credit disclosures. For example, the Board of

Reserve said: “Congress envisioned a na state laws regarding consumer credit. The statute [TILA] itself reflected a general intent for most state laws to coexist with federal law.” 69 Federal Reserve Bulletin

This Bulletin acknowledges the traditional role of the states in credit disclosure: “In

some areas, such as credit disclosures, the states have always been active, while in electronic banking, among other areas, they have [not]...” *Id.* at 100.

A 1988 amendment to TILA strengthens the argument that Congress considered state credit card billing statement disclosures as appropriate state activity. The 1988 addition, titled the Federal Fair Credit and Charge Card Disclosure Act (FCCDA), amended TILA sections 1610(e), 1632(c) and 1637. The FCCDA preempted state disclosure requirements for credit card solicitations, applications, and renewal notices, but it left untouched state authority to require credit card billing statement disclosures. The relevant section, codified at 15 U.S.C. § 1610(e), reads:

Certain credit and charge card application and solicitation disclosure provisions. The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supercede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637 of this title, or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

This section gives express preemptive effect only to 15 U.S.C. § 1632(c) and 15 U.S.C. § 1637(c), (d), (e) and (f). Subsections 1637(c)-(f) address card applications, solicitations to apply, and renewals. Subsection 1632(c) is a related format requirement. Subsection 1637(b), which addresses billing statements, is not

n preemptive effect. *Compare*

-(f),

15 U.S.C. § 1637(b).

that state laws affecting billing statements were not preempted under TILA as

amended

-89 17 (April 1989), 1989 OCC

CB LEXIS 35 (copy at ER Vol. 7 Tab 81 at 107). The Bulletin describes TILA's

continues:

disclosures concerning credit and charge cards other than in applications, solicitations or in renewal notices are preempted. *For example, a state law concerning periodic statements in general would not be preempted by the FCCCDA.*

Banking Bulletin BB-89-17 at 54-55, 1989 OCC CB LEXIS 35 (emphasis added)

(copy at ER Vol. 7 Tab 81 at 107, 124).

Amici ask this Court to examine whether a state credit card billing disclosure statute can significantly interfere with the exercise of national bank powers granted under the NBA when Congress itself contemplated that states would impose credit card billing disclosure requirements, and authorized those requirements under the TILA.

V. Undue Reach of NBA Preemption Would Interfere with the Development of Consumer Protection Law in Financial Services

An expansive interpretation of NBA preemption would stymie the development of consumer protections for consumers of financial services. A key principle of federalism is the role of the states as laboratories for the development of law. *New State Ice Co. v. Leibman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). California has played an important role as a laboratory for the development of protections for consumers of financial services. State and federal consumer protection laws can develop in tandem. After one or a few states legislate in an area, the record and the solutions developed in those states provide important information for Congress to use in deciding whether to adopt a national rule, how to craft such a rule, and whether or not any new national rule should displace state rules.

California's history of legislation on credit card disclosures illustrates the important state role as a laboratory and a catalyst for federal consumer protections for bank customers. In 1986, California required that specific information be included in credit card solicitations with enactment of the then-titled Areias-Robbins Credit Card Full Disclosure Act of 1986. That statute required every credit card solicitation to contain a chart showing the interest rate, grace period, and annual fee. 1986 Cal. Stats., Ch. 1397, *codified at* California Civil Code § 1748.11. Two years later, Congress chose to adopt the same concept in the Federal

Fair Credit and Charge Card Disclosure Act (FCCDA), setting standards for credit card solicitations and preempting state requirements on credit card solicitations, applications and renewals but not on billing statements. P. L. 100-583, 102 Stat. 2960 (Nov. 1, 1988), *codified in part at* 15 U.S.C. §§ 1637(c) and 1610(e). The implementing changes to federal Regulation Z included a model form for the federal disclosure box. 54 Fed. Reg. 13855, Appendix G.

That federal disclosure box is strikingly similar to the disclosure form required under the 1986 California law. The California statute required each credit card solicitation to include the information:

THE FOLLOWING INFORMATION IS PROVIDED PURSUANT TO THE AREIAS-ROBBINS CREDIT CARD FULL DISCLOSURE ACT OF 1986:

INTEREST RATES, FEES, AND FREE-RIDE PERIOD FOR PURCHASES UNDER THIS CREDIT CARD ACCOUNT

ANNUAL PERCENTAGE RATE (1)	VARIABLE RATE INDEX AND SPREAD (2)	ANNUALIZED MEMBERSHIP OR PARTICIPATION FEE	TRANSACTION FEE	FREE-RIDE PERIOD (3)

California Civil Code § 1748.11.

The federal “Schumer Box” required by Congress in 1988 and promulgated by regulation in 1989 for credit card solicitations is markedly similar:

Annual percentage rate for purchases	Variable rate information	Grace period for repayment of the balance for purchases	Method of computing the balance for purchases	Annual fees	Minimum finance charge	Transaction fee for purchases
____%	Your annual percentage rate may vary. The rate is determined by (explanation).	[_ days] [Until____] [Not less than _days] [Between and _days on average] [none]		[Annual fee: \$__per year] [Membership fee: \$__per year] [(type of fee): \$__per year] [(type of fee): \$__]	\$__	[\$__] [_% of__]

Transaction fee for cash advances: [\$__][_%of__]

Late payment fee: [\$__][_%of__]

Over-the-credit-limit fee: \$_____

54 Fed. Reg. 13855 (April 6, 1989 Appendix G, form G-10(B)).

States also led the way in protecting financial services consumers from long holds on deposited checks. California enacted restrictions on the length of time a bank could hold funds deposited by a consumer in 1983; Congress followed in 1986. 1983 Cal. Stats. c. 1011, *codified at* Cal. Fin. Code § 866.5.

California’s 1983 funds availability statute required the California Superintendent of Banks, Savings and Loan Commissioner, and Commissioner of Corporations to issue regulations to define a reasonable time after which a consumer must be able to withdraw funds from an item deposited in the consumer’s account. 1983 Cal. Stat. Ch. 1011, § 2, *codified at* Cal. Fin. Code §

866.5. Congress followed a few years later with the federal Expedited Funds Availability Act of 1986, P. L. 100-86, Aug. 10, 1987, 101 Stat. 552, 635, *codified at* 12 U.S.C. § 4001.

In evaluating the burden, if any, of the California credit card minimum payment warning statute on the exercise of national bank powers, *amici* ask the Court to consider the key role that states play in the development of consumer protection legislation for financial services consumers. As Justice Brandeis said in his dissent in *New State Ice Co.*, “Denial of the right [of States] to experiment may be fraught with serious consequences to the Nation.” 285 U.S. at 311.

CONCLUSION

The District Court’s decision in this case could sound the death knell for effective state protection for consumers of financial services. *Amici* ask this Court to reverse the grant of summary judgment for a factual determination of whether the substantial interference standard for preemption was met without deferral to the OCC, and for a determination of the propriety under California law of severing that portion of the statute held not otherwise preempted by the District Court as to national banks and federally chartered credit unions.

