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

REPLY BRIEF FOR PETITIONER

Robert A. Long, Jr.
Counsel of Record
Mark W. Mosier
Andrew Soukup
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

Counsel for Petitioner

October 2018

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement contained in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The heated rhetoric of Respondent's brief cannot mask a glaring omission: Respondent fails to engage with the first question presented by the Petition. As the Petition explains, state laws that directly regulate the terms and conditions of core national bank activities, such as making loans, are preempted by the National Bank Act under the legal standard set forth by this Court and subsequently codified in the Dodd-Frank Act. As the Petition also explains, the Ninth Circuit's contrary ruling cannot be reconciled with the National Bank Act preemption decisions of this Court and other courts of appeals. Rather than confronting this argument, Respondent attacks the OCC's preemption regulations—regulations that he never challenged in the courts below and that confirm the preemptive scope of the National Bank Act itself. By leaving Petitioner's primary argument unanswered, Respondent emphasizes the need for review by this Court.

At several points, Respondent accuses Petitioner of disregarding the "controlling statutory framework." Br. in Opp. 1. In reality, it is Respondent who misstates the key Dodd-Frank Act provision, which codifies this Court's *Barnett Bank* preemption standard, and who misapplies Dodd-Frank's provisions concerning preemption determinations by the OCC and courts.

Apart from attacking the OCC's regulations and wrongly accusing Petitioner of ignoring relevant statutory provisions, Respondent's argument boils down

to a contention that interlocutory review is inappropriate in this preemption case. But this Court has granted interlocutory review of preemption issues in prior cases, and it should do so here. Respondent's contention that preemption determinations under the National Bank Act must be based on a factual record has been rejected by every appellate court to consider it, including the Ninth Circuit in this very case.

Respondent never acknowledges the OCC's statements that this case is "one of exceptional importance," and that the Ninth Circuit's decision "introduces significant uncertainty" on "a matter of foundational consequence to the OCC and . . . the [national] banking system." OCC Amicus Br., 2018 WL 3702582, at *5. As the agency "charged with supervision of the National Bank Act," the OCC's views are entitled to careful consideration. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). The amicus brief of the Bank Policy Institute and other associations confirms the need for review by this Court. *See* Amicus Br. of Bank Policy Inst. *et al.* at 8-16.

The petition should be granted.

I. Respondent Ignores The Primary Question Presented By The Petition.

A. The Petition presents two questions: (1) whether the National Bank Act preempts state laws that directly regulate the terms of national bank loans, such as the California statute at issue here, and (2) whether the Ninth Circuit improperly disregarded OCC regulations addressing this topic. *See* Pet. i. Remarkably, Respondent ignores the first question. *See*

Br. in Opp. i. (framing three questions concerning the OCC's regulations). As this Court's decisions demonstrate, the National Bank Act can and does preempt state law on its own, even without consideration of any federal regulations. *See, e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 n.13 (2007); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 42 (1996); *Franklin Nat. Bank of Franklin Square v. New York*, 347 U.S. 373, 377-78 (1954). Respondent cannot rewrite the questions presented to focus solely on the OCC's regulations.

The Petition sets forth an argument, supported by citations to decisions of this Court and other courts of appeals, that California's law requiring national banks to pay a specified rate of interest on mortgage escrow accounts is clearly preempted by the National Bank Act itself, without any consideration of the OCC's regulations. *See* Pet. 12-17. Respondent never engages with this argument, and makes no serious effort to defend the Ninth Circuit's contrary conclusion (*see* Pet. App. 15a). Specifically, Respondent does not dispute that:

- California Civil Code § 2954.8(a) directly regulates national banks' exercise of core federal banking powers, including the power to determine the terms on which they provide credit;

- Multiple appellate decisions applying the standard announced by this Court in *Barnett Bank* and codified by Congress in the Dodd-Frank Act hold that state laws directly regulating the exercise of such core federal powers are preempted; and

- the Ninth Circuit recognized (Pet. App. 17a n.7) that state laws regulating interest on mortgage escrow accounts may be preempted in some circumstances, thereby effectively conceding that 15 U.S.C. § 1639d(g)(3)—a provision featured in the Ninth Circuit's decision—does not expressly condition the exercise of federal power on compliance with state mortgage escrow laws.[1]

Respondent never cites this Court's decision in *Franklin National Bank*—a decision that is extensively discussed in *Barnett Bank*, *see* 517 U.S. at 33-35—or the half-dozen similar appellate decisions discussed in the Petition. Pet. 14-16 & n.4. Instead, Respondent tries to dismiss these cases in a single sentence, stating that "they pre-date Dodd-Frank, applied *Chevron* deference, and/or considered preemption of state laws unrelated to mortgage escrow interest requirements." Br. in Opp. 16. Respondents cannot wave away this substantial body of case law so easily.

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[1] The Ninth Circuit also acknowledged (Pet. App. 21a) that section 1693d(g)(3) does not even apply to Respondent's escrow account, which was established before Dodd-Frank was enacted. Although Respondent labels Bank of America's interpretation of the term "applicable" in section 1639d(g)(3) as "strained" and "tortured," Br. in Opp. 17, he does not rebut the arguments that: (i) the ordinary meaning of "applicable" is "able to be applied" or "appropriate," and a preempted law is neither; and (ii) the Ninth Circuit's interpretation renders other statutory language superfluous. *See* Pet. 22-23. *Cf. Fidelity Federal Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 157 n.12 (1982) (holding that a provision stating that a deed of trust "is to be governed by the 'law of the jurisdiction' in which the property is located" does not require national bank to comply with preempted state law).

First, Respondent's assertion (Br. in Opp. 1) that Dodd-Frank "expressly cabined the preemptive reach of the National Bank Act" is incorrect. To the contrary, the Dodd-Frank Act adopted, without change, this Court's *Barnett Bank* preemption standard. *See* 12 U.S.C. § 25b(b)(1)(B). As the Ninth Circuit recognized, Dodd-Frank "codified existing law as set forth by the Supreme Court." Pet. App. 10a. Pre-Dodd Frank decisions applying the *Barnett Bank* standard therefore remain entirely apposite. This is confirmed by the post-Dodd Frank cases cited in the Petition, which apply the very same *Barnett Bank* standard. *See, e.g.*, *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011); *Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376, 393 (Cal. 2012).

Respondent misstates the applicable preemption standard as whether a state law "'significantly interfere[s]' with the operation of a national bank." Br. in Opp. 17 (citing Pet. App. 9a). The standard is whether the state law "significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). A state law that significantly interferes with a discrete national bank power (such as the power to advertise savings accounts, *see Franklin Nat. Bank*, 347 U.S. at 377-79, or the power to sell insurance in small communities, *see Barnett Bank*, 517 U.S. at 34) is preempted without regard to whether it significantly interferes with "the operation of a national bank."

Second, *Chevron* deference has no application to judicial decisions that base preemption on the National Bank Act itself rather than on OCC regulations.

The petition cites multiple cases of this kind. *See, e.g.*, *Barnett Bank*, 517 U.S. at 33-34; *Franklin Nat. Bank*, 347 U.S. at 378-79; *Baptista*, 640 F.3d 1196-97; *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 532-33 (1st Cir. 2007). Respondent ignores them.

Third, the decisions of this Court and other courts of appeals should not be disregarded simply because they did not specifically address state laws requiring the payment of interest on mortgage loan escrow accounts. As the Petition explains, the Ninth Circuit's decision departs from a large body of case law holding, in a variety of contexts, that state laws directly regulating the terms and conditions of core national banking activities, including loan terms and conditions, are preempted. Pet. 14-16 & n.4.[2]

Indeed, the Ninth Circuit's decision has created an urgent need for this Court's review precisely because its approach to deciding National Bank Act preemption issues calls into question whether national banks are subject to a wide range of state laws infringing upon national bank powers that have long been viewed as preempted by the National Bank Act. As the OCC has explained, the Ninth Circuit's "mistaken interpretation" of *Barnett Bank* "introduces significant uncertainty" on "a matter of foundational

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[2] Respondent asserts (*see* Br. in Opp. 11 n.6) that a decision by another national bank to pay interest on escrow accounts "strongly suggests" that there is no significant interference. But one national bank's voluntary decision to comply with a state law, for competitive or other reasons, does not imply that forced compliance by all national banks will not prevent or significantly interfere with the exercise of national bank powers.

consequence to the OCC and the federal banking system." OCC Amicus Br., 2018 WL 3702582, at *5.

B. Rather than addressing preemption under the National Bank Act itself, Respondent attacks the OCC's regulations. But those attacks cannot diminish the importance of the first question presented because they do not address the fundamental defect in the Ninth Circuit's opinion, which is that California's law is preempted under the National Bank Act itself, without considering the OCC's regulations. In any event, Respondent's attacks are unwarranted on their own terms, because the OCC regulations simply confirm the preemptive scope of the National Bank Act itself. Indeed, Respondents did not even challenge the OCC's regulations in the courts below.

Respondent repeatedly accuses Bank of America of ignoring the relevant statutory provisions (*e.g.*, Br. in Opp. 17-19), but as the Ninth Circuit recognized, the Dodd-Frank provisions that Respondent cites "have no bearing" where, as here, the preemption determination is made by a court. Pet. App. 14a.[3] Respondent is thus wrong to assert that "express statutory requirements are of no moment to Petitioner" and that "Petitioner invites this Court to

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[3] *See* 12 U.S.C. § 25b(b)(3)(A) ("As used in this section the term 'case-by-case basis' refers to a determination pursuant to this section made by the Comptroller"); *see also id.* § 25b(b)(5)(A) ("determinations made by the Comptroller"); (5)(c) (a "regulation or order of the Comptroller"); (5)(d) ("review" by "[t]he Comptroller") ((5)(g) ("preemption determinations by the Comptroller"). Respondent faults Bank of America for not including these provisions in its appendix, but there is nothing unusual about including only those provisions that the petitioner and court of appeals consider relevant.

ignore the statutory text altogether." Br. in Opp. 12 n.7. Indeed, it is Respondent who takes liberties with the statutory text by misstating the *Barnett Bank* standard and misapplying provisions expressly directed to the OCC rather than the courts.

Even as to the OCC, Dodd-Frank's rulemaking provisions do not apply to regulations promulgated under a grant of authority "other than title 62 of the Revised Statutes," 12 U.S.C. § 25b(b)(1)(C). The OCC regulation at issue here, 12 C.F.R. § 34.4, was promulgated under 12 U.S.C. § 371, which is not part of title 62 of the Revised Statutes.[4]

Respondent tries to minimize the significance of *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), by disputing the degree of deference owed to the OCC's preemption regulations. *Compare Burke*, 414 F.3d at 315 (applying *Chevron* deference), *with* Br. in Opp. at 14-15 (arguing that the OCC's preemption determinations should receive only *Skidmore* deference). But the Ninth Circuit's decision accords the OCC regulations "little, if any, deference," Pet. App. 13a, which is not consistent with either *Chevron* or *Skidmore* deference. At a minimum, the OCC's preemption regulations are entitled to "some weight," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883

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[4] Respondent incorrectly refers to the OCC's regulations as "field preemption," Br. in Opp. i, 7, 8, 13, 16, 17, 21. The *Barnett Bank* standard is a form of conflict preemption, and the OCC has expressly stated that its regulations "are not based on a field preemption standard." 76 Fed. Reg. 43,549, 43,556 (July 21, 2011).

(2000), because the OCC is uniquely qualified to comprehend the likely impact of state requirements.

In short, California Civil Code § 2954.8(a) is preempted by the National Bank Act itself, under the *Barnett Bank* standard codified in the Dodd-Frank Act. The OCC's regulations confirm this conclusion and provide an additional basis for preemption. The Ninth Circuit's dismissal of important OCC regulations that were not challenged by Respondent simply magnifies the importance of this case and increases the need for this Court's review of the underlying preemption issue.

II. The Court Should Decide The Preemption Issue Now.

Respondent contends that the Court should deny the petition because (i) the Ninth Circuit's decision is interlocutory and (ii) a preemption ruling cannot be made without an evidentiary record. Br. in Opp. 9-14. Neither is a valid reason to defer review.

A. This Court regularly reviews orders deciding preemption questions even when the order remands the case so the claims can to be litigated on the merits. In *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190 (2017), for example, the state supreme court reversed the trial court's determination that plaintiff's claims were preempted and remanded the case for further proceedings *See Nevils v. Group Health Plan, Inc.,* 492 S.W.3d 918, 920, 925 (Mo. 2016). This Court granted certiorari and agreed with the trial court that the claims were preempted. *See id.* at 1196. *See also Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 259 (2013) (granting certiorari

where the trial court held that plaintiff's claims were preempted and the state supreme court reversed and remanded for further proceedings).

Nor is there any prudential reason to deny certiorari based on the case's procedural posture. Respondent notes (Br. in Opp. 14) that the interlocutory nature of a lower court decision typically provides a reason to deny certiorari, but he ignores the very next sentence in the treatise he cites, which states that "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court review may serve to hasten or finally resolve the litigation." Shapiro, et al. *Supreme Court Practice* 285 (10th ed. 2013).

That is the case here. The Ninth Circuit has made a definitive determination that Respondent's claims are not preempted, and thus there is no reason to expect the issue to be considered any further in the lower courts. As both the OCC and the banking association *amici* have explained, the Ninth Circuit's decision creates immediate uncertainty and disruption on an issue of vital importance to the national banking system. In short, there is an urgent need for immediate review, and nothing to be gained by delay.

B. Respondent also contends that immediate review would be "inappropriate" because "preemption is a factual question" that cannot be decided without a "factual record." Br. in Opp. 11. Respondent cites

no authority for this assertion, which cannot be reconciled with decisions of this Court and courts of appeals under the National Bank Act.

In *Barnett Bank*, for example, this Court overturned lower court decisions dismissing a NBA preemption challenge to a Florida insurance law without relying on an evidentiary record. *See* 517 U.S. at 30-37. The Court instead based its preemption decision on an analysis of how the relevant federal and state laws operated. *Id.* Because the state law prohibited conduct that the federal law permitted, the state law was preempted. *Id.* at 37. The Court therefore reversed the court of appeals' decision without remanding for any further proceedings, much less an evidentiary hearing on the preemption issue. *Id.* at 43.

Courts of appeals have regularly decided National Bank Act preemption questions on motions to dismiss. *See, e.g.*, *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (affirming order granting bank's motion to dismiss on preemption grounds); *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) (same). In this very case, the Ninth Circuit concluded that "Bank of America's arguments are purely legal and do not depend on resolution of any factual disputes over the effect of California law on the bank's business." Pet. App. 14a-15a n.6.

Treating the preemption inquiry as factual rather than legal would mean that national banks would "not be able to rely" on prior preemption rulings "because the inquiry will vary depending on the

particular operations of the bank and the factual showing made." *Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376, 393 (Cal. 2012). As a result, the preemption analysis might change on a bank-by-bank basis and might even change over time for a specific bank "as it expands its operations." *Id.*

Contrary to Respondent's assertion, Dodd-Frank did not transform a court's preemption inquiry from a legal to a factual one. As noted above, the Dodd-Frank provisions cited by Respondent address *OCC* preemption determinations, not preemption determinations by a court. As the Ninth Circuit explained, those provisions "*have no bearing here* where the preemption determination is made by this court and not the OCC." Pet. App. 14a (emphasis added).

In sum, determining whether the National Bank Act preempts a state law calls for a legal determination based on an analysis of the relevant statutory provisions rather than a case-by-case factual record. Given the fundamental legal error in the Ninth Circuit's preemption analysis, and the significance of that error for the proper functioning of the national banking system, there is no reason to delay consideration of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert A. Long, Jr.
Counsel of Record
Mark W. Mosier
Andrew Soukup
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

Counsel for Petitioner

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