No. 18-212

In the Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DONALD M. LUSNAK, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI *TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

JEREMY R. NEWELL
GREGG L. ROZANSKY
THE BANK POLICY INSTITUTE
600 13th Street N.W.
Suite 400
Washington, D.C. 20005
(202) 289-4322

H. RODGIN COHEN
MICHAEL M. WISEMAN
MATTHEW A. SCHWARTZ
Counsel of Record
MONTAE LANGSTON
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
schwartzmatthew@sullcrom.com

(*Additional counsel listed on inside cover*)

THOMAS PINDER
AMERICAN BANKERS
ASSOCIATION
1120 Connecticut Avenue
N.W.
Washington, D.C. 20036
(202) 663-5000

STEVEN I. ZEISEL
CONSUMER BANKERS
ASSOCIATION
1225 Eye Street, N.W.
Suite 550
Washington, D.C. 20005
(202) 552-6380

STEVEN P. LEHOTSKY
DARYL JOSEFFER
U.S. CHAMBER LITIGATION
CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JUSTIN WISEMAN
HELEN KANOVSKY
MORTGAGE BANKERS
ASSOCIATION
1919 M Street N.W.
5th Floor
Washington, D.C. 20036
(202) 557-2700

TABLE OF CONTENTS

Page

Statement of Interest of *Amici Curiae* 1

Summary of Argument 4

Reasons for Granting The Petition 8

I. The Ninth Circuit's Holding that California's Escrow Law Does Not Constitute "Significant Interference" with National Bank Powers Conflicts with This Court's Precedents on an Important National Issue 8

A. The Ninth Circuit's Decision Authorizes States to "Significantly Interfere" with the Ability of National Banks to Manage Credit Risks 9

B. The Ninth Circuit's Decision Risks Turning the National Banking System into a Fifty-State Banking System 15

II. The Ninth Circuit's Holding that the TILA Amendment Expresses Congress's Intent to Overcome NBA Preemption Also Conflicts with This Court's Precedents 17

Conclusion 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Barnett Bank of Marion Cty., N.A. v. *Nelson*,
517 U.S. 25 (1996)....................................*passim*

Davis v. *Elmira Sav. Bank*,
161 U.S. 275 (1896)..5, 6

Easton v. *Iowa*,
188 U.S. 220 (1903)..5

Farmers' & Mechs.' Nat'l Bank v. *Dearing*,
91 U.S. 29 (1875)..5

Franklin Nat'l Bank of Franklin Square v. *New York*,
347 U.S. 373 (1954)..................................4, 6, 12

Lusnak v. *Bank of Am., N.A.*,
883 F.3d 1185 (9th Cir. 2018) ....*passim*

Metrobank v. *Foster*,
193 F. Supp. 2d 1156 (S.D. Iowa 2002)...........13

McCulloch v. *Maryland*,
17 U.S. 316 (1819)..13

Monroe Retail, Inc. v. *RBS Citizens, N.A.*,
589 F.3d 274 (6th Cir. 2009) 6, 13

NNDJ, Inc. v. *Nat'l City Bank*,
540 F. Supp. 2d 851 (E.D. Mich. 2008) 13

Powell v. *Huntington Nat'l Bank*,
226 F. Supp. 3d 625 (S.D. W. Va. 2016)..........13

Pereira v. Regions Bank,
918 F. Supp. 2d 1275 (M.D. Fla. 2013) 13

SPGGC, LLC v. *Ayotte*,
488 F.3d 525 (1st Cir. 2007) 12, 13

Talbott v. *Bd. of Comm'rs of Silver Bow Cty.*,
139 U.S. 438 (1891)..16

Tiffany v. *Nat'l Bank of Missouri*,
85 U.S. 409 (1873)...5

United States v. *Locke*,
529 U.S. 89 (2000)......................................19, 20

Watters v. *Wachovia Bank, N.A.*,
550 U.S. 1 (2007)......................................*passim*

Statutes:

National Bank Act, 12 U.S.C.
§ 24 9
§ 25b 20

Federal Reserve Act, 12 U.S.C. § 371 9

Truth in Lending Act, 15 U.S.C. § 1639d 18

Act of June 3, 1864, 13 Stat. 99 (1864).............5, 9

Dodd-Frank Wall Street Reform and Consumer
Protection Act, Pub. L. No. 111-203,
124 Stat. 1376 (2010)...................................5, 20

Cal. Civ. Code § 2954.8 ....*passim*

Conn. Gen. Stat. § 49-2a 16

Iowa Code § 524.905..16

Minn. Stat. § 47.20 16

Or. Rev. Stat. § 86.245 16

Vt. St. tit. 8, § 10404..16

Wis. Stat. § 138.051...16

Other Authorities:

12 C.F.R. § 34.4 ....8, 9

Applicable, Webster's Third New International Dictionary (2002) 18

Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) 8, 10, 16

Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* (1998) 10

FHFA & CFPB, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* (2018) 11

OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. 54,319 (Dec. 2, 1983) 14

OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549 (July 21, 2011) 14, 15

U.S. General Accounting Office, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* (1973) 10, 11

Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits (less than $100,000)* 12

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Bank Policy Institute ("BPI"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), the Chamber of Commerce of the United States of America ("Chamber"), and the Mortgage Bankers Association ("MBA"; collectively, "*Amici*") respectfully submit this brief as *Amici* in support of the petition of Petitioner, Bank of America, N.A., for a writ of *certiorari*.[1]

BPI. The BPI is a nonpartisan public policy, research, and advocacy group, and the successor to the Clearing House Association and the Financial Services Roundtable after their merger in 2018. Members of the BPI include universal banks, regional banks, and major foreign banks doing business in the United States. The BPI members employ nearly two million Americans and make 72% of all loans and nearly half of the nation's small business loans.

ABA. Established in 1875, the ABA is the united voice of America's hometown bankers—small, regional, and large banks that together employ more than two million women and men,

[1] Pursuant to Rule 37.6 of this Court, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties received timely notice of the intent to file this brief under Rule 37.2(a), and all parties have consented to the filing.

hold nearly $17 trillion in assets, safeguard $13 trillion in deposits, and extended more than $9 trillion in loans.

CBA. Founded in 1919, the CBA is the trade association for today's leaders in retail banking—banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets.

Chamber. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry, and from every region of the country.

MBA. The MBA represents over 2,200 member companies in the real estate finance industry, including in the residential, commercial, and multi-family arenas.

This Petition concerns an issue that is critical to the United States' financial system, and thus to *Amici*'s members. In contravention of this Court's precedent and more than a century of regulatory interpretation, the Ninth Circuit held that a State may regulate the prices of a national bank's products and services. Specifically, the Ninth Circuit held that a State may require national banks to pay interest on products called mortgage escrow accounts. Mortgage escrow accounts are crucial tools that lenders, including national banks use to facilitate millions of home loans across the United States. In these accounts—

which lenders require for the vast majority of new home mortgages—borrowers keep sufficient funds to make their tax and insurance payments on the property. These payments are needed to ensure that (i) lenders do not lose all or part of the value of their security interest in a foreclosed-upon property due to various governmental entities' claims for taxes, and (ii) lenders do not encounter unreimbursed loss in the value of the collateral property in case of damage to the property. Borrowers also benefit from these accounts, as without them, lenders would face substantially increased risks on mortgage lending, and could be forced either to (i) require higher down payments and higher mortgage interest rates, or (ii) simply not make loans to certain borrowers with riskier credit profiles. Because of the ubiquity of mortgage escrow accounts, national banks alone hold billions of dollars in them.

The Ninth Circuit's decision (i) exposes national banks to substantial and non-uniform State requirements in the conduct of mortgage lending—a fundamental banking power, and (ii) substantially interferes with the ability of many of *Amici*'s members to conduct the business of banking in a safe and sound manner under a national regulatory system. The Ninth Circuit's decision also sets a dangerous precedent that could allow not only California, but other States as well, to regulate the prices and terms of other national bank products and services.

Accordingly, the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R.

10(c). *Amici* respectfully request that this Court grant the Petition and reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The Ninth Circuit overrode a bedrock rule of law that had been established and reaffirmed in multiple cases by this Court: the National Bank Act of 1864 ("NBA") preempts States from regulating the terms of national banks' products and services. *See*, *e.g.*, *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 376, 379 (1954). Contrary to this Court's well-established precedent that States may not significantly interfere with national banks' powers, *Barnett Bank of Marion Cty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996), the Ninth Circuit held that California Civil Code § 2954.8, which requires lenders to pay a designated rate of annual interest on all mortgage escrow accounts, is not preempted by the NBA. Remarkably, the Ninth Circuit held that the law is simply a "[m]inor interference with federal objectives," *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185, 1194 (9th Cir. 2018), without meaningfully analyzing the most relevant precedent or the importance of national banks' ability to set terms for their products and services in general, or for mortgage escrow accounts in particular.

The Ninth Circuit's decision reflects a misunderstanding of the criticality of a national bank's ability to set terms and conditions of products and services without State regulation, the importance mortgage escrow accounts hold in the U.S. lending system, the relevant decisions of

this Court, and the history and goals of the NBA. Consequently, under this Court's Rule 10(c), review is well warranted. Importantly, granting the Petition would give this Court its first opportunity to speak on NBA preemption since this Court's *Barnett* standard was codified into statutory law through the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

Congress enacted the NBA in 1864 so that federal law—rather than "the hazard of unfriendly legislation by the States"—would govern national banks. *Tiffany* v. *Nat'l Bank of Missouri*, 85 U.S. 409, 413 (1873); *see also Easton* v. *Iowa*, 188 U.S. 220, 231-32 (1903) ("[W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation."). At the foundation of the national banking system, Congress established that national banks would operate under the "paramount authority" of the federal government, *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and be supervised by the Office of the Comptroller of the Currency ("OCC"), *see* Act of June 3, 1864, § 8, 13 Stat. 99, 101 (1864).

Soon after Congress enacted the NBA, this Court began defining the broad parameters of the NBA preemption doctrine, holding consistently that State attempts to "control" the powers of national banks are impermissible, "except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). For well over a century, decisions of this

Court and various federal courts of appeals have recognized that "[n]ational banks are instrumentalities of the federal government," *Davis*, 161 U.S. at 283, and that States "may not curtail or hinder a national bank's efficient exercise" of its powers "under the NBA," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007). Thus, for example, "[i]n the years since the NBA's enactment," this Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

Under the landmark *Barnett* case, this Court set out a standard preempting any State regulation that "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers." 517 U.S. at 33. And *Barnett*'s threshold "is not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009). In *Barnett*, this Court repeatedly cited *Franklin*, "a case quite similar to this one," as the appropriate standard. *See Barnett*, 517 U.S. at 33. In *Franklin*, this Court held that a State law limiting how a particular national bank power could be advertised—something far less impactful than a State law regulating a national bank's pricing of its products—was preempted. 347 U.S. at 374.[2]

[2] The Ninth Circuit did not mention *Franklin*, but rather relied on *Wyeth* v. *Levine*, 555 U.S. 555 (2009), a non-NBA preemption case where there was no federal law expressly preempting the state law.

California Civil Code § 2954.8 is a perfect example of the type of State interference with national bank powers that the NBA has always preempted. The California-mandated 2% rate—which is well above current market rates—constitutes a significant interference with national banks' use of mortgage escrow accounts. Such accounts collectively hold billions of dollars and are key tools used by national banks to manage their credit risk on millions of mortgages across the United States. If national banks were forced to pay interest on escrow accounts, much less an above-market rate of interest, they would need to balance this requirement by charging higher rates on mortgages or reducing the availability of mortgages to riskier credit borrowers. Moreover, national banks would be subjected to differing escrow rate requirements from different States, thus defeating the NBA's purpose of a national regulatory structure for national banks.

Given the conflict between the decision below with this Court's precedents and the substantial implications the decision below has for the national banking system, review by this Court is warranted.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING THAT CALIFORNIA'S ESCROW LAW DOES NOT CONSTITUTE "SIGNIFICANT INTERFERENCE" WITH NATIONAL BANK POWERS CONFLICTS WITH THIS COURT'S PRECEDENTS ON AN IMPORTANT NATIONAL ISSUE.

In holding that California Civil Code § 2954.8(a) is not preempted by the NBA because it does not "significantly interfere" with national banking powers, the Ninth Circuit disregarded this Court's precedents, and reached a conclusion that misunderstands the importance of pricing generally and the basic features of mortgage escrow accounts in particular. *See Lusnak*, 883 F.3d at 1194. The Ninth Circuit's decision also rejected the regulations of the OCC, which, after notice and comment, correctly concluded that State laws "concerning . . . [e]scrow accounts" in the context of real estate loans, 12 C.F.R § 34.4(a)(6), significantly interfere with national banks' ability to manage their credit risks, thus striking at the core of their ability to manage their banking business. *See* OCC, *Bank Activities and Operations: Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1911 (Jan. 13, 2004) (promulgating 12 C.F.R. § 34.4(a)); *see also*, *e.g.*, *Watters*, 550 U.S. at 13 (citing the same OCC

regulation, 12 C.F.R. § 34.4, as "identifying preempted state controls on mortgage lending").[3]

A. The Ninth Circuit's Decision Authorizes States to "Significantly Interfere" with the Ability of National Banks to Manage Credit Risks.

In reversing the district court, the Ninth Circuit erred in concluding that California Civil Code § 2954.8(a) does not "prevent or significantly interfere" with national bank powers under the preemption standard of *Barnett*. *See Lusnak*, 883 F.3d at 1194-95.

First, there is no doubt that the establishment of mortgage escrow accounts is a power of national banks that is entitled to the NBA's preemptive protection. From the NBA's inception, a national bank's powers have extended not only to core banking functions—such as "mak[ing], arrang[ing], purchas[ing] or sell[ing] loans or extensions of credit secured by liens on interests in real estate . . .," 12 U.S.C. § 371(a)—but also to "all such incidental powers as shall be necessary to carry on the business of banking," Act of June 3, 1864, § 8, 13 Stat. at 101 (codified as amended at 12 U.S.C. § 24(Seventh)). This Court has specifically recognized that "[t]he NBA authorizes national banks to engage in mortgage lending,"

---

[3] *Amici* do not address the Ninth Circuit's holding that the OCC's interpretation of *Barnett* is not entitled to deference, because California Civil Code § 2954.8 should be preempted under the clear language of *Barnett*.

Watters, 550 U.S. at 12,[4] and the OCC has made clear that the NBA protects the power to use escrow accounts in connection with real estate lending and to do so "without regard to state law limitations concerning [such accounts]," OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1916.

Second, contrary to the Ninth Circuit's unsupported determination, there is nothing "minor" under *Barnett* about State interference with mortgage lending in general and mortgage escrow accounts in particular. Modern-day mortgage escrow accounts arose from the experience of the Great Depression, when homes were foreclosed upon due to homeowners' "inability to pay property taxes." U.S. General Accounting Office, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Because a tax lien could be senior to a mortgage lien, a bank stood to lose all or part of the value of its security interest in a foreclosed-upon property because any proceeds from the sale could go first to paying back taxes. *See* Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). Moreover, if insurance premiums were not paid

---

[4] This Court has also recognized that States may not "significantly burden" the exercise of "any other power, incidental or enumerated under the NBA." *Watters*, 550 U.S. at 12-13. Although the use of mortgage escrow accounts in lending is a core power of national banks, even if it were not, it would certainly be a power incidental to lending.

and a catastrophic loss occurred, the resultant loss of insurance coverage could seriously jeopardize the value of the collateral. GAO Study at 5. Mortgage escrow accounts allowed lenders to reduce this risk by ensuring "that tax, insurance, and other obligations [were] met[,] and thus enabl[ing] them to protect their investments." *Id.* In doing so, national banks were (and are) able to (i) make mortgage loans to borrowers with riskier credit profiles, (ii) help borrowers manage their money to stay current with their tax and insurance payments, and (iii) manage their own credit risks. *See id.*

Today, mortgage escrow accounts are crucial to the home mortgage system: in 2016 alone, nearly six million mortgage originations—approximately 79% of the total—"included an escrow account for taxes or homeowner insurance." *See* FHFA & CFPB, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 1, 27, 30 (2018). And the sums are considerable: national banks hold billions of dollars in mortgage escrow balances. If the use of these accounts were undermined by subjecting them to State-law price or other controls, national banks would have diminished means to mitigate the credit risks associated with mortgage lending, with substantial consequences—*e.g.*, reduced availability of credit or higher interest rates. In other words, subjecting mortgage escrow accounts to State-law restrictions would significantly interfere with national banks' ability "'to carry on the business of banking.'" *Watters*, 550 U.S. at 6 (quoting 12 U.S.C. § 24(Seventh)).

Third, California's attempt to regulate a national bank's pricing for a product that is key to that bank's core banking powers is exactly the type of law the NBA was designed to preempt. The Ninth Circuit's conclusion that a 2% rate on these accounts—a rate six times higher than the long-run average of .32% paid by FDIC-insured U.S. depository institutions on certificates of deposit[5]—is only a "minor interference," and therefore permissible under *Barnett*, is erroneous. As an initial matter, any attempt by a State to set prices, or other terms and conditions for national bank products and services, is invalid *per se*. In this respect, the Ninth Circuit's decision misconstrues the meaning of "significantly interfere" under *Barnett*. It is inconsistent with decisions of this Court, and lower courts applying this Court's NBA precedents, that State efforts to regulate the terms of national banks' products and services are preempted under the NBA. *See*, *e.g.*, *Franklin*, 347 U.S. at 378-79; *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (State statute regulating national banks' ability to charge non-account holder check cashing fees preempted by NBA); *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (gift card

---

[5] *See*, *e.g.*, Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits (less than $100,000): 12 Month CD*, available at https://fred.stlouisfed.org/series/CD12NRNJ (showing average national rate paid on 12-month non-jumbo certificates of deposit (less than $100,000) from 2010 to September 10, 2018 as 0.32%) (last accessed Sept. 14, 2018).

expiration dates and fees); *Monroe Retail, Inc.*, 589 F.3d 274 (account service fees).[6]

This long-established precedent recognizes that there are two principal forms of "significant interference" on national bank powers. The first is a State's direct attempt to limit or even prevent the exercise of the powers granted to national banks under the NBA. The second, as seen here, is a State's indirect, but no less intrusive, attempt to limit or even prevent the exercise of those powers by regulating the rates charged for a bank's products and services. Just as "[a] right to tax, without limit or control, is essentially a power to destroy," *McCulloch* v. *Maryland*, 17 U.S. 316, 391 (1819), the power to set rates is a power to make a product or service less profitable, unprofitable, less effective, or ineffective, and thus, potentially, nonviable.

Otherwise federal courts would be placed in the impossible position of being continuous evaluators of whether certain rates that States sought to impose on national banks crossed the line from insignificant to significant interferences with national bank powers. Although a required interest rate such as California's that is six times

---

[6] *See also Powell* v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D. W. Va. 2016) (payments ordering and late fees); *Pereira* v. *Regions Bank*, 918 F. Supp. 2d 1275 (M.D. Fla. 2013), *aff'd*, 752 F.3d 1354 (11th Cir. 2014) (check cashing fees and settlement); *NNDJ, Inc.* v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-account holder official check cashing fees); *Metrobank* v. *Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (non-account holder ATM fees).

higher than the long-run average of .32% paid by FDIC-insured U.S. depository institutions on certificates of deposit is clearly significant interference, what if the requisite rate were only twice or 1.25 times? This is not the type of analysis that Congress intended when it enacted the NBA or for which the judiciary is well equipped.

Finally, the Ninth Circuit's holding establishes a dangerously broad, indeed unlimited, precedent: If a State can establish a minimum interest rate on mortgage escrow accounts, then why could it not establish a minimum rate on deposit accounts and minimum rates (or prohibit any charges) for all bank products and services?

Put simply, allowing States to force national banks to pay interest on mortgage escrow accounts—much less forcing them to pay fixed, above market, rates—necessarily interferes with the flexibility national banks need not only to offer products and services, but also to "manage credit risk exposures." *See* OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011). "[T]he safety and soundness of banks depends in significant part on their ability to devise [means] appropriate for their needs." OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. 54,319, 54,319 (Dec. 2, 1983). These means include mechanisms, such as escrow accounts, which help prevent or minimize losses that could threaten a bank's safety and soundness.

By limiting national banks' ability to devise mortgage escrow account policies that are "appropriate for their needs," the Ninth Circuit's decision undermines national banks' ability to manage credit risks, and could force national banks to seek other options, such as charging higher interest rates on mortgages or not making certain mortgages in the first place.

Indeed, the OCC has aptly warned that "state laws that would affect the ability of national banks to underwrite and mitigate credit risk . . . such as laws concerning . . . escrow standards . . . would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks." OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. at 43,557.

B. The Ninth Circuit's Decision Risks Turning the National Banking System into a Fifty-State Banking System.

Contrary to this Court's precedents, the Ninth Circuit's decision also permits significant interference with national bank powers by subjecting national banks to a patchwork of different States' mortgage escrow interest rates. This Court's decisions have "made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. Yet the Ninth Circuit's decision would do the very opposite by exposing banks to mortgage escrow laws as to

pricing and others terms, as each of the fifty States may choose to assert them.

For example, other States have established different rates for mortgage escrow accounts that, if applied to national banks, would force national banks to pay inconsistent rates to borrowers depending on their State of residence. *See*, *e.g.*, Conn. Gen. Stat. § 49-2a ("not less than the deposit index"); Minn. Stat. § 47.20, subd. 9 (3% minimum interest rate); Wis. Stat. § 138.051(5) (5.25% minimum interest rate).[7] As the OCC has recognized, "[t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with [national banks'] ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure." OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908.[8]

---

[7] *See also* Iowa Code § 524.905(2) ("rate the bank pays to depositors of funds in ordinary savings accounts"); Or. Rev. Stat. § 86.245(2) ("at a rate not less than the discount rate); Vt. St. tit. 8, § 10404(b) ("regular savings accounts").

[8] *See also Talbott* v. *Bd. of Comm'rs of Silver Bow Cty.*, 139 U.S. 438, 443 (1891) (describing the national banking system as having "uniform and universal operation through the entire territorial limits of the country").

II. THE NINTH CIRCUIT'S HOLDING THAT THE TILA AMENDMENT EXPRESSES CONGRESS'S INTENT TO OVERCOME NBA PREEMPTION ALSO CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Ninth Circuit also held that, even though the Dodd-Frank Act amendment to the Truth in Lending Act ("TILA") did not apply retroactively to the Respondent's 2008 loan, the amendment expressed congressional intent to overcome NBA preemption as to mortgage escrow account rates. But the amendment refers only to "applicable State or Federal law," and the question here is whether a State law is applicable to national (as opposed to, say, state) banks or instead is preempted. As a result, the Ninth Circuit's reasoning is circular. It is also in conflict with *Barnett* and basic tenets of preemption law.

As *Barnett* makes clear, overriding congressional intent of NBA preemption is strongly disfavored: "[W]here Congress has not *expressly* conditioned the grant of [a national bank] 'power' upon a grant of state permission," courts will ordinarily find that "no such condition applies." *Barnett*, 517 U.S. at 34 (emphasis added). The history of the NBA "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32.

The Ninth Circuit erred by holding that the amendment to TILA—which made no "express"

mention of national banks or preemption—nonetheless demonstrated Congress's intent to override preemption and allow States to force national banks to pay certain interest rates on mortgage escrow accounts. *Lusnak*, 883 F.3d at 1194-96. Even without *Barnett*'s requirement of a clear congressional intent to override NBA preemption, the language of the statute and basic principles of statutory interpretation preclude that result. The amendment to TILA reads as follows:

> Applicability of payment of interest. If prescribed by *applicable* State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that *applicable* State or Federal law.

15 U.S.C. § 1693d(g)(3) (emphases added).

First, "applicable" means "capable of being applied" or "having relevance." Webster's Third New International Dictionary (2002). For all the reasons discussed above, the law that is "applicable" to national banks' use of mortgage escrow accounts is the NBA and other *federal* laws and regulations, not State law. Section 1639d applies to a wide array of lender types. Thus, the word "applicable" accounts for the fact that State escrow account laws apply to some institutions but not to federally chartered depository institutions, such as national banks. And under current federal law, a national bank has the flexibility to decide whether to pay interest or not (and the rate

of interest) on any escrow account. Indeed, Congress's use of the disjunctive "or" in the phrase "State or Federal law" reinforces the understanding that State law does not always apply.

Second, and relatedly, the Ninth Circuit's interpretation of "applicable" as referring "to state escrow interest laws where they exist," *Lusnak*, 883 F.3d at 1195, violates a cardinal rule of statutory interpretation by rendering the term "applicable" superfluous. *See Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" (internal quotation marks omitted)).

The Ninth Circuit asserted that Congress included the term "applicable" in the TILA amendment "because not every state has escrow laws." *Lusnak*, 883 F.3d at 1195. But § 1693d(g)(3) separately addresses that point by requiring payment "[i]f prescribed by applicable" law. The Ninth Circuit's reading thus deprives "applicable" of any independent meaning in the statute.

Third, there is no reason to think that, by referring to "applicable State or Federal law," Congress intended to override the preemptive protection of the NBA and subject national banks to State, rather than federal, law as to mortgage escrow accounts. "We think it quite unlikely that Congress would use a means so indirect . . . to upset the settled division of authority [between federal and State law]." *United States* v. *Locke*,

529 U.S. 89, 106 (2000). Indeed, Congress knew very well when drafting the Dodd-Frank Act how to expressly address and limit the scope of preemption when it wanted to do so. *See*, *e.g.*, Dodd-Frank Act, § 5136C, 124 Stat. at 2016-17 (codified at 12 U.S.C. § 25b(h)(2)) (providing that State law is not preempted as to subsidiaries of national banks that are not themselves national banks).

Fourth, in a footnote, the Ninth Circuit tacitly acknowledged its strained reading of the TILA amendment when it noted that State laws that impose "punitively high rates banks must pay on escrow balances" may be preempted under the NBA, because they "may prevent or significantly interfere with a bank's ability to engage in the business of banking." *Lusnak*, 883 F.3d at 1195 n.7. Either the TILA amendment overrode the Federal preemption in the NBA or it did not. As a matter of common usage, a law's *applicability* does not depend on an analysis of its effect. With no textual support, the Ninth Circuit effectively replaced the settled standard for preemption (significant inteference) with a new, novel standard (punitively high). Nothing in the amendment can be read as affording courts the *ad hoc* power to determine when there is an override based on the percentage interest on mortgage escrow accounts required by State law—something Congress never specified in the amendment.

Moreover, it is inconceivable that Congress intended for federal courts to be in the business of deciding, on an ongoing basis—and, presumably, depending on the then-current level of interest

rates—when a statutory rate is "punitively high" and when it is not. *See infra* Part I.A. For example, is California's 2% minimum rate "punitively high" when it is substantially higher than the current market rate paid on deposit accounts and over six times the average 0.32% rate for one-year (non-jumbo) certificates of deposit during the 2010-2018 period?[9] What about Minnesota's 3% minimum rate, which is nine times the deposit average?

CONCLUSION

The Petition presents an important federal question with broad consequences—whether national banks are subject to State laws establishing rates, terms, and conditions on national bank products and services. The answer the Ninth Circuit reached is in fundamental conflict with this Court's precedent and undermines the national banking system. Moreover, the Ninth Circuit's decision resolves this question in a way that creates risk to the safety and soundness of the national banking system. Accordingly, this Court should grant the Petition and reverse, reaffirming the basic principle that States cannot regulate the terms of a national bank's products or services.

Respectfully submitted.

---

[9] *See supra* note 5.

JEREMY R. NEWELL
GREGG L. ROZANSKY
THE BANK POLICY
INSTITUTE
600 13th Street N.W.
Suite 400
Washington, D.C. 20005
(202) 289-4322

THOMAS PINDER
AMERICAN BANKERS
ASSOCIATION
1120 Connecticut Avenue
N.W.
Washington, D.C. 20036
(202) 663-5000

STEVEN I. ZEISEL
CONSUMER BANKERS
ASSOCIATION
1225 Eye Street, N.W.
Suite 550
Washington, D.C. 20005
(202) 552-6380

STEVEN P. LEHOTSKY
DARYL JOSEFFER
U.S. CHAMBER LITIGATION
CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JUSTIN WISEMAN
HELEN KANOVSKY
MORTGAGE BANKERS
ASSOCIATION
1919 M Street N.W.
5th Floor
Washington, D.C. 20036
(202) 557-2700

H. RODGIN COHEN
MICHAEL M. WISEMAN
MATTHEW A. SCHWARTZ
Counsel of Record
MONTAE LANGSTON
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
schwartzmatthew@sullcrom.com

Attorneys for Amici Curiae