21-56271

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Credit One Bank, N.A., Appellant, **v.** **Michael A. Hestrin, District Attorney of Riverside County, California,** Appellee

On Appeal from the United States District Court
for the Central District of California

No. 21-cv-2156
Hon. Jesus G. Bernal, Judge

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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INTRODUCTION AND STATEMENT OF INTEREST

The California Attorney General submits this brief for the State of California under Federal Rule of Appellate Procedure 29(a) to assist the Court in analyzing 1) the application of *Younger* abstention in the context of law enforcement actions alleging violations of state consumer protection laws and 2) the scope of "visitorial" or supervisory powers under the National Bank Act.

This appeal arises out of a complicated procedural history involving three related cases. The first case is a pending consumer protection action brought by the District Attorneys of Riverside, San Diego, Los Angeles, and Santa Clara (together, "District Attorneys") in state court against Credit One Bank ("Appellant" or "Credit One"), alleging harassing debt collection calls that violate California's consumer protection laws. The second is a now-dismissed case filed by the District Attorneys[1] to enforce an investigative subpoena against Credit One. That case was dismissed after the District Attorneys withdrew their subpoena, recognizing that, as a form of administrative oversight, it was an exercise of visitorial powers prohibited

[1] The subpoena action was brought only by the Riverside District Attorney, who served the subpoena, while the enforcement action was brought jointly by several district attorneys. For ease of reference, this brief simply uses "District Attorneys" for both cases.

by the National Bank Act. In the third case—the matter now on appeal before this Court—Credit One originally contested the District Attorneys' authority to bring the subpoena action, and now contests the District Attorneys' authority to prosecute the still-pending state enforcement action. The district court's dismissal of the federal case on *Younger* abstention grounds is the subject of this appeal.

In urging reversal of the district court's decision, Credit One misapplies the *Younger* abstention doctrine and ignores the established definition of visitorial powers. Specifically, Credit One argues that the District Attorneys' enforcement action constitutes an unlawful exercise of visitorial powers, and therefore cannot satisfy the important state interest prong of *Younger*. This argument suffers from at least two fatal flaws. First, Supreme Court precedent establishes that the District Attorneys' right to bring their civil law enforcement action clearly satisfies the *Younger* state interest requirement. The interest is particularly strong here, where the District Attorneys seek to enforce the State's unfair competition and debt collection laws, which are among the strongest in the nation. Second, the Supreme Court has made clear that enforcement actions are not an exercise of visitorial powers, a rule that applies equally to cases brought by an attorney general and to cases brought by local law enforcement officials.

The District Attorneys therefore had full authority to bring their enforcement action in state court to enforce non-preempted California law.

Not only are Credit One's arguments legally wrong, but if accepted, they would seriously hamper the State's ability to protect Californians from abusive business practices that non-preempted California law prohibits. When it comes to California's consumer protection laws, district attorneys and other local law enforcement officials serve as critical partners to the Attorney General in ensuring that the rights of Californians are protected. By affirming the district court's well-reasoned opinion that Credit One's federal case would interfere with the state enforcement action, this Court would preserve the District Attorneys' right to prosecute violations of state law without violating the visitorial powers doctrine.

ARGUMENT

I. THE RIGHT OF ANY PLAINTIFF TO SUE A NATIONAL BANK FOR VIOLATING NON-PREEMPTED STATE LAW IS WELL ESTABLISHED

It is a foundational principle of our federal system that the existence of a national legal framework regulating a particular industry does not per se bar state law claims against a defendant within that industry. In general, States are free to exercise their historic police powers, which are not superseded by federal law unless Congress's intent to preempt is clear and

manifest. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And, unless a state law is preempted, a plaintiff has the right to file a complaint alleging violations of that state law. *See, e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (explaining bounds of express and implied preemption). As applied to the banking industry, these principles mean that a proper plaintiff may sue a national bank for violating state law, so long as that state law is not preempted by the National Bank Act, 12 U.S.C. § 1 *et seq.*, or any other federal law governing national banks. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or purposes of the [National Bank Act].").

Examples abound of non-preempted California state law claims proceeding against national banks. In the last twenty years, this Court has held that the National Bank Act does not preempt state law claims against national banks over fraudulent representations about overdraft fees (*Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 726–27 (9th Cir. 2012)); the violation of state discrimination laws (*Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 987–88 (9th Cir. 2005), *as amended on denial of reh'g and reh'g en banc* (Feb. 13, 2006)); repossession notices that violate state law governing car loans (*Aguayo v. U.S. Bank*, 653 F.3d 912, 925–28 (9th Cir.

2011)); deceptive marketing of credit card add-on products (*Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1037–38 (9th Cir. 2014)); violations of state escrow laws (*Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194–95 (9th Cir. 2018)); and so on. In each of these cases, the Court examined the interplay between the state law at issue and the federal regime governing national banks and concluded that, because the plaintiff's claims were not preempted, they were actionable under state law.

Specific to the District Attorneys' enforcement action alleging violations of the Rosenthal Fair Debt Collections Practices Act, Cal. Civ. Code § 1788 *et seq.*, which are unlawful business acts or practices under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, this Court has noted the States' "settled authority to regulate national banks in areas such as contracts, *debt collection*, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." *HSBC Bank Nevada,* 761 F.3d at 1037 (internal quotation marks omitted) (emphasis added). Further, the Office of the Comptroller of the Currency's ("OCC") own regulations establish that state laws on "[r]ights to collect debts" are not preempted. 12 C.F.R. § 7.4008(e)(4). The District Attorneys have therefore brought a typical enforcement action in state court to pursue non-preempted debt collection claims.

II. THE STRONG STATE INTEREST IN ENFORCING CALIFORNIA'S CONSUMER PROTECTION LAWS SATISFIES THE IMPORTANT STATE INTEREST PRONG OF *YOUNGER*

Given that the People, represented by the District Attorneys, have brought a typical state law consumer enforcement action, the district court correctly abstained under *Younger*. As the Supreme Court has noted, *Younger* "and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). No such extraordinary circumstances exist here.

Under *Younger*, courts first determine as a threshold matter if the state court proceedings at issue are one of the "three types of proceedings" that "define *Younger's* scope." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013). Here, the District Attorneys' consumer protection case brought in the name of the People to enforce state law easily falls within the category of "civil enforcement proceedings." *Id.* at 80 (describing qualifying enforcement actions as those initiated by the State in its sovereign capacity). Indeed, the Supreme Court has catalogued nearly a dozen similar examples of "enforcement actions [that] are characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some

wrongful act," and has left no doubt that *Younger* abstention applies to such cases. *Id.* at 79–80 (citing cases).

When a case satisfies this threshold *Younger* requirement, courts then assess the following three factors:

> (1) The nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings.

Kenneally v. Lungren, 967 F.2d 329, 331 (9th Cir. 1992). Where all three prongs are satisfied, "*Younger* requires the court to abstain." *Id.* The Attorney General agrees with the District Attorneys' analysis of the second and third factors and focuses here on the first factor: important state interests.

This Court has made clear that "[w]here the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 883–84 (9th Cir. 2011). The District Attorneys' case fits that description. California's law enforcement officials—local and state alike—have a substantial, legitimate interest in enforcing state consumer

protection laws. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989) (answering affirmatively the question whether the State has "a substantial, legitimate interest in regulating intrastate retail rates"); *Potrero Hills Landfill, Inc*., 657 F.3d at 883 ("The *Younger* doctrine recognizes that a state's ability to enforce its laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and Constitution is a basic state function with which federal courts should not interfere.") (internal quotation marks omitted); *Herrera v. City of Palmdale*, 918 F.3d 1037, 1045 (9th Cir. 2019) (finding City of Palmdale's nuisance action "implicate[s] state interests and thus satisfies" that prong of the *Younger* test).

California has a particularly strong interest in ensuring that businesses comply with its debt collection and consumer protection laws. The fact that the State's unfair competition laws "are among the strongest in the country," clearly demonstrates California's commitment to consumer protection. *Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 242 (2001), *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018); *see also Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 616 (Ct. App. 1987) (describing California's unfair

competition law as providing more "favorable" and "greater protection" than similar laws in other states).

Aside from a clear interest in protecting consumers generally against unscrupulous business practices, California has also demonstrated a specific intent to protect Californians from deceptive and harassing debt collection tactics through its enactment of the Rosenthal Act. Though modeled on the federal Fair Debt Collection Practices Act ("FDCPA"), the Rosenthal Act is "more extensive than the [federal law]." *Best v. Ocwen Loan Servicing, LLC*, 64 Cal. App. 5th 568, 74 (2021); *see also Davidson v. Seterus, Inc.*, 21 Cal. App. 5th 283, 303 (2018) (noting that the Rosenthal Act's definition of "debt collector" is "far *broader* than that provided in the FDCPA") (emphasis in original); *Sudhir v. PHH Mortg. Corp.*, No. C 16-06088 WHA, 2017 WL 219681, at *3 (N.D. Cal. Jan. 19, 2017) ("The California legislature clearly intended and afforded greater protection to consumers by making the [Rosenthal] Act applicable to more types of creditors."). This makes plain that California has prioritized the prevention and elimination of harassing debt collection calls to California debtors. The District Attorneys' action to enforce the Rosenthal Act advances that important state interest.

Rather than confront the true interest at stake (the ability of law enforcement to prosecute violations of California's consumer protection

laws), Credit One argues that this case "cannot implicate state interests" under *Younger* because it turns on the jurisdictional question of whether the District Attorneys may exercise visitorial powers. Appellant's Opening Brief ("AOB") 10–12. As discussed further below, however, that line of reasoning requires disregarding the Supreme Court's bright-line rule that law enforcement actions to enforce state law do not constitute visitation. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 528, 531 (2009). In other words, the jurisdictional question Credit One relies on to keep the door open on *Younger* has already been squarely answered by the highest court.

III. CREDIT ONE'S ATTEMPT TO EXPAND THE SCOPE OF VISITORIAL POWERS TO BAR A TYPICAL STATE LAW ENFORCEMENT ACTION SHOULD BE REJECTED

Credit One wrongly argues that the District Attorneys' consumer enforcement action is barred as an exercise of visitorial powers prohibited by the National Bank Act. AOB at 15–20; 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law . . ."). But this fundamentally misunderstands the nature of visitorial powers, which are defined as the administrative power to inspect or require production of a bank's books or records on demand. *See Cuomo,* 557 U.S. at 535–36. That power is wholly distinct from the right to file suit to enforce state law in state court.

A. The United States Supreme Court Has Expressly Defined Visitorial Powers to Exclude the Prosecution of a Lawsuit

Credit One conflates the District Attorneys' initial (and invalid) action to enforce an investigative subpoena with the subsequent typical state law enforcement action—essentially arguing that both constitute the same unlawful exercise of visitorial powers. AOB at 13. But the Supreme Court expressly defined visitorial powers to *exclude* a lawsuit to enforce state law in *Cuomo*. In that case, the Court discussed the historical meaning of "visitation," which it described as "the right to oversee corporate affairs." *Cuomo*, 557 U.S. at 526. The Court noted that the "'general supervision and control' and 'oversight' that constitute visitorial powers are worlds apart from law enforcement" and explained that "[i]f a State chooses to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will be treated like a litigant." *Id.* at 528, 531 (internal citation omitted).[2] Here, the District Attorneys are not engaging in "administrative oversight that allows a sovereign to inspect books and records on demand", they are seeking to "*enforce* . . . valid, non-pre-empted laws against national

[2] Credit One cites *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) to argue that visitorial powers encompass enforcement actions (AOB at 15–16), but *Cuomo* squarely rejected that reading of *Watters*. *Cuomo*, 557 U.S. at 528 (holding that *Watters* "is fully in accord with the well established distinction between supervision and law enforcement").

banks." *Id.* at 529, 536 (emphasis in original). The Supreme Court could not have been clearer that such action does not constitute an exercise of visitorial powers.

B. The Identity of the Plaintiff Does Not Determine Whether an Action Is an Exercise of Visitorial Powers

The reasoning in *Cuomo* makes clear that the exercise of visitorial powers is defined by the nature of the action (supervision versus enforcement), not *who* takes that action. Credit One argues that *Cuomo* "held only that the state's ***attorney general*** had authority to bring a lawsuit against a national bank to enforce state law," AOB at 17, but the Court's analysis turned on *what* the attorney general sought to do, not his position. Indeed, in explaining why "on a pragmatic level" visitation poses different risks than enforcement, the Court juxtaposed the fact that a visitor "may inspect books and records at any time for any or no reason" with the obvious requirement in enforcement that the "attorney general *acting as a civil litigant* must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive." *Cuomo,* 557 U.S. at 531 (emphasis added). These realities of litigation apply equally to an attorney general and a district attorney.

Relatedly, although the specific question in *Cuomo* was whether the OCC's exclusive exercise of visitorial powers in the National Bank Act barred a law enforcement action by the New York Attorney General, the Court did not consider *only* attorney-general enforcement when answering that question with a resounding "no." Rather, the Court explicitly rejected the OCC's interpretation of visitorial powers as preventing the New York Attorney General's lawsuit in part because that interpretation "would also preclude law enforcement by federal agencies. Of course it does not." *Id.* at 528–29. In other words, the Court rejected the very logic Appellant advances here—that the identity of the plaintiff is relevant in analyzing visitorial powers.

A year after *Cuomo*, Congress codified the Court's holding in the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act provides that, "[i]n accordance with [*Cuomo*], no provision of title 62 of the Revised Statutes which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law." 12 U.S.C. § 25b(i). Contrary to Credit One's claims, AOB at 17–18,

the fact that Section 25(b) refers to attorneys general simply reflects the specific facts of *Cuomo*, whose reasoning Congress endorsed, and should not be construed as limiting the enforcement rights of other law enforcement entities. Indeed, such a reading would be incompatible with *Cuomo*'s logic and analysis, which turned on the distinctions between supervision and enforcement activities when defining visitorial powers.

Credit One's attempt to read into Dodd-Frank a prohibition on local law enforcement actions against national banks would also be highly inconsistent with one of the critical purposes of the new law: to limit banks' ability to ignore or evade state law. *See, e.g.*, 12 U.S.C. § 25b(a)(5)(A) (reducing deference to preemption determinations made by OCC); 12 U.S.C. § 5551(a) (limiting preemptive effect of Dodd-Frank itself); 12 U.S.C. § 25b(b)(1)(B) (adopting a new and narrower definition of conflict preemption applicable to national banks); *see also* Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chap. L. Rev. 171, 218 (2011) ("Gone are the ideas that the federal banking agencies are the sole regulators of banks and thrifts, and that banks and thrifts can virtually ignore state regulation. Congressional intent is the touchstone for preemption, and

Dodd-Frank shows irrefutable Congressional intent to limit and roll back federal preemption of state consumer finance law.").

Finally, Credit One ignores that in the years since *Cuomo* and Dodd-Frank, both private and public-entity plaintiffs have continued to pursue claims against national banks. That includes cities and counties, in addition to private class-action plaintiffs and state attorneys general. *See, e.g.*, *People v. Wells Fargo & Co.*, No. CV 15-4181-GW(FFMX), 2015 WL 4886391 (C.D. Cal. Aug. 13, 2015) (city attorney alleging illegal sales tactics violating California unfair competition law); *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, No. CIV. JFM-08-62, 2011 WL 1557759 (D. Md. Apr. 22, 2011) (mayor and city council alleging violations of Fair Housing Act); *see also* Section I above (listing private plaintiff cases). By contrast, Credit One cannot cite any case where a court endorsed the notion that the visitorial powers doctrine bars a lawsuit alleging non-preempted claims. Indeed, given Credit One's admission that the Attorney General has the right to bring state consumer protection actions, AOB at 17, combined with the significant body of cases demonstrating private parties' clear right to do so, the illogical end point of Credit One's argument would be to carve out local cities and counties as the only category of plaintiff *not* permitted to sue for violations of California's consumer protection laws.

That would be inconsistent with the reasoning of *Cuomo*, the case law that has developed in the intervening decade, and common sense.

Because the District Attorneys' enforcement action is a typical state law enforcement action, Credit One's citation to cases involving tribal sovereignty issues, which made *Younger* abstention inappropriate, do not control here. For example, Credit One points to *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), *as amended on denial of reh'g* (Apr. 28, 1995). In that case, this Court concluded that California could not have an important state interest in enforcing state gambling laws in Indian country because Congress had granted the federal government "exclusive jurisdiction to prosecute." *Id*. at 541. That reasoning has no application to the District Attorneys' non-preempted state law debt collection claims against Credit One, claims that any litigant can pursue against any national bank. In sum, Credit One's *Younger* abstention argument depends on an unsound interpretation of visitorial powers.

C. District Attorneys Have Statewide Authority to Pursue Consumer Protection Claims

Even if the identity of the plaintiff did matter to the visitorial powers analysis, which it does not, when it comes to California's consumer protection laws, the District Attorneys are authorized by statute to prosecute

unlawful conduct statewide. The California legislature intentionally drafted our State's unfair competition law in "broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 181 (1999) (internal citations omitted). In light of the law's breadth, California's sizable population, and the number and variety of businesses operating within its borders, the Attorney General has never had the capacity to be the exclusive enforcer of California consumer laws. Indeed, since even its earliest form, California's unfair competition law has given enforcement authority to the Attorney General *and* district attorneys. Stats. 1933, ch. 953, § 1, p. 2482. Today, the law also confers enforcement authority on certain city attorneys and county counsel. Cal. Bus. & Prof. Code § 17204. As a result, the Attorney General has always viewed city attorneys, county counsel, district attorneys, private plaintiffs, and others as critical partners in protecting California consumers from abusive business practices. Indeed, state and local prosecutors commonly coordinate enforcement efforts against defendants within California.

Recently, the California Supreme Court affirmed that district attorneys in California have authority to bring unfair competition law claims—like

those alleged in this case—on behalf of Californians statewide, not just on behalf of their county's residents. *Abbott Labs. v. Superior Ct. of Orange Cty.*, 9 Cal. 5th 642, 649 (2020). In other words, like the Attorney General, district attorneys may pursue statewide injunctive relief and seek civil penalties for violations of law that occur in their county and throughout California. *Id.* Regardless of whether counsel is a district attorney or the Attorney General, all of these suits are brought in the name of the same plaintiff: the People of the State of California. Cal. Bus. & Prof. Code §§ 17204, 17206(a). There is therefore no basis for treating the two types of prosecutors differently for purposes of visitorial powers.

CONCLUSION

The district court's judgment should be affirmed.

Dated: May 26, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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