No. 10-15934 (Consolidated with No. 09-16703)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE and WILLIAM BRUCE FULLER

Plaintiffs-Appellants

v.

KEYBANK, NATIONAL ASSOCIATION; KEY EDUCATION RESOURCES; and GREAT LAKES EDUCATIONAL LOAN SERVICES, INC.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. THELTON E. HENDERSON, NO. 3:08-CV-02958-TEH

BRIEF OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND THE CLEARING HOUSE ASSOCIATION, L.L.C., AS AMICI CURIAE IN SUPPORT OF KEYBANK, NATIONAL ASSOCIATION

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NOVEMBER 1, 2010

CORPORATE DISCLOSURE STATEMENT

Each of the *amici* state that they are not owned by a parent corporation and that no publicly-held corporation owns 10% or more of the stock of any of the amici. The Clearing House Association L.L.C. ("The Clearing House") is a limited liability company and as such has no shareholders. Rather, each member of The Clearing House holds a proportionate limited liability interest in The Clearing House.

Dated: October 28, 2010

By _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae American Bankers Association (ABA) is the principal national trade association of the banking industry in the United States. Its members are located in each of the 50 States and the District of Columbia. ABA members hold a substantial majority of domestic assets of the banking industry of the United States, and they are leaders in consumer financial services, including credit cards.

The Consumer Bankers Association (CBA) is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA's member institutions collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

Established in 1853, The Clearing House, L.L.C., is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing through regulatory

comment letters, amicus briefs, and white papers the interests of its member banks on a variety of important banking and payments systems issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S.

On behalf of their members, the *amici* support the affirmance of the District Court's decision below. The District Court correctly rejected a series of arguments that rely upon *state* law (California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200) (hereinafter "UCL") to mandate the insertion of facially-inapplicable *federal*[1] "Holder Notices" into loan transactions involving the Defendant, KeyBank, a federally chartered national bank. The District Court properly determined that the remedy sought by the Plaintiffs – an injunction that bars KeyBank from collecting on Plaintiffs' loans due to Silver State's failure to perform – amounts to having the court reform the loan documents at issue by inserting "Holder Notices" into KeyBank's promissory notes. Such an application of California's UCL would impose state law-based

[1] The Federal Trade Commission's "Holder Rule," 16 C.F.R. § 433.2.

changes to the "terms of credit" offered by national banks operating within the state for non-real estate loans, resulting in an impermissible attempt to limit KeyBank's ability to exercise its federally granted lending power conferred to it under the National Bank Act. *See* 12 C.F.R. § 7.4008(d)(2)(iv).

The outcome of this case will have a direct impact upon the manner in which *amicis*' members (many of whom are national banks) conduct business within the state of California, one of the largest banking markets in the nation. Various *amici* have provided the Court with briefs supporting the reversal of the lower court's ruling; it is appropriate for the court to consider the position of the banking industry.

II. ARGUMENT

At issue in this case in attempt by the Plaintiffs to use a state consumer protection statute (California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200) to create new and unprecedented liability for lenders predicated on a facially-inapplicable federal regulation. As outlined in the District Court's opinion, the Federal Trade Commission's "Holder Rule," 16 C.F.R. § 433.2, cannot be used as a basis to proceed against the Defendant because (1) the regulation is not directly applicable to KeyBank in this circumstance since it is

not a "seller" for purposes of the "Holder Rule,"[2] and (2) the FTC's regulation does not provide for a private right of action.[3] Undeterred, the Plaintiffs attempt to use state law to twist the FTC's otherwise-inapplicable regulations into a new, privately-enforceable cause of action by making it a predicate for a state law based cause of action under California's UCL. In doing so, they seek to expand the reach of California's UCL to the point where the proposed injunctive remedy conflicts with the powers granted to national banks under federal law.

This brief will focus on the District Court's determination that three of the Plaintiffs' six causes of action were preempted by the National Bank Act, 12 U.S.C. § 1 *et seq.* The Court has recently taken up the specific issue of federal preemption of the California UCL in *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549 (9th Cir. 2010) (National Bank Act and relevant

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2 16 C.F.R. § 433.1(j). The "Holder Rule" imposes obligations only on the seller. *See* District Ct. opinion at pp. 8-9. *See also*, *In re Vincent Crisomia, Sr.*, No. 00-35085DWS, 2001 Bankr. Lexis 1469, at *11 (E.D. Pa. Bankr. 2001). *Abel v. KeyBank USA, N.A.*, No. 1:03 CV 524, 2003 U.S. Dist. Lexis 27175, at *26-27 (N.D. Ohio Sept. 24, 2003)("[T]he clear and unambiguous language contained in the regulation places no liability on the part of a lender for failing to include the term in its loan documents.").

3 *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973) ("[P]rivate actions to vindicate rights asserted under the Federal Trade Commission Act may not be maintained.").

OCC regulations preempt claims under Cal. Bus. & Prof. Code § 17200 in connection with fees charged by National Banks associated with mortgage lending) and *Rose v. Chase Bank USA*, 513 F.3d 1032 (9th Circuit, 2008)(National Bank Act preempts claims under Cal. Bus. & Prof. Code § 17200 in connection with disclosures associated with "convenience checks."). Longstanding Supreme Court precedent and this Court's analysis in *Rose* and *Martinez* wholly support the conclusion that the relief sought by Plaintiffs' "would deploy state law to alter those terms of credit and bar KeyBank from collecting on Plaintiffs' debts" and that their claims were properly dismissed "in light of its clear interference with powers conferred on KeyBank by federal law."[4]

A. Two Hundred Years Of Supreme Court Precedent Supports The District Court's Conclusion.

The fundamental primacy of federal law regarding the rights and obligations of federally chartered banking institutions is enshrined in almost 200 years of consistent Supreme Court precedent. Beginning with *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819) and continuing up through the

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[4] District Ct. Opinion at p. 20.

current court term,[5] the Supreme Court has not deviated from the Constitutional lodestar that federal law rightly takes precedence over state law with respect to national banking.

In 1864, Congress enacted the National Bank Act, establishing the system of national banking that remains in place today.[6] The NBA vests in nationally chartered banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24

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[5] The Supreme Court's recent decision in *Cuomo v. Clearing House Ass'n*, --- U.S. ----, 129 S. Ct. 2710 (2009), does not break this string of consistent precedents. As noted in the District Court's opinion, the Supreme Court in *Cuomo* was called upon to address an unrelated provision of the National Bank Act, which provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law" and other limited circumstances. 12 U.S.C. § 484(a). The Court found only that the Office of the Comptroller of the Currency erred in extending the definition of "visitorial powers" to bar state officials from 'prosecuting enforcement actions' in state courts." 129 S. Ct. at 2721 (quoting 12 C.F.R. § 7.4000). The Supreme Court held that the term properly refers to "a sovereign's supervisory powers over corporations," including "any form of administrative oversight that allows a sovereign to inspect books and records." *Id.* The present litigation is readily distinguished as it involves a *private* litigant's attempt to bring state law causes of action that, if successful, would place conditions upon the exercise of a national bank's statutory power to make loans within the state of California. *Amicus* agrees with the District Court that "visitorial powers are not at issue here, this Court does not see how *Cuomo* is controlling or even relevant." District Court Opinion at 20, n. 7.

[6] National Bank Act, ch. 106, 13 Stat. 99. *See, Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007); *Atherton v. FDIC*, 519 U.S. 213, 221-222 (1997); *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 310 (1978).

(Seventh). Banks chartered under the NBA "are subject to state laws of general application in their daily business *to the extent such laws do not conflict with the letter or the general purposes of the NBA*." (Emphasis added). *Watters*, 550 U.S. at 11(citing *Atherton*, 519 U.S. at 223, and *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896)). See also, *Martinez*, 598 F.3d at 555; Rose, 513 F.3d at 1037; *Bank of America. v. City of San Francisco*, 309 F.3d 551, 558-59 (9th Cir.2002). The United States Supreme Court has consistently "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Watters*, 550 U.S. at 12, quoting *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996). *See also, Franklin Nat. Bank of Franklin Square v. New York*, 347 U.S. 373, 375-379 (1954). *Accord, Rose*, 513 F.3d at 1037; *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir.2005)(citing *Bank of America,* 309 F.3d at 558). Accordingly, this Court has recognized that "the usual presumption against federal preemption of state law is inapplicable to federal banking regulation." *Rose,* 513 F.3d at 1037; *Boutris*, 419 F.3d at 956 (citing *Bank of America*, 309 F.3d at 558-59). S*ee also Barnett Bank*, 517 U.S. at 32.

States are permitted to regulate the activities of national banks where doing so "does not prevent or significantly interfere with the national bank's or

the national bank regulator's exercise of its powers." *Watters*, 550 U.S. at 12. But when state law prescriptions significantly impair the exercise of federally-conferred authority, enumerated or incidental under the NBA, the State's regulations must give way. *Id.* *See*, *Barnett Bank*, 517 U.S. at 32-34 (federal law permitting national banks to sell insurance in small towns preempted state statute prohibiting banks from selling most types of insurance); *Franklin Nat. Bank*, 347 U.S., at 377-379 (local restrictions on advertising preempted because they burdened exercise of national banks' incidental power to advertise). *See also*, *Martinez*, 598 F.3d at 555; *Bank of Am. v. City and County of S.F.*, 309 F.3d 551, 561 (9th Cir.2002) ("State attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." (citation omitted)).[7]

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[7] The recent amendment to the National Bank Act by Section 1044 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (July 21, 2010), does not change this analysis. First, and most fundamentally, the provisions in Dodd-Frank relating to preemption and the applicability of state law are inapplicable because they have not yet taken affect. Dodd-Frank, §§ 1048, 1061, 1062. Second, once the statute does become effective, the amendment largely codifies preexisting preemption analysis and Supreme Court precedent, particularly the Court's decision in *Barnett*. Section 1044 of Dodd-Frank provides for preemption of a "state consumer finance law" if:

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B. OCC Regulations Faithfully Reflect Supreme Court Precedent.

The chartering authority and primary federal regulator for national banks, the Office of the Comptroller of the Currency (OCC), has issued regulations that capture this body of case law regarding the role of state law and how it applies to bank operations.[8] Briefly summarized, the OCC's regulations mirror the Supreme Court's interpretation of the preemptive effect of the National Bank Act in that (1) the National Bank Act confers certain powers to banks

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- the law discriminates against federal banks as compared to state banks;
- the law "prevents or significantly interferes with the exercise by the national bank of its powers," in accordance with the standard articulated in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner*, 517 U.S. 25 (1996), as determined by the Comptroller of the Currency on a case-by-case basis or by a court; or
- the law is preempted by another federal law.

Setting aside the threshold issue of whether California's UCL falls with the scope of the amendment as a "state consumer finance law," the express preservation of the *Barnett* standard resolves any latent question as to whether *Barnett* and it progeny remains good law.

[8] "Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); Martinez, 598 F.3d at 555 ("OCC regulations possess the same preemptive effect as the Act itself."). That preemptive effect may only be disturbed if the regulation "is not one that Congress would have sanctioned." *Id.* at 154. The District Court's opinion notes that "[n]either party disputes the force of the OCC regulations here." District Court Opinion at 17, n. 6.

chartered under the statute, (2) state legislation or regulation that limits the exercise of those federally-conferred powers is preempted, and (3) states are permitted to enact laws of general application that incidentally affect national bank powers and do not prevent or significantly interfere with a national bank's exercise of powers conferred by federal law.

Consistent with the authority granted to national banks under Section 24(Seventh) of the National Bank Act, 12 U.S.C. §24(Seventh), OCC regulations authorize national banks to make loans that are not secured by real estate:

> [a] national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

12 C.F.R. § 7.4008(a). As articulated by the Supreme Court in *Barnett* and subsequent decisions, OCC regulations provide that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks" except where made applicable by Federal law. 12 C.F.R. §7.4008(d)(1). OCC regulations also supply a subject-matter list of state laws of general application that "are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect

the exercise of national banks' non-real estate lending powers..."[9]

Significantly, OCC's regulations expressly state that a national bank "may make non-real estate loans without regard to state law limitations concerning" such things as "the terms of credit"[10] or any laws "requiring specific statements, information, or other content to be included in ... credit contracts, or other credit related documents..."[11] As discussed below, given the relief sought by Plaintiffs in this case, these particular exclusions should be dispositive of any attempt to use state law to add a specific terms to a loan agreement, such as a "Holder Notice" or other reservation of legal rights.

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9 The OCC list of laws that "are not inconsistent" with the non-real estate lending powers of national bank include the following subject areas:

- Contracts;
- Torts;
- Criminal law;
- Rights to collect debts;
- Acquisition and transfer of property;
- Taxation;
- Zoning; and
- "Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out" at 12 C.F.R. § 7.4008(a).

12 C.F.R . § 7.4008(e).

10 12 C.F.R. § 7.4008(d)(2)(iv).

11 12 C.F.R. § 7.4008(d)(2)(viii).

C. Ninth Circuit Precedent Wholly Supports Dismissal.

The Ninth Circuit has recently taken up the issue of federal preemption of the California UCL in the banking context in two cases: *Martinez v. Wells Fargo Home Mortgage, Inc.* and *Rose v. Chase Bank USA.* In both cases, the Ninth Circuit recognized the preemptive effect of the National Bank Act (and OCC regulations) in shutting down attempts by litigants to use the UCL to "boot-strap" claims based upon preempted state law or inapplicable federal regulation.

In *Martinez,* the plaintiffs refinanced their mortgage through a national bank. The bank allegedly added a "mark up" to underwriting fees and tax service fees charged by the bank at closing, as well as other fees charged for other services. The complaint alleged that the mark-up was improper, and that the bank failed to disclose the actual cost to the bank of the underwriting, tax service, and other related fees in violation of Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b) and the UCL. With respect to the UCL, plaintiffs argued that defendants had (1) engaged in "unfair" competition by overcharging underwriting fees and marking up tax service fees; (2) engaged in "fraudulent" practices by failing to disclose actual costs of its underwriting and tax services; and (3) that these actions violated

multiple state and federal laws, which predicate violations are independently actionable under the UCL as "unlawful" conduct. [12]

The District Court dismissed the claims, which was affirmed by this Court on appeal. Treating the California UCL as a state law "of general application" which does not necessarily impair a bank's ability to exercise its federally-granted powers,[13] the Court nonetheless concluded that two different OCC regulations preempted the Martinez's claims based upon the Supreme Court precedent in *Watters*. Court in *Martinez* recognized that that OCC regulations grants banks the authority to set fees based on principles of safety and soundness without regard to state law limitations, 12 C.F.R. § 7.4002(b)(2) and 12 C.F.R. § 34.4(a)(9) and (10), thereby preempting the plaintiffs' "unfair" and "fraudulent" claims under those prongs of the California UCL. *Martinez*, 598 F.3d at 556-57. With regard to the causes of action under the "unlawful" prong of the UCL, the Court concluded that

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[12] California's Unfair Competition Law prohibits business acts or practices that are "unlawful," "unfair," or "fraudulent." *Id.* § 17200. Each of these three prongs constitutes a separate and independent cause of action. *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, 539-40 (1999) (citations omitted).

[13] *Martinez,* 598 F.3d at 555.

> to the extent that any of these state laws address overcharges, mark-ups, and disclosure duties, by or of a national bank, they are preempted and cannot serve as predicate violations for the claim of "unlawful" conduct.

Id. Moreover, no actionable federal predicate violation was found to exist that would support an "unlawful conduct" claim under the UCL; the Court properly concluded that Congress did not create an obligation or an express cause of action under RESPA mandating that a bank must disclose any "mark up" for a particular service on a HUD-1 form. *Id.* at 558.

The Court's opinion in *Rose* is equally on point. In *Rose*, the plaintiffs brought UCL claims based on a national bank defendant's alleged failure to include certain disclosures (as required under California Civil Code § 1748.9) with convenience checks mailed to its credit card holders. Taking up the grant of non-real estate lending authority at issue here, 12 C.F.R. § 7.4008, the Court concluded that the state disclosure statute could not serve as a predicate violation under the "unlawful" prong of California's UCL because it was preempted by the National Bank Act and OCC regulations:

> That power to "loan money on personal security" is the power pursuant to which [the bank] here extends credit to its cardholders via convenience checks. Where, as here, Congress has explicitly granted a power to a national bank without any indication that Congress intended for that power to be subject to local restriction, Congress is presumed to have intended to preempt state laws such as Cal Civ.Code § 1748.9. See *Barnett Bank*, 517 U.S. at 33-35, 116 S.Ct. 1103; *see also Franklin*, 347

> U.S. at 378, 74 S.Ct. 550; *cf. Watters*, 127 S.Ct. at 1570 ("[I]n analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's powers.") (emphasis in original).

Rose, 513 F.3d at 1037-38. *See* 12 C.F.R. § 7.4008 (d)(1), (2)(viii). Consistent with this threshold determination that the state disclosure statute was preempted with respect to national banks, the Court found that the causes of action under the "deceptive" or "unfair" prongs of the UCL failed as well because they too lacked a viable predicate. *Rose*, 513 F.3d at 1038 ("Regardless of the nature of the state law claim alleged, however, the proper inquiry is whether the "legal duty that is the predicate of" Plaintiffs' state law claim falls within the preemptive power of the NBA or regulations promulgated thereunder.").

The Court should easily and readily draw direct parallels between its decisions in *Martinez* and *Rose* and the present case. *See* District Court Opinion at 22 ("That is precisely the type of claim before this Court."). Like *Martinez,* the present case presents nothing more than an attempt to use the UCL to manufacture a wholly new state law cause of action predicated on a federal regulatory requirement that, in fact, does not apply in the particular instance. The District Court was entirely correct when it concluded that Plaintiffs' attempt to use the FTC's "Holder Rule" as the predicate for a claim under California's UCL "would deploy the UCL to require KeyBank to comply with a federal regulation that does not itself require KeyBank's compliance."

District Court Opinion at 22. Both *Martinez* and *Rose* require that for a UCL action to be viable against a national bank the predicate violation must actually impose a duty on the bank and, if it is based on state law, that it fall outside of the "preemptive power of the NBA or regulations promulgated thereunder." *Rose,* 513 F.3d at 1038. *See*, *Martinez*, 598 F.3d at 556-57. The Court should conclude that, in the present litigation, there is no viable predicate violation for *any* of the Plaintiffs' UCL claims; the FTC's "Holder Rule" neither grants a private right of action nor is it applicable to the transaction in question because KeyBank is not a "seller" for the purposes of the regulation.

More fundamentally, both *Martinez* and *Rose* recognize that even state laws "of general application" may be preempted if they are deployed in a manner that more than incidentally affects a national bank's ability to exercise its federally granted lending powers under the National Bank Act. The District Court was entirely correct when it concluded that the relief sought by Plaintiffs in this case – an injunction that would, in effect, alter the terms of the underlying loan documents by reading it to include a "Holder Notice" – would impermissibly "would deploy state law to alter those terms of credit" by barring KeyBank from collecting on Plaintiffs' debts.[14] *See* 12 C.F.R. §

[14] District Ct. opinion at p. 20.

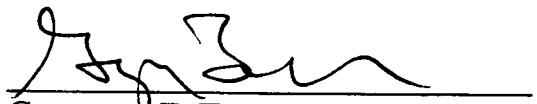
7.4008(d)(2)(iv) ("A national bank may make non-real estate loans without regard to state law limitations concerning....[t]he terms of credit...including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan...").

III. CONCLUSION

The ABA submits that the District Court's application of Supreme Court precedent and OCC regulations is correct, and that the Court should affirm the decision. The District Court correctly concluded that the proposed application of the California statute and the injunctive relief demanded by Plaintiffs would impose an impermissible state law limitation on the exercise of KeyBank's authority under the National Bank Act to establish "terms of credit" in connection with its non-real estate lending. 12 C.F.R. § 7.4008(d)(2)(iv).

Respectfully submitted,

C. DAWN CAUSEY



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Dated: October 28, 2010

CERTIFICATION OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and FRAP 32(a)(7)(C), I certify that this *amicus curiae* brief is proportionally spaced in CG Times, has a typeface of 14 points, and is 3,891 words (excluding tables and this Certification), i.e., is less than one-half the maximum permissible length of the brief it supports,

DATED: October 28, 2010.

Gregory F. Taylor

CERTIFICATE OF SERVICE

I hereby certify that on October 29th, 2010, 2 copies of the forgoing Brief of the American Bankers Association as *Amici Curiae* in support of Appellee, were served via federal express pursuant to Federal Rules of Appellate Procedure 25(d) and 31(d), upon each of the following counsel of record:

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