No. 18-212

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DONALD M. LUSNAK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Do regulations of the Office of Controller of the Currency ("OCC") that preexist the financial collapse of 2008 override new congressional mandates under the Dodd-Frank Wall Street Reform and Consumer Protection Act?

Did the Court of Appeals correctly conclude that the OCC lacks the power to field preempt state bank regulations that "condition" the activities of national banks when this Court established a standard preempting only state regulations that "significantly interfere" with national banks' operations and Congress then expressly codified that standard?

Did the Court of Appeals correctly conclude that the OCC is entitled to at most *Skidmore* deference to its preemption determinations?

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INTRODUCTION

Like a production of Hamlet without the Prince, there is a telling void at the heart of the Petition. In this case of statutory interpretation, Petitioner and its Amici studiously avoid engaging with the controlling statutory framework. Missing in the Petition's account of a well-settled pattern of regulatory autonomy on the part of the Office of Controller of the Currency ("the OCC") over issues of preemption is any attempt to address seriously what Congress did to redress the cataclysmic events of 2008 that rocked this country's economic foundations down to the studs.

In response to the financial meltdown, Congress passed a new statutory framework, known colloquially as Dodd-Frank,[1] that expressly cabined the preemptive reach of the National Bank Act, expressly codified the limited level of deference owed to the OCC, and expressly invited state regulation as an integral part of bank oversight. Most critically, Congress stated that any action taken by the OCC to thwart state regulation required express administrative findings justifying preemption and that those findings were subject to non-deferential judicial review.

In turn, and on the very date Dodd-Frank took effect, the OCC decided to override Congress by reaffirming, on a wholesale basis, its entire pre-2008 regulatory regime. It did so in defiance of Congress's mandate that all decisions purporting to preempt state laws be subject to evidentiary proof and justification. Such administrative arrogation of power violates the legislative supremacy at the inviolate core of

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 53, *et seq.*) ("Dodd-Frank").

administrative law. The Petition does not purport to identify a contemporary Circuit conflict or any other legal support for the unsustainable proposition that Congress's post-2008 regulatory interventions could be ignored in favor of business as usual at the OCC. Instead, the Petition asks this Court to override Congress and restore the OCC regulations from 2004 that Congress thoroughly overhauled.

It is hard to imagine a more unattractive case for the proposition that the OCC could invoke its past practices to override Congress. At issue in this case is a consumer mortgage originally issued in 2008 by Countrywide, the poster child for the mortgage securitization catastrophe. That mortgage then passed over to Bank of America when Countrywide collapsed in the opening salvo of the 2008 bank meltdown. Now Bank of America has the audacity to claim that the regulatory environment controlling Countrywide's practices prior to 2008 should continue to control unabated, despite Congress's determination in Dodd-Frank to rein in such financial irresponsibility.

There has been no trial here, no evidence presented, just a barely disguised claim that regulatory fiat trumps express statutory language. No court has ever endorsed this view, there is no Circuit conflict, and the Ninth Circuit's decision rejecting it is manifestly correct. There is no basis for certiorari review of the denial of a motion to dismiss.

STATEMENT OF THE CASE

A. Bank of America Issues the Mortgage but Refuses to Comply with State Law.

In July 2008, Countrywide Financial sold Lusnak a Veterans Administration–guaranteed mortgage for his home in Palmdale, California. RA 14a.[2] That same month, shortly before the crest of the financial crisis hit, Countrywide's mortgage empire collapsed and Bank of America purchased Countrywide and with it acquired Lusnak's mortgage. RA 14a; App. 5a.[3] Subsequently, Lusnak and Bank of America agreed to refinance and then entered into a loan modification agreement in January 2011. RA 15a; App. 5a.

These contracts required Lusnak—like many of Bank of America's borrowers—to pay funds each month ($250 per month in Lusnak's case) into an escrow account maintained by Bank of America and used to pay for property taxes and insurance for the property. RA 12a, 15a. These escrow accounts routinely have significant positive balances (e.g., when the monthly payments into the account build up for several months before annual or semi-annual property tax payments, or otherwise exceed the expenditures from the account). RA 12a. Bank of America has access to these excess balances and earns interest on those amounts. RA 12a, 15a.

The contracts state that Bank of America will pay interest on these escrow funds only if applicable law requires it, and that it "shall be governed by federal law and the law of the jurisdiction in which the

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[2] "RA __a" refers to pages in Respondent's Appendix.

[3] "App. __a" refers to pages in Petitioner's Appendix.

Property is located." RA 13a. Bank of America agrees with Lusnak that the contract obligates it to pay interest on escrow funds if required by federal or non-preempted state law. App. 6a.

California law requires financial institutions to pay borrowers at least two percent interest per year on mortgage escrow accounts. Cal. Civ. Code § 2954.8(a); RA 6a–7a. There is no dispute that Bank of America does not pay Lusnak or other California borrowers interest on their mortgage escrow accounts, despite the requirement of state law. RA 12a, 14a; App. 6a. Bank of America also concedes that Wells Fargo, its chief competitor and the largest mortgage bank in the nation, abides by California's mortgage escrow interest law. App. 6a; *see also* RA 12a–13a (quoting Wells Fargo). Like Bank of America, Wells Fargo is a nationally chartered bank operating under the National Bank Act, 12 U.S.C. § 38, *et seq.*

B. Dismissal in the District Court.

In March 2014, Lusnak sued Bank of America on behalf of himself and other California Bank of America borrowers with escrow accounts, alleging that the bank's failure to pay interest on mortgage escrow accounts was unlawful under Cal. Civ. Code § 2954.8(a) and that compliance with state law was also required under the provision of Dodd-Frank obligating national banks to follow state law mandates on the payment of interest. The statute provides:

> 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. § 1639d(g)(3); RA 6a. The complaint alleged a violation of California's unfair competition law and a breach of the parties' contract. App 6a.

Bank of America moved to dismiss, arguing that Cal. Civ. Code § 2954.8 is preempted by the National Bank Act. In the procedural posture of the motion to dismiss, Bank of America could seek relief only as a matter of law. There was no factual showing at this stage of the litigation that the California escrow requirement interfered with the ability of a national bank to do business in California, let alone that the California mortgage escrow rule would "significantly interfere," as this Court defined the applicable preemption standard in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). App. 25a, 27a.

The district court granted the motion to dismiss, concluding that the National Bank Act preempted California's mortgage escrow interest law. App. 39a. The district court purported to apply the preemption standard in *Barnett Bank*—which the court concluded was unaffected by Dodd-Frank—and held as a matter of law that California's mortgage escrow interest requirement significantly interfered with the bank's lending power, notwithstanding the fact that Wells Fargo, another nationally chartered bank, was operating in California in compliance with state law. App. 39a. The district court reached this conclusion without a hearing, without taking any evidence from the parties, and without permitting any discovery. App. 23a.

C. The Decision Below.

The Court of Appeals reversed. State consumer protection laws are "a field traditionally regulated by the states," the court ruled, which meant that Bank of America bore "the burden of proving its preemption defense" with "compelling evidence." App. 9a (internal citations omitted). *Id.* Under this Court's controlling precedent in *Barnett Bank*, states may regulate national banks so long as "doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers." App. 10a (quoting *Barnett Bank*, 517 U.S. at 33). Dodd-Frank codified this "prevent or significantly interfere" requirement with explicit citation to *Barnett Bank*, such that the basic preemption standard remained the same before and after Dodd-Frank. App. 13a (citing 12 U.S.C. § 25b(b)(1)(B)); RA 1a.

There was no factual showing (or even proffer) below by Bank of America that California's escrow interest law significantly interfered with the bank's powers, given the procedural posture of the case as an appeal from a motion to dismiss. Consequently, the Court of Appeals considered whether the bank had shown that the state escrow requirement was preempted as a matter of law. App. 14a–15a n.6. Thus the court considered whether legal authority demonstrated Congress's intent that state laws requiring interest payments on mortgage escrow accounts significantly interfered with the bank's operations on an across-the-board basis with no need for factual proof. App. 18a.

Rather than seeking to foreclose all state regulation of national banks, Congress expressly mandated that "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any . . . escrow account . . . ." 15 U.S.C. § 1639d(g)(3), RA 6a. According to the Court of Appeals, this language "expresses Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations."[4] App. 15a.

The court below rejected Bank of America's argument that the word "applicable" in § 1639d(g)(3) rendered the provision nugatory by somehow precluding all state regulation as inapplicable. Instead the Ninth Circuit concluded that the word "applicable" simply acknowledged that different states have differing (or no) laws requiring interest on mortgage escrow accounts. App. 16a–17a. A House Report provided further evidence that Congress intended this provision to address problems in mortgage servicing of escrow accounts that had led to the subprime mortgage crisis. App. 17a–18a. By specifically allowing state regulation of escrow payment, the court held, Congress had by the direct language of Dodd-Frank expressly invited state regulations that would require interest payments on escrow accounts. *Id.*

Alternatively, Bank of America had argued below that it was entitled to judgment as a matter of law based on the OCC's broad preemption determinations. App. 18a. According to both Bank of America and the OCC appearing as an amicus on a petition for rehearing en banc, the OCC's decrees of complete field preemption were entitled to deference from reviewing courts. The Court of Appeals concluded that the OCC's preemption interpretations, both before and after Dodd-Frank, were "entitled to little, if any, deference" for several reasons. App. 12a–13a. First, both the

[4] Although Respondent's individual loan agreement pre-dated the effective date of § 1639d(g)(3), the court below found this provision of Dodd-Frank inviting applicable state law to be pertinent for purposes of *Barnett Bank*'s preemption analysis. App. 20a–21a.

OCC's 2004 rule essentially claiming field preemption, and its post-Dodd-Frank 2011 rule sweepingly reaffirming the 2004 determinations, were merely the "OCC's articulation of its legal analysis," without a "review of specific potential conflicts on the ground." App. 12a. The Court of Appeals relied upon this Court's ruling that, absent specific authorization, agencies' legal conclusions about preemption are owed no deference. App. 11a–12a (citing *Wyeth v. Levine*, 555 U.S. 555, 576 (2009)). Even if the OCC had conducted empirical conflict analysis, such analysis is owed deference only to the extent it is persuasive (i.e., no more than *Skidmore* deference). App. 11a–12a (citing *Wyeth*, 555 U.S. at 577, and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Indeed, in Dodd-Frank, Congress specifically reaffirmed that the OCC's preemption determinations are entitled to only *Skidmore* deference. App. 10a, 13a (citing 12 U.S.C. § 25b(b)(5)(A)); *see also* RA 2a–3a.

Second, the court concluded that the OCC's 2004 articulation of the *Barnett Bank* preemption standard and its 2011 reaffirmation were "inaccurate[.]" App. 12a. Where *Barnett Bank* held (and Dodd-Frank codified) that preemption was limited to laws that "***prevent or significantly interfere***" with bank powers—a fact-based conflict preemption standard—the OCC effectively rewrote this standard as field preemption, covering "state laws that ***obstruct, impair, or condition***" bank powers. App. 10a–11a (quoting 12 C.F.R. § 34.4(a)) (emphasis added); RA 7a. This interpretation conflicted with *Barnett Bank* and Dodd-Frank by removing the requirement of "significantly" and substituting "condition," a term consistent with field preemption rather than fact-specific conflict preemption. App. 11a n.4. These rejections of the standard from both *Barnett Bank* and the language of Dodd-Frank lessened the persuasiveness of, and thus the deference owed to, the OCC's determinations. *See* App. 12a.

In sum, the Court of Appeals concluded that the OCC's ungrounded say-so, especially in light of Dodd-Frank, was insufficient evidence that Congress intended to preempt state mortgage escrow interest laws. Therefore, at this pre-discovery stage of the case, Bank of America failed to show that as a matter of law the National Bank Act preempted Cal. Civ. Code § 2954.8. The court acknowledged that certain facts *could* prove that an escrow interest law significantly interfered with a bank's powers, such as evidence of a punitively high interest rate. App. 17a n.7. The Court of Appeals accordingly remanded the case to the district court for further proceedings, rejecting only the motion to dismiss at this stage. App. 22a.

REASONS TO DENY THE WRIT

I. Under Dodd-Frank, the Question of Preemption Cannot Be Decided on a Motion to Dismiss.

This case is unripe and inappropriate for this Court's review for two reasons: the decision below was only an interlocutory appeal that has been remanded for further factual development, and the preemption analysis required depends on a factual record that does not yet exist.

A. This Interlocutory Appeal Is Not Ripe for Supreme Court Review.

This Court has long emphasized that it "must limit its review of interlocutory orders." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240

U.S. 251, 258 (1916) (citing, *inter alia*, *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 378, 384 (1893) ("[A] writ of error . . . to this court . . . does not lie until after final judgment . . . .")). In *Hamilton-Brown*, the mere fact that the judgment below was not final "itself alone furnished sufficient ground for the denial of the application." *Id.*[5]

Here, Bank of America seeks review of a reversal of a grant of a motion to dismiss. The district court dismissed the case without discovery, evidence, or a hearing. There is no factual record, there have been no findings of fact, and there has been no determination of liability. The Court of Appeals reversed and remanded the case for further proceedings. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curium) (denying certiorari); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 285 (10th ed. 2013). ("[I]n the absence of some such unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

The decision below has not produced any immediate consequences for Bank of America or any other parties in a way that might under extraordinary circumstances invite interlocutory intervention by this Court. The case is stayed pending appeal, and following

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[5] *See also Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J.) (statement on denial of certiorari) (denial appropriate "[b]ecause no final judgment has been rendered"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.) (statement on denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

remand would return to the district court at an early, pre-discovery phase. Meanwhile, Bank of America continues to not pay interest on borrowers' escrow accounts pending further litigation in this case.

B. Review Is Inappropriate Here Without a Factual Record.

Interlocutory review by this Court without a factual record is especially inappropriate in this case. National Bank Act preemption analysis turns on a factual determination about whether the state law at issue "prevent[s] or substantially interfere[s] with" a bank's exercise of its powers. 12 U.S.C. § 25b(b)(1)(B); RA 1a; *Barnett Bank*, 517 U.S. at 33. This is a factual question regarding the real-world impact of the state law in question and the ability of the bank to exercise its powers while abiding by the law. Review prior to the parties creating a factual record on these questions at summary judgment or trial would be premature.[6]

Preemption analysis is ultimately governed by congressional intent, and in Dodd-Frank Congress made its intent crystal clear that preemption of state consumer financial protection laws depends on a factual record. In addition to codifying *Barnett Bank*, Congress expressly required the OCC to justify any preemption determinations with "substantial evidence, made on the record of the proceeding" that "supports the specific finding" "in accordance with" the fact-dependent standard of *Barnett Bank*. 12 U.S.C. § 25b(c); RA 3a. Congress instructed that "any preemption determination . . . by a court, or by regulation or order of the [OCC]" must

[6] One key fact conceded by Bank of America strongly suggests there is no significant interference here: Bank of America asks this Court to exempt it from a state law with which its primary competitor, Wells Fargo, readily complies. RA 13a.

be made "on a case-by-case basis," defined as "a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law," again requiring fact-based analysis. 12 U.S.C. §§ 25b(b)(1)(B), (b)(3)(A); RA 1a, 2a. Congress could not have been more explicit about wanting these preemption determinations to be based on specific, case-by-case analysis of facts.[7]

By presenting its defense as a motion to dismiss, Bank of America necessarily failed to provide the courts below with any factual support for its preemption argument. Bank of America then compounded its legal error by claiming that the OCC preemption rules merited court deference,[8] even though those rules were also issued without factual support—and no factual support was provided even after Congress specifically required it.

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[7] Bank of America faces an insurmountable hurdle reconciling its defense of a district court motion to dismiss with the express statutory language mandating a fact-based inquiry as a precondition for any claim of preemption. The express statutory requirements of fact-finding are apparently of no moment for Petitioner. Far easier to simply disregard what Congress mandated. In a manner similar to air-brushing disfavored characters out of historical photos, Petitioner invites this Court to ignore the statutory text altogether. To this end, Bank of America has even gone to the length of omitting these statutory sections from its Appendix. *See* App. 48a–49a. The appropriate statutory text is found in the Respondent's Appendix. *See* RA 1a–4a.

[8] The OCC's preemption rules do not merit deference not only because the agency issued them without factual support, but also because (*inter alia*) Congress expressly instructed that courts owed them no more deference than their persuasiveness (i.e., *Skidmore* deference), and without factual support they lack such persuasiveness. *See* 12 U.S.C. § 25b(b)(5)(A); RA 2a.

The controlling fact is that the OCC issued its original 2004 rule preempting state mortgage escrow laws as part of a blanket field preemption determination without any factual evidence or discussion regarding mortgage escrow laws. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1907–08, 1917 (Jan. 13, 2004); RA 7a; Catherine M. Sharkey, *Inside Agency Preemption*, 110 Mich. L. Rev. 521, 581 (2012) (citing 2004 OCC rules as having "no factual findings . . . explaining why preemption was necessary in the specific case or what conflicts between state authorities and federal banks justified preemption").

But the offense to the legislation only gets worse. Incredibly, in 2011, on the very same day Dodd-Frank's preemption provisions became effective, the OCC reaffirmed its 2004 conclusion that state "escrow standards . . . would meaningfully interfere"[9] with bank's powers and were accordingly preempted based on the 2004 regulations. *See* Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43557 (July 21, 2011); RA 8a. The OCC made no effort to provide any (let alone "substantial") evidence on the record regarding the impact of escrow interest laws, as required by Dodd-Frank.[10] *Id.* at

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[9] Even in 2011 the OCC resisted using *Barnett Bank* and Dodd-Frank's prescribed language of "significantly interfere."

[10] Not only did the OCC's 2011 rule not abide by Dodd-Frank's requirement of case-by-case analysis based on substantial evidence, but based on Respondent's research the OCC also failed to follow Dodd-Frank's requirements to: (1) consult with the Consumer Financial Protection Bureau; (2) review its preemption rulings through notice and comment within five years; (3) submit reports of such reviews to Congress; or (4) publish a quarterly list of preemption determinations. *See* 12 U.S.C. §§ 25b(b)(1)(B), (b)(3), (c), (d), (g); RA 1a–4a. Petitioner omitted these statutory sections

43554–57. In other words, this case lacks either a court record or an administrative record providing the facts required—both by this Court's *Barnett Bank* standard and by Congress's explicit statutory command—to properly assess preemption.

II. There Is No Circuit Conflict or Substantial Question of Law to Resolve.

The heart of the Petition is the claim that the Court of Appeals has introduced uncertainty by "rejecting settled case law and regulations . . . ." Pet. 19. This purportedly creates a conflict with the Second Circuit's 2005 interpretation of the 2004 OCC regulation, which an OCC amicus brief to the Ninth Circuit insisted must control. Pet. 18–19 (citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005)).[11] *See also* Amicus Br. 8, 10 (citing 2004 OCC regulations as controlling and claiming preemptive authority under the 1864 National Banking Act, with no mention of Dodd-Frank).

At bottom, the claim is that Congress did nothing in 2010 and that Petitioner should be entitled to continue with business as usual. The simplest answer is

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from its appendix and presented no evidence to the courts below of the OCC's compliance with these statutory prerequisites for preemption.

[11] Petitioner further argues that not recognizing the OCC's pre-2008 rules on preemption would run counter to *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Pet. 18. To the contrary, compelling the OCC to follow Dodd-Frank's statutory requirements in making preemption determinations is perfectly consistent with *Geier*: "Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking . . . respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context . . . ." 529 U.S. at 912.

that Congress, with the 2010 passage of Dodd-Frank, changed the controlling statutory scheme, directly discredited the OCC's previous preemption determinations, and instructed courts to apply only *Skidmore* deference, rendering the Second Circuit's 2005 analysis irrelevant in the new statutory environment. *See* 12 U.S.C. § 25b(b)(5)(A); RA 2a–3a; Shapiro et al., *Supreme Court Practice*, *supra*, at 248 (purported conflict based on "discredited" or "stale" authority "will not be an adequate basis for granting certiorari").

The Second Circuit's decision in *Wachovia* is stale as it predates Dodd-Frank, the controlling statute. *Wachovia* creates no conflict because its conclusion that the OCC's 2004 rule preempted state law was based on *Chevron* deference. 414 F.3d at 315 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). Congress has since confirmed that *Chevron* deference does not apply to OCC preemption determinations, erasing any uncertainty. 12 U.S.C. § 25b(b)(5)(A); RA 2a–3a. Petitioner cites no circuit that has defied Congress on this point since it was codified as part of Dodd-Frank, and thus fails to point the Court to any circuit split under today's law.

Second, Petitioner ignores that since the Second Circuit applied the OCC's 2004 preemption rule, Congress undid them. The Senate Report for Dodd-Frank made Congress's intentions unmistakably clear: the "standard for preempting State consumer financial law would *return to what it had been for decades*, those recognized by the Supreme Court in *Barnett Bank* . . . ***undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004***." S. Rep. No. 111-176, at 175 (2010), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf (emphasis added). Understanding how Congress rejected the OCC's field preemption is not just a question of reading the legislative history alone.[12] This rejection, and the intent to restore this Court's previously articulated standard, is reflected in the statute's express codification of *Barnett Bank*'s "significantly interfere" language.

Third, unlike for the state laws at issue in *Wachovia*, here Congress *specifically allowed states to require payment of interest on escrow accounts*. 15 U.S.C. § 1639d(g)(3); RA 6a. This distinction is especially pertinent given that Congress instructed that OCC preemption determinations must be made on a case-by-case basis. 12 U.S.C. § 25b(b)(3); RA 2a.

The remaining cases Petitioner cites for purported conflicts all fail to evidence circuit conflicts for the same reasons as *Wachovia*: they pre-date Dodd-Frank, applied *Chevron* deference, and/or considered preemption of state laws unrelated to mortgage escrow interest requirements. *See* Pet. 14–16 (citing cases).

There are also no other cases interpreting 15 U.S.C. § 1639d(g)(3), Dodd-Frank's section requiring banks to "pay interest" on escrow funds of "prescribed by that applicable State . . . law." Therefore there is also no

[12] The Treasury Department also immediately criticized the OCC's 2011 blanket preemption reauthorization as inconsistent with Dodd-Frank. Letter from George W. Madison, General Counsel, Dep't of the Treasury, to the Hon. John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, June 27, 2011 (stating that the OCC's rule was "inconsistent with the plain language of [Dodd-Frank] and its legislative history" and ran afoul of "basic canons of statutory construction"), *quoted in* Jay B. Sykes, Cong. Research Serv., R45081, *Banking Law: An Overview of Federal Preemption in the Dual Banking System* 21 (Jan. 23, 2018), https://fas.org/sgp/crs/misc/R45081.pdf.

circuit conflict regarding Petitioner's strained statutory argument that the word "applicable" in that section renders it a nullity and allows for field preemption of all state law. Pet. 22–23. Bank of America reasons that because some state regulations may indeed be preempted, the word "applicable" is a congressional invitation to the complete removal of state law from the regulatory oversight of banking. Pet. 23. As the Court of Appeals correctly held, the fact that some state laws may be preempted does nothing to relieve Petitioner of the burden of establishing the affirmative defense that *this* state law "significantly interfere[s]" with the operation of a national bank, the applicable standard under *Barnett Bank* both before and after Dodd-Frank. App. 9a.

Not surprisingly, Petitioner can point to no authority for its tortured statutory construction under which the word "applicable" removes state regulation as a matter of law. There is no circuit conflict because the decision below is the first appellate decision to address the application of 15 U.S.C. § 1639d(g)(3) to the question of state laws on mortgage escrows, and fully conforms to Dodd-Frank's instruction that state law applies absent substantial factual findings to the contrary.

A cursory review of the statute, in the sections excised from Petitioner's Appendix and unmentioned by Amici, reveals the absurdity of claiming the field preemptive force of the OCC regulations from 2004:

12 U.S.C. § 25b(b)(3). This section requires that any determination by the OCC concerning the adverse impact of a State consumer financial law on a national bank must be made on a "case-by-case" basis. RA 2a. Further, subsection (3)(B) requires that in making any such case-by-case determination the OCC "shall first consult with the Bureau of Financial Protection and shall take the views of the Bureau into account . . . ." *Id*. Contrary to the statutory requirements for preemption, the OCC conducted no case-specific fact-finding and there was no consultation with the CFBB when it reaffirmed its 2004 rules (which also were not based on any case-specific findings). App. 10a (Dodd-Frank "required the OCC to follow specific procedures in making the preemption determination."); *cf. Sacco v. Bank of Am., N.A.*, No. 5:12-CV-00006-RLV, 2012 WL 6566681, at *8 n.7 (W.D.N.C. Dec. 17, 2012) (the OCC's "blanket regulatory stance would appear to violate" the section of Dodd-Frank requiring case-by-case analysis).

12 U.S.C. § 25b(b)(5)(A) and § 25b(c). These sections make clear that, consistent with *Barnett Bank*, OCC preemption decisions are not entitled to *Chevron* deference and that any claim of preemption must be made on the basis of "substantial evidence, made on the record of the proceeding [that] supports the specific finding regarding the preemption . . . ." RA 2a–3a; *see also* Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. Rev. 1, 26–29 (2015) (providing legislative history of congressional determination to codify only *Skidmore* deference for OCC preemption claims).[13]

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[13] *See also id.* at 39 ("Congress stripped the OCC's preemption decisions of *Chevron* deference after years of questionable rulings during which the banking industry had captured the agency and the agency conceded its conflict of interest. The legislative history referred to this troubling behavior as grounds for the preemption provisions."). Even before Dodd-Frank, the OCC's penchant for unmoored preemption claims had been the target of criticism. *See* Sharkey, *supra*, at 581 (citing 2004 OCC rules as having "no factual findings . . . explaining why preemption was necessary in the specific case"); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat*

There are no findings by the OCC invoked by Petitioner or Amici. Although subsections (b) and (c) are not included in the Petitioner's Appendix, they were properly identified below as supporting the need for exacting judicial scrutiny. App. 14a.

12 U.S.C. § 25b(d). This section requires a review, through notice and comment, of any preemption determination within a five-year period after promulgation. RA 3a–4a. There is no grandfathering of pre-Dodd-Frank regulations, and even if the 2004 regulations were deemed in place at the time Dodd-Frank was enacted in 2010, the five-year period for administrative review would have passed before this litigation began. Moreover, subsection (2) requires the OCC to report to Congress on any preemption determinations "and the reasons therefor." RA 4a. No such reporting has ever been made for the escrow preemption claim.

12 U.S.C. § 25b(g). This section requires publication and quarterly updating of all preemption determinations by the OCC. RA 4a. No such publication of the claimed preemption at issue has been made.

In sum, the reason for the absence of any circuit conflict is clear. The OCC has failed to discharge its statutory obligations and has acted contrary to preemption standards that applied both pre- and post-Dodd-Frank. No court has indulged this malfeasance.

to the Dual Banking System and Consumer Protection, 23 Ann. Rev. Banking & Fin. L. 225, 232 (2004) (with well over 90 percent of its revenue coming from regulated banks, the OCC "has an obvious self-interest in pursuing a preemption agenda").

III. The Decision Below Correctly Applies the Preemption Standard this Court Set and Dodd-Frank Codified.

The court below properly began its analysis with the statutory commands of Dodd-Frank. App. 8a ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case" (quoting *Wyeth*, 555 U.S. at 565)). Dodd-Frank was Congress's response to the 2008 financial crisis, and one of its primary goals was to prevent another mortgage crisis. App. 4a. Congress recognized that "a major cause of the most calamitous worldwide recession since the Great Depression was the simple failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending." S. Rep. No. 111-176, at 15; RA 8a–9a.

Ultimately the Petition is an effort to obtain by improper judicial means a reversal of the congressional determination that, in the aftermath of 2008, the bank regulatory framework in the U.S. had to change. There is no secret that the major banks, often acting through the institutional amici present in this case,[14] sought to derail the Dodd-Frank reforms. Nor is it a secret that, as the court below wrote, "Dodd-Frank brought about a 'sea change' in the law, affecting every corner of the nation's financial markets." App. 4a.

As previously noted, the Senate Report for Dodd-Frank specifically stated that the act would "return

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[14] *See, e.g.*, Letter from American Bankers Association et al. to Members of Congress, June 28, 2010 ("writing to express strong opposition to . . . Dodd-Frank" and urging all Senators and House members to "vote against"), https://www.aba.com/archive/Letters_Congress_Archive/Letters%20to%20Congress%20Archive/CongressJointStatesMemoreRegulatoryRestructuring06.pdf.

[the preemption standard] to . . . *Barnett Bank* . . . undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175. In turn, *Barnett Bank* stands in direct opposition to the 2004 OCC regulations. Under *Barnett Bank*, state regulatory authority was preserved so long as it "does not ***prevent or significantly interfere*** with the national bank's exercise of its powers." 517 U.S. at 33 (emphasis added); App. 10a. That is the preemption standard that Congress expressly codified, and which applied even before Dodd-Frank.

By contrast, the OCC regulations invoked by Petitioner, Amici, and the OCC itself as amici below, would preempt state laws if they "obstruct, impair, ***or condition*** a national bank's ability to fully exercise the powers authorized to it under Federal law." 12 C.F.R. § 34.4 (emphasis added). This is clearly the language of field preemption and is irreconcilable with the "significantly interfere" holding of this Court and its subsequent endorsement by Congress.

In rejecting the 2004 OCC claims of broad preemptive authority, Congress set out to restore regulatory balance between the states and federal agencies. For example, in the section consolidating the OCC and the Office of Thrift Supervision, Congress stated that one of its purposes was "to preserve and protect the dual system of Federal and State-chartered depository institutions." 12 U.S.C. § 5401(2); RA 5a. Similarly, in the section establishing the Consumer Financial Protection Bureau, an entire subsection titled "Preservation of State Law" clarifies that Dodd-Frank sets a regulatory floor that state law may exceed if it affords greater protection to consumers. 12 U.S.C. § 5551; RA 5a.

The OCC is acting beyond its statutory authority in claiming deference and in claiming the right to make a preemption decision not authorized by statute. The Court of Appeals correctly reviewed agency claims to preemption under the standard that this Court upheld in *Barnett Bank*, and correctly applied only *Skidmore* deference to the OCC on preemption, both of which Congress reaffirmed in the express statutory language of Dodd-Frank. 12 U.S.C. §§ 25b(b)(1)(B), (b)(5)(A); RA 1a, 2a–3a. The claim that the 2004 OCC regulations should control as if nothing had changed in the financial crisis of 2008 and the congressional response in Dodd-Frank has absolutely no legal foundation.[15] To argue in the face of Dodd-Frank that the same rules governing Countrywide mortgage practices at the height of the crisis are vigilant today is, in one word, "amazing."[16]

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[15] The OCC's 2011 re-authorization of its 2004 preemption rules do not save them, as the 2011 re-authorization failed to abide by Dodd-Frank's procedural requirements even though it was issued the day those requirements became effective. The OCC's 2011 blanket determination that its 2004 rules were consistent with *Barnett Bank* and thus Dodd-Frank is simply uncredible, including because the 2004 rules were issued under the broader "obstruct, impair, or condition" interpretation that was rejected in *Barnett Bank* and by Congress in Dodd-Frank. *See, e.g.*, *Sacco*, No. 5:12-CV-00006-RLV, 2012 WL 6566681, at *8 (The OCC's preemption position "substitute[s] the *Barnett Bank* directive with a more wide-ranging preemption standard.").

[16] "[W]hen the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law. Amazing." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016).

Accordingly, the Petition fails to identify any issue meriting this Court's review.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 17, 2018

APPENDIX

APPENDIX

12 U.S.C. § 25b

State law preemption standards for national banks and subsidiaries clarified

* * *

(b) PREEMPTION STANDARD

(1) IN GENERAL State consumer financial laws are preempted, only if—

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

* * *

(3) CASE-BY-CASE BASIS

(A) Definition

As used in this section the term "case-by-case basis" refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.

(B) Consultation

When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) RULE OF CONSTRUCTION

Title 62 of the Revised Statutes does not occupy the field in any area of State law.

(5) STANDARDS OF REVIEW

(A) Preemption

A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.

(B) Savings clause

Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

* * *

(c) SUBSTANTIAL EVIDENCE

No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996).

(d) PERIODIC REVIEW OF PREEMPTION DETERMINATIONS

(1) IN GENERAL

The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 43 of this title.

(2) REPORTS TO CONGRESS

At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

* * *

(g) TRANSPARENCY OF OCC PREEMPTION DETERMINATIONS

The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and practices covered by each determination and the requirements and constraints determined to be preempted.

* * *

12 U.S.C § 5401

Purposes

The purposes of this title are—

* * *

(2) to preserve and protect the dual system of Federal and State-chartered depository institutions;

* * *

12 U.S.C § 5551

Relation to State law

(a) IN GENERAL

* * *

(2) GREATER PROTECTION UNDER STATE LAW

For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provisions of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person.

* * *

15 U.S.C. § 1639d

Escrow or impound accounts relating to certain consumer credit transactions

* * *

(g) ADMINISTRATION OF MANDATORY ESCROW OR IMPOUND ACCOUNTS

* * *

(3) 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.

* * *

Cal. Civ. Code § 2954.8

(a) Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier.

(b) No financial institution subject to the provisions of this section shall impose any fee or charge in connection with the maintenance or disbursement of money received in advance for the payment of taxes and assessments on real property securing loans made by such financial institution, or for the payment of insurance, or for other purposes relating to such real property, that will result in an interest rate of less than 2 percent per annum being paid on the moneys so received.

* * *

12 C.F.R. § 34.4

Applicability of state law.

(a) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.4, without regard to state law limitations concerning:

* * *

(6) Escrow accounts, impound accounts, and similar accounts

* * *

Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004)

(b) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.4, without regard to state law limitations concerning:

* * *

(7) Escrow accounts, impound accounts, and similar accounts

* * *

Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43557 (July 21, 2011)
(footnote call numbers omitted)

* * *

The types and terms of laws that are set out in the 2004 preemption rules were based on the OCC's experience with the potential impact of such laws on national bank powers and operations. We have re-reviewed those rules in connection with this rulemaking to confirm that the specific types of laws cited in the rules are consistent with the standard for conflict preemption in the Supreme Court's Barnett decision. For example, in the lending arena, based upon our assessment as the primary Federal supervisor of national banks, state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, 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.

* * *

S. Rep. No. 111-176, at 15–17 (2010)

* * *

Failure of the Safety and Soundness Regulators

> It has become clear that a major cause of the most calamitous worldwide recession since the Great Depression was the simple failure of federal regulators to stop abusive lending,

> particularly unsustainable home mortgage lending.[39]
>
> —*Travis Plunkett*

Underlying this whole chain of events leading to the financial crisis was the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable, "exploding" adjustable rate mortgages, interest only mortgages, and negative amortization mortgages. These regulators "routinely sacrificed consumer protection for short-term profitability of banks,"[40] undercapitalized mortgage firms and mortgage brokers, and Wall Street investment firms, despite the fact that so many people were raising the alarm about the problems these loans would cause.

* * *

Where federal regulators refused to act, the states stepped into the breach. In 1999, North Carolina became the first State to enact a comprehensive anti-predatory law. Other States followed suit as the devastating results of predatory mortgage lending became apparent through increased foreclosures and disinvestment.

Unfortunately, rather than supporting these anti-predatory lending laws, federal regulators preempted them. In 1996, the OTS preempted all State lending laws. The OCC promulgated a rule in 2004 that, likewise, exempted all national banks from State lending

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[39] Testimony of Travis Plunkett, Legislative Director of the Consumer Federation of America to the Banking Committee, July 14, 2009.

[40] Testimony of Patricia McCoy to the Banking Committee, March 3, 2009.

laws, including the anti-predatory lending laws. At a hearing on the OCC's preemption rule, Comptroller Hawke acknowledged, in response to questioning from Senator Sarbanes, that one reason Hawke issued the preemption rule was to attract additional charters, which helps to bolster the budget of the OCC.[43]

Two recent studies by the Center for Community Capital at the University of North Carolina document the damage created by this preemption regulation. The two studies found that:

> (1) States with strong anti-predatory lending laws exhibited significantly lower foreclosure risk than other States. A typical State law reduced neighborhood default rates by as much as 18 percent;
>
> (2) Loans made by lenders covered by tougher State laws had fewer risky features and better underwriting practices to ensure that borrowers could repay;
>
> (3) Mortgage defaults increased more significantly among exempt OCC lenders in States with strong antipredatory lending laws than among lenders that were still subject to tougher State laws. For example, default rates of fixed-rate refinance mortgages made by national banks not subject to State laws were 41 percent more likely to default and purchase-money mortgages made by these banks were 7 percent more likely to default than loans those banks made prior to preemption; and

[43] Banking Committee hearing, April 7, 2004.

> (4) Risky lending by national banks more than doubled in some loan categories (fixed-rate refinances) after preemption than before, 11 percent to 29 percent.[44]

* * *

In remarkably prescient testimony, Martin Eakes warned in 2004 that the OCC's action on preemption "plants the seeds for long-term trouble in the national banking system." He went on to say:

> Abusive practices may well be profitable in the short term, but are ticking time bombs waiting to explode the safety and soundness of national banks in the years ahead. The OCC has not only done a tremendous disservice to hundreds of thousands of borrowers, but has also sown the seeds for future stress on the banking system.[45]

In sum, the Federal Reserve and other federal regulators failed to use their authority to deal with mortgage and other consumer abuses in a timely way, and the OCC and the OTS actively created an environment where abusive mortgage lending could flourish without State controls.

* * *

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[44] "The APL Effect: The Impacts of State Anti-Predatory Lending Laws on Foreclosures," by Lei Ding, et al; University of North Carolina, March 23, 2010 and "The Preemption Effect: The Impact of Federal Preemption of State Anti-Predatory Lending Laws on the Foreclosure Crisis," by Lei Ding et al, March 23, 2010.

[45] Testimony of Martin Eakes to the Banking Committee, April 7, 2004.

Court of Appeals Excerpts of Record, ER 105–111

First Amended Complaint

INTRODUCTION AND STATEMENT OF FACTS

1. This consumer fraud class action is based on Defendant Bank of America, N.A.'s ("Defendant" or "BofA") direct, per se violation of California laws requiring a mortgage lender making loans secured by property located in California, to pay the borrower a minimum of 2% simple interest for money received in advance from the borrower for tax and insurance. BofA, like many mortgage lenders, require a large percentage of their borrowers to maintain an impound escrow account in connection with their mortgage. BofA collects in advance from their borrowers' money to pay the property tax and insurance on the property and places it in the escrow account. BofA then directly pays the property tax and insurance from the escrow account when it becomes due. These additional and significant deposits made by the mortgagor to maintain the escrow account, are the borrowers' funds in which mortgage lenders have use of the funds for investment, and therefore, California law requires that the mortgage lenders, including BofA pay at least 2% interest on the monies to the borrowers.

* * *

2. However, Defendant systematically and uniformly has adopted a policy to violate California law by refusing to pay the mandated interest to borrowers, thereby enriching itself on the free use of borrowers' escrow funds that Defendant earns interest on. This decision and policy is at odds with other mortgage lenders, such as Wells Fargo Bank, N.A. – BofA's chief competitor and the largest mortgage originator in the

U.S. – which does comply with California law and pays interest on impounded escrow money:

> **<u>“Does Wells Fargo pay interest on Escrow?</u>**
>
> > Yes. Wells Fargo pays interest on escrow in accordance with the Real Estate Settlement Procedures Act (RESPA) and applicable state laws.”

(Ex. 1; Wells Fargo’s “Understand Your Escrow Account”, emphasis added.)

* * *

10. Plaintiff Donald M. Lusnak (“Plaintiff”) entered into mortgage contracts with Defendant, wherein, based on the express terms of the contracts, he was required to deposit funds into an escrow account and BofA would be required to pay interest on the escrow if applicable laws so required. The boilerplate, adhesive and nonnegotiable terms of the mortgage agreements drafted by Defendant included the following:

> **4. Escrow Account** . . . . Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower’s obligation to pay the Funds for any or all Escrow Items . . . . Unless . . . Applicable Law requires interest to be paid on the [escrow] Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds.
>
> . . . .
>
> **17. Governing Law; Severability; Rules of Construction.** This security shall be governed by federal law and the law of the jurisdiction in which the Property is located.

> All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law . . . . In the event that any provisions of this Security Instrument or the Note conflicts with Applicable Law, such conflicts shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

The home loan modification he received in 2011 modified the amount of his escrow account requirements, but the obligations that the parties must comply with state and federal law remains.

11. Therefore, Plaintiff has continuously deposited funds into his escrow account which are due every month in an amount that was often more than $250. But he has never received the interest accrued on his funds maintained in the escrow account back from Defendant, and Defendant has expressly refused to pay Plaintiff interest on these funds as demanded by Plaintiff prior to his filing the lawsuit.

* * *

THE PARTIES

15. Plaintiff Donald M. Lusnak is a resident and citizen of the city of Palmdale, California. He purchased a new house in Palmdale on or about July 2008, and simultaneously entered into a home loan agreement with Countrywide Financial, prior to its purchase by Bank of America Corporation, and being renamed BAC Home Loans Servicing, LP, which has since merged into Defendant Bank of America, N.A., its successor. As he served as a member of the United States Army, he received a Veterans Administration Home Loan Guarantee as part of the mortgage. In

early 2011, he entered into a new mortgage contract with BofA through a home loan modification of the first mortgage contract. Throughout the time that Plaintiff entered into the first mortgage contract and the second modified mortgage contract, he has been required to make $250 in monthly payments to BofA, in addition to the regular monthly mortgage payment, for the pre-payment of property tax and insurance on the property. Based on information and belief, Defendant has use of those funds at all times between when received from Plaintiff to the time when Defendant made tax and insurance payments on Plaintiff's property.

16. However, Plaintiff has never received from Defendant interest on the monies pre-paid by Plaintiff and held by Defendant for the payment of the taxes and insurance.

* * *