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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BANK OF AMERICA, N.A.; WELLS FARGO BANK, N.A., and CALIFORNIA BANKERS ASSOCIATION, Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, et al., and CITY OF SANTA MONICA, CALIFORNIA, et al., Defendants.	No. C 99 4817 VRW

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF NATIONAL BANK PLAINTIFFS

ISSUES PRESENTED

1. Whether national banks are authorized by the National Bank Act to set and charge fees for banking services provided through automated teller machines ("ATMs").

2. Whether city ordinances that prohibit national banks from charging fees for ATM services, and thus from exercising powers authorized by federal statute, are preempted by operation of the Supremacy Clause of the United States Constitution.

STATEMENT OF THE CASE

BACKGROUND

The immediate catalysts for this litigation are the ordinances that San Francisco and Santa Monica have voted to adopt that purport to prohibit financial institutions, including national banks, from charging automated teller machine ("ATM") "access fees."[1/] More broadly, the context for this and other pending ATM-related litigation has been formed by recent statutory and market changes that have enabled and encouraged banks, including national banks to expand their deployment of ATMs. Until 1996, nationwide ATM networks prohibited their member banks from charging access fees, and as a result most national banks did not do so. *See Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990)(upholding state law response to network prohibitions for state banks). After the nationwide networks abandoned that prohibition in April 1996, the availability of ATMs increased significantly as access fees enabled banks to defray costs and sometimes earn a return on ATM deployment.[2/]

The other major change, also in 1996, was an amendment to the National Bank Act that removed geographical limits on the deployment of national bank ATMs.[3/] Some national banks

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[1/] We use "access fees" to denote what the Banks call "usage fees" or "convenience fees" and the ordinances call "surcharges:" a fee charged by the owner of an ATM terminal to a user of that terminal who is not otherwise a customer of the ATM-owning bank.

[2/] Even the "finding" in the preamble of the San Francisco ordinance suggests that ATM installations of all kinds grew from 122,000 to 165,000 after 1996. The finding tracking the growth of access fees from the beginning of 1996 to 1998 fails to mention the role played in that growth by the termination of the nationwide network access fee prohibition.

[3/] Those geographical limits had been applied to ATMs after they were first deployed in the 1970s, when court decisions established that national bank ATMs would be considered "branches" under the National Bank Act, a legal status that made ATMs subject to location limits incorporated by reference to state law. *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976). Under Section 36 of the National Bank Act, national banks may establish "branches" only to the extent that state law authorizes state banks to establish branches. *See* 12 U.S.C. § 36(c)-(g).

exercised that freedom to introduce ATMs into states where restrictions had previously discouraged entry. Litigation ensued when states attempted to enforce state restrictions that no longer applied to national bank ATMs. *See First Union Nat'l Bank v. Burke,* 48 F. Supp. 2d 132 (D.Conn.. 1999)*(*Connecticut enjoined from asserting enforcement jurisdiction over national bank ATMs*)) ; Bank One, Utah v. Guttau,* __F.3d ___, 1999 WL 681652 (8th Cir. 1999)(pet.for reh. pending)(Iowa location, registration, and advertising restrictions on national bank ATMs preempted).[4/]

POSTURE

1. OCC Letters

The OCC has addressed the merits of the issue posed by this litigation in two materially identical letters (the "Letters") from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, to two national banks, the Bank of America, N.A., (October 25, 1999) and Wells Fargo Bank, N.A. (October 27, 1999). In each case, the OCC concurred that the bank was statutorily

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Accordingly, from the 1970s until 1996, national banks could establish ATM "branches" only to the extent that they could establish full-service brick-and-mortar branches in that state. The 1996 amendment changed that status, expressly excluding ATMs from the definition of a "branch,"and thereby removed national bank ATMs from the reach of state-law based restrictions that continue to apply to national banks' full-service brick-and-mortar facilities. *See* Economic Growth and Regulatory Paperwork Reduction Act, Pub. L. No. 104-208, § 2205(a), 110 Stat. 3009-405 (Sept. 30, 1996); *Bank One, Utah v. Guttau,* ___F.3d ___, 1999 WL 681652 (8th Cir. 1999).

[4/] The pending Gramm-Leach-Bliley Act, which is expected imminently to be signed by President Clinton, does not directly address any of the issues involved here. In a section entitled the "ATM Fee Reform Act of 1999," however, the legislation does acknowledge the existence of access fees, and implicitly the power to charge access fees, in requiring that ATM operators give consumers **notice** of the amount of access fees. Gramm-Leach-Bliley Act, Section 701-705, S. 900, 106th Cong., 1st Sess. § 702 (1999). Thus, in its current legislation purporting to "reform" ATM fees, Congress made no changes to the authority of national banks under the National Bank Act to charge access fees.

authorized, as an element of the authority to conduct the business of banking, to exercise its discretion to charge access fees to non-accountholders using its ATMs.[5/]

2. The Ordinances

The Santa Monica and San Francisco ordinances each prohibit financial institutions, including national banks, from charging a fee of any kind for the use of ATMs within the jurisdiction by anyone who uses an ATM card not issued by that institution to obtain ATM services. Violation of the prohibition exposes the bank to liability for statutory damages, attorneys fees, and court costs, and, in cases of a pattern of willful violations, punitive damages of up to $5,000 per violation. The ordinances also provide that actions for injunctive relief may be brought by city government officials or by representatives of a class.

ARGUMENT

THE NATIONAL BANK ACT AUTHORIZES NATIONAL BANKS TO SET AND CHARGE FEES FOR ATM SERVICES AND THEREFORE PREEMPTS CONTRARY CITY ORDINANCES

The National Bank Act, dating from 1864, sets forth the framework for the creation, regulation, and operation of national banks, including the scope of "banking powers" – *i.e.,* statutorily-authorized banking-related activities. That scope is defined by an enumerated list of five express powers – comprising traditional banking functions such as lending money and taking deposits – and by the umbrella phrase "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh).[6/] The Supreme Court has made clear that the "business of banking" authorization is broad and mutable, embracing additional activities as the business of banking changes.

[5/] The Letters also noted that the OCC had reviewed the processes by which the banks had established the fees and concluded that they were entirely consistent with safety and soundness considerations.

[6/] 12 U.S.C. § 24, in relevant part, authorizes national banks:"Seventh. To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes * * * ."

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Corp., 513 U.S. 251, 258, n.2 (1995) ("We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."). The Supreme Court thereby confirmed that the "business of banking" evolves to meet the needs of a changing society, innovations in financial transactions, and advances in technology.[7/]

I. The National Bank Act Authorizes National Banks To Charge Access Fees

A. The National Bank Act Authorizes National Banks To Provide Services Through ATMs

The banking services provided through ATMs do not approach the cutting edge of the "business of banking," but instead represent long-established banking activities. For the most part, ATMs serve to conduct the core banking activities of receiving deposits, disbursing cash from bank accounts, enabling account management, and, in the case of cash advances, extending credit. Each of these activities lies at the heart of national bank authority, whether as part of the enumerated national bank power to receive deposits, as part of the umbrella authority to engage in the "business of banking," or as an activity incidental to an otherwise authorized banking power.[8/]

This analysis is unaffected by the mode of delivery of these traditional services, through ATMs rather than through teller windows.[9/] The power to deploy and operate ATMs is

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[7/] *See M & M Leasing Corp. v. Seattle-First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir.) *cert. denied*, 436 U.S. 956 (1978) ("[W]e draw comfort from the fact that commentators have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms * * * .[W]e believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking.").

[8/] This is in no way altered where, as here, the ATM-owning bank performs the same banking functions for deposit customers of other banks. Such interbank relationships have a long history, including traditional banking activities such as correspondent banking.

[9/] 12 C.F.R. § 7.1019 provides, in part: "A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver."

implicit in the National Bank Act's authorization of national banks to receive deposits, make loans and carry on the "business of banking." 12 U.S.C. § 24(Seventh); *Bank One v. Guttau,* 1999 WL at *4. ATMs and other electronic media simply represent a different means of exercising established banking powers. That authority, as with all other powers vested in national banks, is not subject to conditions imposed by state law except where Congress has so specified.[10/]

B. National Banks Are Authorized To Charge Fees For Their Services.

National Banks are for-profit enterprises. As the OCC's Letters state: "A bank's authority to provide products or services to its customers necessarily encompasses the ability to charge a fee for the product or service." Letters at 2.[11/] The authority to engage in national bank activities that are part of or incidental to the "**business** of banking" cannot be separated from the authority to receive a business return from those activities. Any contrary rule would render national bank powers meaningless.

The Supreme Court has long recognized that national banks are private enterprises that are entitled to exercise National Bank Act powers inherent in the operation of the business of banking. In holding that the National Bank Act preempts a state restriction on national bank advertising, the Court stated: "Modern competition for business finds advertising one of the most usual and useful of weapons.* * * It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-78 (1954).[12/] Here, as the Ordinances would have it, national banks would be "permitted to engage in a business" but

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[10/] *See, e.g., Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 406-408 (1987) (no geographic restrictions upon authorized securities transactions); *NBD Bank v. Bennett*, 67 F.3d 629, 632-33 (7th Cir. 1995) (national banks can transact business irrespective of their customers' locations unless federal law says otherwise).

[11/] By "customers," the Letters expressly include any party that obtains a product or service from the bank, and not just deposit customers. Letters at 3 n.4.

[12/] *See also Guttau,* 1999 WL at *4-*5 (Iowa ban on on-terminal national bank ATM advertising preempted).

would have no right to receive payment for services provided as part of that business. The right to be compensated for a service rendered is fundamental to business generally and, lies at the core of the statutory power to engage in the "business of banking."[13/]

C. National Banks Are Authorized To Set Prices For Service Fees

Because federal statutes impose neither a prohibition on charging fees nor a cap on how much a national bank may charge, national banks are free to set the prices for their services, subject only to the OCC's supervisory oversight. Even though heavily regulated, national banks are neither public utilities nor common carriers, which must justify to regulators any change in their rates. The National Bank Act does not displace business judgments by dictating any general restrictions on the kinds or amounts of fees that banks may charge for services, leaving those decisions to the discretion of bank management. That statutory freedom to set the rate for **fees** contrasts with the specific National Bank Act restriction on national bank **interest** rates, which are made subject to state usury laws. 12 U.S.C. § 85. Because the National Bank Act states no parallel restrictive provision for fees, national bank fee rate decisions are not subject to limitation, either directly or by reference to state law.

The OCC's interpretations of the National Bank Act reflect these principles. The Letters indicate that the establishment and rate of fees are matters to be determined by the national bank "'in its discretion, according to sound banking judgment and safe and sound banking principles.'" Letters at 3, *quoting* 12 C.F.R. § 4.002.[14/] Furthermore, because those powers are inherent elements of

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[13/] This principle is further supported by the 9th Circuit's *Valley Bank* decision, which upheld state legislation governing the powers of state banks to charge access fees. A Nevada statute made unenforceable the then-prevailing nationwide network contractual prohibition on access fees, thereby freeing Nevada state banks to charge those fees. 914 F.2d at 1188-1189. As the chartering entity for state banks, Nevada had plenary authority to determine the scope of state banking powers and to nullify contrary private restrictions. Here, the National Bank Act and the Supremacy Clause play a role parallel to that of the Nevada legislation, empowering national banks to charge fees notwithstanding municipal restrictions.

[14/] The Letters point out that the bank's authority to charge fees, like all other banking activities, must be exercised in a manner consistent with safe and sound banking practices. Letters at 3. The regulation addresses a variety of factors relevant to the OCC's supervisory concerns, including

national banks' authority to conduct the business of banking, no prior approval from the OCC is required for a national bank to set or change a fee or service charge. Letters at 4 n.6. Unlike a utility or a common carrier, national banks are empowered to set fees in their sound business judgment, and thus may adjust them as business conditions dictate, without required resort to regulatory approval. Within the bounds of supervisory considerations, national banks may decide what fees to charge for the services they provide.

II. City Ordinances That Purport To Prohibit Fees Authorized By The National Bank Act Are Preempted By Operation of The Supremacy Clause

Under the Constitution's Supremacy Clause, when the federal government acts within the sphere of its authority, federal law is paramount over, and preempts, inconsistent state law. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). The nature and degree of incompatibility between state and federal law that will trigger preemption has been expressed in a variety of formulations,[15/] but has been usefully summarized as a question whether, under the circumstances of particular case, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Those principles have repeatedly been applied to preempt state authority that would pose obstacles to the exercise of national bank powers.[16/] The

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whether a fee is anticompetitive, unsafe or unsound, or arrived upon through collusion. If the fee-setting process in the bank has addressed these factors, there is no supervisory impediment to the exercise of the bank's authority to charge fees. Letters at 3.

[15/] "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)*; see Bank of America Nat'l Trust & Sav. Ass'n v. Shirley*, 96 F.3d 1108 (8th Cir. 1995)(preemption may be express or by federal occupation of the field).

[16/] The Supreme Court established long ago that "the states can exercise no control over [national banks], nor in any way affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Merchants' Nat'l Bank v. Dearing*, 91 U.S. 29, 33-35 (1875). *See also First*

Court has observed that the history of Supremacy Clause litigation for national banks is "one of interpreting grants of enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law." *Barnett Bank*, 517 U.S. at 27.[17/]

Here, there is no question that the Ordinances "pose an obstacle" to the exercise of powers conferred by federal authority. This is not a case where the preemption question turns on a fine assessment of the degree of burden posed by an oblique state requirement. Here, instead, the possible outcomes are binary: federal law says that national banks may charge access fees; local ordinances say that they may not. The conflict between federal and local prescriptions is manifest and total. In these circumstances, there is no question that the local ordinances are preempted by federal law and rendered unenforceable with respect to national banks.

III. The Public Interest Favors Injunctive Relief

No extended discussion of the public interest favoring injunctive relief is necessary. As, the 8th Circuit held in *Guttau*, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law." *Guttau*, 1999 WL at *2 (entering a permanent injunction *sua sponte* against enforcement of preempted state restrictions). The merits argument above therefore also establishes the public interest element favoring entry of equitable relief in this case.

In addition, however, the OCC fully believes that the public interest – including the public interest in consumer convenience, product innovation, and banking safety and soundness – weighs in favor of an injunction ensuring the uninterrupted exercise of national banks' ability to charge fees for

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Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966) (observing that "[t]he paramount power of the Congress over national banks has * * * been settled for almost a century and a half"). *See generally, Barnett Bank* (federal statute preempts state statute restricting bank sales of insurance); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

[17/] It is immaterial to the application of this principle whether the federal power is explicit or implicit in the National Bank Act. *Barnett Bank*, 517 U.S. at 31; *see Franklin Nat'l Bank v. New York*, 347 U.S. at 375-79 & n.7.

services they provide as part of their authorized banking business. If the Ordinances were to become effective pending the resolution of this case on the merits, the uncertainty generated by the Ordinances' liability provisions would chill any any further deployment of ATMs in the affected cities, and could cause national banks to limit the availability of their ATMs to non-accountholders. Neither result would favor the public interest.

CONCLUSION

For all of the foregoing reasons, the Ordinances purporting to prohibit the charging of ATM access fees by national banks are contrary to federal law and are therefore null and void..

Respectfully submitted,

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