No. 09-56679

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE AGUAYO,
*Plaintiff-Appellant*,
v.

U.S. BANK, *et al.*,
*Defendants-Appellees.*

On Appeal from the United States District Court
for the Southern District of California, No. 08-cv-2139 W (BLM)

**BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING, AARP, NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, CALIFORNIA REINVESTMENT COALITION, LAW FOUNDATION OF SILICON VALLEY, AND HOUSING AND ECONOMIC RIGHTS ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT AND ARGUING FOR REVERSAL**

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# RULE 26.1 DISCLOSURE STATEMENT

With the exception of the Center for Responsible Lending ("CRL"), none of the *amici* has a parent corporation.

CRL is a non-profit supported organization under the Internal Revenue Code. CRL's supporting, or parent, organization is the Center for Community Self-Help, which is tax-exempt under section 501(c)(3) of the Internal Revenue Code.

None of the *amici*, or their parent organizations (if applicable), have issued shares or securities.

DATED: March 5, 2010

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## INTEREST OF *AMICI CURIAE*

This brief is filed with the consent of both parties. Fed. R. App. P. 29(a).

*Amici Curiae* are national and California non-profit organizations with a commitment to consumer protection that have an interest in seeing strong and effective enforcement of consumer protection laws. *Amici* have seen the primary role that state laws have played in protecting consumers from financial institutions' abusive practices, including practices related to car lending and repossession, and believe that consumers, communities and the economy would be ill-served by preempting state consumer protection laws as to some of the nation's largest banks.

## SUMMARY OF ARGUMENT

As part of its debt collection law allowing for self-help car repossessions, California's Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering"), Cal. Civ. Code § 2983.2, requires that car owners receive basic notices specifying what they must do to recover their cars. This law provides an important protection to California car loan borrowers, while still allowing loan holders a quick and easy way to collect after default. In contrast, neither federal law nor federal banking regulators provides any relevant consumer protections to borrowers.

Accordingly, Rees-Levering's repossession notice provisions do not conflict with federal law and are not preempted when applied to national banks. Indeed, the longstanding interpretation of the National Bank Act ("NBA"), 12 U.S.C. § 1 *et seq*., is that it does not preempt state debt collection laws precisely because they create the background "infrastructure" that establishes the settled rule of law in commercial transactions. A contrary interpretation would create a lawless void and allow national banks to follow their own whims in collecting debts.

The district court upset this settled law by misinterpreting a regulation promulgated by the Office of the Comptroller of the Currency ("OCC"). This Court should reverse that dangerous decision, which would leave California car loan borrowers—and possibly many other borrowers—without basic protections when national banks seize collateral.

## ARGUMENT

### I. REES-LEVERING PROVIDES VALUABLE YET BALANCED PROTECTIONS TO CONSUMERS.

The California Legislature enacted Rees-Levering in 1962 to provide "more comprehensive protection for the unsophisticated motor vehicle consumer." *Hernandez v. Atl. Fin. Co. of L.A.*, 105 Cal. App. 3d 65, 69 (1980). It provides broad regulation of car financing transactions, arising from the Legislature's concern that "[t]he sale of automobiles is particularly important because of the very size, for the great majority of families, of the economic decision involved in

the purchase of an automobile. Such a purchase is second in importance to a family only to the purchase of a home." *Id.* at 69 n.2 (quoting Assembly committee report).

One of the topics covered by Rees-Levering is a loan holder's rights upon default. To further its desire to protect vulnerable consumers, the Legislature created comprehensive notice and recovery rights for defaulting borrowers. *Cerra v. Blackstone*, 172 Cal. App. 3d 604, 608 (1985). Rees-Levering "improved upon the [previous car repossession law's] redemption provision by setting forth specific items which the notice of intent to sell must contain." Robert S. Goldberg & Marvin G. Goldman, Recent Legislation, *The Rees-Levering Motor Vehicle Sales and Finance Act*, 10 UCLA L. Rev. 125, 156 (1962). The California courts have held that complying with Rees-Levering's notice provision is important enough that it would be an "unreasonable and unfair result[]" to leave consumers without an effective remedy for its violation. *Cerra*, 172 Cal App. 3d at 608-09.

Under the law, "[t]he notice required to be given pursuant to section 2983.2 details the buyer's rights and the sum necessary to cure the default." *Id.* at 608. The statute details the precise information that loan holders must provide in order for car owners to know exactly how to exercise Rees-Levering's means for recovering their cars. *See Juarez v. Arcadia Fin., Ltd.*, 152 Cal. App. 4th 889, 912 (2007). The information required by the notice provision should be readily

available to the loan holder, and providing it to the borrower should present little burden. *See In re McCarthy*, No. 04-10493, 2004 WL 5683383, at *6 (Bankr. E.D. Va. July 14, 2004) (noting figures such as principal, finance charges, interest rate, and "other" charges are "all information that should be readily available in an age in which . . . accounts are maintained on large and sophisticated computer systems").

Rees-Levering not only offers modest protections for borrowers, but it also benefits loan holders. Specifically, it enhances the traditional common law right to repossess by permitting the loan holder to seek a deficiency judgment after selling the repossessed car, a remedy that was not automatically available at common law. *See* James Phillips, Note, *California's Automobile Deficiency Judgment Problem*, 4 U.C. Davis L. Rev. 91, 92-93 (1971). California first provided statutory authorization for post-repossession deficiency judgments on car loans in 1957, and that right was carried forward in Rees-Levering. *See id*. at 95.[1] And more generally, Rees-Levering provides protection of consumers, "yet leave[s] the greatest freedom of contract available to the experienced businessman." *Shapiro v. Ogle*, 28 Cal. App. 3d 261, 266 (1972) (quoting 36 Cal. St. B.J. 689) (internal quotation mark omitted).

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[1] Consumer loan deficiency judgments are still unavailable in California when most other types of collateral are seized. *See, e.g.*, Cal. Civ. Code § 1812.5 (prohibiting deficiency judgments in retail installment sales); Cal. Civ. Proc. Code §§ 580b, 580d (prohibiting deficiency judgments after most foreclosures).

## II. STATE LAWS ARE THE ONLY AUTHORITY GOVERNING NATIONAL BANKS' REPOSSESSION PRACTICES.

In contrast to California's efforts to balance its car repossession law in a way that is fair both to borrowers and loan holders, federal law provides loan holders with no provisions on how to conduct repossessions and borrowers with no enforceable protections against unfair repossession practices. And more broadly, federal banking regulators have largely ignored consumer protection concerns. Instead, they have focused on allowing national banks to maximize their short-term profits without regard for their fair treatment of consumers—a decision now understood to have had dire consequences for the nation's economy. *See* Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 Conn. L. Rev 1327, 1344-57 (2009) (reviewing the role that federal bank regulators' failure to protect consumers in mortgage underwriting played in causing the ongoing global credit crisis).

Because federal laws, and the regulators who enforce those laws, have not addressed national banks' car repossession practices, or more general consumer protection duties, longstanding preemption principles allow state law to address this issue. The form of preemption relevant to this case, conflict preemption, arises only "when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Indep. Living Ctr. of S.*

*Cal. Inc. v. Maxwell-Jolly*, 572 F.3d 644, 653 (9th Cir. 2009) (internal quotation marks omitted).[2] On many consumer protection issues—and specifically those involving car repossessions—neither federal regulation nor federal purposes and objectives exists, and state laws are not preempted.

### A. No Federal Law Provides a Remedy for Unfair Repossessions by National Banks.

Consumers cannot rely on federal law to replace state law protections if they are preempted. Except for a few particular subjects,[3] neither the NBA nor any other federal law gives consumers the right to take action against national banks for wrongful treatment, no matter how unfair or violative of basic legal norms for commercial conduct. *See Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) (holding consumers have no private right of action under the FTC Act, which is the general federal consumer protection statute); *cf. Levitansky v. FIA Card Servs., N.A.*, 492 F. Supp. 2d 758, 762 (N.D. Ohio 2007) (holding consumer claims

[2] Conflict preemption is the relevant framework because the OCC's preemption regulation was an effort to codify longstanding conflict preemption case law under the NBA. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) [hereinafter Preemption Promulgation] ("The [p]reemption [s]tandard [a]pplied in [t]his [f]inal [r]ule [i]s [e]ntirely [c]onsistent [w]ith the [s]tandards [a]rticulated by the Supreme Court . . . . As observed by the Supreme Court . . ., a state law will be preempted if it *conflicts* with the exercise of a national bank's Federally authorized powers." (emphasis added)).

[3] The NBA provides a federal cause of action for usury. *See* 12 U.S.C. § 86. Federal law also covers discrete aspects of credit transactions. *See, e.g.*, 15 U.S.C. §§ 1601-1667f (Truth in Lending Act); *id.* §§ 1681-1681x (Fair Credit Reporting Act).

against a national bank other than usury are not subject to "complete preemption," which requires a federal cause of action to replace a state law cause of action).

Specifically focusing on the dispute at issue in this case, no federal law addresses U.S. Bank's obligations in connection with repossession or requires the bank to provide Mr. Aguayo with any notice related to the repossession of his car or ways he can recover it prior to sale.[4] Indeed, neither the district court nor U.S. Bank identified federal law concerning any of the myriad issues involved with repossession: for example, how to seize the collateral, how to notify borrowers about the seizure, or how to sell the collateral. And no such law exists. Although the district court noted that the Uniform Commercial Code ("UCC") provides for borrowers to receive certain notices after repossession, ER 11; *see* UCC §§ 9-613, -614, the UCC applies to transactions as a matter of state law rather than federal law, s*ee Barnhill v. Johnson*, 503 U.S. 393, 398 & n.5 (1992) (discussing the UCC as establishing "the rights and duties enjoyed under state law," and acknowledging "the absence of any controlling federal law").[5]

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[4] Federal law restricts national banks' repossession activities in the narrow context of repossessing a car owned by an active-duty military servicemember. *See* 50 App. U.S.C. § 532(a).

[5] The OCC has "agree[d]" with the assessment that "the UCC is a body of state law," rather than suggesting it is a federal law applicable to national banks. OCC Interpretive Letter No. 1005, at 2, 2004 WL 3465750 (June 10, 2004). Moreover, borrowers must invoke state law to enforce the UCC because federal law provides no cause of action for a national bank's violation of it.

### B. The OCC Does Not Protect Consumers Against Unfair Bank Practices.

Not only are consumers unable to rely upon federal law to provide basic protections fundamental to commercial transactions, including repossession, but their interests also are unprotected by the national banks' federal regulator, the OCC. The OCC has a reluctant and inadequate history of protecting consumers, particularly if it means challenging the practices of large national banks, such as U.S. Bank, who fund most of its operations. As particularly relevant to this case, the OCC has *never* taken a consumer protection enforcement action against a national bank for unfair or deceptive car lending or repossession practices.

All of the agency's enforcement against national banks' unfair or deceptive acts or practices is both of recent vintage and not robust. The OCC admits that it was not until 2000 that it invoked long-dormant consumer protection authority provided by the 1975 amendments to the FTC Act. *See* Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244 (2003) ("An obvious question is why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act.").

In the decade since the OCC dusted off its FTC Act enforcement authority, its performance on consumer protection has been unconvincing. During that time,

the OCC has taken only thirteen enforcement actions. *See* OCC, Consumer Protection News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm (last visited Mar. 5, 2010). Moreover, the OCC has a history of ignoring consumer complaints regarding its banks and refusing to intervene on behalf of consumers, dismissing allegations of abusive practices as "private party situation[s]." Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown—States Federal Agencies Clashed on Subprimes as Market Ballooned*, Wall St. J., Mar. 22, 2007, at A1 (quoting the OCC's response to an elderly consumer with an abusive loan originated by a national bank). Despite taking such minimal consumer protection efforts during the past decade when banks' abusive practices became widespread and threatened the nation's economic health, the OCC has ignored its own regulatory failings by pointing to lenders not under its supervision as the real villains.

For example, today's mortgage crisis has its roots in the virtual disappearance of underwriting in the subprime and "Alt-A" (other non-prime loans) markets combined with a prevalence of loan products and terms that exacerbated the risk of failure. Although the OCC issued multiple guidances about underwriting and sound practices, the record of some of the banks it supervises suggests poor follow-through and indeed deliberate actions to protect the banks at the expense of consumers. For example, at the request of National City Mortgage,

the OCC stopped Washington State from inquiring into its mortgage practices in 2002. *See* Eric Nalder, *Mortgage System Crumbled While Regulators Jousted*, Seattle Post-Intelligencer, Oct. 11, 2008, at A1. The following year the parent, National City Bank, and its subprime operating subsidiary, First Franklin, sought and received an OCC ruling exempting national banks from state anti-predatory mortgage lending laws designed to protect consumers from unsafe loans. *See* Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003). Having been given the green light, these two entities proceeded to concentrate on such poorly underwritten loans that neither institution survived the current economic downturn.

The record of five of the nation's largest banks, all under OCC supervision, further demonstrates the OCC's inattention to consumer protection:

> The five largest U.S. banks in 2005 . . . made heavy inroads into low- and no-documentation loans. The top-ranked Bank of America, N.A., had a thriving stated-income and no-documentation loan program, which it only halted in August 2007, when the market for private-label mortgage-backed securities dried up. Bank of America securitized most of those loans, which may explain why the OCC tolerated such lax underwriting practices. Similarly, in 2006, the OCC overrode public protests about a "substantial volume" of no-documentation loans by JPMorgan Chase Bank, N.A., the second largest bank in 2005, on grounds that the bank had adequate "checks and balances" in place to manage those loans.

McCoy et al., *supra*, at 1354. Wachovia Bank, another major issuer of poorly underwritten loans, suffered a huge jump in losses on them. *Id*. at 1354-55. Wells

Fargo Bank admitted in a 2007 prospectus for a securitized pool of loans requiring little documentation from borrowers that it "had relaxed its underwriting standards in mid-2005 and did not verify whether the mortgage brokers who had originated the weakest loans in that loan pool complied with its underwriting standards before closing"; by mid-2008, over one in five loans in the pool were in trouble. *Id*. at 1355.

The few consumer protections actions taken by the OCC reinforce the assessment that it pays little attention to consumer harm. Until 2008, it had taken no public consumer protection enforcement actions against a major bank—a category that includes U.S. Bank. *See* Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 232 (2004). Even its two recent actions against large banks are exceptions that prove the OCC's reluctance to protect consumers.

In 2008, the OCC took action against Wachovia Bank for its relationships with telemarketing scammers who had fraudulently obtained bank account information and then used the information to deposit "remotely created checks" with Wachovia. *See* Press Release, OCC, OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank's Relationships with Telemarketers and Payment Processors (Apr. 25, 2008), *available at* http://www.occ.gov/ftp/

release/2008-48.htm; *see also* Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times, Feb. 6, 2008, at C1. However, the OCC pursued a robust inquiry into Wachovia's role only after being informed of the bank's conduct by private attorneys for the victims and federal prosecutors.[6]

Even then, the OCC's original settlement with Wachovia created a cumbersome and lengthy claims process that would have left many victims without relief and allowed the bank to retain the large sum of unclaimed settlement funds, which would have resulted from the flawed claims process. Private intervenors, supported by three members of Congress as *amici*,[7] had to challenge the settlement in court before the OCC amended it to provide for direct restitution payments to the victims. *See* Press Release, OCC, Wachovia Enter Revised Agreement to Reimburse Consumers Directly (Dec. 11, 2008), *available at* http://www.occ.gov/ftp/release/2008-143.htm.

Similarly, the OCC's recent settlement with Capital One Bank for unfairly charging fees to credit card accountholders who had closed their accounts came only after a dogged investigation by state attorneys general into violations of state

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[6] *See* Plaintiffs' Memorandum in Support of the Petition for Approval of the Agreed Attorneys' Fees and Costs, *Faloney v. Wachovia Bank*, No. 07-1455 (E.D. Pa.) and *Harrison v. Wachovia Bank*, No. 08-755 (E.D. Pa.) at 3-4, 12, 15.

[7] *See* Motion and Brief of Representatives Barney Frank, Edward Markey and Joseph Sestak, in support of the Intervenor Faloney Plaintiff's Motion for an Injunction Under the All Writs Act, *USA v. Payment Processing Center, LLC*, No. 06-0725 (E.D. Pa.).

consumer protection laws. *See* Press Release, OCC Reaches Agreement with Capital One on Unfair Credit Card Account Closing Practices (Feb. 18, 2010) ("The practices in question were brought to the OCC's attention by the offices of the California and West Virginia Attorneys General."), *available at* http://www.occ.gov/ftp/release/2010-16.htm. West Virginia had already engaged in nearly three years of litigation with the bank over its abusive treatment of credit card accountholders when the OCC nevertheless allowed Capital One to obtain a national bank charter in early 2008. *See Capital One Bank (USA), N.A. v. McGraw*, 563 F. Supp. 2d 613, 614-15 (S.D. W. Va. 2008) (detailing litigation history). It took nearly two more years, during which time West Virginia continued to pursue its litigation, for the OCC to address even one of the multiple abuses identified by the Attorney General's lawsuit.

A variety of systemic reasons explain the OCC's failure to protect consumers. One of those reasons is "regulatory arbitrage," which allows institutions to shop various federal and state bank charters for the most favorable legal regime and regulatory enforcement. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 79-83 (2008). OCC leaders have made no secret that the OCC, in essence, markets its charter. *See* Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers—Dependent on Lenders' Fees, OCC Takes Their Side Against Local,*

*State Laws—Defending Uniform Rules*, Wall St. J., Jan. 28, 2002, at A1 (quoting former Comptroller, John D. Hawke, Jr., describing the OCC's use of its power to override state laws protecting consumers as "one of the advantages of a national charter" and asserting that he was "not the least bit ashamed to promote it").

The OCC has the incentive to cater to this arbitrage and attract banks to adopt a national bank charter because its funding is dependant on keeping banks within its fold. The OCC's revenue for Fiscal Year 2009 was $774.7 million, of which 97% came from the assessments it levies on national banks. OCC, Annual Report Fiscal Year 2009, at 51, *available at* http://www.occ.gov/annrpt/2009AnnualReport.pdf. These revenues are extremely dependent upon "large banks," such as U.S. Bank, which pay 69% of the assessments. *Id.*

Another explanation for the OCC's inattention to consumer protection lies in the agency's focus and priorities. The OCC traditionally has concerned itself with the financial "safety and soundness" of institutions. It has seen this role as primary and disconnected from protecting consumers from banks' unfair practices. *See* Bar-Gill & Warren, *supra*, at 90; Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 73 (2005).

But whatever the explanation, it is clear that neither federal law nor federal regulators manage the conduct of repossession or protect consumers from unfair

practices by national banks. State repossession laws, as well as general consumer protection laws, cannot create a duty or purpose that conflicts with this federal vacuum. Without any such conflict, those laws are not preempted.

## III. THE DISTRICT COURT ERRED BY ALLOWING NATIONAL BANKS TO OPERATE UNCONSTRAINED BY ANY LAW.

Not only do general preemption principles refute the district court's holding that U.S. Bank need not comply with Rees-Levering, but it is contrary to the established law on the NBA's preemptive effect.

State debt collection laws, such as Rees-Levering, form part of the background regime of debtor-creditor laws necessary to provide for the rule of law in banks' daily operation. Indeed, the Supreme Court, this Court, and the OCC have recognized the continued validity of such "infrastructure" state laws even when applied to national banks. Nevertheless, the district court's approach allows such a law to be preempted and leaves national banks free to operate unconstrained by law.

### A. Established Law Dictates that the Daily Operations of National Banks Are Largely Controlled by State Laws.

Longstanding and consistent Supreme Court precedent, as also recognized by this Court and the OCC, holds that some state laws constrain national banks in their daily operations even though they are creatures of federal law. This is because no applicable federal law regulates many of the topics—such as the

making and enforcement of contracts, the ownership of property, or the collection of debts—at the heart of banking. Preemption of state law in this context does not protect the supremacy of federal law but instead creates a void in the law.

Since 1870, the Supreme Court has consistently held 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. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870).

Particularly important for purposes of this case, the Supreme Court specifically recognized debt collection laws are among the state laws that continue to apply to national banks. *Id*. The passage of time has not altered that holding, as this Court continues to recognize that "states retain some power to regulate national banks in areas such as contracts, *debt collection*, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." *Bank of Am. v. City & County of S.F.*, 309 F.3d 551, 559 (9th Cir. 2002) (emphasis added). Last year, the Supreme Court reiterated that "the National Bank Act leaves in place some state substantive laws affecting banks." *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2718 (2009).

The OCC also recognized the continued validity of state laws that establish the legal infrastructure "that makes practicable the conduct of [banking] business" in promulgating the regulation relied on by the district court, which details the OCC's view of the NBA's preemptive power. Preemption Promulgation, *supra*, 69 Fed. Reg. at 1913. Accordingly, the OCC specified in 12 C.F.R. § 7.4008(e) seven categories of infrastructure state laws, including laws related to "rights to collect debts," that generally are not preempted.

Instead of preempting all state laws that otherwise apply to banks, the Supreme Court has specified that the NBA invalidates only those state laws that "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). The Supreme Court has *never* held that a generally applicable infrastructure law, including debt collection laws, can "significantly interfere" with national banks' operations. Indeed, it suggested the very opposite last year by observing that in the NBA, "Congress declined . . . [to] exempt national banks from all state *banking laws*." *Cuomo*, 129 S. Ct. at 2720 (emphasis added). The fact that even some banking-specific laws have an insufficient effect on national banks' operations to render them preempted logically indicates that generally applicable infrastructure laws will necessarily pose insignificant interference.

By reiterating the continuing role of state law over national banks, the *Cuomo* Court also put an end to the notion that the NBA's preemptive effect broadly exempts national banks from state law. *Cuomo* rejected the notion that Supreme Court case law was trending toward a more expansive view of NBA preemption by explicitly dismissing the banks' and the OCC's argument that a 2007 decision had ushered in a broad change to NBA preemption case law. *See id.* at 2717 (explaining "[t]he [2007] opinion addresses and answers no other question" beyond the application of preemption provisions to operating subsidiaries of national banks to the same extent as applicable to the bank itself). As one court recently aptly observed:

> In its recent decision, *Cuomo v. Clearing House Ass'n, L.L.C.*, the Supreme Court caused a sea change in the perception of the preemptive effect of the NBA and the OCC regulations. Before this pronouncement, courts appeared to be expanding the scope of federal preemption for national banks. *Cuomo* reverses this trend and has dispelled the popular notion that all state laws that affect national banks in any way or to any degree are preempted.

*See Mwantembe v. T.D. Bank, N.A.*, __ F. Supp. 2d __, 2009 WL 3818745, at *3 (E.D. Pa. Nov. 17, 2009) (citations omitted).

Moreover, as specifically relevant to this case, *Cuomo* forcefully repudiated, as "bizarre" and unsupported by any "credible argument," a preemption regulation[8] that was a companion to the regulation relied upon by the district court, and which was issued the same day by the OCC in a related rulemaking. 129 S. Ct. at 2718; *see also* Preemption Promulgation, *supra*, 69 Fed. Reg. at 1913 n.67 (cross-referencing the rulemaking, "also published today," for 12 C.F.R. § 7.4000 in the explanation of the 12 C.F.R. § 7.4008). The Supreme Court specifically found that the OCC's recognition of the continued role of state infrastructure laws, including debt collection laws, "cannot be reconciled with the regulation's almost categorical prohibition" of state enforcement of such laws. *Cuomo*, 129 S. Ct. at 2719. This repudiation cautions against broad readings of the OCC's related preemption regulation now at issue, especially an interpretation that would create "categorical prohibitions" on state infrastructure laws applying to national banks.

### B. The District Court Unreasonably Interpreted the OCC's Regulation to Leave Infrastructure Laws Highly Vulnerable to Preemption.

The district court failed to account for the continued role that state infrastructure laws, including debt collection laws, must play in the day-to-day

[8] The Supreme Court interpreted the regulation at issue in *Cuomo*, 12 C.F.R. § 7.4000, as a preemption regulation even though it technically defined only the scope of state officials' "visitorial" enforcement powers. *See* 129 S. Ct. at 2721 ("The regulation declares that '[s]tate officials may not ... prosecut[e] enforcement actions.' If that is not pre-emption, nothing is." (citations and internal quotation marks omitted)).

operations of national banks. Instead, two critical errors in the district court's interpretation of 12 C.F.R. § 7.4008 rendered debt collection laws largely preempted. If the district court's opinion is allowed to stand, national banks will face no legal consequence for failing to provide any notice to owners of repossessed cars.

The district court's first error was its broad interpretation of "credit-related documents," a topic on which state laws are preempted according to 12 C.F.R. § 7.4008(d)(2)(viii). The court wrongly extended § 7.4008, the preemption regulation related to national banks' "lending powers," to documents that relate *solely* to the collection of debts—a post-lending event, without any connection to the extension of credit or operation of a credit account. *See Alkan v. Citimortgage, Inc.*, 336 F. Supp. 2d 1061, 1064 (N.D. Cal. 2004) ("[A] statutory scheme [that] does not come into play until after a loan is made or credit otherwise extended, and [that] does not affect the manner in which the lender services or maintains the loan . . . does not constitute a lending regulation."). The district court did not cabin its interpretation by distinguishing the Rees-Levering notices from any other notices that a state statute requires to be sent after repossession—and, in fact, no such distinction is plausible.

The district court's expansive interpretation ignores the recognition by this Court, the Supreme Court, and the OCC that state debt collection laws govern

national banks. *See supra* Section III.A. Rees-Levering's notice provision, Cal. Civ. Code § 2983.2, is undoubtedly such a law, particularly because the consumer protections provided by the notice were a legislative trade off for allowing car loan holders to engage in self-help repossessions and obtain deficiency judgments. *See supra* Section I.[9] Given that 12 C.F.R. § 7.4008(d)(2) provides a detailed list of topics on which state laws are preempted and that state laws related to debt collection procedures are widespread, the OCC's failure to specify collection notices as a type of preempted disclosure law strongly suggests state laws requiring those notices are not preempted. *See Davis v. Chase Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1085 (C.D. Cal. 2009) ("Although the Court recognizes that the [12 C.F.R. § 7.4008(d)(2)(viii)] list is exemplary rather than exclusive, the Court notes that the language is aimed at *specific* types of disclosures, rather than general 'false advertising' laws. As false advertising laws are widespread, the Court would expect to see such an example.").

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[9] Indeed, whether the portions of Rees-Levering not involving borrower notices survive the district court's preemption ruling is an open question. *See Am. Bankers Ass'n v. Lockyer*, 541 F.3d 1214, 1217-18 (9th Cir. 2008) (applying severability analysis, which looks at legislative intent, when the NBA leaves a statute with both preempted and non-preempted application). National banks obviously do not want preemption of Rees-Levering's provisions that authorize car repossessions and deficiency judgments, as federal law does not provide a substitute. *See supra* Section II.A. But it would be profoundly unfair, and contrary to legislative intent, for national banks to avoid the burdens of Rees-Levering yet still take its benefits.

Second, the district court erred in refusing to consider the regulation's explicit carve out from preemption—contained in its subsection labeled "[s]tate laws that are not preempted"—of categories of state laws, including debt collection laws, that have only an "incidental effect" on national banks. Through this provision, 12 C.F.R. § 7.4008(e), the OCC created what the district court, consistent with other courts and commentators, acknowledged was a "savings clause." ER 9; *see also Hood v. Santa Barbara Bank & Trust*, 143 Cal. App. 4th 526, 538-39 (2006) ("[T]he . . . . [OCC preemption] regulation[s] 'save' or 'exempt' certain state laws (including contracts, tort, and debt collection laws) from preemption. . . . These exemptions are sometimes called 'savings clauses' or 'catch-all' provisions."), *cert. denied* 551 U.S. 1103 (2007). Nevertheless, the district court was clear that it viewed the savings clause as having no effect so long as the state law at question fits into the categories of laws ordinarily preempted by the regulation: "If the state law fits in the list of laws preempted, then the analysis is over. Courts need not consider whether the state law also fits under the areas listed in the savings clause." ER 13 (citation omitted).

This interpretation of the savings clause is flawed for multiple reasons. Most basically, it nonsensically transforms the *savings clause* into a provision that *cannot save any law* from the preemptive effect of the regulation's other subsections. *See United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir. 2007) (en

banc) ("We avoid whenever possible statutory interpretations that result in superfluous language."). Indeed, in a different statute, the Supreme Court has held "th[e] broad reading of the pre-emption clause . . . cannot be correct" when such an interpretation would mean "few, if any, state tort actions would remain for the saving clause to save." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000).

The district court further erred by interpreting the regulation's savings clause in a way that alters the longstanding case law on the NBA's preemptive effect—which saves from preemption all state laws that "do[] not prevent or significantly interfere with the national bank's exercise of its powers," *Barnett Bank*, 517 U.S. at 33—despite the OCC's expressed intent to codify this case law, *see supra* note 2. The district court also wrongly based its interpretation of the savings clause on the Office of Thrift Supervision's ("OTS") view of the preemptive effect of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 *et seq.*, even though this Court has held that HOLA preempts the field of state lending laws[10] in contrast to the NBA's more limited preemption of only conflicting state laws. *Compare Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1008 (9th Cir. 2008) ("HOLA, through OTS, preempted the entire field of lending regulation."), *with Bank of Am.*, 309 F.3d at 561 (explaining the NBA preempts conflicting state laws); *see also Davis*, 650 F. Supp. 2d at 1083 ("Courts have cautioned against wholesale

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[10] OTS exempts a substantial body of state law—contract, commercial, real property, tort, and criminal law—from field preemption. 12 C.F.R. § 560.2(c).

application of an OTS/HOLA analysis in the OCC context."); Preemption Promulgation, *supra*, 69 Fed. Reg. at 1911 (OCC's statement that "we decline to adopt the suggestion . . . that we declare that these regulations [including 12 C.F.R. § 7.4008] 'occupy the field' of national banks' real estate lending, other lending, and deposit-taking activities").[11]

The district court's erroneously broad interpretation of 12 C.F.R. § 7.4008(d)(2)(viii), when combined with its cabined read of 12 C.F.R. § 7.4008(e), not only preempts Rees-Levering's post-repossession notice requirement, but it also preempts the UCC's post-repossession notice requirement. The notices required by sections 613 and 614 of UCC Article 9 are just as much "credit-related documents" under the district court's expansive interpretation of 12 C.F.R. §

[11] For similar reasons, the district court's analysis of NBA preemption gains no support from this Court's suggestion in *Silvas* that an OTS regulation preempts any state law that comes within a list of preempted topics without regard to a savings clause. *See* 514 F.3d at 1006-07 (citing 12 C.F.R. § 560.2(c)). Moreover, even if it were appropriate to import HOLA preemption case law into the NBA, *Silvas*' discussion of the savings clause is dicta because it held that the state law claim in question did not fall within the savings clause. *See id*. at 1007 n.3. That dicta should be disregarded because it conflicts with the Seventh Circuit's holding that "we read subsection [12 C.F.R. § 560.2](c) to mean that OTS's assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies." *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 643 (7th Cir. 2007). The Seventh Circuit adopted this reasoning because the OTS "cannot provide a remedy to persons injured by wrongful acts of savings and loan associations, and furthermore HOLA creates no private right to sue to enforce the provisions of the statute or the OTS's regulations." *Id*. The *Silvas* dicta, however, leaves consumers unprotected against any bank actions within numerous subjects, even for acts that violate basic common law principles.

7.4008(d)(2)(viii) as the Rees-Levering notices. These UCC notice provisions apply to national banks only as a matter of state law. *See supra* Section II.A & note 5. Thus, according to the district court's construction of the regulation, they are preempted regardless of the 12 C.F.R. § 7.4008(e) savings clause. Although the district court denied its ruling has that effect by citing to the OCC's interpretation that the regulation leaves national banks subject to the UCC, that interpretation instead proves its error. ER 11 (citing OCC Interpretive Letter 1005, *supra*). The OCC's interpretation confirms that the legal infrastructure subjects covered by the UCC, including post-repossession notices, are non-preempted state laws under the principles codified by the regulation, rather than declaring that the regulation does not apply to the UCC. *See* OCC Interpretive Letter 1005, *supra*, at 2. In other words, the OCC interprets the regulation not to preempt the UCC because it does not preempt laws concerning the subjects covered by the UCC, but the district court's interpretation of the regulation preempts a law concerning just such a subject.

This result impermissibly refuses to defer to an agency's reasonable interpretation of its own regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). It is also dangerously allows national banks to provide whatever notice they want, or no notice at all, when they repossess cars because federal law and

regulators make no provision for national banks' treatment of borrowers facing repossession. *See supra* Section II.[12]

### C. The District Court's Logic Allows National Banks To Claim They Are Unconstrained by State Foreclosure Laws.

The outcome of this case does not simply affect whether national banks must notify owners of repossessed cars of the amount they must pay to recover their cars. Although the district court's opinion technically interprets only the OCC's preemption regulation related to national banks' non-real estate lending powers, 12 C.F.R. § 7.4008, the OCC used largely identical language in its preemption regulation related to national banks' real estate loans, 12 C.F.R. § 34.4. Indeed, the language in 12 C.F.R. § 7.4008(d)(2)(viii) used by the district court to justify preemption of Rees-Levering appears verbatim, at 12 C.F.R. § 34.4(a)(9), in the real estate loan preemption regulation. Accordingly, for all practical purposes, interpreting how the preemption regulation applies to Rees-Levering broadly dictates the continued applicability of *any* state law that requires a creditor to give a notice to a defaulting borrower for any type of loan.

State foreclosure laws are just such laws. In exchange for allowing creditors to foreclose on families' residences without the delay and expense of obtaining a

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[12] U.S. Bank's position in the district court that 12 C.F.R. § 7.4008(d)(2)(iv) and 12 C.F.R. § 7.4008(d)(2)(vi) recognize that Rees-Levering is preempted as a state law related to the "terms of credit" and "security property" would leave consumers unprotected against all national bank conduct related to repossession—not just conduct related to repossession notices.

court judgment, many states have enacted nonjudicial foreclosure statutes that carefully prescribe certain notices borrowers must receive in order to safeguard against unauthorized or unnecessary foreclosures. *See Dreyfuss v. Union Bank of Cal.*, 24 Cal. 4th 400, 411 (2000) ("The nonjudicial foreclosure provisions evince the legislative intent to establish an equitable trade-off of protections and limitations affecting the defaulting borrower and his or her creditor. In a nonjudicial foreclosure, the borrower is protected, inter alia, by notice requirements . . . . For its part, the creditor gains the certainty of a quick, inexpensive and efficient remedy."); *see also* Cal. Civ. Code §§ 2924.8, 2924b, 2924f (requiring mailing and posting of certain notices prior to a foreclosure sale). It would disrupt this balance to allow national banks to foreclose upon homes without having to prove the right to do so to a neutral party *and* without having to provide any notices to homeowners documenting their default and explaining how they can save their homes.

This Court must avoid any holding that places into doubt the continued effect of state foreclosure laws over national banks. There is no generally applicable federal foreclosure law to replace preempted state foreclosure laws, nor even an adopted uniform foreclosure code that could purportedly continue to restrain national banks' foreclosure practices. Instead, foreclosure law has always been understood to be highly state-specific. *See BFP v. Resolution Trust Corp.*,

511 U.S. 531, 541-42 (1994) ("[T]he States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers."). Because "[i]t is beyond question that an essential state interest is at issue" in state foreclosure laws, the Supreme Court has specified that "the federal statutory purpose must be clear and manifest" to preempt them. *Id*. at 544. Indeed, this Court regularly *imports* state foreclosure laws into federal common law—the very antithesis of preemption. *See, e.g., Dupnik v. United States*, 848 F.2d 1476, 1484 (9th Cir. 1988) (requiring the Small Business Administration to adhere to junior lienholder notice provisions in Arizona's foreclosure law).

Accordingly, the district court's ruling that Rees-Levering falls within the OCC's list of preempted credit disclosure laws, and is not subject to the savings clause, creates impermissible implications.

## CONCLUSION

For the reasons stated in the Appellant's brief and supported by our arguments as *amici curiae*, the district court should be reversed.

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**CERIFICATE OF COMPLIANCE**

I hereby certify that this brief contains 6,812 words and thus complies with the type-volume limitations of Fed. R. App. P. 29(d) because it is no more than one-half the maximum length authorized by Fed. R. App. P. 32(a)(7)(B). In making this certification, the undersigned has relied upon the word count of the word-processing systems used to prepare this brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 5, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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