NO. 03-50865

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IN THE UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT

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Sarah Jenkins Horton, et al.,
Plaintiffs/Counter-Defendants/Appellants,

vs.

Bank One, N.A., et al., Defendants/Counter-Plaintiffs/Appellees

# BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF DEFENDANTS/COUNTER-PLAINTIFFS/APPELLEES BANK ONE, N.A., ET AL. REQUESTING AFFIRMANCE OF THE DISTRICT COURT RULING REGARDING JURISDICTION

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## INTEREST OF THE AMICUS CURIAE

The Office of the Comptroller of the Currency ("OCC") is a bureau within the Department of Treasury charged with the administration of the National Bank Act, 12 U.S.C. §§ 1, *et seq*., and supervision of national banks. The OCC has broad authority over the chartering, supervision, and regulation of almost every aspect of the affairs of banks organized under the National Bank Act, including the power to determine whether a bank's activities are permissible under national banking laws. *See Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980).

Plaintiffs-Counter Defendants-Appellants Sarah Jenkins Horton and George Leon Matassarin's (hereinafter "Horton") erroneous interpretation of 28 U.S.C. § 1348 would make a national bank a citizen of each and every state in which it maintains a branch, a result clearly contrary to congressional intent to treat national banks as favorably as state banks and other state-chartered corporations. Because this result would place national banks at a unique disadvantage in prosecuting and defending actions that involve state law, the OCC, which is charged with protecting the safety and soundness of the national banking system, is vitally interested in this Court's proper resolution of the issue raised in this case.

The OCC files this brief *amicus curiae* in support of Defendants-Appellees Bank One Corporation; Bank One Wisconsin (hereinafter Bank One) and pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

## ISSUE PRESENTED

Whether for purposes of determining diversity jurisdiction 28 U.S.C. § 1348 means that a national bank is a citizen of the state in which it has its principal place of business and the state listed in its articles of association, or of every state in which the bank maintains a branch.

## SUMMARY OF ARGUMENT

This case turns upon the interpretation of 28 U.S.C. § 1348, a statute that delineates the citizenship of national banks for diversity jurisdiction. The statute provides that for all but a few types of actions, national banks shall "be deemed citizens of the States in which they are respectively located."

Only by looking to the longstanding and consistently expressed congressional intent regarding this jurisdictional statute will this court arrive at a correct interpretation of the statute's meaning. This intent has been clearly illustrated by the succession of statutes governing jurisdiction of the federal courts over suits involving national banks. This same congressional intent has long been recognized and followed by the federal appellate courts.

What Congress intended is very simple. Congress wanted national banks to have access to federal courts via diversity jurisdiction on terms at least comparable to that available to state banks and state corporations. Congress, therefore, never intended that a national bank be considered to be "located" for purposes of 28 U.S.C. § 1348 in any state where a national bank has branch locations. Rather, a national bank is "located" where it has its principal place of business, and the state listed in its articles of association.

## ARGUMENT

### I. Congress Intended National Banks to Have Access to Federal Courts Comparable to that of State Banks and Other State Corporations.

National banks are chartered by the federal government. Since their creation in 1863, Congress has consistently expressed its intent that national banks have access to federal courts at least as favorable as state banks and other state corporations. This intent is found in the various statutes that Congress enacted with respect to federal court jurisdiction of suits involving national banks, and is recognized in the appellate decisions of the federal courts.

#### A. Congress Consistently Amended the National Bank Act and Other Jurisdictional Statutes so that Federal Jurisdiction of Suits Involving National Banks Was At Least Comparable to Federal Jurisdiction Over Suits Involving State Banks.

The Currency Act of 1863 provided that national banks could sue and be

sued "as fully as natural persons," National Bank Act of 1863 ch. 58, § 11, 12 Stat. 665, 668 (1863), and that "suits, actions, and proceedings by and against any association under [the] act may be had in any circuit, district, or territorial court of the United States." *Id*. at § 59. The effect of this language was that national banks could sue and be sued, but only in federal court. Because national banks were federally chartered, courts concluded that all suits involving national banks arose under the laws of the United States, and therefore fell under federal question jurisdiction. *See Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892).

In 1864, Congress acted to put national banks on a more even footing with state banks and other corporations by adding new language providing that suits against[1] national banks could also be brought in "any state, county or municipal court . . . having jurisdiction in similar cases." National Bank Act of 1864, § 57, 13 Stat. 99, 116-17 (1864).[2] In 1882, Congress again acted to bring national

[1]The Supreme Court interpreted this provision as extending jurisdiction to all actions "*by or* against" national banks. *Kennedy v. Gibson*, 75 U.S. 498, 506-07 (1869).

[2]The first phrase of Section 57 of the 1864 Act was reflected in the sections of the Revised Statutes governing jurisdiction of the federal district and circuit courts. *See* R.S. (1873) §§ 563(Fifteenth) and 629(Tenth) (each identifying Section 57 of the Act of 1864 as the source of the section). Section 57 of the 1864 Act, however, was otherwise omitted from the 1873 codification. This omission was corrected by the Act of February 18, 1875, which amended Section 5198 of the Revised Statutes (dealing with the penalty for usury) to add the missing language from Section 57 of the 1864 Act.

banks' access to the federal courts in line with the ability of state banks and other corporations to be heard in federal and state courts by enacting a new provision governing jurisdiction of suits involving national banks. The 1882 statute provided that:

> [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking-associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.

Act of July 12, 1882, ch.290, § 4, 22 Stat. 162, 163 (1882).[3]

By its express terms, the 1882 Act put national banks on the same footing as state banks for jurisdictional purposes, except for suits involving the United States or its officers and agents. It required courts to exercise jurisdiction over a suit involving a national bank only when they would have jurisdiction over actions

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[3]By repealing all prior inconsistent laws, Congress insured that the 1882 Act would be controlling for all matters of jurisdiction over suits involving national banks. To the extent that Section 5198 of the Revised Statutes addressed jurisdiction, it was operative only where it was consistent with the 1882 Act. Section 5198 remained on the books in substantially the same form until 1982. *See* 12 U.S.C. § 94 (amended in 1983 by Pub. L. 97-457, 96 Stat. 2507). In its 1977 decision in *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977) the Supreme Court found that Section 94 pertained solely to venue. *Bougas*, 434 U.S. at 35.

involving a state bank in like circumstances.[4]

In 1888, Congress reworded the jurisdictional grant and further clarified its intent that national banks could take advantage of federal jurisdiction to the same extent as state banks and corporations of the time. *See* Act of Aug. 13, 1888, ch. 866, § 4, 25 Stat. 433, 436 ("1888 Act"). The 1888 Act introduced the language[5] concerning the citizenship of national banks that is found today in Section 1348. This provision read as follows:

> That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

*Id.* By enacting this statute, Congress required courts to treat national banks as if they were individual citizens for jurisdictional purposes. Because individuals, as well as corporations at that time, only had one state of citizenship, Congress in the 1888 Act firmly tied national bank citizenship to a single state. The statute assured national banks of access to federal courts under diversity jurisdiction, and

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[4]Because state bank were nothing more than state corporations, the act had the effect of making federal court jurisdiction over suits involving national banks equal to federal courts' jurisdiction over suits involving state corporations as a whole.

[5]The language was originally enacted as part of the Act of March 3, 1887, Chap. 373 § 4, 24 Stat. 552, 554. It was reenacted in 1888 to correct errors in the enrollment of the 1887 bill. There were no changes in language between the two statutes.

confirmed the elimination of federal question jurisdiction for suits involving national banks solely on the basis that they were federally chartered. Under the regime created by this statute, a national bank was located for purposes of determining its citizenship for diversity jurisdiction in the place specified for its operations in accordance with 12 U.S.C. § 22. *See Petri*, 142 U.S. at 651.

This statutory provision also departs from prior formulations concerning federal court jurisdiction of cases involving national banks. Rather than specifically granting federal courts subject matter jurisdiction over particular cases involving national banks, the statute defines national bank citizenship. Therefore, national banks, like state corporations, must rely on other statutes, including the general grant of diversity jurisdiction, to demonstrate federal court subject matter jurisdiction.

There have been no significant changes to the statutory language concerning the citizenship of national banks for purposes of determining diversity jurisdiction since 1888. Although the statutory language underwent several structural amendments and re-codifications, none of the changes evidence any intent by Congress to alter the legal effect of the language it adopted in 1888 and that is currently found in Section 1348. *See Firstar Bank, N.A., v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001); *Evergreen Forest Products v. Bank of America*, 262 F. Supp.

2d 1297, 1305 (M.D. Ala. 2003); *Financial Software Systems, Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 600-01 (E.D. Penn. 1999).

While Congress greatly modified the laws governing the geographical scope of national bank branching in 1994, Congress has never shown any intent to change its mandate that national banks be provided at least comparable treatment to state banks and other state corporations for purposes of federal court jurisdiction.[6] Thus, the 1882 and 1888 statutes remain the most authoritative sources for determining congressional intent with respect to the language now contained in section 1348.

### B. Federal Appellate Courts Have Consistently Recognized that Congress Intended Parity Between National Banks and State Banks With Respect to Diversity Jurisdiction.

[6]The treatment of state banks and national banks for purposes of diversity jurisdiction is equivalent, but not identical. Because state banks are treated like any other state corporation, their citizenship is defined by 28 U.S.C. § 1332, and they can theoretically be citizens of two states. This could occur if the state bank is incorporated in more than one state, or has a principal place of business in a state other than the state of incorporation. *See* 28 U.S.C. § 1332(c)(1). While this is theoretically possible, the OCC is unaware of any case in which a state bank has been deemed to be a citizen of a state other than its state of incorporation. Moreover, even if a state bank has branches in more than two states, Section 1332 establishes other, more limited points of reference for determining its citizenship for purposes of diversity jurisdiction. A national bank has no state of incorporation, but is deemed to be a citizen of the state where it is located, as specified in the bank's articles of association. While Congress has explicitly enacted a limited expansion of the potential states of citizenship for state chartered corporations by amending Section 1332, Congress has never determined state corporations to be citizens of every state in which they had an office nor has Congress expressed any intent to expand the citizenship of national banks for purposes of diversity jurisdiction to every location at which they may have a branch.

The Supreme Court has consistently recognized that Congress intended national banks to be treated at least as favorably as state banks and state corporations for purposes of diversity jurisdiction. In *Leather Manufacturers v. Cooper*, 120 U.S. 778 (1887), the Court examined the purpose and meaning of the jurisdictional grant over suits involving national banks passed by Congress in 1882. The Court stated that the act was "intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Id*. at 780.

Following enactment of the 1888 statute, the Supreme Court confirmed that Congress intended that national and state banks be treated equally with respect to diversity jurisdiction. *See Petri*, 142 U.S. at 644. Reviewing the 1882 and 1888 statutes, the *Petri* Court found that both acts were designed to ensure that national banks could not sue or be sued in federal court simply because of their federal charters. 142 U.S. at 651. Instead, the Court explained that those acts were intended to make federal jurisdiction over suits involving national banks the same as that over state banks. 142 U.S. at 649-50. This has been the consistent view of the federal appellate courts. *See, e.g., Ex Parte Jones*, 164 U.S. 691 (1897); *Continental Nat'l Bank v. Buford,* 191 U.S. 119 (1903); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 565-566 (1963) (" § 4 of the 1882 Act and the 1887 Act .

. . sought to limit, with exceptions, the access of national banks to, and their suitability in, the federal courts to the same extent to which non-national banks are so limited").

Prior to the *Firstar* decision, the only federal court of appeals to consider the precise issue presented by this case – the meaning of "located" in 28 U.S.C. § 41(16) (1911)[7] in the context of a national bank with branches in more than one state – concluded that the national bank was a citizen only of the state where the bank had its principal place of business. *See American Surety Co., v. Bank of California*, 133 F.2d 160 (9th Cir. 1943). In reaching the conclusion that the bank was a citizen of California, the district court considered the bank's articles of association, which specified that its "banking house or office" was located in San Francisco, California, and that it had branch offices in Portland, Oregon. Reviewing the federal statutes governing jurisdiction of suits involving national banks, the district court concluded that Congress intended "to confer upon a national bank the right to come into or remove a cause to a United States court in common with private corporations invested with powers by the several states." *American Surety Co. of New York v. Bank of California*, 44 F. Supp. 81, 83 (D. Or.

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[7]28 U.S.C. § 41(16) is the predecessor to 28 U.S.C. § 1348. There are no significant differences in the text of the two provisions.

1941), *aff'd* 133 F.2d 160 (9th Cir. 1943).

On appeal, the Ninth Circuit agreed, explaining that "a logical interpretation of the phraseology of 28 U.S.C. § 41(16) leads to the conclusion that the 'States in which they (national banking associations) are respectively located' are those states in which their principal places of business are maintained." *American Surety*, 133 F.2d at 162.

*American Surety* has never been overturned or even questioned by other federal courts of appeals concerning its jurisdictional holding. Indeed, even after interstate operations of national banks became common, courts continued to recognize that national banks, like state corporations, were to be treated as citizens of the state in which they have their principal place of business, as specified in the bank's charter, rather than as citizens of every state in which they maintained a branch office or otherwise had a presence. *See Moore v. General Motors Pension Plans*, 91 F.3d 848 (7th Cir. 1996) (determining citizenship of national bank with respect to diversity jurisdiction by resorting to general rule for state corporations); *Financial Software*, 84 F.Supp.2d at 594 (analyzing the legislative history of 1348 and holding that Congress intended that national banks would be citizens of the state where each had its principal place of business); *Baker v. First Nat'l Bank*, 111 F. Supp. 2d 799, 800 (W.D. La. 2000) ("[T]he traditional view that the term

"located," as used in § 1348, must be confined to a bank's principal place of business . . . is consistent with the Congressional intent that national banks be on the same jurisdictional playing field as state banks."); *Berkowitz v. Midlantic Corp.*, No. CIV A90-1811AMW (D. N.J., July 18, 1997), 1997 WL 422206, ("[A] national bank is a citizen only of the state encompassing its principal place of business.") *But see Connecticut Nat'l Bank v. Iacono,* 785 F.Supp. 30 (D. R.I. 1992) (national bank a citizen of each state in which it has a branch); *Bank of New York v. Bank of America,* 861 F.Supp. 225 (S.D.N.Y. 1994) (national bank a citizen of New York because it maintains an office with six employees there); *Ferraiolo Construction Inc. v. Keybank, N.A.*, 978 F.Supp. 23 (D. Me. 1997) (citizen of all states where a national bank has a branch); *Frontier Insurance Co. v. MTN Owner Trust,* 111 F.Supp.2d 376 (S.D.N.Y. 2000).

In *Firstar*, the court recognized that the language of the Act of March 3, 1888, § 4, 24 Stat. 552, 554-55, which first included the phrase making national banks "citizens of the States in which they are respectively located," that appears today in 28 U.S.C. § 1348, "has been consistently interpreted by the Supreme Court to maintain jurisdictional parity between national banks and state banks or other corporations." 253 F.3d at 988, citing *Mercantile Nat'l Bank*, 371 U.S. at 565-66. The court noted that for jurisdictional purposes, a state bank or other state

corporation is potentially a citizen of two states – the state where it has its principal place of business and the state of incorporation. And so the court concluded that national banks should be similarly treated. Because a national bank is not incorporated by a state, the court looked to the state designated in a national bank's organization certificate to serve as an analogue and concluded that a national bank is a citizen, for jurisdiction purposes, both of the state of its principal place of business and the state listed in its organization certificate:

> As the discussion of the subject matter context, settled and longstanding interpretive background, and judicial construction of "located" in the predecessors of [section 1348] demonstrate, "located" should be construed to maintain jurisdictional equality between national banks and state banks or other corporations. . . . Therefore, we hold that for purposes of [section 1348] a national bank is "located" in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate.

*Firstar*, 253 F.3d at 993.

Subsequent to the *Firstar* decision, the OCC issued an interpretive letter which construed the meaning of the term "located" in 28 U.S.C. § 1348. OCC Interpretive Letter #952 from Eric Thompson, Director, Bank Activities & Structure to Scott Cammarn, Esq., Associate General Counsel, Bank of America, at 6 (Oct. 23, 2002) (attached). The interpretive letter clarifies the application of the *Firstar* test in situations where a national bank has changed its principal place

of business:

> [*Firstar*'s] use of the state listed in the organizational certificate as the analogue to the state of incorporation was incomplete. While most national banks do not change the location of their main office from the state originally listed in the organizational certificate, some do. As set out above, the state that was listed in the organizational certificate can be changed under statutes that provide for changing the location of the main office. When this occurs, the original organizational certificate document itself is not changed. The change in designation of the place of operations (including state) is reflected in other documents, particularly the articles of association.

The interpretative letter concludes that: "We think this [interpretation of § 1348] better comports with the underlying national bank corporate statutes and practice. It is also consistent with the reasoning in *Firstar Bank, N.A. v. Faul.*"

Thus, for diversity purposes a national bank should be deemed a "citizen" of the state of its principal place of business and (if different), the state specified in the bank's articles of association.

## II. Appellant's Reliance Upon a District Court Case That Misapplied a Supreme Court Case Interpreting a Venue Statute is Misplaced.

The Appellants' Brief, at 14, mistakenly relies on a district court decision, *Connecticut Nat'l Bank v. Iacono*, 785 F. Supp. 30 (D.R.I. 1992), which erred by interpreting the jurisdictional statute in a way that conflicts with the long-recognized intent of Congress that national banks be treated like state banks for purposes of federal court jurisdiction. *Firstar*, 253 F.3d at 990; *Financial*

*Software*, 84 F. Supp. 2d at 605-07. That opinion, to the extent it ever represented a "majority view," Appellant's Brief at 14, no longer does so. Since the Seventh Circuit's announcement of its decision in *Firstar*, reaffirming the traditional reading that "located" does not include any state where a national bank operates branches, "every district court that has construed section 1348 has adopted *Firstar*." *Evergreen Forest Products*, 262 F. Supp. 2d at 1302.[8]

In *Bougas*, the Supreme Court interpreted the word "located" contained in a *venue* provision of the National Bank Act. Without rigorous analysis, the *Iacono* court applied the definition of "located" for the venue statute to define "located" within Section 1348. It then interpreted Section 1348 to mean that a national bank is located for jurisdictional purposes in every state where the bank has a branch.

The *Iacono* court based its conclusion upon three premises: (1) that the term "located" had the same meaning in Section 1348 as in Section 94, a statute setting the proper venue for state and federal suits involving national banks; (2) that by amending Section 94 based on the Supreme Court's decision in *Bougas*

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[8]*See Bank One, N.A. v. Shreeji A&M, Inc.*, 2003 U.S. Dist. LEXIS 10994 (N.D. Tex. June 27, 2003); *Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629, 630-31 (D. Md. 2002) (*Firstar* provides a "comprehensive analysis," an "in-depth application of canons of statutory construction and interpretation" that "located" should be construed "to maintain jurisdictional equality between national banks and state banks or other corporations."); *Bank One, N.A. v. Euro-Alamo Investments, Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002); *Bank of America, N.A. v. Johnson*, 186 F. Supp. 2d 1182, 1183-84 (W.D. Okla. 2001).

without amending Section 1348, Congress nevertheless intended the *Bougas* Court's construction of "located" to be applied to Section 1348 even though Congress did not amend Section 1348 to provide that result; and (3) that there was a general policy to limit national bank access to federal courts to help relieve the crowded dockets of the federal judiciary. Because the court began from erroneous premises and never considered the intent of Congress with respect to the statute being analyzed, it reached the wrong conclusion.

### A. Horton Erroneously Interprets the Supreme Court's Decision in Bougas.

Contrary to the assertions in *Iacono*, the *Bougas* Court in no way intended its interpretation of "located" within the venue statute to extend to questions of jurisdiction. The court specifically noted that "located" has no fixed meaning within the law. *Bougas,* 434 U.S. at 44-45. After explaining this, the Court went on to determine the appropriate meaning of "located" in 12 U.S.C. § 94 by referring to the intent of Congress regarding the purpose of *venue* statutes. *Id*.

The *Iacono* court did not follow a similar analysis in construing Section 1348. Instead of considering the intent of Congress relevant to Section 1348, the Court's analysis essentially consisted of noting that "located" appeared in both statutes. From this, the *Iacono* court concluded that it was appropriate to give the

word the same meaning in both statutes. This conclusion was not required. *See, e.g., Securities Industry Association v. Clarke*, 885 F.2d 1034, 1052 (2d Cir. 1989) (the meaning of "securities" under the securities laws did not control the meaning under the Glass-Steagall Act).[9] Moreover, as discussed above, Congress has consistently demonstrated its intent that national banks have the same access to federal court as state banks and corporations. This intent concerning federal jurisdiction over suits involving national banks has been confirmed by the courts. *See Petri*, 146 U.S. 644. Yet it was entirely ignored by the *Iacono* court. In doing so, the court reached an interpretation of Section 1348 that was contrary to the intent of Congress.

B. By Amending the Venue Statute Interpreted in *Bougas*, Congress in No Way Implicitly Approved Application of the *Bougas*

[9]Variations of the word "locate" appear in more than 20 places in the parts of the United States Code that govern the activities of national banks, and it is well-recognized that the meaning of the term differs based on the particular statutory provision. Thus, for certain provisions "located" refers solely to the place specified in the national bank's charter where the bank has its main office, *see, e.g.* 12 U.S.C. §§ 32 (change of location does not release bank from liabilities); 52 (stock certificates to list location of bank); 75 (effect on shareholder meeting of legal holiday where bank is located); and 182 (publication of notice of intent to dissolve); while in other provisions "located" refers to any place where a national bank has a branch office, *see, e.g.,* 12 U.S.C. §§ 36 (establishing branch banks); and 92 (acting as an insurance agent); and in still other contexts may refer to offices were specialized non-branch functions are conducted, *see, e.g.*, § 92a (trust offices conducting core trust functions). In each case, the appropriate definition of "located" is determined by analyzing the particular statutory provision and the context in which the term is used in order to effectuate the intent of Congress. *See NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 631 (7th Cir. 1995) ("Interpretation is a contextual enterprise. Statutory words take color from their many contexts-often neighboring sentences and sections, and frequently the economic transactions the words are designed to affect.")

Interpretation of “Located” to Section 1348.

In 1982, Congress amended 12 U.S.C. § 94 to eliminate the special venue rule for national banks except for suits involving insolvent national banks for which the Federal Deposit Insurance Corporation is receiver. Under the amended Section 94, the venue of suits involving national banks is determined according to the same rules that apply to suits involving state corporations. This amendment superseded the holding in *Bougas* that venue is appropriate in every county or city where a national bank has a branch office. In *Iacono*, the court reasoned that Congress' elimination of the special venue rule for national banks and failure to amend Section 1348 in a similar manner indicated that Congress approved of the *Bougas* interpretation of "located" for the jurisdictional statute. *See* 785 F.Supp. At 33. This argument is fundamentally flawed.

First, the *Bougas* opinion explicitly confined its holding to the interpretation of Section 94. *See* 434 U.S. at 35. Congress had no reason to counteract the *Bougas* holding by amending Section 1348 because the decision did not affect that statute. Second, at the time Congress amended Section 94, the Ninth Circuit's decision in *American Surety* specifically addressing the meaning of Section 1348 was unchallenged by any other federal court. *See Financial Software*, 84 F.Supp.2d 594 at 606. Congress had no need to amend Section 1348 because the

federal courts were in agreement that the statute made national banks citizens of the states of their principal places of business. Third, it simply defies logic that Congress's conclusion to explicitly address the special venue rule for national banks by amending Section 94 to place national banks on the same footing with state corporations for determining venue reflected congressional intent, that was nowhere expressed, to supersede existing case law addressing citizenship of national banks in order to treat them less favorably than state banks for purposes of diversity jurisdiction.

## III. Horton's Other Arguments Do Not Detract from the <u>Fundamental Principle Affirmed in *Firstar*</u>.

Horton's Brief quotes from the Supreme Court's conclusion in *Petri* to the effect that national banks should have the same access to federal court as state banks and state corporations. Brief, at 9-10. Horton then suggests that *Petri's* conclusion, cited by *Firstar*, "does not take into consideration laws enacted by the various states," including the Texas Constitution and the Texas finance code. *Id.* at 10. The provisions of Texas state law relied upon by Horton refer, by their terms, to the state's authority to regulate certain activities of national banks which operate in Texas; those provisions have nothing to do with national or state bank

or state corporation access to the federal courts via diversity jurisdiction. By contrast, that topic is addressed comprehensively in 28 U.S.C. § 1348.

Horton cites *Koog v. United States*, 79 F.3d 452, 455 (5th Cir. 1996). This decision too is inapposite. In that case, the court held that the interim provisions of the Brady Handgun Violence Protection Act, 18 U.S.C. § 922(s) (Supp. V. 1993) violate the Tenth Amendment to the U.S. Constitution because Congress "has transgressed the Tenth Amendment principle that it may not commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 79 F.3d at 453. The portion of this opinion quoted by Horton, that "the Commerce Clause does not authorize Congress to regulate state government regulation of interstate commerce" has nothing to do with the jurisdictional issue before this court.

Horton's reliance upon *Speights v. Willis*, 88 S.W.3d 817 (Tx.App.9th Dist. Beaumont 2002) is misplaced. That case deals with an individual's domicile under Texas law and provides no guidance to the issue of diversity jurisdiction under 28 U.S.C. § 1348.

## CONCLUSION

The intent of Congress that national banks have the same access to federal courts as similarly situated state banks is reflected in the statutes and appellate

decisions of the federal courts, and fairly implements the Constitutional promise that suits involving citizens of different states may be heard in federal courts.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FRAP, this brief contains 5,342 words.

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