No. B184489

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

_____

CANIEVA HOOD and CONGRESS OF CALIFORNIA SENIORS,
Plaintiffs and Appellants,

v.

SANTA BARBARA BANK & TRUST and PACIFIC CAPITAL BANK, N.A.,
Defendants and Respondents.

_____

Appealing from a Judgment of the Superior Court of the State of California, County of Santa Barbara, Case No. 1156354
The Honorable James W. Brown, Judge Presiding

_____

APPLICATION BY CENTER FOR RESPONSIBLE LENDING AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CANIEVA HOOD AND CONGRESS OF CALIFORNIA SENIORS

_____

ERIC HALPERIN (Bar No. 198178)
Kathleen Keest, *Of Counsel*
Amanda Quester, *Of Counsel*
Center for Responsible Lending
910 17th Street, NW, Suite 500
Washington, DC 20006
Tel: (202) 349-1859; Fax: (202) 289-9009
Attorneys for *Amici Curiae*

Unfair Competition Case
Service on the California Attorney General and the District Attorney Required by Bus. & Prof. Code § 17200 and Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

I. APPLICATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

To The Honorable Arthur Gilbert, Presiding Justice of Division Six of the Second Appellate District of the California Court of Appeal:

The Center for Responsible Lending ("CRL") and the National Association of Consumer Advocates ("NACA") request leave to file a brief as *amici curiae* in this case in support of Appellants Canieva Hood and Congress of California Seniors, regarding whether the "visitorial powers" provision of the National Bank Act precludes Appellants' private action. CRL has done extensive research and policy work on issues related to national bank activities. CRL has testified numerous times before Congress and regularly provides written and oral testimony to federal and state regulatory agencies. CRL has also appeared before numerous other courts as an *amicus curiae*.

NACA is a nationwide non-profit corporation whose over 1000 members are private and public sector attorneys, law professors, law students, and non-attorney consumer advocates. NACA's mission is to promote justice for all consumers and to provide a forum for information sharing among consumer advocates across the country. From its inception, NACA has focused on issues concerning abusive and fraudulent practices by businesses that provide financial and credit-related services. NACA has advocated consumer interests by filing *amicus* briefs in a number of leading consumer protection cases before California courts, the U.S. Supreme Court, and other courts across the country.

Statement of Interest of *Amici Curiae*

CRL is dedicated to protecting home ownership and enabling families to build wealth by working to eliminate abusive financial practices. A non-profit, non-partisan research and policy organization, CRL promotes responsible practices by financial institutions to assure access to fair terms of credit and opportunities to build assets for low-wealth families. CRL is an affiliate of the Center for Community Self-Help ("Self-Help"), which also includes a credit union and a loan fund. Self-Help has provided more than $4 billion in financing to help over 40,000 low-wealth borrowers in forty-seven states buy homes, build businesses, and strengthen community resources. CRL is interested in this appeal because CRL believes that actions by private parties, including class actions and "private attorney general" actions, are essential to ensuring compliance with consumer protection laws and stopping abusive lending practices by national banks.

NACA is organized under the laws of the State of Massachusetts and is tax-exempt under section 501(c)(6) of the Internal Revenue Code. NACA members' primary interest is the protection and representation of consumers. NACA is interested in this appeal because Respondents' arguments threaten important consumer protections and consumers' ability to obtain relief when national banks violate their rights.

II. PROPOSED BRIEF OF *AMICI CURIAE*

A. Introduction

Respondents have misread the National Bank Act and the Office of the Comptroller of the Currency's implementing regulations in a two-pronged attempt to immunize themselves from consumer protection laws and other legal provisions of general applicability: first, by arguing that such laws are preempted, and second, by taking the position that only the OCC has the power to enforce them against national banks. *Amici* CRL and NACA concur in the views expressed by Appellants and the Attorney General of California as *amicus curiae,* including Appellants' argument that Respondents have not met their burden of demonstrating preemption because the OCC's regulations expressly recognize that debt collection, tort, and contract laws are *not* preempted where, as here, they no more than incidentally affect the exercise of national bank powers.

CRL and NACA submit this brief to address in greater detail Respondents' astonishing argument that the "visitorial powers" provision of the National Bank Act, 12 U.S.C. § 484, prevents *any* private party class action or "private attorney general" action against a national bank or private action that would "change how national banks do business."[1] As the background section below explains, Respondents' position would

[1] *See, e.g.,* Respondents' Brief at 44 ("Even if certain state-law claims survive preemption, the judgment still should be affirmed because Appellants seek to change how national banks do business."); 45 (describing the instant litigation as "essentially an 'enforcement action' which the 'visitorial powers' doctrine forbids the Appellants from

have sweeping and devastating effects for consumers because the OCC has neither the resources nor the right incentives to vigorously enforce laws protecting consumers and has historically brought very few formal enforcement actions. Although Respondents suggest that the OCC has been the only entity enforcing laws designed to protect consumers since 1864, private parties and state attorneys general have in fact played a critical role in seeking meaningful remedies when national banks have violated consumers' rights.

As the argument section below explains, private party actions, including class actions and "private attorney general" actions, are not visitations. Visitation presupposes the act of a sovereign, as the OCC has acknowledged. Although the OCC has submitted *amicus* briefs in a number of other high-profile class actions, including actions under California Business and Professions Code Section 17200, it has not argued that they are visitations. Moreover, as the Attorney General notes in his *amicus* brief, an action to enforce the generally-applicable consumer protection laws at issue in this case would not be a visitation even if brought by the Attorney General, so there is no way this private party action could be a visitation.

Furthermore, even if this action were a visitation, 12 U.S.C. § 484 would not prohibit it because the statute explicitly permits visitations that involve the exercise of

---

pursuing" and quoting language from the Superior Court's decision at AA267 stating that "[t]he visitorial powers doctrine . . . precludes plaintiff's claims that are brought on behalf of a class or the general public").

powers "vested in the courts of justice." Over a century ago, the Supreme Court recognized that Congress did not intend for the "visitorial powers" provision of the National Bank Act to take away the right to proceed in courts of justice to enforce recognized rights, a holding that naturally extends to the rights at issue in this action. Respondents' argument that the reference to the powers "vested in the courts of justice" does not include class actions because it means only those powers that were vested in the judiciary at the time when the National Bank Act was enacted is contrary to established rules of statutory construction, a Supreme Court decision from another state, and the OCC's rule and commentary. In light of the clear authority indicating that private party actions are not visitations and that such actions would in any event constitute a permitted exercise of the powers vested in the judiciary, the Court should not allow Respondents to use the "visitorial powers" provision to shield themselves from generally-applicable laws, including those prohibiting deceptive and unfair business practices and abusive debt collection practices.

B. Background

1. The OCC's Poor Track Record Enforcing Consumer Protection Laws Shows That It Cannot Be Trusted with the Enormous Task of Enforcing All Applicable Consumer Protection Laws Against National Banks.

The sheer magnitude of the national banking sector shows that one federal agency could not possibly have the resources necessary to address *all* consumer protection and commercial law violations by national banks. As of June 30, 2005, the OCC supervised

approximately 1,900 national banks holding 67 percent of the total assets of all U.S. commercial banks. OCC, Annual Report, Fiscal Year 2005, at 1, 7 (Oct. 2005), *available at* www.occ.treas.gov/annrpt/2005AnnualReport.pdf. In 2004 alone, the OCC's Customer Assistance Group received approximately 37,000 consumer complaints about national banks. *See* OCC, 2004 Report of the Ombudsman 28 (Dec. 2004), *available at* http://www.occ.treas.gov/2004Report.pdf. OCC personnel are clearly not adequate to address all of these complaints and ensure that all applicable consumer protection laws are enforced against all of these institutions.

The OCC's poor track record enforcing laws designed to protect consumers more than bears this out. The OCC currently lists only eight actions in a section on its website captioned "[a]ctions the OCC has taken against banks engaged in abusive practices." OCC, Consumer Protection News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm (last visited April 18, 2006). During the eighteen-year period from 1987 to 2004, the OCC brought only four formal enforcement actions pursuant to its authority under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, and/or its implementing Regulation Z, 12 C.F.R. Part 226, and from 1999 to 2005, the OCC made only six fair lending referrals to the U.S. Department of Justice.[2]

[2] This information is contained in annual reports that the Federal Reserve Board and U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f. The relevant pages for the FRB Annual Reports by year are as follows: for 2004, 69-73; 2003, 67-71; 2002, 75-79; 2001, 134-37; 2000, 104-08; 1999, 106-11; 1998, 220-24; 1997, 192-95; 1996, 199-203; 1995, 211-15; 1994, 224-28; 1993, 210-15; 1992, 196-201; 1991, 180-84; 1990, 166-69; 1989, 146-49; 1988, 149-51; 1987, 157-60. The U.S. Attorney General's

For the years 1997 to 2004, the Federal Reserve Board reported just seven formal enforcement actions by the OCC under the Truth in Lending Act's Regulation Z. *See* FRB Annual Reports cited *supra* note 2.

The OCC also stayed its hand for *more than a quarter century* before bringing its first action in 2000 to address unfair and deceptive practices under Section 5 of the Federal Trade Commission Act by a national bank.[3] Even then, the action came only after a decade in which the target bank "had been well known in the . . . industry as the poster child of abusive consumer practices" and after the OCC was "embarrassed . . . into taking action" by a California prosecutor.[4]

No matter what steps the OCC may be taking behind the scenes, this level of public enforcement is clearly inadequate. Although the Federal Trade Commission Improvement Act of 1975 required the OCC to "establish a separate division of consumer

---

Reports to Congress for 1999 to 2005 are available at http://www.usdoj.gov/crt/housing/housing_special.htm (last visited March 31, 2006).

[3] *See* Julie L. Williams & Michael S. 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, 1246 & n.25, 1253 (May 2003) (noting that the OCC brought its first such action in 2000, citing authority from the early 1970s indicating that the OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act, and conceding that "[a]n 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").

[4] Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s Europe and North American card business), Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17; *see also* Frontline, *Secret History of the Credit Card*, Transcript at 16-17, http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html.

affairs which shall receive and take appropriate action upon complaints" regarding unfair or deceptive acts or practices, Pub. L. No. 93-637, 88 Stat. 2183 (1975), *codified at* 15 U.S.C. § 57a(f)(1), the Customer Assistance Group set up by the OCC to perform this function is no substitute for private actions such as the instant case. By its own account, the group maintains a "philosophy" of "resolving complaints on first contact whenever possible," and "has found that the most effective way to resolve a complaint is for the consumer to address the issue first directly with the bank" or, put differently, for the OCC to do nothing. OCC, Annual Report Fiscal Year 2004, at 19 (Oct. 2004), *available at* http://www.occ.treas.gov/annrpt/2004AnnualReport.pdf; OCC, 2004 Report of the Ombudsman, at 38 (Dec. 2004), *available at* http://www.occ.treas.gov/2004Report.pdf. In fact, the OCC tells customers whose complaints stem from factual or contractual disputes that "[o]nly a court of law can resolve those disputes and award damages" and suggests that such customers consult an attorney for assistance, just as Appellant Hood has done. *See* OCC, Consumer Complaints and Assistance, http://www.occ.treas.gov/customer.htm (last accessed April 17, 2006). If Respondents are allowed to have their way, Appellant Hood and others like her will be caught in a Catch-22, where the OCC sends them to private attorneys and the courts, and the courts send them back to the OCC.

Rather than vigilantly and publicly enforcing consumer protection laws, the OCC has in recent years frequently intervened on the side of national banks or their

subsidiaries when consumer rights are at stake. *See* Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1. For example, when the State of Minnesota filed suit against a subsidiary of a national bank, the OCC filed an *amicus* brief arguing unsuccessfully that Minnesota did not have authority to enforce the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 - 310.7, against the subsidiary. *See Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 997, 999-1001 (D. Minn. 2001) (denying a motion to dismiss and noting that the "[t]he OCC's insistence that it must have exclusive jurisdiction over subsidiaries in order to avoid having its authority 'restricted' is not persuasive"); *see also* Comments of the Attorneys General of 50 States and the Virgin Islands and the D.C. Office of Corporation Counsel, Docket No. 03-16, at 7-9 (Oct. 6, 2003), *available at* http://www.naag.org/issues/pdf/20031006-multi-occ.pdf (describing recent OCC actions that have interfered with state consumer protection enforcement actions).

2. The OCC Has a Financial Incentive to Please the Banks It Regulates.

That the OCC sides with banks rather than consumers when their interests conflict is not surprising, given that depository institutions are allowed to choose their regulator and that the OCC's operations are funded primarily by fees from the banks it regulates. A depository institution may choose between the federal charters issued by the OCC or the Office of Thrift Supervision or a state charter. Institutions may also switch charters.

The OCC competes to keep banks under its charter and has a financial stake in how it fares in the charter competition. *See* Bravin & Beckett, *supra*.[5] According to the OCC's annual report, the agency's budget authority for fiscal year 2005 was $519.4 million. OCC, Annual Report, Fiscal Year 2005, at 61 (Oct. 2005), *available at* www.occ.treas.gov/annrpt/2005AnnualReport.pdf. Its total revenue for that year was $577.7 million, of which $557.8 million (97%) came from assessments. *Id.* at 7, 62. The assessment revenue increased nearly $80 million over fiscal year 2004, "due mostly to increased assessments . . . as a result of the more than 26.2 percent growth in bank assets, which includes the assets of new large banks joining the national banking system in FY 2005." *Id.* at 62. The OCC's dependence on fees and banks' choice of charter create conditions conducive to regulatory capture and may well explain why "the OCC has not initiated a single public prosecution of a major national bank for violating a consumer protection law" in the past decade. 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. of Banking & Fin. Law 225, 232 (2004).

[5] In a 2002 interview with the Wall Street Journal, then-Commissioner of the Currency John D. Hawke, Jr. described the OCC's efforts to override state and local laws designed to protect consumers as "one of the advantages of a national charter" and asserted that he was "not the least bit ashamed to promote it." Bravin & Beckett, *supra*.

3. State Actions and Private Actions, Including Class Actions and "Private Attorney General" Actions, Have Historically Protected Consumers from National Bank Abuses.

While Respondents suggest that the OCC has had exclusive power to enforce laws against national banks since 1864, *see, e.g.*, Respondents' Brief at 5, 46, 53, in fact private parties and the states have historically played a critical role in ensuring that national banks comply with the law. State attorneys general have litigated consumer protection cases against national banks. *See, e.g.*, Comments & Recommendations of the Attorneys General of 47 States and the D.C. Corporation Counsel to the OCC 7 & n.29 (Apr. 8, 2003), *available at* http://www.naag.org/issues/pdf/20030408-comments-occ.pdf (citing cases); *Attorney Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405 (Mich. App. 1981) (action brought by state of Michigan against a national bank over its mortgage escrow practices), *rev'd in part and remanded on other grounds*, 325 N.W.2d 777 (Mich. 1982); *West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995) (action by West Virginia Attorney General against Citizens National Bank for assignee liability as financer of dealer's car loans).

Private parties have also brought many actions against national banks. *See, e.g.*, Comments of National Consumer Law Center *et al.*, Docket No. 03-16, § 2A (Oct. 6, 2003), *available at* http://www.nclc.org/initiatives/test_and_comm/10_6_occ.shtml (listing examples of cases brought against national banks). In many cases, such actions would not be feasible if the class action mechanism and "private attorney general"

statutes did not permit consumers to litigate claims that would otherwise be cost prohibitive. As the U.S. Supreme Court has recognized:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

AmChem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Similarly, the California Supreme Court has repeatedly "acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 434 (2000); *see also Discover Bank v. Superior Court*, 36 Cal. 4th 148, 156-57 (2005); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807-08 (1971). Attorneys fees are awarded to "private attorneys general" because "citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right." *Beach Colony II v. Cal. Coastal Comm'n*, 166 Cal. App. 3d 106, 114 (1985). It would be devastating for consumers if violations of consumer protection laws by national banks could not be remedied through such actions in the future. Considering the OCC's poor enforcement record and its history of siding with the banks, what the banks in this case are effectively seeking is the ability to act with impunity when it comes to many consumer rights.

C. Argument

1. Private Party Actions Seeking Injunctive and Other Relief for National Banks' Violations of Consumer Protection Laws Are Not Visitations.

While sovereign actions are not necessarily visitations, visitation necessarily presupposes the act of a sovereign. *See Guthrie v. Harkness*, 199 U.S. 148, 158-59 (1905) (describing the right of visitation as "a *public* right, existing in the *state* for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers") (emphasis added); 69 Fed. Reg. 1895, 1899 n.30 (Jan. 13, 2004); *see also State v. First Nat'l Bank of St. Paul*, 313 N.W.2d 390, 393 (Minn. 1981) ("It is now accepted that the state is visitor of all corporations."). From the early days of the National Bank Act, private actions proceeded against national banks without interference. *See, e.g., First Nat'l Bank of Charlotte v. Morgan*, 132 U.S. 141 (1889); *Bank of Bethel v. Pahquioque Bank*, 81 U.S. 383 (1871).[6] Respondents' effort to dodge this established

[6] Although Respondents cite one recent federal district court case that concluded that a "private attorney general" action to enforce Cal. Civ. Code § 1748.9 was a prohibited visitation, that decision is not binding on this Court and cited no authority for its departure from the line of cases permitting private actions to proceed against national banks. *See Bank One, Delaware, N.A. v. Wilens*, No. SA CV 03-274JVS(ANX), 2003 WL 21697749 (C.D. Cal. July 8, 2003) & 2003 WL 21703629 (C.D. Cal. July 7, 2003); *Cowan v. Myers*, 187 Cal. App. 3d 968, 985 (1986) ("[T]he decisions of the lower federal courts, even on federal questions, are not binding on this court."). *Wilens* is, in any event, distinguishable because, *inter alia*, the complaint in this case alleges personal injury and the plaintiff in the *Wilens* case did not claim such injury. *Compare Wilens*, 2003 WL 21703629, at *2 n.1 *with, e.g.*, AA 59 ¶ 28 (alleging that SBBT seized Appellant Hood's refund to pay an alleged debt to Household Bank).

line of cases must fail because, without any state action, there can be no visitation in this case.

Even the OCC has acknowledged that it is well settled law that private party actions are *not* visitations. In the commentary to its final "visitorial powers" rule, the OCC expressly distinguished several cases cited by commentators as "examples of the use of courts for private civil cases in pursuit of personal claims against national banks, which, unlike attempts by state authorities to exercise authority over national banks using the courts, do not amount to visitations." 69 Fed. Reg. at 1899; *see also id.* at n.30 ("Because 'visitation' assumes the act of a sovereign body, private actions brought by individuals against banks in pursuit of personal claims ordinarily are outside the scope of visitorial powers rules."). The OCC recently reaffirmed this in its reply brief in the *OCC v. Spitzer* district court litigation, where it explained that the Supreme Court in its 1905 *Guthrie v. Harkness* decision "rejected the attempt by the bank officers to argue that the suit by the shareholders was equivalent to a prohibited visitation, *applying the settled law that non-governmental actions do not constitute visitations*. 199 U.S. at 158-159." Reply Mem. in Support of Injunctive & Declaratory Relief By Plaintiff OCC, *OCC v. Spitzer*, No. 05 Civ. 5636 (SHS), at 7 (emphasis added). Consistent with these comments, 12 C.F.R. § 7.4000(a)(1) provides that "[s]tate officials may not exercise visitorial powers with respect to national banks . . . except in limited circumstances authorized by federal law," but contains no parallel language regarding private parties.

The fact that Appellant Hood has chosen to bring her private claims as part of a class action does not change the substance of the underlying claims and certainly cannot convert this private action into a visitation. *See generally Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 461 (2005) ("[T]he class action statute is a procedural device for collectively litigating substantive claims.") (internal quotation marks omitted). Respondents' characterization of this action as a "private attorney general" case also does not convert it to a visitation. The word "private" should be dispositive because there is, simply put, no state actor in this case. *Cf. Net2Phone, Inc. v. Superior Court*, 109 Cal. App. 4th 583, 587 (2003) (noting in analyzing a forum selection clause "the fundamentally different nature of an action brought by a prosecutor and privately pursued representative actions" and that "[t]he filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant for purposes of the issue presented here"). Respondents' assertion that Appellants seek "to write new rules for the handling of RAL delinquencies," Respondents' Brief at 51, is both factually inaccurate and irrelevant to the visitation inquiry: Far from an effort to write new rules, this action is an effort to assert the rights already granted under existing California and federal law, which Appellants are clearly entitled to do under *Guthrie*.

Respondents' argument that private party action amounts to a visitation is so lacking in merit that it has not even been raised by the OCC or the defendants in other

high profile class actions seeking significant injunctive and monetary relief from national banks. One such case is *Miller v. Bank of America*, a class action challenging Bank of America's practice of unilaterally seizing its customers' directly-deposited government benefits to pay overdraft-related debts. No. CGC-99-301917, 2004 WL 3153009, *1-2 (Dec. 30, 2004), *appeal docketed*, No. A110137 (1st Dist. Ct. App. 2004). In *Miller*, the Superior Court determined that the named plaintiff was an adequate representative of the general public for purposes of Business and Professions Code Section 17200 and entered an injunction against the bank under the Unfair Competition Law and the Consumer Legal Remedies Act, as well a judgment including over $200 million in restitution. *Id.* at *18-19, *33-35. In briefing on appeal, neither Bank of America nor the United States as *amicus curiae* on behalf of the OCC suggested that the action would constitute a visitation, although both argued that affirming the lower court's judgment would radically alter the way national banks conduct their business. *See* Brief for Appellant Bank of America, N.A. & *Amicus Curiae* Brief of the United States in Support of Appellants/Cross-Appellants Bank of America & Does 1-50, No. A110137 (1st Dist. Ct. App. 2005). Similarly, there is no mention of "visitorial powers" in any published opinion in the *Smiley v. Citibank (South Dakota)* litigation, even though Section 17200 claims for monetary damages and injunctive relief against a national bank were litigated in that case all the way to the U.S. Supreme Court and the relief sought would have had a dramatic effect on national banking policy. *See, e.g.*, 863 F. Supp. 1156, 1163-64 (C.D.

Cal. 1993), *on appeal after remand*, 32 Cal. Rptr. 2d 562, 563 (1994), *aff'd*, 11 Cal. 4th 138 (1995), *aff'd*, 517 U.S. 735 (1996) (affirming dismissal on preemption grounds); *see also* Brief for the United States & the Comptroller of the Currency as *Amici Curiae* Supporting Respondent, 1996 WL 153227 (Mar. 29, 1996) (not mentioning "visitorial powers"). If the type of private party class action claims advanced by the plaintiffs in *Smiley*, *Miller*, and the instant case in fact encroached in any way upon the OCC's "visitorial powers," the OCC or a defendant surely would have raised the issue in the *Smiley* and *Miller* litigation.

Although the Court need not reach this issue to decide this appeal in favor of Appellants, Respondents are also mistaken when they suggest that an action brought by a state attorney general to enforce a generally-applicable consumer protection law, such as a fair debt collection law, would be a prohibited visitation. *See* Brief of the Attorney General as *Amicus Curiae* in Support of Respondents at 8-28.[7] Respondents' sweeping assertion that "[e]ven when state laws apply to national banks, the OCC has exclusive power to enforce those laws against the banks" and that the vistorial powers "doctrine reserves to the OCC exclusive regulatory and enforcement power over national banks, even in areas where state laws apply to them" simply cannot be reconciled with well-

[7] Although a federal district court recently enjoined the New York Attorney General from pursuing a fair lending investigation as a prohibited visitation, that decision is on appeal and, in any event, expressly notes that the OCC's regulation does not bar private parties from enforcing laws against national banks. *See OCC v. Spitzer*, 396 F. Supp. 2d 383, 401, 407-08 (S.D.N.Y. 2005), *appeal docketed*, No. 05-5996cv (2d Cir. 2005).

established case law. Respondents' Brief at 5, 53. In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), for example, the Supreme Court upheld a state's right to enforce applicable state law against the argument of the bank and the United States as *amicus curiae* that the visitorial provisions of the National Bank Act precluded that. 263 U.S. at 642-43, 645-48. Although the Court's opinion did not mention "visitorial powers" by name, it decisively rejected this argument, stating:

> To demonstrate the binding quality of a statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law . . . . What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation.

Id. at 660. To the extent that the OCC's "visitorial powers" rule suggests that an action by a state attorney general would be a visitation, it is not entitled to deference, for the reasons set forth on pages 23 to 28 of the Attorney General's brief. In short, this action is not a visitation, both because Appellants are private parties and because the claims at issue would not amount to a visitation even if brought by a state actor.

2. Even If This Action Were a Visitation, It Would Be Permitted as an Exercise of the Powers "Vested in the Courts of Justice."

Even if Appellants' action could plausibly be considered a visitation, 12 U.S.C. § 484 would not prohibit it because the statute explicitly permits visitations that involve the exercise of powers "vested in the courts of justice." In *Guthrie v. Harkness*, 199 U.S. 148 (1905), the Supreme Court upheld the common law right of a shareholder to inspect a

bank's books notwithstanding the bank's effort to shield itself with the National Bank Act. The Court held that Congress "did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved." 199 U.S. at 159. Likewise, here, it is clear that Congress did not intend to take away California consumers' rights to use the California courts to assert their rights to be free from the types of deceptive, unlawful, and unfair business practices involving third-party debt collection alleged in this case.

Respondents' argument that the reference to the powers "vested in the courts of justice" does not include class actions because it means only those powers that were vested in the judiciary at the time when the National Bank Act was enacted is contrary to established rules of statutory construction. Respondents have cited absolutely no legislative history to support their contention that Congress intended the provision to be read in such a strained and improbable manner. *See* Respondents' Brief at 47-50; *cf. People v. Anderson*, 28 Cal. 4th 767, 779 (2002) (noting that legislative intent is determinative when the statutory words themselves do not make clear whether the statute contemplates only a time-specific incorporation). In the absence of other evidence as to Congress's intent, traditional rules of statutory construction should apply. Section 484's reference to the powers "vested in the courts of justice" incorporates general law rather a specific statutory provision and is therefore a statute of "general reference," not a statute of "specific reference." *See* 2B Norman J. Singer, Sutherland Statutes and Statutory

Construction (6th ed. 2000) §§ 51.07-51.08. "[W]here [a statutory] reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time." *Palermo v. Stockton Theatres, Inc.*, 32 Cal. 2d 53, 59 (1948); *see also* Singer, *supra*, at §§ 51.07-51.08. Under this rule of construction, "vested in the courts of justice" refers not only to the law in force on the date of enactment, but also to all subsequent laws affecting the powers of the judiciary.[8]

Consistent with this authority, the Oregon Supreme Court has held that the "vested in the courts of justice" exception applies in the context of a class action. The Oregon Supreme Court considered an argument that a class action against a national bank would interfere with the OCC's exclusive "visitorial powers" in *Best v. U.S. National Bank of Oregon*, 739 P.2d 554, 559, 572 (Or. 1987). After determining that the inspections and disclosures required by the class action were not an "exercise of visitorial powers," the court went on to hold that "even if these actions could be characterized as an exercise of

[8] There is nothing in the passage that Respondents cite from the *OCC v. Spitzer* decision that supports their argument that Section 484's reference to the powers "vested in the courts of justice" means only the powers vested in the courts as of 1864. *See* Respondents' Brief at 48 (citing 396 F. Supp. 2d 383, 405-06 (S.D.N.Y. 2005)). The *Spitzer* court looked to the law as it existed in 1864 in an effort to determine congressional intent behind the statute, not to interpret the meaning of a reference within the statute to another body of law. 396 F. Supp. 2d at 405-06. The *Spitzer* court also expressly noted elsewhere in its decision that "[t]he OCC's regulation bars states, not private parties, from enforcing laws against national banks." *Id.* at 401 (citing 12 C.F.R. § 7.4000).

visitorial powers, Section 484's exception for visitorial powers 'vested in the courts of justice' would be applicable." 739 P.2d at 572.

Even the OCC – which is no shrinking violet when it comes to interpretations that augment its own authority – has not tried to freeze the meaning of the "vested in the courts of justice" clause as of 1864. Quite the contrary, the agency's "visitorial powers" rule uses the present tense in referring to judicial powers, providing that "[n]ational banks are subject to such visitorial powers as *are* vested in the courts of justice." 12 C.F.R. § 7.4000(b)(2) (emphasis added); *see also id.* (referring to the "powers inherent in the judiciary"). The commentary to the final rule likewise states: "The [courts of justice] exception preserves the powers that *are* inherent in the courts. . . . The exception permits the exercise of 'visitorial powers' that *are* 'vested in the courts of justice,' powers, in other words, that courts *possess*." 69 Fed. Reg. at 1900 (emphasis added). The OCC notably did not say "such powers as *were* vested in the courts of justice *in 1864*," the "powers that *were* inherent in the judiciary *in 1864*," or the "powers . . . that courts *possessed in 1864*." Although the OCC's "visitorial powers" rule overreaches with regard to the types of actions state officials may bring,[9] it is significant that even the

[9] The OCC's rule sweepingly asserts that the "courts of justice" exception "does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(b)(2). This interpretation is contrary to the plain language of the statute and is not entitled to deference, for all of the reasons stated on pages 23 to 28 of the Attorney General's brief. However, for purposes of this appeal, it is enough to note that §

OCC's expansive reading of its own powers provides no support for Respondents' contention that this private class action does not fall within the "courts of justice" exception.

Indeed, in initially proposing its "visitorial powers" rule, the OCC made clear that it did *not* intend for its interpretation of the "courts of justice" exception to prevent private party actions. The agency expressly noted, for instance, that its position "does not preclude private civil actions." 68 Fed. Reg. 6363, 6370 (Feb. 7, 2003); *see also id.* at 6369 ("Courts must be able to compel a national bank to produce books and records in connection with private litigation involving the bank."). The Supreme Court's decision in *Guthrie*, established rules of statutory construction, a Supreme Court decision from another state, and the OCC's rule and commentary thus all make it clear that this action, if it could be considered a visitation, would fall squarely within the exception in Section 484 for the powers "vested in the courts of justice." Because Appellants' action is not a prohibited visitation for purposes of Section 484, the Court should reject Respondents' efforts to establish a single federal agency that has neither the resources nor the incentives to enforce the consumer protection laws at issue in this case as the *only* entity with the power to do so.

7.4000(b)(2) only refers to "state or other governmental authorities" and contains no parallel provision for private parties.

D. CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

Respectfully submitted,

_____

ERIC HALPERIN (Bar No. 198178)
KATHLEEN KEEST, *Of Counsel*
AMANDA QUESTER, *Of Counsel*
Center for Responsible Lending
910 17th Street, NW, Suite 500
Washington, DC 20006
Tel: (202) 349-1859
Fax: (202) 289-9009
Attorneys for *Amici Curiae*

CERTIFICATE OF WORD COUNT

The text of APPLICATION BY CENTER FOR RESPONSIBLE LENDING AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CANIEVA HOOD AND CONGRESS OF CALIFORNIA SENIORS consists of 6,105 words (including footnotes but excluding the table contents, the table of authorities, and certificates) as counted by Microsoft Word 2000 word-processing program.

Dated: April __, 2006

_____

Eric Halperin (Bar No. 198178)
Center for Responsible Lending
910 17th Street, NW, Suite 500
Washington, DC 20006
Tel: (202) 349-1859
Fax: (202) 289-9009

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing APPLICATION BY CENTER FOR RESPONSIBLE LENDING AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CANIEVA HOOD AND CONGRESS OF CALIFORNIA SENIORS were served this __ day of April, 2006, upon the Court (Second District Court of Appeal, Division Six, Court Place, 200 East Santa Clara Street, Ventura, CA 93001) via Overnight Delivery and upon the following as indicated:

D. Ronald Ryland — Overnight Delivery
SHEPPARD, MULLIN, RICHTER
& HAMPTON LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4106
Attorney for Defendant and Respondents Santa Barbara Bank & Trust, a division of Pacific Capital Bank, N.A. and Pacific Capital Bank, N.A.

Stephen Newman — Overnight Delivery
Julia Strickland
STROOCK & STROOCK & LAVAN
2029 Century Park East, Suite 1800
Los Angeles, CA 90067
Attorney for Cross-Defendants and Respondents Beneficial National Bank, Household Bank, F.S.B., HSBC Taxpayer Financial Services Inc., formerly known as Household Tax Masters, Inc., and JPMorgan Chase Bank, N.A., successor by merger to Bank One, N.A. (Ohio)

Clerk of the Court — U.S. Mail
Santa Barbara County Superior Court
1100 Anacapa Street
Santa Barbara, CA 93101

Michele R. Van Gelderen — U.S. Mail
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013
Attorney for Amicus Curiae

Ronald A. Reiter — U.S. Mail
Supervising Deputy Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
(per Business and Professions Code § 17209)

Thomas W. Sneddon, Jr. — U.S. Mail
Santa Barbara District Attorney
1112 Santa Barbara Street
Santa Barbara, CA 93101
(per Business and Professions Code § 17209)

Supreme Court — U.S. Mail (5 copies)
350 McAllister Street, Room 1295
San Francisco, CA 94102

Stuart Rossman — U.S. Mail
Chi Chi Wu
THE NATIONAL CONSUMER
LAW CENTER
77 Summer Street, 10th Floor
Boston, MA 02110
Attorneys for Plaintiffs-Appellants Canieva Hood and Congress of California Seniors

William P. Donovan, Jr. — U.S. Mail
DLA PIPER RUDNICK GRAY CARY
1999 Avenue of the Stars, Fourth Floor
Los Angeles, CA 90067-6022
Attorney for Defendants Jackson Hewitt, Inc., Cendant Corp., and Tax Services of America, Inc.

John F. Dienelt U.S. Mail
DLA PIPER RUDNICK GRAY CARY
1200 19th Street, N.W.
Washington, D.C. 20036-2412
Attorney for Defendants Jackson Hewitt, Inc., Cendant Corp., and Tax Services of America, Inc.

Michael Heumann U.S. Mail
NOSSAMAN, GUTHNER,
KNOX & ELLIOT, LLP
445 S. Figueroa Street, 31st Floor
Los Angeles, CA 90071
Attorney for Cross-Defendants and Respondents First Security Bank of Mackinaw, IL

Brendan Macaulay U.S. Mail
NOSSAMAN, GUTHNER,
KNOX & ELLIOT, LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Attorney for Cross-Defendants and Respondents First Security Bank of Mackinaw, IL

Michael Hirn U.S. Mail
John Selent
DINSMORE & SHOHL, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
Attorney for Cross-Defendants and Respondents Republic Bank & Trust Co. and River City Bank, Inc.

David Reis U.S. Mail
Dipanwita Deb Amar
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABIN
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Attorney for Cross-Defendants and Respondents Republic Bank & Trust Co. and River City Bank, Inc.

Christopher C. Kearney U.S. Mail
KEKER & VAN NEST
710 Sansome Street
San Francisco, CA 94111
Attorney for Cross-Defendants and Respondents Republic First Bank and First Bank of Delaware

Dated: April _, 2006

_____

Eric Halperin (Bar No. 198178)
Center for Responsible Lending
910 17th Street, NW, Suite 500
Washington, DC 20006
Tel: (202) 349-1859
Fax: (202) 289-9009