

obstruct a national bank's exercise of powers granted under Federal law.⁶⁸

This does not mean, as asserted by some commenters, that state laws presumptively apply to national banks. These commenters suggest that all preemption analysis begins with the presumption against preemption. As explained recently by the Court, however, this presumption is "not triggered when the States regulate in an area where there has been a history of significant federal presence."⁶⁹ As further explained by the Ninth Circuit in *Bank of America*, "because there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable."⁷⁰

Nor, contrary to these commenters' assertions, did Congress specifically endorse the presumptive application of state laws in the Riegle-Neal Act. Although the Riegle-Neal Act, at 12 U.S.C. 36(f)(1)(A), initially makes applicable the laws of the host state regarding community reinvestment, consumer protection, and fair lending to branches of an out-of-state national bank located in the host state, the statute expressly excepts any state laws that are preempted under Federal law. In a few situations, Federal law has incorporated provisions of state law for specific purposes.⁷¹ Congress may more generally establish standards that govern when state law will apply to national banks' activities.⁷² In such cases, the OCC applies the law or the standards that Congress has required or established.

III. Discussion and Analysis

The GFLA affects a national bank's ability to engage in real estate lending, the rate of interest a national bank may charge for a loan, and a national bank's ability to charge non-interest fees. Our discussion analyzes the provisions of the GFLA according to these categories. Following that analysis, we discuss the extent to which Federal law preempts the remaining provisions. We first review the provisions of the GFLA as they apply to a national bank, then

apply those conclusions to the bank's operating subsidiaries.

A. The GFLA Conflicts With the Federal Grant of Power to a National Bank to Engage in Real Estate Lending Activities

In *Barnett*, the Supreme Court analyzed a statute, 12 U.S.C. 92, similar in structure to section 371, to determine the extent to which section 92 leaves room for state regulation of the activities the statute authorizes. There, the Supreme Court stated that:

[section 92's] language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks "may * * * act as the agent" for insurance sales. 12 U.S.C. 92. It specifically refers to "rules and regulations" that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency.⁷³

The Court concluded that "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."⁷⁴

Section 371 authorizes national banks to engage in real estate lending "subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." This express language specifically addresses the sources of restrictions on national banks' real estate lending activities and, by its terms, does not envision that the exercise of those powers, granted by section 371, would be subject to compliance with any state requirement.⁷⁵

The legislative history of section 371 lends further support to this

construction. National banks' real estate lending activities have consistently been subject to comprehensive Federal regulation ever since the authority to lend on the security of real estate was first granted to them in the Federal Reserve Act of 1913. For many years, national banks' real estate lending authority was governed by the express terms of section 371. As originally enacted in 1913, section 371 contained a limited grant of authority to national banks to lend on the security of "improved and unencumbered farm land, situated within its Federal reserve district."⁷⁶ In addition to the geographic limits inherent in this authorization, the Federal Reserve Act also imposed limits on the term and amount of each loan as well as an aggregate lending limit. Over the years, section 371 was repeatedly amended to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits.

In 1982, Congress removed these "rigid statutory limitations"⁷⁷ in favor of a broad provision authorizing national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation."⁷⁸ The purpose of the 1982 amendment was "to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market."⁷⁹ In 1991, Congress removed the term "rule" from this phrase and enacted an additional requirement, codified at 12 U.S.C. 1828(o), that national banks (and other insured depository institutions) conduct real estate lending pursuant to uniform standards adopted at the Federal level by regulations of the OCC and the other Federal banking agencies.⁸⁰ The two versions of section 371—namely, the lengthy and prescriptive approach prior to 1982 and the more recent statement of broad authority qualified only by reference to Federal law—may be seen

⁶⁸ See *Barnett*, 517 U.S. at 15, 33–34, and cases cited therein.

⁶⁹ *United States v. Locke*, 529 U.S. at 108.

⁷⁰ 309 F.3d at 559.

⁷¹ See, e.g., 12 U.S.C. 92a(a) (the extent of a national bank's fiduciary powers is determined by reference to the law of the state where the national bank is located).

⁷² See, e.g., 15 U.S.C. 6701 (codification of section 104 of the GLBA, Pub. L. 106–102, 113 Stat. 1338, 1352 (1999)), which establishes standards for determining the applicability of state law to different types of activities conducted by national banks, other insured depository institutions, and their affiliates).

⁷³ *Barnett*, 517 U.S. at 32.

⁷⁴ *Id.* at 34.

⁷⁵ One commenter argued that this construction of national banks' real estate lending authority is refuted by the 1896 case of *McClellan v. Chipman*, 164 U.S. 347 (1896). In that case, a national bank unsuccessfully asserted that the statute then applicable to national banks' real estate lending activities left no room for the application of a state insolvency law. The state insolvency law at issue in *McClellan* is easily distinguished from the GFLA, however. The Supreme Court recognized two propositions in *McClellan*. First, "general state laws upon the dealings and contracts of national banks" apply to the banks' operations. *Id.* at 357. Second, there is an exception to this general rule for state laws that "expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." *Id.* The Supreme Court held that the state insolvency law at issue in *McClellan* was the type of law governed by the first proposition. The GFLA is not a general state contract law that only incidentally impacts national banks' real estate lending activities, however. Because the GFLA directly regulates the real estate lending of national banks, it is inapplicable to national banks pursuant to the second proposition recognized in *McClellan*.

⁷⁶ Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).

⁷⁷ S. Rep. No. 97–536, at 27 (1982).

⁷⁸ Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97–320, section 403, 96 Stat. 1469, 1510–11 (1982).

⁷⁹ S. Rep. No. 97–536, at 27 (1982).

⁸⁰ See section 304 of the Federal Deposit Insurance Corporation Improvement Act, codified at 12 U.S.C. 1828(o). These standards governing national banks' real estate lending are set forth in Subpart D of part 34.