UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ILLINOIS BANKERS ASSOCIATION, et al., Plaintiffs, v. KWAME RAOUL, Illinois Attorney General, Defendant.	Civil Action No. 24-7307 Hon. Virginia M. Kendall

BRIEF OF AMICUS CURIAE
THE OFFICE OF THE COMPTROLLER OF THE CURRENCY
IN SUPPORT OF PLAINTIFFS

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Amicus curiae the Office of the Comptroller of the Currency ("OCC") respectfully submits this brief in support of Plaintiffs on remand. In short, the Court should recognize (1) that the OCC's Interim Final Order (defined below) independently preempts the Illinois Interchange Fee Prohibition Act, 815 Ill. Comp. Stat. 151/150 ("IFPA"), or alternatively (2) that the national bank powers codified in the OCC's Interim Final Rule (defined below) plainly preempt the IFPA. The Court should also decline to consider in this action any challenge by Defendant Illinois Attorney General ("Illinois") to the OCC's interim actions as the OCC is not a party to this case and Illinois has pled no cognizable or plausible claim in this action under the Administrative Procedure Act ("APA") or otherwise that could disturb those interim actions.

INTRODUCTION

As the OCC discussed in its prior briefs, the IFPA is an unworkable state law that threatens to upend the Nation's intricately-designed card payments system—one of the vital payment systems in the United States in which national banks and Federal savings associations[1] play critical roles. Recognizing this, and in light of this Court's interpretation of the OCC's regulations in its February 2026 decision, the OCC took action under its rulemaking authorities to clarify and codify "that national banks' power to charge non-interest charges and fees includes the power to assess, collect, impose, levy, receive, reserve, take, or otherwise obtain non-interest charges and fees, including interchange fees from credit and debit card operations" irrespective of the party that sets them. OCC, National Bank Non-Interest Charges and Fees, 91 Fed. Reg. 22989, 22994-95 (Apr. 29, 2026) ("Interim Final Rule"). The OCC has also issued an interim final order preempting the IFPA in light of its Interim Final Rule. OCC, Order Preempting the Illinois Interchange Fee

[1] The OCC discusses the impact of the IFPA on national banks and their powers. Except as specifically noted, that discussion applies with equal force to Federal savings associations. *See* Mem. Op. at 15 n.2, Dkt. No. 179 ("the fate of federal savings associations is tied to that of national banks").

Prohibition Act, 91 Fed. Reg. 23150, 23151 (Apr. 29, 2026) ("Interim Final Order") (together with the Interim Final Rule, the "interim actions"). These interim actions take effect on June 30, 2026, the day before the IFPA is set to take effect on July 1, 2026. Interim Final Rule, 91 Fed. Reg. at 22989; Interim Final Order, 91 Fed. Reg. at 23150; IFPA, 815 Ill. Comp. Stat. 151/150.

The OCC's interim actions change the underpinnings of this case in important ways.

First, the OCC's Interim Final Order has the force and effect of law and, thus, will preempt the IFPA before it goes into effect independent of any judicial ruling. The Court should recognize as much, stay the claims in this case pertaining to national banks until July 1, and dismiss those claims on July 1st as moot unless the Interim Final Order is disturbed in the interim.

Second, if the Court intends to address the preemptive effect of the Interim Final Rule on the IFPA before the Interim Final Order goes into effect on June 30, the Court should find that the IFPA's interchange fee prohibition prevents or significantly interferes with the national bank powers, including as clarified and codified in the Interim Final Rule.[2] Accordingly, the Court should rule that the IFPA is preempted as it applies to national banks.

Third, the Court cannot in this case consider challenges to the interim actions when the OCC is not a party and no claim is pending against the OCC—a federal government agency that enjoys sovereign immunity. If Illinois wishes to challenge the interim actions, it can attempt to do so in a case against the OCC brought under the APA. It cannot collaterally do so here.

For these reasons, which are set forth in detail below, the Court should either recognize the independent preemptive effect of the OCC's Interim Final Order or find that the IFPA will be fully preempted as to national banks under the Interim Final Rule.

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[2] The Court's prior analysis regarding the IFPA's data usage limitation remains correct, is consistent with the Interim Final Order, and is undisturbed by the Interim Final Rule. Were the Court to reach the merits, it should reiterate its holding as to that facet of the IFPA.

BACKGROUND

I. National Bank Act

Congress has granted national banks enumerated powers, including to "loan[] money on personal security" and to "receiv[e] deposits," as well as "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). As the OCC and courts have long recognized, national banks thus have broad power to engage in activities that are part of, or incidental to, the business of banking, including issuing debit and credit cards and processing payments. *See, e.g.*, OCC Conditional Approval No. 773, 2006 WL 4589434, at *1 (Nov. 30, 2006). The Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 324 (1996). Where state law prevents or significantly interferes with national banks' exercise of their federally authorized powers, the state law conflicts with federal law and is preempted by operation of the Supremacy Clause. U.S. Const., art. VI, cl. 2; *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 219-21 (2024); *Barnett Bank*, 517 U.S. at 31-34.

Under the National Bank Act, the OCC is charged with "primary responsibility for surveillance of 'the business of banking,'" *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). The OCC has broad authority from Congress to prescribe rules and regulations to carry out its responsibilities and to issue declaratory orders. 12 U.S.C. §§ 93a, 1463(a)(2); 5 U.S.C. § 554(e). This includes authority to define powers that are part of or incidental to the business of banking and to authorize activities beyond those enumerated by statute. *NationsBank*, 513 U.S. at 258, n.2. OCC regulations "have no less pre-emptive effect than" the National Bank Act itself. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Indeed, the OCC's "regulatory authority, which carries the same weight as federal statutes, includes interpretation of state law preemption under the" National Bank Act. *Aguayo v. U.S. Bank*, 653 F.3d 912, 919 (9th Cir. 2011); *see also Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 962 (9th Cir. 2005) ("once the OCC's authority" to rule-make "is established, its authority to displace contrary state regulation where the Bank Act itself preempts contrary state regulation of national banks follows"); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) ("Federal courts have recognized that the OCC may issue regulations with preemptive effect.").

II. Interim Final Rule

The Interim Final Rule revises 12 C.F.R. § 7.4002 (2025) to clarify and codify that "national banks' power to charge non-interest charges and fees includes the power to assess, collect, impose, levy, receive, reserve, take, or otherwise obtain non-interest charges and fees, including interchange fees from credit and debit card operations." Interim Final Rule, 91 Fed. Reg. at 22994-95.[3] The Interim Final Rule further explains that "national banks may charge non-interest charges or fees, even when such charges and fees are set by or in consultation with third parties." *Id.* at 22995. As the OCC explains, issuance of the Interim Final Rule provides "certainty that the IFPA is preempted with respect to national banks before it goes into effect." *Id.* at 22992.

III. Interim Final Order

The Interim Final Order provides that relevant statutes "and the regulations promulgated thereunder preempt the IFPA's interchange fee prohibition . . . with respect to national banks[.]" Interim Final Order, 91 Fed. Reg. at 23154. It also states, in reference to the Interim Final Rule, that "[a]s revised, 12 C.F.R. § 7.4002 should remove any doubt that federal law both authorizes national banks to charge interchange fees and vests them with wide flexibility to charge such fees in accordance with sound business judgment and safe and sound banking principles." *Id.* at 23152.

[3] In the Interim Final Rule, the OCC notes that 12 C.F.R. § 145.17 provides Federal savings associations with comparable authority. Interim Final Rule, 91 Fed. Reg. at 22990 n.4.

It further states that the flexibility afforded by revised section 7.4002 "supports a national bank's efficient and effective exercise of its deposit-taking, lending, and payment processing powers, as well as its corollary authority to be compensated." *Id.* at 23152-53.

ARGUMENT

I. This Case As It Pertains to National Banks Will Soon Become Moot.

The Interim Final Order independently preempts the IFPA as it applies to national banks. That is, the OCC has used its authorities to preempt the IFPA, and its actions have the force and effect of law. *See Bahramizadeh v. INS*, 717 F.2d 1170, 1173 (7th Cir. 1983) ("Regulations promulgated pursuant to statutory authority have the force and effect of law[.]"); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) (recognizing that "agency regulations [ ] have the force of law"); 5 U.S.C. § 554(e) (declaratory orders under the APA have "like effect as in the case of other orders"). Consequently, on June 30th the Interim Final Order, if left undisturbed, will independently preempt the IFPA.

Because the Interim Final Order takes effect on June 30th and will independently preempt the IFPA, this Court should refrain in the interest of prudence and judicial economy from issuing an opinion that will be mooted in the span of weeks. *See generally Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (recognizing the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants" (citations omitted)); *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 811-12 (7th Cir. 2005) ("judicial economy and restraint" warranted not "decid[ing] a question that may not even be pertinent" later). That is, any decision regarding preemption in this case will be superseded by the Interim Final Order before the decision has any operational effect—i.e., the Interim Final Order takes effect on June 30th, the day before the IFPA takes effect on July 1st. *Cf. Miller v. French*, 530 U.S. 327, 347 (2000) (when the "law underlying a judgment awarding . . . relief" changes, "relief is no longer enforceable to the extent it is inconsistent with the new law"); *City of Chicago v. Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777, 783 (7th Cir. 2005) (when new law "affects the propriety of . . . prospective relief," there is "no vested right in the decree entered by the trial court [below]" (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273-74 (1994)).

Thus, instead of issuing an opinion that will be superseded by operation of law, the Court should recognize the independent preemptive effect of the Interim Final Order, stay its consideration of the claims in this case concerning national banks through July 1st, and dismiss those claims on July 1st as moot unless the Interim Final Order is disturbed in the interim.[4] *Cf. Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1114 (10th Cir. 2010) (finding challenge moot; "The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed. A new system is now in place." (quoting *Nat'l Min. Ass'n v. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001)).

Illinois argues that the Interim Final Order is invalid. Ill. App. Supp. Br. at 10-15, *Ill. Bankers Ass'n v. Raoul*, No. 26-1354 (7th Cir. May 6, 2026), Dkt. 94 ("Ill. App. Supp. Br."); Ill. Resp. at 4-7, Dkt. 217. But as explained below, if Illinois believes as much, the proper route is to challenge that order through a claim brought against the OCC under the APA. *See infra* at 10-12.

Also, Illinois's suggestion that the OCC's Interim Final Order is owed no deference misses the point. Ill. App. Supp. Br. at 14-15; Ill. Resp. at 7-9, Dkt. 217. It is true that were Illinois to bring an APA challenge to the Interim Final Order, the OCC would not be entitled to *Chevron* deference as the Supreme Court overturned that rule in *Loper Bright Enterprises v. Raimondo*,

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[4] For any claims in this suit that are unaffected by the OCC's interim actions, the Court can consider those on the merits and issue a final judgment under Federal Rule of Civil Procedure 54(b). As the Seventh Circuit was motivated to remand based on the OCC's interim actions, and those interim actions may have no effect on certain other claims in this suit, there is "no just reason [to] delay" the entry of final judgment on them. Fed. R. Civ. P. 54(b).

603 U.S. 369, 412 (2024). But Illinois must first bring a plausible suit under the APA against the OCC to challenge the Interim Final Order. On the merits in any such suit, the OCC's view that the IFPA prevents or significantly interferes with the powers clarified and codified in its Interim Final Rule would enjoy some considerable weight. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (agencies are "uniquely qualified" to weigh the likely impact of state laws when their delegated authority concerns subject matters that are "technical" and "the relevant history and background are complex and extensive").

II. Alternatively, the Court Should Conclude that the IFPA Is Preempted by the National Bank Powers Clarified and Codified in the Interim Final Rule.

The Interim Final Rule also has the force and effect of law, and the IFPA will prevent or significantly interfere with the national bank powers clarified and codified in the Interim Final Rule. As such, while the OCC respectfully submits that the IFPA is preempted under the National Bank Act and the OCC's current regulation for the reasons previously argued in this case, it is now beyond doubt that the interim actions will preempt the IFPA's interchange fee prohibition as to national banks before it goes into effect.

A. Federal Bank Preemption is Governed by *Barnett Bank* and *Cantero*.

As the Court is aware, the Supremacy Clause of the U.S. Constitution provides that federal law is "the supreme Law of the Land" and contrary state law is preempted. U.S. Const. art. VI, cl. 2. In applying this principle, the Supreme Court has identified several ways in which federal law may preempt state law, including when there is a conflict between state and federal law. *Barnett Bank*, 517 U.S. at 33. In the national banking context, a state law is preempted when it "prevent[s] or significantly interfere[s]" with a national bank's exercise of its federal powers. *Id.* Also, federal grants of authority in the national banking context are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Id.* at 32.

In *Cantero*, 602 U.S. at 219-20, the Court reaffirmed the *Barnett Bank* standard and explained that its application must be based on "a practical assessment of the nature and degree of the interference caused by a state law." *Id.* This assessment may include consideration of *Barnett Bank* and its antecedents and be based on "the text and structure of the laws, comparison to other precedents, and common sense." *Id.* at 220 n.3; *see also id.* 219-21.

B. The Interim Final Rule Will Plainly Preempt the Interchange Fee Prohibition.

National banks have express statutory authority to "loan[] money on personal security," "receiv[e] deposits," and engage in "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh); *see also* 12 C.F.R. § 7.1000. As the OCC and courts have long recognized, national banks thus have broad powers to engage in activities that are part of, or incidental to, the business of banking, including issuing payment cards and processing payments. The OCC, through its legislative rulemaking authorities, promulgated the Interim Final Rule to further clarify and codify national bank powers in this space.

As the Interim Final Rule recognizes, national banks necessarily have the authority to be compensated for the products and services they provide, including to charge and receive interchange fees for processing payment card transactions. 12 C.F.R. § 7.4002 (b) (2026). The Interim Final Rule clarifies and codifies this national banks power, specifically providing that national banks have the power to "assess, collect, impose, levy, receive, reserve, take, or otherwise obtain" non-interest charges and fees, including interchange fees from payment card activity, regardless of whether those fees are set by the bank or a third party. *Id.* §§ 7.4002 (a), (b), (c)(2). The Interim Final Rule, thus, conclusively resolves this previously "close case." Mem. Op. at 11, Dkt. No. 179. It expressly recognizes a national bank power to receive fees for bank products and services, even where those fees are set by third parties—the key issue that led the Court to find that the law as it existed before the Interim Final Rule did not preempt the interchange fee prohibition. *See id.* at 22-23 ("It is undeniable that State intervention into national bank fee arrangements should be subject to legitimate scrutiny. After all, it involves an express power . . . But while that argument definitively protects national banks from intrusion into the fees they charge on their ATMs and savings account services, it is hard to square with a state law that impacts a fee that those same banks do not set and that are not keyed to their particular services." (citing 12 C.F.R. § 7.4002(b) (2025)).

The national bank powers recognized by the Interim Final Rule are now in direct conflict with the IFPA's interchange fee prohibition. While the Supreme Court's preemption authorities do "not purport to establish a clear line to demarcate" which state laws are and are not preempted, they offer a lens through which the standard comes into focus. *Cantero*, 602 U.S. at 215. Specifically, the authorities demonstrate that, at a minimum, a state law prevents or significantly interferes with a federal power when it (1) interferes with critical flexibility granted to a national bank under federal law (*Fidelity*, 458 U.S. at 141); (2) interferes with a national bank's efficiency or effectiveness in exercising its federal power (*Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373 (1954)); or (3) qualifies a federal power in an unusual way (*First Nat'l Bank of San Jose v. California*, 262 U.S. 366 (1923)). The IFPA does all three as to the national bank powers recognized in the Interim Final Rule.

As clarified by the Interim Final Rule, 12 C.F.R. § 7.4002 (2026), federal law both authorizes national banks to charge interchange fees and vests them with wide flexibility to charge such fees in accordance with sound business judgment and safe and sound banking principles. This flexibility supports a national bank's efficient and effective exercise of its deposit-taking, lending, and payment processing powers, as well as its corollary authority to be compensated. Federal law grants these powers to national banks "without relevant qualification," and as such, these grants are "not normally limited by, but rather ordinarily preempt[], contrary state law." *Barnett Bank*, 517 U.S. at 32. As was the case in *Fidelity*, where a state law restricting the use of due-on-sale clauses interfered with the flexibility granted by federal law, the IFPA's interchange fee prohibition restricts a national bank's discretion to determine the appropriate compensation for its payment card activity, thereby interfering with the flexibility granted by federal law. *See Fidelity*, 458 U.S. at 155 (finding preempted a California law that forbade a federal institution from exercising a due-on-sale clause and thus "deprived the lender of the 'flexibility'" given to it by federal law).

The nature and degree of the interchange fee prohibition's interference with a national bank's federal powers clarified and codified by the Interim Final Rule is "more akin" to the interference in the cases where the Court found preemption, including *Franklin*, *Fidelity*, *Barnett Bank*, and *San Jose*. *See* Interim Final Order, 91 Fed. Reg. at 23152-54. Therefore, the interchange fee prohibition "must give way" to federal law and be preempted with respect to national banks.

III. Illinois's Arguments Challenging the Interim Actions Amount to Improper Collateral Attacks on Agency Decisions Over Which this Court Lacks Jurisdiction.

Illinois's principal response to the independent preemptive effect of the Interim Final Order and the preemptive force of the powers clarified and codified by the Interim Final Rule is to claim that the OCC's interim actions are invalid. But Illinois has brought no claim against the OCC in this action (and, for that matter, no claim in any case at all as of the date of this filing) that seeks to vacate or invalidate the interim actions. *See* 5 U.S.C. § 703 (proper defendants for an APA claim are "the United States, the agency by its official title, or the appropriate officer"). Accordingly, the Court must assume the validity of the interim actions and should reject Illinois's attempt to collaterally challenge them here.

The validity of the interim actions is reviewable only in a suit against the OCC under the APA. 5 U.S.C. §§ 703, 706(2) (describing bases on which a court may set aside agency action).

Because the matter before the Court does not arise under the APA and because the OCC is not a party to this litigation, Illinois is effectively asking a federal court to circumvent the parameters prescribed by Congress for review of agency actions. It is "well settled," however, that such collateral attacks on agency actions are not permitted. *Gaunce v. deVincentis*, 708 F.2d 1290, 1292-93 (7th Cir. 1983) ("This action is in derogation of the well settled principle that collateral attacks upon administrative orders are not permissible."); *see also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290–91 (11th Cir. 2015) ("Alabama cannot raise a collateral challenge" to agency action that must be directly challenged under the APA); *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015), *as amended on denial of reh'g en banc* (July 8, 2015) (holding that California cannot raise collateral attack outside APA challenge to agency's authority to take tribal lands into trust; "California has not brought an APA action in this case, nor has it joined the United States, the Secretary of the Interior, or any other federal government official."); *Townley v. United States*, Civ. A. No. 22-0107, 2023 WL 8006628, at *1 (M.D. Ga. Nov. 17, 2023) ("Plaintiffs are not permitted to assert an APA challenge through collateral attack."). This Court therefore lacks jurisdiction to review the procedural or substantive validity of the interim actions.

In its response filed with this Court, Illinois argues to the contrary, citing a single case in support, *Fidelity*, 458 U.S. at 154. But *Fidelity* cannot bear the weight that Illinois places on it. As noted above, *Fidelity* concerned whether federal regulations preempted a California law restricting due-on-sale clauses. In concluding that the regulations did preempt California's law, the Court framed the dispute as follows:

> A pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . . Rather, the questions upon which resolution of this case rests are whether the [federal agency] meant to pre-empt California's

> due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

Id. at 154. Here, there is no question that the OCC means to preempt the IFPA and neither Illinois nor its amicus suggest that the OCC lacks authority to preempt state laws. *See* Ill. Resp. at 6, Dkt. 217. Instead, Illinois and its amicus make procedural and substantive challenges to the interim actions. *Id.* at 3 ("Because the OCC's interim actions are procedurally and substantively invalid, they have no effect."); Merchants Br. at 1, Dkt. 216 (arguing the interim actions are "procedurally flawed" and "substantively flawed"). Those arguments are far afield from claims that the OCC lacks the congressionally delegated authority to preempt the IFPA, and they must be made in a suit under the APA against the OCC by parties with standing. Nothing in *Fidelity* permits otherwise.

CONCLUSION

For the foregoing reasons, the Court should recognize (1) that the OCC's Interim Final Order independently will preempt the IFPA, or alternatively (2) that the national bank powers codified and clarified in the OCC's Interim Final Rule will preempt the IFPA.

Respectfully submitted,

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