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Breaking the Bank: Split Interpretations of the Bank Acts in the Era of #MeToo

Conor R. Harvey[†]

I. INTRODUCTION TO THE BANK ACTS

Many conflicts exist between state anti-discrimination laws and federal banking statutes. Traditionally, federal law provided certain banks carte blanche to terminate qualifying employees at will, or “at pleasure.”¹ But some federal courts now afford state law protections to these discharged employees through a more nuanced interpretation of federal law.² Today, those courts find that banks do not have an absolute right to fire employees “at pleasure” if the firing violates a state anti-discrimination law. Consequently, their interpretations conflict with the interpretations of circuits that hold that federal law provides certain banks the absolute right to dismiss qualifying personnel “at pleasure,” subject only to federal law.³

Three different statutes encompass the “Bank Acts”: the National Bank Act,⁴ the Federal Reserve Act,⁵ and the Federal Home Loan Bank

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¹ This Comment uses the terms “at will” and “at pleasure” synonymously. See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 492 (11th Cir. 2015) (“At pleasure” was utilized by Congress to mean “only that Bank officers are ‘at will’ employees, as opposed to ‘term’ employees.”).

² See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274 (3d Cir. 2006); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005); *Morris v. U.S. Bank*, No. 4:12-cv-281-DPM, 2013 U.S. Dist. LEXIS 3950 (E.D. Ark. Jan. 10, 2013); *Risinger v. HNB Corp.*, No. 10-2640-KHV/KMH, 2011 U.S. Dist. LEXIS 148560 (D. Kan. Dec. 21, 2011); *Ewing v. Fed. Home Loan Bank of Des Moines*, 645 F. Supp. 2d 707 (S.D. Iowa 2009); *Crowe v. Fed. Reserve Bank of St. Louis*, No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427 (E.D. Mo. Jan. 20, 2009); *James v. Fed. Reserve Bank of N.Y.*, 471 F. Supp. 2d 226 (E.D.N.Y. 2007); *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995); *Booth v. Old Nat’l Bank*, 900 F. Supp. 836 (N.D. W. Va. 1995); *Moodie v. Fed. Reserve Bank of N.Y.*, 835 F. Supp. 751 (S.D.N.Y. 1993).

³ See *Wiersum*, 785 F.3d 483; *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285 (4th Cir. 2008); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987).

⁴ 12 U.S.C. §§ 21 *et seq.* (2012).

⁵ 12 U.S.C. §§ 221 *et seq.* (2012).

Act.⁶ Each of the Bank Acts contains different requirements for governance. For example, to be governed by the National Bank Act, a bank must include the word “National” in its title and must be certified as a national banking institution by the comptroller of the currency.⁷ The Federal Reserve Act binds all twelve of the United States Federal Reserve Banks.⁸ And the Federal Home Loan Bank Act governs the eleven banks supervised by the Federal Housing Finance Agency.⁹

The Bank Acts all contain similar language within what is known as their “at-pleasure” provisions,¹⁰ and thus, courts often apply jurisprudence regarding one Bank Act’s “at-pleasure” provision interchangeably with the same provision of another Bank Act.¹¹ These provisions allow a bank’s board of directors governed by one of the Bank Acts to dismiss certain personnel for whatever reason the board sees fit,¹² and for the most part, without any legal consequence.¹³ Under the National

⁶ 12 U.S.C. §§ 1421 *et seq.* (2012).

⁷ 12 U.S.C. § 35.

⁸ 12 U.S.C. §§ 221–522.

⁹ 12 U.S.C. § 1442a.

¹⁰ Compare 12 U.S.C. § 24 (A national banking association “shall have power . . . [t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.”) with 12 U.S.C. § 341 (“[A] Federal reserve bank . . . shall have power . . . to appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.”).

¹¹ *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285, 288 (4th Cir. 2008) (“[T]he at-pleasure provisions of the Federal Home Loan Bank Act . . . and the Federal Reserve Act . . . have [been] interpreted [] consistently with each other and with the at pleasure clause of the [National Bank Act].”); *Stone v. Nat’l Bank & Trust Co.*, 92-cv-211, 1996 U.S. Dist. LEXIS 7927, at *18 (N.D.N.Y. June 6, 1996) (“[T]he ‘dismissal at pleasure’ language is nearly identical in all of these federal bank acts. Thus, plaintiff cannot avoid [the application of] other cases . . . [because] the employers therein were not banks organized under the National Bank Act.”); *Farmer v. Nat’l City Corp.*, c-2-94-966, 1995 U.S. Dist. LEXIS 21478, at *20–21 (S.D. Ohio Sept. 12, 1995) (finding the “at pleasure” language of the Federal Home Loan Bank Act, the Federal Reserve Act, and the National Bank Act are identical).

¹² This dismissal power extends to other employees in some contexts. Porter Wright, *Nat’l Bank Act May Preempt Certain Bank Officer Employment Claims*, EMPLOYER LAW REPORT (Nov. 12, 2008), <https://www.employerlawreport.com/2008/11/articles/eo/national-bank-act-may-preempt-certain-bank-officer-employment-claims/> [<https://perma.cc/L2XT-PVKN>]; see also *Schweikert*, 521 F.3d at 290 (“We hold that ratification by a board of directors of a termination is sufficient to invoke the preemptive effect of the at-pleasure provision of the [National Bank Act].”). *Contra* *Wells Fargo Bank v. Superior Court*, 811 P.2d 1025, 1032–33, 1036 (Cal. 1991) (“Board action of many kinds is often ratification of recommendations by senior management. But the board remains responsible for performing its statutory and other functions . . . If [the National Bank Act] unreasonably requires such a function to be carried out by a bank’s board, the remedy lies with Congress, not with this court.”).

¹³ *Kemper v. First Nat’l Bank*, 418 N.E.2d 819, 821 (Ill. App. Ct. 1981) (“The provision for dismissal of officers at the pleasure of the board of directors has been construed consistently to allow a national bank to discharge an officer without liability.”); see also *Mackey v. Pioneer Nat’l Bank*, 867 F.2d 520, 524–25 (9th Cir. 1989); *Kozlowsky v. Westminster Nat’l Bank*, 6 Cal. App. 3d

Bank Act, these employees include presidents, vice presidents, and other officers of qualifying banks.¹⁴ The Federal Reserve Act extends dismissal to additional employees.¹⁵ Moreover, the Federal Home Loan Bank Act allows for the “at-pleasure” dismissal of attorneys and agents.¹⁶ Today, in the era of #MeToo, an interesting question is whether a board’s power to dismiss personnel at will preempts state laws prohibiting discrimination on the basis of sex or other personal characteristics.¹⁷

This Comment argues that the Bank Acts’ “at-pleasure” provisions preempt all contradictory state laws.¹⁸ However, the Bank Acts should be amended to allow plaintiffs to bring state law discrimination claims that parallel—or exactly match—their federal counterparts. Part II of the Comment explores the origin and purpose of the “at-pleasure” provision. Part III provides a quick overview of anti-discrimination provisions and their applications and interactions with at-will employment. Part IV discusses the Supremacy Clause and the preemption doctrine as lenses through which to view this issue. Part V dives into the intersection of state law claims and the supremacy of the Bank Acts. Part VI discusses solutions to discrimination in the era of #MeToo when federalism preempts state law anti-discrimination provisions.

II. THE ORIGIN OF THE “AT-PLEASURE” PROVISION

The “at-pleasure” provision was first introduced in 1863 as part of the National Currency Act.¹⁹ Congress left “no record of any discussion of [the ‘at-pleasure’ provision], or of any specific purpose or motive it

593, 596–97 (Cal. Ct. App. 1970); *First Nat’l Bank of Colquitt v. Miller*, 98 S.E. 402, 404–05 (Ga. Ct. App. 1919); *Copeland v. Melrose Nat’l Bank*, 229 A.D. 311, 313 (N.Y. App. Div. 1930), *aff’d*, 173 N.E. 898 (N.Y. 1930); *Westervelt v. Mohrenstecher*, 76 F. 118, 122–23 (8th Cir. 1896).

¹⁴ 12 U.S.C. § 341.

¹⁵ *See Little v. Fed. Reserve Bank of Cleveland*, 601 F. Supp. 1372, 1375 (N.D. Ohio 1985) (determining the Federal Reserve Bank could fire a security guard at pleasure under the Federal Reserve Act); *Obradovich v. Fed. Reserve Bank of N.Y.*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983) (holding that a painter whose duties did “not seem essential to the Federal Reserve’s discharge of its financial responsibilities” could be dismissed at pleasure).

¹⁶ 12 U.S.C. § 1432(a) (2012).

¹⁷ *See, e.g., Boesch v. Champaign Nat’l Bank*, 2008 Ohio 3282 (Ohio Ct. App. 2008) (finding a bank officer’s gender discrimination claim brought under state law was preempted by the NBA).

¹⁸ Courts interpreting the “at pleasure” language in the Federal Reserve Act and the Federal Home Loan Act look to the interpretation of the National Bank Act’s nearly identical provision to identify the preemptive scope of all three federal banking act provisions. *See, e.g., Fasano*, 457 F.3d at 286–87. This interpretative method is supported by congressional intent. Decades after the National Bank Act, when enacting the Federal Reserve Act, Congress specified that the purpose of the “at-pleasure” provision was “precisely analogous to those of the national banks.” H.R. REP. NO. 63-69 (1913).

¹⁹ Act of Feb. 25, 1863 ch. 58, § 11, 12 Stat. 665, 668 (1863).

might have had in enacting it.”²⁰ Yet as courts²¹ and commentators²² have noted, historical context suggests that the provision served a “quite narrow” purpose.²³ Its purpose is likely derivative of the National Currency Act’s purpose, which some have argued Congress passed to: (1) develop a national currency; (2) create a federal bond market to finance the Civil War; and (3) establish a nationally governed depository for government funds.²⁴ But the oldest commentator argues that the National Currency Act, subsequently the National Bank Act once amended in 1864,²⁵ was passed “to create a market for loans of the general government” and to facilitate the “issu[ance] and circulation of a currency based upon the credit of the government.”²⁶ Although state bank notes are obsolete today—long ago replaced by federal currency—federal banks faced fierce competition from state banks during the second half of the nineteenth century.²⁷ Congress appeared “solicitous of the new national banks, their competitiveness, and ultimately, the system’s survival,”²⁸ going as far as to enact a ten percent tax on all bank notes issued by state-chartered banks in an effort to make national banks competitive.²⁹ The tax proved so successful that it was later considered to have taxed the state banks out of existence.³⁰

Although the congressional record lacks any discussion of the National Bank Act’s “at-pleasure” provision, some courts argue that Congress intended it “to place the fullest responsibility upon the directors

²⁰ *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013) (internal quotation marks omitted).

²¹ *Id.*

²² Miriam Jacks Achtenberg, *Rereading the Nat’l Bank Act’s ‘At Pleasure’ Provision: Preserving the Civil Rights of Thousands of Bank Employees*, 43 HARV. C.R.-C.L. L. REV. 165, 172 (2008).

²³ *Goonan*, 916 F. Supp. 2d at 493 (interpreting the Federal Reserve Act’s identical language).

²⁴ Achtenberg, *supra* note 22, at 176; Geoffrey P. Miller, *The Future of the Dual Banking Sys.*, 53 BROOK. L. REV. 1, 13 (1987); Edward L. Symons, Jr., *The “Business of Banking” in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 699 (1983); CHARLES THEODORE BOONE, *THE LAW OF BANKS AND BANKING* 290 (1892).

²⁵ Act of June 3, 1864, ch. 106, § 8, 13 Stat. 88, 101 (1864) (codified at 12 U.S.C. §§ 21 *et seq.*) (“[A] national banking association . . . shall have power . . . to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, required bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.”).

²⁶ BOONE, *supra* note 24, at 290.

²⁷ See *Tiffany v. Nat’l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1873) (describing the National Bank Act’s pro-competitive policies); M.B.W. Sinclair, *Employment at Pleasure: An Idea Whose Time Has Passed*, 23 U. TOL. L. REV. 531, 533 (1991).

²⁸ Sinclair, *supra* note 27, at 533.

²⁹ Act of July 13, 1866, ch. 184, § 9, 14 Stat. 93, 146 (1866); see also *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 549 (1869) (upholding the constitutionality of the tax).

³⁰ BOONE, *supra* note 24, at 290 (quoting *Tiffany*, 85 U.S. (18 Wall.) at 413) (“Much has accordingly been done to insure their national banks’ taking the place of state banks. The latter, it is said, ‘have been substantially taxed out of existence.’”).

[of national banks] by giving them the right to discharge [] officers at pleasure.”³¹ Specifically, “the power to dismiss bank officers at will reflects the constitutional mandate to establish an independent national system in order to maintain the stability of, and promote the welfare of, the national banks.”³² Furthermore, it empowers banks to immediately remove questionable individuals on the basis that a strong public image is important to a bank’s prosperity.³³ Although simple,³⁴ this argument is nevertheless valid. Because banks profit by caring for their customers’ money, untrusting customers will withdraw that money, and the banks’ prosperity will leave with it.³⁵ While national banks no longer need a competitive advantage over state banks, customers simply will not deposit money in institutions they do not trust. Whether that trust is lost by a bank officer’s actual misbehavior, mismanagement, or by some fiction, the same result occurs: less money is deposited and less prosperity is achieved. Federal deposit insurance may mitigate the effects of untrusting customers; however, it likely cannot eliminate their fears altogether.³⁶

Their effectiveness aside, the “at-pleasure” provisions remain largely untouched since their enactments and continue to serve their alleged purpose.³⁷ Yet, lacking other evidence and left with this broad purpose, some courts interpret the provisions according to their more tailored views. Until relatively recently, courts truly and consistently upheld a bank’s right to discharge its officers “at pleasure.” But in the

³¹ *Copeland v. Melrose Nat’l Bank*, 229 A.D. 311, 313 (N.Y. Sup. Ct. 1930), *aff’d*, 173 N.E. 898 (N.Y. 1930). *But see* Note, *Statutory Provision for Removal of Corporate Officer “At Pleasure”*, 50 HARV. L. REV. 518, 520 (1937) (characterizing *Westervelt v. Mohrenstecher*, 76 F. 118 (8th Cir. 1896), similar interpretation of the purpose of the “at-pleasure” provision as “conjecture”).

³² *Alegria v. Idaho First Nat’l Bank*, 723 P.2d 858, 860 (Idaho 1986) (citing *Westervelt*, 76 F. at 122).

³³ *See Westervelt*, 76 F. at 122 (“Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are instructed, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank.”); *Mackey v. Pioneer Nat’l Bank*, 867 F.2d 520, 526 (9th Cir. 1989) (The purpose of the provision is to give national banks “the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.”).

³⁴ *Sinclair*, *supra* note 27, at 534.

³⁵ *Id.*

³⁶ For example, because federal deposit insurance insures up to \$250,000, adjusted for inflation, a person with funds exceeding \$250,000 may choose to place that money elsewhere. 12 U.S.C. § 1821 (2012). Moreover, 27 percent of millennials think Bitcoin is more trustworthy than incumbent banks, such as JPMorgan Chase, Wells Fargo, and Goldman Sachs. Blockchain Capital, *Bitcoin Survey Fall 2017*, <http://www.survey.blockchain.capital/#1509374164943-0459e929-976e> [<https://perma.cc/V2F2-MQWX>].

³⁷ *See Westervelt*, 76 F. at 122 (“to provide for [the lack of public confidence in a bank officer]”). Remember, courts interpret the Bank Acts’ “at-pleasure” provisions analogously. *See Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 286–87 (3d Cir. 2006).

era of #MeToo and other anti-discriminatory movements, courts might view the “at-pleasure” provisions from a different perspective.

III. EMPLOYMENT “AT PLEASURE” AND ANTI-DISCRIMINATION PROVISIONS

Traditionally, at-will,³⁸ or “at-pleasure,”³⁹ employment barred a “claim of entitlement to continued employment enforceable against the employers.”⁴⁰ However, the Supreme Court has upheld some restrictions on these employment relationships.⁴¹ Various state laws have forbidden employment discrimination since the 1940s, and similar federal statutes have done so since the 1960s.⁴² Today, federal statutory restrictions prohibit discrimination on the basis of age,⁴³ physical disability,⁴⁴ “race, color, religion, sex, or national origin,”⁴⁵ wage garnishment,⁴⁶ “pregnancy, childbirth, or related medical conditions,”⁴⁷ military status,⁴⁸ jury duty,⁴⁹ and a myriad of other classifications⁵⁰ that limit an employer’s ability to fire an employee at will. Many of these federal anti-discrimination statutes contain express anti-preemption provisions that preserve parallel state laws and remedies.⁵¹ Yet no such provision exists in any of the three Bank Acts. Consequently, courts often struggle to properly apply the Bank Acts’ “at-pleasure” provisions. While “[a]ll courts recognize that, to the extent that the federal banking

³⁸ *Black’s Law Dictionary*, (11th ed. 2019), available at Westlaw BLACKS (“Employment that is usu. undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.”).

³⁹ “That Congress used the term ‘at pleasure’ instead of ‘at will’ in the National Bank Act is not surprising. The term ‘at will’ would not be employed for more than a decade after Congress passed the National Bank Act.” Achtenberg, *supra* note 22, at 172.

⁴⁰ *Cherin v. Lyng*, 874 F.2d 501, 504 (8th Cir. 1989).

⁴¹ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding a federal restriction on employment at will that sought to balance the relationship between employers and employees).

⁴² See, e.g., Act of Mar. 12, 1945, ch. 118, 1945 N.Y. Laws 457; Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241 (1964).

⁴³ 29 U.S.C. §§ 621 *et seq.* (2012).

⁴⁴ 42 U.S.C. §§ 12101 *et seq.* (2012); 29 U.S.C. §§ 701 *et seq.* (2012).

⁴⁵ 42 U.S.C. §§ 2000e *et seq.* (2012).

⁴⁶ 15 U.S.C. §§ 1601 *et seq.* (2012).

⁴⁷ 42 U.S.C. § 2000e(k).

⁴⁸ 38 U.S.C. § 4311 (2012).

⁴⁹ 28 U.S.C. § 1975 (2012).

⁵⁰ 42 U.S.C. § 7622 (2012) (protecting employees under the Clean Air Act); 42 U.S.C. § 3608 (2012) (providing employee protection in asbestos actions); 42 U.S.C. § 1997d (2012) (providing protection to employees reporting the mistreatment of an institutionalized person).

⁵¹ See, e.g., 42 U.S.C. § 2000e-7.

acts conflict with subsequently enacted anti-discrimination laws, subsequent federal anti-discrimination law must prevail,”⁵² courts often split with one another when attempting to simultaneously apply the “at-pleasure” provisions and state anti-discrimination statutes.

IV. THE SUPREMACY CLAUSE AND THE PREEMPTION DOCTRINE

*National State Bank v. Long*⁵³ explains that “whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the National Bank Act in 1863.”⁵⁴ Still, since as early as 1819, the Supreme Court has maintained that nationally chartered banks are federal instrumentalities entitled to regulate themselves without state interference.⁵⁵ State laws only apply to a bank governed by the Bank Acts insofar as the laws do not “infringe the national banking laws or impose an undue burden on the performance of the bank’s functions.”⁵⁶ Therefore, otherwise valid state law discrimination claims must be dismissed if they conflict with the Bank Acts’ “at-pleasure” provisions. Nevertheless, because courts exercise substantial discretion in determining whether a state and federal law conflict, and consequently, whether a federal law preempts a state law, some state law discrimination claims proceed despite being barred by the “at-pleasure” provisions.

Federal preemption, read from the Supremacy Clause of the Constitution,⁵⁷ requires reviewing courts to examine congressional intent⁵⁸ and the “purpose of the disputed federal statute.”⁵⁹ Preemption exists in three different forms: (1) express preemption; (2) field preemption; and (3) conflict preemption.⁶⁰ First, express preemption occurs when Congress explicitly defines the “extent to which its enactments preempt state law.”⁶¹ An explicit congressional preemption of state laws

⁵² Achtenberg, *supra* note 22, at 167 (emphasis in original).

⁵³ 630 F.2d 981 (3d Cir. 1980).

⁵⁴ *Id.* at 985.

⁵⁵ *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819).

⁵⁶ *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233, 248 (1944); *see also* *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (“Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank’s exercise of power.”); *Aalgaard v. Merch. Nat’l Bank, Inc.*, 224 Cal. App. 3d 674, 686 (Cal. Ct. App. 1990).

⁵⁷ U.S. CONST. art. VI, cl. 2. (“[T]he Laws of the United States . . . shall be the supreme Law of the Land.”).

⁵⁸ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990); *Aalgaard*, 224 Cal. App. 3d at 686.

⁵⁹ *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492 (S.D.N.Y. 2013).

⁶⁰ *Peatros v. Bank of Am. NT & SA*, 990 P.2d 539, 542–43 (Cal. 2000).

⁶¹ *Id.*

that regulate banks is a rare occurrence.⁶² The “at-pleasure” provisions do not expressly preempt state anti-discrimination laws and courts are generally left to determine the proper boundaries and application of federal and state laws.⁶³

Second, field preemption occurs when a state law “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”⁶⁴ Congressional “intent may be inferred from a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”⁶⁵ In 1869, the Supreme Court noted that national banks were “subject to the laws of the State and are governed in their daily course of business far more than the laws of the State than of the Nation.”⁶⁶ Since then, it has generally been accepted that the Bank Acts do not employ field preemption.⁶⁷ Consequently, courts recognize the “historic dual regulation of banks by state and federal law.”⁶⁸

Third, conflict preemption occurs when a state law “actually conflicts” with a federal law.⁶⁹ The Supreme Court recognizes that “federal

⁶² See *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (“In only a few instances has Congress explicitly preempted state regulations of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision.”).

⁶³ See *id.*; *Goonan*, 916 F. Supp. 2d 470, 491 (2013) (“The [Federal Reserve Act] contains no such express preemption clause and does not, by its plain language terms, speak to state-antidiscrimination laws.”); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000); see also, e.g., *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594–95 (2011).

⁶⁴ *Peatros*, 990 P.2d at 542; see also *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

⁶⁵ *English*, 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁶⁶ *First Nat'l Bank of Louisville v. Kentucky*, 76 U.S. 353, 362 (1869).

⁶⁷ *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, at *3 (N.D. Ill. Mar. 3, 1995) (“[A] state may attempt to affect the conduct of [national] bank officials so long as the exercise of their authority does not conflict with, or frustrate the purposes of federal law or impair the efficiency of banks to perform their statutory duties.”); see also *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (“Since shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive.”).

⁶⁸ *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 982 (9th Cir. 2005); see also *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (“Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act.”); *Idaho v. Sec. Pac. Bank*, 800 F. Supp. 922, 925 (D. Idaho 1992) (“It is clear that Congress has not completely preempted the entire banking field.”).

⁶⁹ *Peatros*, 990 P.2d at 542–43; see also *United States v. Locke*, 529 U.S. 89, 109 (2000) (Conflict preemption “occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.”) (internal quotation marks omitted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law[.]”).

law may be in irreconcilable conflict with state law,' such that '[c]ompliance with both statutes' results in a 'physical impossibility,' and caus[es] the state law to stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷⁰ The Bank Acts neither employ express preemption nor exclusively occupy the field of banking regulation; consequently, conflict preemption must apply, voiding state laws "if they conflict with federal law, frustrate the purposes of[,] . . . or impair the efficiency of national banks to discharge their duties."⁷¹

V. THE INTERSECTION OF STATE LAW CLAIMS AND THE SUPREMACY OF THE BANK ACTS

Plaintiffs alleging employment discrimination often pursue claims under both state and federal law. Federal circuit courts—as well as many federal district courts—are split concerning whether the Bank Acts preempt state anti-discrimination laws.⁷² While similarities often exist between federal and state anti-discrimination laws, the laws are not always identical. These differences often result in drastically different outcomes for plaintiffs depending on the location where a cause of action arises. Consequently, if a uniform preemption application is to be applied, the Supreme Court will need to clarify the extent to which the "at-pleasure" provisions preempt contradictory state laws.

If the "at-pleasure" provisions are read according to their plain text,⁷³ then it follows that the Bank Acts preempt all state law discrimination claims. Despite this, not all courts adopt such a textualist

⁷⁰ *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 491 (11th Cir. 2015) (quoting *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996)); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

⁷¹ *Bank of Am. v. San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002); see also *Barnett Bank*, 517 U.S. at 33–37 (holding that a federal statute granting national banks authority to sell insurance conflicts with, and therefore preempts, state laws forbidding national banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377–79 (1954) (determining that the power of national banks to receive deposits conflicts with, and therefore preempts, a state statute prohibiting the use of the word "savings" in banking advertisements); *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 248–49 (1944) (holding that a state law allowing the transfer of abandoned bank deposits was not preempted because "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on them").

⁷² See, e.g., *Morris v. U.S. Bank*, No. 4:12-cv-281-DPM, 2013 U.S. Dist. LEXIS 3950 (E.D. Ark. Jan. 10, 2013); *Risinger v. HNB Corp.*, No. 10-2640-KHV/KMH, 2011 U.S. Dist. LEXIS 148560 (D. Kan. Dec. 21, 2011); *Ewing v. Fed. Home Loan Bank of Des Moines*, 645 F. Supp. 2d 707 (S.D. Iowa 2009); *Crowe v. Fed. Reserve Bank of St. Louis*, No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427 (E.D. Mo. Jan. 20, 2009); *James v. Fed. Reserve Bank of N.Y.*, 471 F. Supp. 2d 226 (E.D.N.Y. 2007); *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995); *Booth v. Old Nat'l Bank*, 900 F. Supp. 836 (N.D. W. Va. 1995); *Moodie v. Fed. Reserve Bank of N.Y.*, 835 F. Supp. 751 (S.D.N.Y. 1993).

⁷³ See *Kemper v. First Nat'l Bank in Newton*, 418 N.E.2d 819, 171–72 (Ill. App. Ct. 1981) ("[T]he words "dismiss * * * at pleasure" should be taken to signify exactly that, as courts in many

view.⁷⁴ The circuits take one of three approaches: (1) total preemption; (2) retail preemption; and (3) wholesale preemption.⁷⁵ The Fourth, Sixth, and Eleventh Circuits follow the total preemption approach.⁷⁶ Total preemption requires that the “at-pleasure” provisions preempt contradictory state laws without question, even if the state statutes are consistent with federal law.⁷⁷ The Ninth Circuit follows the retail preemption approach.⁷⁸ Retail preemption requires that a federal law preempt a state law only to “the minimum extent necessary,” as long as the state law “substantively mirrors” the federal law.⁷⁹ Finally, the Third Circuit follows the wholesale preemption approach.⁸⁰ Wholesale preemption requires that federal laws preempt state laws that do not “exactly match” their federal counterparts; that is, the discrimination causes of actions and remedies under state law must be exactly the same as those allowed for under federal law.⁸¹

Moreover, numerous federal district courts in circuits that have not addressed the preemption issues of the Bank Acts fall within those categories. It is important to note these district court rulings because those rulings may indicate which preemption theory a circuit court will employ. For example, in *Fasano v. Federal Reserve Bank of New York*,⁸² the Third Circuit “count[ed] [itself] fortunate to have the benefit of a very well-reasoned opinion of Judge Padova of the Eastern District of Pennsylvania”⁸³ from *Evans v. Federal Reserve Bank of Philadelphia*.⁸⁴

jurisdictions have said for over a century.”).

⁷⁴ See generally *Kroske*, 432 F.3d 976; *Morris*, 2013 U.S. Dist. LEXIS 3950; *Ewing*, 645 F. Supp. 2d 707; *James*, 471 F. Supp. 2d 226; *Lambright v. Fed. Home Loan Bank of S.F.*, No. C074340CW, 2007 U.S. Dist. LEXIS 91075 (N.D. Cal. Dec. 3, 2007); *Moodie*, 835 F. Supp. 751.

⁷⁵ Another approach, proposed by three dissenting justices of the Supreme Court of California, strongly suggests that later-enacted federal anti-discrimination regulations do not impliedly amend the Federal Reserve Act. This would immunize the Federal Reserve Banks from any liability under Title VII, the American with Disabilities Act, the Age Discrimination in Employment Act, and other federal anti-discrimination statutes. No federal courts have adopted this approach. See *Peatros*, 990 P.2d 539, 183–89 (Brown, J., dissenting).

⁷⁶ See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015); *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285 (4th Cir. 2008); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987).

⁷⁷ See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 286 (3d Cir. 2006) (“[T]otal preemption holdings suggest that any state-created limitation on the bank’s power would fundamentally, and irreconcilably, conflict with Congress’s intent to grant total, unlimited discretion.”) (emphasis in original).

⁷⁸ See *Kroske*, 432 F.3d 976 (2005).

⁷⁹ *Id.* at 986–87.

⁸⁰ See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274 (3d Cir. 2006).

⁸¹ *Id.* at 274.

⁸² 457 F.3d 274 (3d Cir. 2006).

⁸³ *Id.* at 287.

⁸⁴ No. 03-4975, 2004 U.S. Dist. LEXIS 13265 (E.D. Pa. July 8, 2004).

Thus, district court decisions occasionally predict how an undecided circuit might resolve preemption or provide a roadmap for a circuit court that has not considered the issue.

A. Total Preemption (Followed by the Fourth, Sixth, and Eleventh Circuits)

The Fourth, Sixth, and Eleventh Circuits have concluded that the Bank Acts' "at-pleasure" provisions completely forbid state law prohibitions that limit a qualifying bank's ability to discharge certain personnel. In *Ana Leon T. v. Federal Reserve Bank of Chicago*,⁸⁵ one of the older cases concerning the Bank Acts' preemption of state law, the Sixth Circuit determined that the Federal Reserve Act's "at-pleasure" provision preempted state law discrimination claims.⁸⁶ Plaintiff Ana Leon T., a woman of Colombian origin and former employee of the Federal Reserve Bank of Chicago, filed an action under both Title VII and Michigan's Elliott-Larsen Act⁸⁷ for wrongful discharge based on her national origin.⁸⁸ With little analysis, the Sixth Circuit concluded that the Federal Reserve Act's "at-pleasure" provision prevented a bank employee from stating a claim under Michigan's Elliott-Larsen Act, a statute prohibiting employers from discriminating against employees on the basis of national origin.⁸⁹ Despite its lack of analysis, the Sixth Circuit ruled broadly: the Federal Reserve Act's "at-pleasure" provision "preempts any state-created employment right to the contrary."⁹⁰

The *Ana Leon T.* ruling was not met without criticism. For instance, in *Katsiavelos v. Federal Reserve Bank of Chicago*,⁹¹ the Northern District of Illinois criticized "[t]he *Leon* court [for] provid[ing] no reasons or policy for its holding."⁹² The Southern District of New York refused to follow the decision because "the Sixth Circuit's pronouncement [in *Ana Leon T.*] gives no basis for its opinion and sets forth no policy reasons for its holding."⁹³ Moreover, in *White v. Federal Reserve Bank of Cleveland*,⁹⁴ the Ohio Court of Appeals stated that "[t]he Sixth

⁸⁵ 823 F.2d 928 (6th Cir. 1987).

⁸⁶ *Id.* at 931.

⁸⁷ MICH. COMP LAWS ANN. § 37.2202(1)(a) (2018).

⁸⁸ *See generally, Ana Leon T.*, 823 F.2d at 928.

⁸⁹ MICH. COMP LAWS ANN. § 37.2202(1)(a); *Ana Leon T.*, 823 F.2d at 929–31.

⁹⁰ *Ana Leon T.*, 823 F.2d at 931 (emphasis added); *accord* Kispert v. Fed. Home Loan Bank of Cincinnati, 778 F. Supp. 950, 952–53 (S.D. Ohio 1991) (determining the Federal Home Loan Bank Act's "at-pleasure" provision preempted a state law claim for age discrimination).

⁹¹ No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995).

⁹² *Id.* at *6.

⁹³ *Moodie v. Fed. Reserve Bank of N.Y.*, 831 F. Supp. 333, 336 (S.D.N.Y. 1993).

⁹⁴ 660 N.E.2d 493 (Ohio Ct. App. 1995).

Circuit . . . failed to engage in any analysis or state the basis of its decision.” Thus, the Ohio court “decline[d] to rely upon the holding in *Ana Leon T.*”⁹⁵ Despite these criticisms and the passage of nearly twenty years, the Sixth Circuit has since reiterated its holding in *Ana Leon T.* that the “at-pleasure” provision preempts all state law employment discrimination claims.⁹⁶ Similarly, before *Ana Leon T.*, in *Wiskotoni v. Michigan National Bank-West*,⁹⁷ the Sixth Circuit observed that the National Bank Act’s “at-pleasure” provision “has consistently been construed by both federal and state courts as preempting state law governing employment relations between a national bank and its officers and depriving a national bank of the power to employ its officers other than at pleasure.”⁹⁸

Likewise, in *Schweikert v. Bank of America, N.A.*,⁹⁹ the Fourth Circuit determined that the National Bank Act’s “at-pleasure” provision preempted the state law claims before the court.¹⁰⁰ Plaintiff Schweikert, a bank officer, was terminated by his former employer’s board of directors for failing to cooperate with both internal and external investigations of the bank.¹⁰¹ Schweikert sued the Bank of America, alleging wrongful or abusive discharge.¹⁰² Relying on the National Bank Act’s “at-pleasure” provision, the district court dismissed Schweikert’s action and the Fourth Circuit affirmed.¹⁰³ In its decision, the Fourth Circuit noted that it previously interpreted the analogous “at-pleasure” provision of the Federal Home Loan Bank Act in a wrongful discharge action based on state law.¹⁰⁴ This precedent—*Andrews v. Federal Home Loan Bank of Atlanta*¹⁰⁵—concluded that “Congress intended for federal law to define the discretion which the Bank may exercise in the discharge of employees.”¹⁰⁶ Any wrongful termination claim under state law

⁹⁵ *Id.* at 495.

⁹⁶ See *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004) (“[I]nasmuch as Arrow was an employee of a Federal Reserve Bank, her rights under Kentucky state law were preempted by federal law.”).

⁹⁷ 716 F.2d 378 (6th Cir. 1983).

⁹⁸ *Id.* at 387; accord *Arrow*, 358 F.3d at 394.

⁹⁹ 521 F.3d 285 (4th Cir. 2008).

¹⁰⁰ *Id.* at 288–89; see also *Citizens Nat’l Bank & Trust Co. v. Stockwell*, 675 So. 2d 584, 586 (Fla. 1996) (Prior to the Fourth Circuit’s ruling, the Supreme Court of Florida found that the “at-pleasure” provision precludes any “limitation on the power of a bank to remove its officers” under the National Bank Act).

¹⁰¹ *Schweikert*, 521 F.3d at 287.

¹⁰² *Id.*

¹⁰³ See generally *id.*

¹⁰⁴ *Id.* at 288 (citing *Andrews v. Fed. Home Loan Bank of Atl.*, 998 F.2d 214, 220 (4th Cir. 1993)).

¹⁰⁵ 998 F.2d 214 (4th Cir. 1993).

¹⁰⁶ *Id.* at 220.

“would plainly conflict with the discretion accorded the Bank by Congress.”¹⁰⁷ Consequently, and consistent with *Andrews*,¹⁰⁸ the Fourth Circuit held that “the at-pleasure provision of the National Bank Act preempts state law claims for wrongful discharge.”¹⁰⁹

Finally, in *Wiersum v. U.S. Bank, N.A.*,¹¹⁰ a succinct opinion citing *Wiskotoni*,¹¹¹ the Eleventh Circuit joined the Sixth and Fourth Circuits.¹¹² Plaintiff Wiersum alleged wrongful termination by U.S. Bank, N.A. under the Florida Whistleblower Act¹¹³ for his discharge after he objected to certain activities that he believed were unlawful and refused to participate in them.¹¹⁴ After noting that several circuits, as well as the Supreme Court of Florida, had found conflict preemption between similar state laws and the Bank Acts, the Eleventh Circuit followed suit in finding preemption without providing much reasoning of its own.¹¹⁵

Together, the Fourth, Sixth, and Eleventh Circuits constitute the three circuits that provide for the Bank Acts’ total preemption of state law. The total preemption approach is alive and well, and its position as the approach followed by the most circuits suggests it might be adopted by other courts in the future that have yet to rule upon the proper application of the “at-pleasure” provisions.

B. Retail Preemption (Followed by the Ninth Circuit)

In *Kroske v. U.S. Bank Corp.*,¹¹⁶ the Ninth Circuit considered whether the National Bank Act’s “at-pleasure” provision preempts state law, ultimately rejecting the Sixth Circuit’s “summary conclusion” in *Ana Leon T.*¹¹⁷ Plaintiff Kroske, a bank officer, alleged that the bank terminated her in violation of the Washington Law Against Discrimination, a state law prohibiting age discrimination in employment.¹¹⁸ Although Kroske did not pursue a claim under the Age Discrimination in Employment Act,¹¹⁹ or any federal claim at all,¹²⁰ the court concluded

¹⁰⁷ *Id.*

¹⁰⁸ 998 F.2d 214 (4th Cir. 1993).

¹⁰⁹ *Schweikert*, 521 F.3d at 288–89.

¹¹⁰ 785 F.3d 483 (11th Cir. 2015).

¹¹¹ 716 F.2d 378 (6th Cir. 1983).

¹¹² *Wiersum*, 785 F.3d at 491.

¹¹³ FLA. STAT. ANN. § 448.102(3) (2018).

¹¹⁴ *Wiersum*, 785 F.3d at 486.

¹¹⁵ *Id.* at 489–91.

¹¹⁶ 432 F.3d 976 (9th Cir. 2005).

¹¹⁷ *Id.* at 980–89.

¹¹⁸ *Id.* at 978; WASH. REV. CODE ANN. §§ 49.60.010 *et seq.* (2018).

¹¹⁹ 29 U.S.C. §§ 621 *et seq.* (2012).

¹²⁰ The court had diversity jurisdiction under 28 U.S.C. § 1332 (2012); *Kroske*, 432 F.3d at 979.

that the National Bank Act did not preempt her claim.¹²¹ Instead, the Age Discrimination in Employment Act impliedly amended the National Bank Act's "at-pleasure" provision to "the minimum extent necessary" to resolve contradictory federal laws.¹²² Furthermore, the court reasoned that because Kroske's state law claim under the Washington Law Against Discrimination "substantively mirrored" a federal claim under the Age Discrimination in Employment Act, the National Bank Act did not preempt her state claim.¹²³ Although the Ninth Circuit failed to define its "substantively mirrors" standard, it explained that "state law provisions prohibit[ing] termination on grounds more expansive than the grounds set forth in federal law" remain preempted.¹²⁴

While district courts in the Second Circuit have reached conflicting decisions as to whether the Bank Acts' "at-pleasure" provisions preempt state anti-discrimination law, they have more recently followed the retail preemption approach. For example, in *James v. Federal Reserve Bank of New York*,¹²⁵ the Eastern District of New York adopted the Supreme Court of California's retail preemption approach, concluding that federal law preempts state law to the extent that the laws conflict, but that federal law does not preempt state law to the extent that the laws do not conflict.¹²⁶ And as of yet, the Southern District of New York seems to agree. In *Moodie v. Federal Reserve Bank of New York*,¹²⁷ the court held that the Federal Reserve Act's "at-pleasure" provision did not preempt the New York State Human Rights Law because "Congress did not intend the Federal Reserve Act to preempt state anti-discrimination

¹²¹ *Kroske*, 432 F.3d at 987, 988 (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 102 (1983) (noting that its "conclusion is buttressed by the 'importance of state fair employment laws to the federal enforcing scheme'" and that "parallel state anti-discrimination laws are explicitly made part of the enforcement scheme of federal laws"))).

¹²² *Id.* at 986.

¹²³ *Id.* at 987; see also *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 926 n.1 (9th Cir. 2003) (stating the Washington Law Against Discrimination "tracks federal law"); *Grimwood v. Univ. of Puget Sound, Inc.*, 753 P.2d 517, 520 (Wash. 1988) (holding that because the Washington Law Against Discrimination "does not provide any criteria for establishing an age discrimination case," Washington courts look to federal cases construing the Age Discrimination in Employment Act).

¹²⁴ *Kroske*, 432 F.3d at 989. Beyond the "substantively mirrors" standard, at least one federal district court in a circuit yet to rule on this issue, without citing any other court's opinion on this issue, determined that the "at-pleasure" provision of the National Banking Act does not preempt a retaliatory discharge claim because public policy favors allowing such a claim. See *Ruisinger v. HNB Corp.*, No. 10-2640-KHV/KMH, 2011 U.S. Dist. LEXIS 148560, at *13 (D. Kan. Dec. 21, 2011) (citing *Sargent v. Cent. Nat'l Bank & Trust Co. of Enid*, 809 P.2d 1298, 1301-02 (Okla. 1991)).

¹²⁵ 471 F. Supp. 2d 226, 236 (E.D.N.Y. 2007).

¹²⁶ *James*, 471 F. Supp. 2d at 236; see also *Peatros v. Bank of Am.*, 990 P.2d 539, 553 (Cal. 2000) ("In a preemption case . . . state law is displaced only to the extent that it actually conflicts with federal law. This rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." (citing *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1995) (per curiam))).

¹²⁷ 835 F. Supp. 751 (S.D.N.Y. 1993).

laws that are consistent with federal anti-discrimination legislation.”¹²⁸ Moreover, the court found that Title VII made no mention of exempting qualifying bank personnel from the act’s requirements.¹²⁹ Consequently, the court reasoned that the Federal Reserve Bank of New York is subject to New York anti-discrimination laws to the extent that those laws are analogous to federal law.¹³⁰ The Southern District of New York’s decision in *Moodie* backtracks on *Osei-Bonsu v. Federal Home Loan Bank of New York*,¹³¹ an earlier decision from the same district. There, the court held that a New York state human rights agency could not pursue a state claim against a national bank because the Federal Home Loan Bank Act’s “at-pleasure” provision preempted the cause of action.¹³²

Similarly, the Northern District of California determined that the Ninth Circuit’s decision in *Kroske v. U.S. Bank Corporation*¹³³ allows courts to “limit relief for [a] Plaintiff’s [state law discrimination] claims against Defendant [Federal Home Loan Bank of San Francisco] to that which is available under Title VII.”¹³⁴ When adopting this approach, the Southern District of Iowa described it as the “most consistent with the law of conflict preemption.”¹³⁵ And the Eastern District of Arkansas, following *Ewing v. Federal Home Loan Bank of Des Moines*,¹³⁶ noted that “[t]he relevant inquiry is the variance” between the federal and state anti-discrimination laws at issue, “and whether [the state law] conflicts with [the federal law] such that all or part of [the state law] is preempted.”¹³⁷ To the Eastern District of Arkansas, such a conflict must make a legal difference in the case,¹³⁸ which did not include “differing statutes of limitation, exhaustion requirements, punitive damages caps, and permissible liability against supervisors under Arkansas law [but not federal law].”¹³⁹ Despite such differences, the Eastern District

¹²⁸ *Moodie*, 835 F. Supp. at 753.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 726 F. Supp. 95 (S.D.N.Y. 1989).

¹³² *Id.* at 98.

¹³³ 432 F.3d 976 (9th Cir. 2005).

¹³⁴ *Lambright v. Fed. Home Loan Bank of S.F.*, No. C074340CW, 2007 U.S. Dist. LEXIS 91075, at *5 (N.D. Cal. Dec. 3, 2007).

¹³⁵ *Ewing v. Fed. Home Loan Bank of Des Moines*, 645 F. Supp. 2d 707, 720 (S.D. Iowa 2009).

¹³⁶ 645 F. Supp. 2d 707 (S.D. Iowa 2009).

¹³⁷ *Morris v. U.S. Bank*, No. 4:12-cv-281-DPM, 2013 U.S. Dist. LEXIS 3950, at *5 (E.D. Ark. Jan. 10, 2013).

¹³⁸ *Id.*

¹³⁹ *Id.* at *6.

of Arkansas characterized the state anti-discrimination law as a “mere[] echo[] of Title VII.”¹⁴⁰

In *Katsiavelos v. Federal Reserve Bank of Chicago*,¹⁴¹ the Northern District of Illinois held that the bank was subject to the Illinois Human Rights Act,¹⁴² a statute containing anti-discrimination provisions modeled after federal anti-discrimination law.¹⁴³ The district court disagreed with the Sixth Circuit’s *Ana Leon T.* ruling, finding that the Federal Reserve Act’s “at-pleasure” provision preempts only contractual rights and not other, non-contractual federal or state rights in employment.¹⁴⁴ In fact, the Northern District of Illinois criticized the Sixth Circuit’s *Ana Leon T.* decision, claiming that the ruling “provided no reasons or policy for its holding that all state employment rights were preempted by the dismiss at pleasure language.”¹⁴⁵ In doing so, the Northern District of Illinois determined that “dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee. The right to be free from discrimination is not a contractual right, and therefore is not necessarily embodied in the dismiss at pleasure language.”¹⁴⁶

C. Wholesale Preemption (Followed by the Third Circuit)

In *Fasano v. Federal Reserve Bank of New York*,¹⁴⁷ the Third Circuit reasoned that the Federal Reserve Act’s “at-pleasure” provision entirely¹⁴⁸ preempts state laws that fail to “exactly match” their federal counterparts.¹⁴⁹ Plaintiff Fasano, pursuing claims under New Jersey

¹⁴⁰ *Id.* at *7.

¹⁴¹ No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995).

¹⁴² 775 ILL. COMP. STAT. 5/1-101 (LEXIS 2018).

¹⁴³ *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, at *1 (N.D. Ill. Mar. 3, 1995).

¹⁴⁴ *Id.* at *2; *accord* *White v. Fed. Reserve Bank of Cleveland*, 660 N.E.2d 493, 495 (Ohio Ct. App. 1995) (agreeing with *Katsiavelos* and holding that plaintiff’s state law claim of handicapped discrimination was not preempted by the Federal Reserve Act).

¹⁴⁵ *Katsiavelos*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, at *2.

¹⁴⁶ *Id. Contra Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 255 (3d Cir. 2004) (“We hold that the Federal Reserve Act precludes enforcement against a federal reserve bank of an employment contract that would compromise its statutory power to dismiss at pleasure, and prevents the development of a reasonable expectation of continued employment.”).

¹⁴⁷ 457 F.3d 274 (3d Cir. 2006).

¹⁴⁸ *Compare id.* at 290 (“There is simply no way to give full effect to [] state laws while picking and choosing which parts of them may apply.”) *with* *Kroske v. U.S. Bank Corp.*, 432 F.2d at 987–88, 989 (holding that only actual inconsistencies in state laws are preempted rather than entire provisions).

¹⁴⁹ *Fasano*, 457 F.3d at 290; *cf. Mele*, 359 F.3d at 255 (previously holding the “at-pleasure” provision of the Federal Reserve Act bars all contractual employment claims against a Federal Reserve Bank; however, leaving unresolved whether preemption extends to statutory employment claims).

law, alleged she was fired by the Federal Reserve Bank of New York in retaliation for complaining about illegal activity and that the bank failed to accommodate her disability.¹⁵⁰ As it “wad[ed] into murky waters,” the Third Circuit explicitly rejected both the Sixth Circuit’s *Ana Leon T.*¹⁵¹ approach and the substantive-mirror approach adopted by the Ninth Circuit in *Kroske*.¹⁵² Developing its own, self-described “partial preemption” approach, the Third Circuit requires that, to avoid preemption, state laws must “exactly match” their federal counterparts because the court will not “pare back” state law to match federal law.¹⁵³ Ultimately, despite the fact that federal law and New Jersey law both covered Fasano’s causes of action, because the courts had not identically interpreted the remedies of Fasano’s state claims, her claims were preempted in their entirety.¹⁵⁴

Similarly, in *Crowe v. Federal Reserve Bank of St. Louis*,¹⁵⁵ the Eastern District of Missouri adopted the Third Circuit’s approach, determining that “broad state employment laws cannot apply to the Federal Reserve Banks when those state laws prohibit those acts that are incident to Federal Reserve Banks dismissing ‘at pleasure’ their employees, within the bounds of the [Americans with Disabilities Act.]”¹⁵⁶ In doing so, the court dismissed a plaintiff’s claim that would have allowed him to seek additional remedies under state law beyond those allowed for under federal law.¹⁵⁷

VI. FEDERALISM IN THE ERA OF #METOO

A “wide split in authority” exists¹⁵⁸ and continues to grow with little evidence that the Supreme Court will enter the fray.¹⁵⁹ At one extreme, the Fourth, Sixth, and Eleventh Circuits hold that personnel dismissed

¹⁵⁰ These claims respectively fall under the New Jersey Conscientious Employee Act, N.J. STAT. ANN. §§ 34:19-1 *et seq.* (2018), and New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 *et seq.* (2018). Federal law prohibits retaliation against bank employees complaining of illegal conduct. 12 U.S.C. § 1831(j) (2012). It also prohibits employers from discrimination on the basis of disability. *See* 42 U.S.C. §§ 12101 *et seq.* (2012).

¹⁵¹ 823 F.2d 928 (6th Cir. 1987).

¹⁵² 432 F.3d 976 (9th Cir. 2005).

¹⁵³ *Fasano*, 457 F.3d at 290.

¹⁵⁴ *Id.*

¹⁵⁵ No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427 (E.D. Mo. Jan. 20, 2009)

¹⁵⁶ *Id.* at *5 (internal quotation marks omitted).

¹⁵⁷ *Id.* at *4.

¹⁵⁸ *Fasano*, 457 F.3d at 279.

¹⁵⁹ *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016); *Fasano*, 457 F.3d 274, *cert. denied*, 127 S. Ct. 977 (2007); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 549 U.S. 822 (2006); *Ana. Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987).

“at pleasure” may only pursue federal law claims against a bank governed by the Bank Acts.¹⁶⁰ Conversely, the Ninth Circuit holds that a state anti-discrimination statute must “substantively mirror” federal anti-discrimination law to avoid dismissal.¹⁶¹ And the Third Circuit falls somewhere in between, requiring that the state regulation “exactly match” federal law.¹⁶²

The “starting presumption” is that Congress did not intend for federal law to preempt state law.¹⁶³ Instead, any “[c]onsideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [the] Federal Act unless that [is] the clear and manifest purpose of Congress.’”¹⁶⁴ And of course, no provision of the Bank Acts expressly preempts state law. Moreover, courts consistently hold that federal law does not “preempt the field” of state employment law.¹⁶⁵ Consequently, courts must rely on conflict preemption to resolve the preemption question posed by an application of the Bank Acts.

Preemption is “fundamentally a question of congressional intent” that requires statutory interpretation.¹⁶⁶ As commentators have noted, the National Bank Act, which the subsequent Bank Acts’ “at-pleasure” language is modeled from, was passed “to create a market for loans of the general government” and to facilitate the “issu[ance] and circulation of a currency based upon the credit of the government.”¹⁶⁷ But why Congress included the “at-pleasure” provision in the National Bank Act remains a mystery; Congress did not mention the provision in any recorded debates.¹⁶⁸

¹⁶⁰ *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 491 (11th Cir. 2015); *Schweikert v. Bank of Am.*, 521 F.3d 285, 288–89 (4th Cir. 2008); *Ana Leon T.*, 823 F.2d at 931.

¹⁶¹ *Kroske*, 432 F.3d at 987.

¹⁶² *Fasano*, 457 F.3d at 290.

¹⁶³ *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

¹⁶⁴ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

¹⁶⁵ *See, e.g., Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (“[R]egulation of banking has been one of dual [federal and state] control since the passage of the National Bank Act”).

¹⁶⁶ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“The purpose of Congress is the ultimate touchstone in every pre-emption case.”).

¹⁶⁷ BOONE, *supra* note 24, at 290.

¹⁶⁸ *See Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013) (noting that Congress left no record that it discussed the “at-pleasure” provision). The earliest mention of the provision by courts occurred in 1896, over thirty years after the National Bank Act’s passage. *See generally Westervelt v. Mohrenstecher*, 76 F. 118 (1896).

Considering the National Bank Act's purpose at face value, that purpose, or any other purpose alleged by commentators,¹⁶⁹ does not expressly indicate an intent to preclude a plaintiff's ability to pursue state claims. One early source, written thirty years after the National Bank Act's passage, suggests the "at-pleasure" provision was purposed to prevent banks from entering into fixed-term contracts to preserve their ability to remove qualifying personnel who had lost the public's trust.¹⁷⁰ Assuming the "at-pleasure" provisions' purpose is to protect public trust, as many argue,¹⁷¹ permitting the Bank Acts to prohibit state law sex discrimination claims, especially in the #MeToo era, arguably undermines that purpose. And a bank's ability to fire untrustworthy personnel is unlikely to be greatly inhibited by most state anti-discrimination regulations, as the bank remains subject to federal anti-discrimination law.

Nonetheless, some courts are rightfully reluctant to tinker with the "at-pleasure" provisions' preemptive capabilities. As *Evans* articulated:

subjecting the federal reserve banks to state employment laws and regulations which broaden the rights and remedies available under federal law will subject the federal reserve banks, and possibly their employees, to a myriad of different laws and regulations which vary from jurisdiction to jurisdiction.¹⁷²

Not only would doing so violate the plain text of the "at-pleasure" provisions, but, if the provisions' purpose to maintain public trust is to be believed, it would frustrate the alleged intent of Congress "to allow the [qualifying] banks the 'greatest latitude possible' in terminating employees."¹⁷³ Furthermore, accidental frustration of purpose is not the only reason courts should be reluctant to tinker with the provisions.

¹⁶⁹ See Achtenberg, *supra* note 22, at 176; Geoffrey P. Miller, *The Future of the Dual Banking Sys.*, 53 BROOK. L. REV. 1, 13 (1987); Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 699 (1983).

¹⁷⁰ See *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989) ("[T]he purpose of the [at-pleasure dismissal] provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust."). Compare *Westervelt*, 76 F. at 122 ("High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. . . . In such a case it is necessary . . . that the board of directors should have power to remove [] an officer, and to put in his place another, in whom the community has confidence.") with *Statutory Provision for Removal of Corporate Officer "At Pleasure"*, *supra* note 31, at 520 (criticizing the purpose of the "at-pleasure" provision articulated in *Westervelt* as "conjecture").

¹⁷¹ *Westervelt*, 76 F. 118 at 122; see also *Mackey*, 867 F.2d at 526.

¹⁷² *Evans v. Fed. Reserve Bank of Phila.*, No. 03-4975, 2004 U.S. Dist. LEXIS 13265, at *17 (E.D. Pa. July 8, 2004).

¹⁷³ *Id.* at *17-18 (citing *Mackey*, 867 F.2d at 526); see also *Talbott v. Silver Bow Cty.*, 139 U.S. 438, 35 (1891) (noting Congress designed the National Bank Act to create a national banking system with "uniform operation").

When interpreting a statute, the “starting point must be the language employed by Congress, and [the Court] assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used.”¹⁷⁴ By this canon, “at pleasure,” with no qualifications, speaks for itself. Under the provisions’ “straightforward statutory command, there is no reason to resort to legislative history.”¹⁷⁵ But even disregarding this canon, one can only resort to legislative history to little avail since Congress left no record of the “at-pleasure” provisions’ purpose.¹⁷⁶

No court, and few judges,¹⁷⁷ dispute that banks governed by the Bank Acts are subject to Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other federal anti-discrimination statutes. Preemption only occurs where the federal and state laws conflict so that it is “impossible . . . to comply with both”¹⁷⁸ or where state law stands as “an obstacle to the accomplishment and execution of the full purposes and objectives underlying the federal law.”¹⁷⁹ Yet the Ninth Circuit takes this a step further, stating in *Kroske* that “in the absence of clear congressional intent to the contrary . . . Kroske’s claim of age discrimination under the Washington Law Against Discrimination is not preempted by [the National Bank Act], as limited by the [Age Discrimination in Employment Act].”¹⁸⁰

Surely the last-in-time rule¹⁸¹ amends the Bank Acts to the “minimum extent necessary” to resolve any conflict with federal anti-discrimination laws.¹⁸² However, the “minimum extent necessary” cannot logically include rights and remedies beyond those allowed for by federal law. Repeal or amendment may only occur if “the two acts are in irreconcilable conflict, or [if] the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it.”¹⁸³ The “at-pleasure” provisions provide qualifying banks the absolute, unlimited power to dismiss certain employees. Conversely, Title VII and other federal anti-discrimination laws prohibit such banks from dismissing

¹⁷⁴ *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal quotation marks omitted).

¹⁷⁵ *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *see also Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (Congress “says in a statute what it means and means in a statute what it says there.”).

¹⁷⁶ *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013).

¹⁷⁷ *See Peatros v. Bank of Am.*, 990 P.2d 539, 183–89 (Cal. 2000) (Brown, J., dissenting).

¹⁷⁸ *English v. Gen. Electric Co.*, 496 U.S. 72, 79 (1990).

¹⁷⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁸⁰ 432 F.3d 976, 987–88 (9th Cir. 2005), *cert. denied*, 549 U.S. 822 (2006).

¹⁸¹ *See Doe v. Considine*, 73 U.S. 458, 468 (1868) (“The rule applicable to the construction of conflicting statutory provisions is, that the last in order of time . . . must take effect.”).

¹⁸² *See Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 986 (9th Cir. 2005).

¹⁸³ *Posadas v. Nat’l City Bank*, 296 U.S. 497, 504 (1936).

employees under certain conditions.¹⁸⁴ Therefore, any unconditioned right to dismiss granted by the “at-pleasure” provisions is made illegal. That is, to the extent that federal anti-discrimination laws irreconcilably conflict with the “at-pleasure” provisions, those laws impliedly amend the Bank Acts to grant the qualifying banks “a *limited* power to dismiss [qualifying personnel] at pleasure.”¹⁸⁵

Despite any implied amendments, state causes of action remain barred even though some federal statutes contain provisions known as “saving clauses,” which preserve state laws.¹⁸⁶ The “double saving clause” argument holds that the “at-pleasure” provisions do not preempt federal anti-discrimination laws containing saving provisions, and in turn, those federal anti-discrimination laws do not preempt state anti-discrimination laws.¹⁸⁷ But the Supreme Court has dismissed such reasoning.¹⁸⁸ Federal laws containing a saving clause do not transform state laws into federal laws that are saved from preemption.¹⁸⁹ Furthermore, because Title VII and many other federal laws contain such non-preemption provisions, applied to all state laws with which they do not conflict, and taken to its logical extreme, the double saving clause argument would protect almost all state laws from preemption by the “at-pleasure” provisions.¹⁹⁰

As the Supreme Court explained, “[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.”¹⁹¹ Yet the “at-pleasure” provisions remain plain, blanket prohibitions on state law to the contrary.¹⁹²

¹⁸⁴ See 42 U.S.C. § 2000e (2012) (forbidding certain types of discrimination on the basis of “race, color, religion, sex, or national origin”); see also, e.g., 29 U.S.C. §§ 621 *et seq.* (2012); 42 U.S.C. §§ 12101 *et seq.* (2012); 29 U.S.C. §§ 701 *et seq.* (2012); 15 U.S.C. §§ 1601 *et seq.* (2012); 38 U.S.C. § 4311 (2012).

¹⁸⁵ *Peatros*, 990 P.2d at 549–50.

¹⁸⁶ See, e.g., 42 U.S.C. § 2000e-7; *California Fed. Savings and Loan Ass’n v. Guerra*, 479 U.S. 272, 288 (1964) (Title VII “assert[s] the intention of Congress to preserve existing civil rights laws.” (quoting 110 CONG. REC. 2788 (1964) (statement of Rep. Meader))).

¹⁸⁷ See *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ *Id.*; see also 42 U.S.C. § 2000e-7 (“Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.”).

¹⁹¹ *English v. Gen. Elec. Co.*, 496 U.S. 72, 89 (1990).

¹⁹² The “double saving clause” argument, that the “at-pleasure” provision does not preempt federal anti-discrimination law, and federal anti-discrimination law does not preempt state anti-discrimination laws, has been described a simplistic. See *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983). For example, Title VII does not transform state laws into federal laws that are saved from preemption. See *id.* Furthermore, because Title VII’s saving clause applies to all state laws with which it is not in conflict, and since many federal laws contain non-preemption provisions, the double saving clause argument, taken to its logical extreme would save almost all state laws

Thus, as observed by the Fourth, Sixth, and Eleventh Circuits, the “at-pleasure” provisions preempt *any* state anti-discrimination law that contradicts them.¹⁹³ Courts should not “rewrite the statute to reflect a meaning” they “deem more desirable.”¹⁹⁴ Under the retail approach, courts fail to “give full effect to . . . state laws [by] picking and choosing which parts of them may apply,”¹⁹⁵ and consequently, courts replace any “absence of legislative intent” with their own.¹⁹⁶ In *Fasano v. Federal Reserve Board of New York*,¹⁹⁷ the Third Circuit demonstrated the problems with such an approach:

For example . . . the [state law] does not require exhaustion of administrative remedies; a plaintiff elects whether to proceed in the administrative arena, or in court, but a final decision in either forum is binding and renders the other forum unavailable. Were we to graft the [Americans with Disabilities Act]’s exhaustion requirement onto the [state law], we would transform formerly final, binding administrative determinations into non-binding preliminaries to litigation. We will not step on the toes of the New Jersey legislature in this or any other like manner.¹⁹⁸

Not only does *Kroske*’s reasoning step on the toes of state legislatures, it also disregards Congress’ intent—whatever it was—when enacting the National Bank Act’s “at-pleasure” provision, and its intent when enacting subsequent Bank Acts that purposely and deliberately borrowed that same language.¹⁹⁹ Instead, by looking to the ordinary meaning, courts can avoid “rewriting” state laws “to parrot Federal anti-discrimination law” as occurs under the retail approach.²⁰⁰ Such reasoning is not only faithful to the plain language, but also to Title VII and other federal anti-discrimination laws, impliedly repealing the Bank Acts only to the extent necessary to give effect to those laws, and no further.

from pre-emption. *Id.*

¹⁹³ See *Crowe v. Fed. Reserve Bank of St. Louis*, No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427, at *5 (E.D. Mo. Jan. 20, 2009) (“If preemption only applied to state laws that directly contradict federal laws, federal laws could be effectively nullified by state laws prohibiting those acts that are incident to, but not specifically authorized, by federal law.”) (internal quotations marks omitted).

¹⁹⁴ *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008).

¹⁹⁵ 457 F.3d 274, 290 (3d Cir. 2006).

¹⁹⁶ See *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 987–88 (9th Cir. 2005).

¹⁹⁷ See generally *Fasano*, 457 F.3d 274.

¹⁹⁸ *Id.*

¹⁹⁹ See H.R. REP. NO. 63-69 (1913) (stating the purpose of the Federal Reserve Act’s “at-pleasure” provision is the same as that of the National Bank Act).

²⁰⁰ *Evans v. Fed. Reserve Bank of Phila.*, No. 03-4975, 2004 U.S. Dist. LEXIS 13265, at *21 (E.D. Pa. July 8, 2004).

Moreover, the total preemption approach allows for the efficient administration and governance of qualifying banks because anti-discrimination laws are then applied to them uniformly across the country.²⁰¹ Conferring qualifying personnel different rights and remedies “would frustrate the ability of the national banks to make crucial employment decisions, ultimately undermining confidence in the national banking system.”²⁰² While Congress’ original intent for including the “at-pleasure” provision is unknown and relies on speculation, this efficiency argument furthers the purpose of the National Bank Act, and subsequent acts, as a whole by giving full effect to the language employed by Congress.

Adopting this approach—that the Bank Acts preempt all state laws prohibiting the at-will dismissal of qualifying personnel—still demands congressional action. Although Title VII affords plaintiffs alleging sex discrimination a meaningful remedy, Congress should narrow the “at-pleasure” provisions’ scope. In the era of #MeToo and other anti-discriminatory movements, it would be wise to eliminate barriers to pursuing sex discrimination claims. Congress should proceed cautiously, however, as undesirable consequences may accompany such duplicative claims. For example, allowing for state law remedies to discrimination may “dissuade[] employers from executing lawful and economically necessary terminations” because such terminations might be characterized as discriminatory “and could subject employers to more time-intensive and expensive litigation.”²⁰³ The Third Circuit’s approach, articulated in *Fasano v. Federal Reserve Bank of New York*,²⁰⁴ avoids such problems because entities governed by the Bank Acts, while subject to both state and federal anti-discrimination law, are subject to only one set of claims: those arising under federal anti-discrimination law and state anti-discrimination law to the extent that the state law “exactly match[es]” the federal law.²⁰⁵ By adopting this approach, Congress would neither unknowingly disturb any of the alleged purposes of the Bank Acts’ “at-pleasure” provisions, nor would Congress fail to give state laws their full effect by allowing courts to pick and choose which various provisions of state laws to apply.²⁰⁶ This remains faithful to

Congress’ purpose for including the “at-pleasure” provisions in the Bank Acts, while effectuating the purposes of state anti-discrimination

²⁰¹ See *Peatros v. Bank of Am.*, 990 P.2d 539, 562 (Cal. 2000) (Brown, J., dissenting).

²⁰² *Id.*

²⁰³ Katherine R. Morelli, Note, *A Misguided Reversal: Why the Okla. Supreme Court Should Not Have Interpreted Saint v. Data Exchange, Inc. to Provide a Burk Tort Cause of Action to Plaintiffs Alleging Age Discrimination in Employment*, 62 OKLA. L. REV. 329, 352 (Winter 2010).

²⁰⁴ 457 F.3d 274 (3d Cir. 2006).

²⁰⁵ *Id.* at 290.

²⁰⁶ See *id.*

laws to the extent that they are consistent with federal law. Such an approach bolsters anti-discrimination protections by expanding the number of options²⁰⁷ available to those harmed while protecting Congress' purpose for including the "at-pleasure" provisions in the Bank Acts and without butchering the intent of state legislatures.

VII. CONCLUSION

The Fourth, Sixth, and Ninth Circuits adopt the correct reading and application of the Bank Acts' "at-pleasure" provisions.²⁰⁸ Their approach is not only true to the plain meaning of the provisions' words, but also to Congress' purpose for including the provisions in the acts—whatever that purpose may be.²⁰⁹ Moreover, their approach respects legislative intent by giving full effect to state laws without picking and choosing which portions of those laws should apply.

But in the #MeToo era, Congress need not settle for this interpretation. Instead, Congress can remain faithful to both federal and state legislative intent while strengthening anti-discrimination regulations. To do so, Congress should adopt the Third Circuit's wholesale preemption approach,²¹⁰ providing that the Bank Acts do not preempt state anti-discrimination laws to the extent that the state laws "exactly match" federal laws.²¹¹ Such an approach does not remove the "at-pleasure" provisions from law, leaving them to serve whatever purpose they may. And in preserving the provisions, it bolsters plaintiffs' ability to seek anti-discrimination relief by providing them with matching state law options to pursue. Consequently, the Third Circuit's approach increasingly deters qualifying banks from engaging in discrimination while respecting the "at-pleasure" provisions' purpose.

²⁰⁷ Such as bringing state law claims in state court.

²⁰⁸ See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015); *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285 (4th Cir. 2008); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987).

²⁰⁹ See *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013) (finding "at-pleasure" provision is not mentioned in any congressional records).

²¹⁰ See *Fasano*, 457 F.3d at 290.

²¹¹ *Id.*