No. 22-529

IN THE

Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, AND ILANA HARWAYNE-GIDANSKY, individually and on behalf of all others similarly situated,

Petitioners,

v.

BANK OF AMERICA, N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

December 15, 2023

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. Since the Founding, State Governments Have Played Important Roles in Regulating Banks and Lending	5
II. As This Court Has Repeatedly Recognized, States May Enforce Their Laws Against National Banks as Long as Those Laws Do Not Significantly Interfere with the Banks' Public Functions	10
III. *McCulloch v. Maryland* Does Not Compel a Different Result	15
CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson Nat'l Bank v. Luckett,
321 U.S. 233 (1944) 12, 14, 15

Atherton v. F.D.I.C.,
519 U.S. 213 (1997) 2

Barnett Bank of Marion Cnty., N.A. v. Nelson,
517 U.S. 25 (1996) 2, 12, 13, 20

Cuomo v. Clearing House Ass'n,
557 U.S. 519 (2009) 2

E. N.Y. Sav. Bank v. Hahn,
326 U.S. 230 (1945) 5

Easton v. Iowa,
188 U.S. 220 (1903) 13

Farmers' & Mechanics' Nat'l Bank v. Dearing,
91 U.S. 29 (1875) 13

Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 5

First Nat'l Bank in Plant City v. Dickinson,
396 U.S. 122 (1969) 5

First Nat'l Bank of San Jose v. California,
262 U.S. 366 (1923) 12-14

TABLE OF AUTHORITIES -- cont'd

Page(s)

First Nat'l Bank of St. Louis v. State of Missouri,
263 U.S. 640 (1924) 11, 15

Franklin Nat'l Bank of Franklin Square v. New York,
347 U.S. 373 (1954) 13-15

Jamaica Sav. Bank v. Lefkowitz,
390 F. Supp. 1357 (E.D.N.Y. 1975) 1

Lewis v. BT Inv. Managers, Inc.,
447 U.S. 27 (1980) 5

McClellan v. Chipman,
164 U.S. 347 (1896) 4, 11, 15, 20

McCulloch v. Maryland,
17 U.S. 316 (1819) 2, 4, 16, 17, 19

Nat'l Bank v. Commonwealth,
76 U.S. 353 (1869) 2, 3, 10

Osborn v. Bank of the United States,
22 U.S. 738 (1824) 19, 20

Printz v. United States,
521 U.S. 898 (1997) 4

Watters v. Wachovia Bank, N.A.,
550 U.S. 1 (2007) 5

TABLE OF AUTHORITIES -- cont'd

Page(s)

Statutes and Legislative Materials

12 U.S.C. §§ 21–522 18

12 U.S.C. § 25b 2, 9, 10

12 U.S.C. § 265 19

Act of Feb. 25, 1863, 12 Stat. 665 8

Act of June 3, 1864, 13 Stat. 99 18

Cong. Globe, 37th Cong., 3d Sess. (1863) 18

Cong. Globe, 38th Cong., 1st Sess. (1864) 8

Cong. Globe, 38th Cong., 2d Sess. (1865) 8

Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (2010) 9

Fed. Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) 18

H.R. Rep. No. 63-69 (1913) 18

S. Rep. No. 584, 72d Cong., 1st Sess. Part II (1932) 9

TABLE OF AUTHORITIES -- cont'd

Page(s)

Other Authorities

Richard E. Ellis, *Aggressive Nationalism:* McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* (2007) 6, 7, 16

Carl Felsenfeld & David L. Glass, *Banking Regulation in the United States* (3d ed. 2011) 3, 5-7, 9, 10, 17, 19

Anne Fleming, *City of Debtors: A Century of Fringe Finance* (2018) 5

Milton Friedman & Anna Jacobson Schwartz, *A Monetary History of the United States, 1867-1960* (1963) 18

Andra Ghent, Research Inst. for Hous. Am., *The Historical Origins of America's Mortgage Laws* (2012).. 6

Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* (1957) 5-8, 17

Benjamin Klebaner, *American Commercial Banking: A History* (1990) ... 6

Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. Chi. L. Rev. 1361 (2021) 7-9, 17, 18

Report of the Secretary of the Treasury on the State of the Finances for the Year Ending June 30, 1861 7

Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 Fordham L. Rev. 1133 (1990) 3, 8

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the careful balance of state and federal power established by the Constitution and in ensuring that federal statutes like the National Bank Act are interpreted in accordance with their text and history. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1974, after "considerable investigation" and extensive hearings, New York legislators adopted a state law to protect homeowning New Yorkers. *See Jamaica Sav. Bank v. Lefkowitz*, 390 F. Supp. 1357, 1363 (E.D.N.Y. 1975). The law, which requires mortgage lenders to "share . . . the profits" earned by interest-generating mortgage escrow accounts, built on two centuries of state laws affecting banks, lending, and homeownership. *Id.*

Although lenders have complied with New York's mortgage escrow law for more than four decades, Respondent Bank of America now seeks an exemption from its operation, arguing that the law is preempted

---

[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

by the National Bank Act (NBA). Under the NBA, the federal government charters, regulates, and supervises national banks, which operate alongside state banks and are generally "subject to state law." *Atherton v. F.D.I.C.*, 519 U.S. 213, 222 (1997). While the NBA creates a unique role for federal banking agencies, it has never displaced the states' control over the banks within their borders, as this Court has made clear. Instead, since the NBA's passage in 1864, states "have enforced their banking-related laws against national banks," *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 534 (2009), and national banks have been "governed in their daily course of business far more by the laws of the State than of the nation," *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1869).

Despite this, the court below concluded that the NBA preempts the application of New York's escrow interest law to national banks. Pet. App. 25a. As the court below acknowledged, under the Dodd-Frank Act and preexisting preemption rules applicable to the NBA, the NBA only preempts state laws that "prevent or significantly interfere with [a] national bank's exercise of its powers." *Id.* at 16a (quoting *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)); *see also* 12 U.S.C. § 25b(b)(1)(B). Nevertheless, the court below declined to investigate the "degree of interference" imposed by New York's law, Pet. App. 16a (quotations omitted), instead reasoning that the law was preempted because, "taken to its extreme," the enforcement of laws like it would "threaten to 'destroy'" the bank's exercise of its powers, *id.* at 18a (quoting *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)).

This approach is wrong. By applying a per se rule—in which any law seeking to "exert control over a banking power" is preempted, *id.* at 5a—the court below ignored the plain text of the Dodd-Frank Act, as

Petitioners persuasively demonstrate, *see* Pet'rs Br. 31-39, as well as the long history of state regulation of banks and lending. Furthermore, the court below relied on a misreading of *McCulloch*, which does not support the per se rule it applied.

States have chartered banks and actively regulated their activities since this nation's founding. Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 Fordham L. Rev. 1133, 1153 (1990). The system of federal and state regulation of banks has "withstood repeated assaults," and is viewed as promoting "core national values of competition, federalism, and freedom of choice." Carl Felsenfeld & David L. Glass, *Banking Regulation in the United States* 81 (3d ed. 2011) (quoting Comptroller of Currency John D. Hawke). While statutes like the NBA provide for a federal role in bank regulation, they do not displace the role of the states in this field.

For this reason, this Court has instructed that national banks are presumptively subject to state law. *Commonwealth*, 76 U.S. at 362 ("[national] banks . . . are subject to the laws of the State"). In a line of precedent almost as old as the NBA itself, this Court has instructed that state laws should only be preempted in their application to national banks when they significantly interfere with banks' performance of the "functions by which they are designed to serve that government." *Id.*

None of this precedent endorses the principle that the NBA preempts any state law that purports to control a national bank in the exercise of its powers, no matter the degree of such control. After all, any state banking regulation or contract law could, "in the broadest sense," act as a "restraint upon the power of a national bank," and this Court has rejected the principle that all such laws should be preempted. *McClellan v. Chipman*, 164 U.S. 347, 358 (1896). Instead, it has instructed courts to focus on the actual impact of a state law on a national bank's operations—an instruction that the court below completely ignored.

McCulloch does not compel a different result. In that case, this Court held that the Second Bank of the United States was immune from state taxes. While this Court observed that the power to tax or "control" the Second Bank involved the power to "destroy" it, *McCulloch*, 17 U.S. at 431, it did not suggest that federal banking laws preempt any state law purporting to "control" a national bank's exercise of its powers. Instead, that case turned on this Court's understanding that the specific type of state tax at issue would hinder the Second Bank's ability to serve the government. The court below, by contrast, declined to evaluate the impact of New York's law entirely. In addition, the court below failed to recognize key differences between the Second Bank in *McCulloch* and national banks today, further undercutting its reliance on that case.

The dual-banking system has deep roots in our country's history and reflects the "great innovation" of our constitutional design—that "our citizens would have two political capacities, one state and one federal." *Printz v. United States*, 521 U.S. 898, 920 (1997) (internal quotation marks omitted). State lawmakers have thus regulated banks, including national banks, for over a century. The decision of the court below failed to engage with this history and misread this Court's precedent. It should be reversed.

ARGUMENT

I. Since the Founding, State Governments Have Played Important Roles in Regulating Banks and Lending.

A. As this Court has recognized, "ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). Indeed, a "dual banking system," under which banks are chartered and supervised by both the state and federal governments, *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 25-26 (2007) (Stevens, J., dissenting)), has been a "recurring theme" in banking law since the Founding, Felsenfeld & Glass, *supra*, at 41.

In the nation's early years, state governments consistently recognized the "propriety and need of imposing conditions" on the practice of banking. Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 186 (1957). State lawmakers protected their citizens from various banking-related "evils," *id.* at 180 (quoting Maryland law of Feb. 17, 1819), often restricting banks in the acquisition of liabilities, redemption of notes, and issuance of loans, *id.* at 172-96.

States also played a role in protecting borrowers, including by regulating mortgage lending. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174 (1982); *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 235 (1945) (describing a state's "power to safeguard its people" against "economic conditions in sofar as they affect the mortgage market"). "[T]he law governing household loans was ancient and varied from state to state," Anne Fleming, *City of Debtors: A Century of*

Fringe Finance 4 (2018), with some states imposing special regulations on the provision of loans by banks, Andra Ghent, Research Inst. for Hous. Am., *The Historical Origins of America's Mortgage Laws* 18 (2012); Benjamin Klebaner, *American Commercial Banking: A History* 39 (1990) (describing antebellum regulation of bank lending). Some states were more "effective regulators" than others, producing a diverse regulatory landscape that enabled experimentation. Felsenfeld & Glass, *supra*, at 43.

B. Congress passed the NBA against this backdrop. That law created a system of federally regulated banks, but it did not eliminate the dual-banking system. Indeed, since the NBA's passage, Congress has consistently allowed state regulation of banks and lending to coexist with federal regulation.

Before the passage of the NBA, the federal government had chartered only two banks, the First and Second National Banks of the United States. These banks were incorporated under congressionally approved federal charters that were "lengthy, detailed, restrictive, and conditioned to the banking functions which were to be performed." Hammond, *supra*, at 129-35 (describing the charter of the First Bank of the United States); Richard E. Ellis, *Aggressive Nationalism:* McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* 42 (2007) (describing the Second Bank's charter). Both charters were obtained over "vehement resistance," Hammond, *supra*, at 115, from those who charged that federal chartering would "directly interfere with the rights of states to prohibit as well as to establish banks," *id.* (quoting James Madison). The charter for the Second Bank expired in 1836, after President Andrew Jackson vetoed Congress's attempt to renew it, citing his concern that it was not "compatible with justice, sound policy, or with the Constitution." Ellis, *supra*, at 212 (quoting Jackson's veto message).

After the dissolution of the Second Bank, states once again dominated bank chartering in addition to bank regulation. Felsenfeld & Glass, *supra*, at 43 (describing the "so-called 'free banking' era," in which state laws facilitated the chartering of private—rather than state-run—banks). Thousands of state-chartered banks opened during these years, leading to the development of additional state regulatory authorities to oversee them. *Id.*

There was one significant problem during this period, and the NBA was ultimately passed to address it. Each state bank issued its own notes, the value of which varied widely from place to place, making it "impossible to have a uniform national currency." Hammond, *supra*, at 726 (quoting Sen. John Sherman). It would take the Civil War and the related currency crisis to "bring the deficiencies of th[is] system to a head," Felsenfeld & Glass, *supra*, at 44, leading to calls for a "uniform, equal, and safe" currency. *Report of the Secretary of the Treasury on the State of the Finances for the Year Ending June 30, 1861*, at 20. During the war, Treasury Secretary Salmon Chase and his allies in Congress embarked on a campaign for what would become the NBA, seeking the "sovereign right of furnishing and controlling the currency." Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. Chi. L. Rev. 1361, 1386 (2021) (quoting Rep. Samuel Hooper).

Using various states' "free banking" systems as a model, the drafters of the NBA created a scheme in which private banks would be chartered and regulated by the federal government. These national banks were supervised by a new Treasury Department agency known as the Currency Bureau, a predecessor to today's Office of the Comptroller of Currency (OCC). *See* Act of Feb. 25, 1863, § 1, 12 Stat. 665. National banks were given the authority to issue bank notes secured by government bonds*, id.* at § 11, 12 Stat. at 668, which would further lawmakers' goal of "secur[ing] the national currency," Cong. Globe, 38th Cong., 1st Sess. 2128 (1864) (Sen. Sumner).

The Act's sponsors planned for the new national banks to serve distinct public purposes. Specifically, they would promote the much-sought-after stable national currency and support the federal government's funding operations for the Civil War. National banks were the principal purchasers of U.S. government bonds and issued bank notes backed by those bonds, taking on the "public function of money creation," Menand & Ricks, *supra*, at 1389, and helping the federal government finance the Civil War, Hammond, *supra*, at 724-25. National banks also served as depositories of government funds, much like the Banks of the United States before them. *Id.*

The NBA did not purport to eliminate state-chartered banks. To be sure, its drafters anticipated "that existing banks would surrender their state charters and re-incorporate under the terms of the new law with national charters," *id.* at 728, which would advance the drafters' goal of creating a national currency, *see* Menand & Ricks, *supra*, at 1394; Cong. Globe, 38th Cong., 2d Sess. 1139 (1865). Indeed, a year after passing the NBA, Congress attempted to "drive state banks out of business" by imposing a tax on state bank notes. Wilmarth, *supra*, at 1153-54.

But state-level innovations ensured that the dual-banking system persisted. For example, in response to the tax on state bank notes, state banks shifted to using checks written on deposit accounts, rather than notes, as their main business, Hammond, *supra*, at

734, an innovation that shaped the development of banking for years to come, *see* Menand & Ricks, *supra*, at 1395-96. And in the years that followed, state regulators would, among other things, permit banks to establish branches, allow banks to participate in real estate lending, and require them to insure deposits long before federal bank regulators adopted similar provisions. Wilmarth, *supra*, at 1156. Congress ultimately imitated these innovations in subsequent revisions to the NBA, seeking to maintain parity between state and federal banks, *id*.

In the years following the NBA's passage, Congress has recognized and preserved states' roles as banking regulators. For example, when enacting the Banking Act of 1933, lawmakers considered but rejected proposals to provide federal deposit insurance only to national banks, with opponents of that measure asserting that it would "destroy our dual system of banking" and wreak havoc on the "State banking system," S. Rep. No. 584, 72d Cong., 1st Sess. Part II, at 6 (1932) (minority views). Instead, lawmakers ensured that both state and federal banks would be eligible for deposit insurance coverage, a concession to proponents of state banking regulation.

Most recently, the drafters of the Dodd-Frank Act ensured the continued role of state regulation in the banking system. *See* Felsenfeld & Glass, *supra*, at 80 ("While dramatic reforms of the regulatory system were . . . adopted into the Dodd Frank reform law, elimination of the dual banking system is not one of them."). The Act explicitly recognized the power of state enforcement authorities to "bring an action against a national bank" under state consumer protection laws. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1047(a), 124 Stat. 1376, 2018 (2010) (codified at 12 U.S.C. § 25b(i)(1)).

Furthermore, lawmakers included the statutory preemption standard at issue in this case, instructing that state laws would apply to a national bank so long as they do not "prevent[] or significantly interfere[] with the exercise by the national bank of its powers," 12 U.S.C. § 25b(b)(1)(B)). In imposing this standard, Congress specifically "restrict[ed] the ability of federal law to preempt state consumer protection measures," Felsenfeld & Glass, *supra*, at 174, reinforcing the role of state regulation in the modern banking system.

II. As This Court Has Repeatedly Recognized, States May Enforce Their Laws Against National Banks as Long as Those Laws Do Not Significantly Interfere with the Banks' Public Functions.

National banks are not immune from state banking laws. Rather, this Court has repeatedly made clear that states may enforce non-discriminatory laws against national banks unless those laws conflict with the express terms of the NBA or significantly impair the ability of national banks to discharge their duties to the federal government. Indeed, even the cases cited by the court below support this point. This Court's precedents thus foreclose the per se rule imposed by the court below.

A. Six years after the passage of the NBA, this Court upheld a Kentucky law requiring national banks to pay the state's tax on bank shares. *Commonwealth*, 76 U.S at 353. This Court explained that national banks "are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government." *Id.* at 362. A state law would be preempted, this Court continued, only when it "incapacitates the banks from discharging their duties to the government." *Id.*

In *McClellan v. Chipman*, this Court once again emphasized the presumptive applicability of state law to national banks. There, this Court upheld the application of a state statute prohibiting the use of preferences when distributing the assets of insolvent debtors. 164 U.S. at 358. This Court explicitly rejected the argument that "national banks . . . are entirely removed, as to all of their contracts, from any and every control by the state law," *id.* at 359, even if the law could, "in the broadest sense," be seen as a "restraint upon the power of a national bank," *id.* at 358. Instead, this Court focused on whether the law "impair[ed] the efficiency of national banks, or frustrate[d] the purpose for which they were created." *Id.*

In *First National Bank of St. Louis v. Missouri*, this Court reiterated the premise that national banks are subject to state laws unless those laws "tend to impair or destroy [the banks'] efficiency as federal agencies." 263 U.S. 640, 656 (1924). There, this Court held that a Missouri statute prohibiting national banks from opening branches in the state was not preempted by the NBA. *Id.* First, the statute did not conflict with the NBA's terms, *id.* at 657, because no provision of the NBA explicitly "contemplate[d] the establishment of branch banks," *id.* at 658. Second, this Court reasoned that the anti-branching statute did not "impair" the efficiency of national banks, because the banks had "gone on for more than half a century without branches," and Congress had not taken steps to "remedy the omission." *Id.* at 659.

In *Anderson National Bank v. Luckett*, this Court reiterated the importance of measuring the magnitude of infringement imposed by a state law. There, this Court upheld a Kentucky law requiring banks to transfer dormant accounts to a state agency to determine whether those accounts should escheat to the state. 321 U.S. 233, 238 (1944). The Court rejected the argument that the statute interfered with the authority of national banks to accept deposits. *Id.* at 239. It first reasoned that the statute did not discriminate against national banks or conflict with any specific provision of the NBA. *Id.* at 248. It then found that the law posed "no danger of unlimited control by the state over the operations of national banking institutions," *id.* at 249, because it would not "deter [depositors] from placing their funds in national banks," *id.* at 252, and because "an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business," *id.* at 248.[2]

In *Barnett Bank*, this Court once again emphasized that the NBA does not preempt state laws that do not "significantly interfere" with a national bank's exercise of its powers. 517 U.S. at 33. That case concerned a Florida statute that generally prohibited the sale of insurance by national banks. *Id.* at 29. This Court held that the NBA preempted the state statute because the NBA specifically authorized national banks to sell insurance, and "Congress would not want

---

[2] The court below distinguished *Luckett* on the ground that the Kentucky statute at issue there "did not purport to regulate any bank power—it merely changed which parties could make a claim on a bank account as a background rule of property law." Pet. App. 20a-21a. This reading of the case ignores *Luckett*'s repeated emphasis on the fact that the law would not deter prospective depositors from using national banks and did not have an "unusual" or "novel" impact on banking. *See Luckett*, 321 U.S. at 252 (noting that it was unable "to discern any greater or different effect so far as prospective depositors in national banks are concerned"); *id.* at 251 (distinguishing *First National Bank of San Jose* because of the "unusual alteration of depositors' accounts" under the state statute at issue there).

States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. This Court specifically explained that its ruling did not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id*. (citing *Commonwealth*, *Luckett,* and *McClellan*).

B. Ignoring the cases described above, the court below instead purported to find support for its per se rule in several of this Court's other NBA preemption cases. *See* Pet. App. 19a-20a (citing *First Nat'l Bank of San Jose v. California,* 262 U.S. 366 (1923), and *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373 (1954)). Those cases, however, do not support preemption here. To the contrary, they reiterate the importance of assessing the magnitude of the impact imposed by a state law.[3]

In *First National Bank of San Jose,* this Court held that the NBA preempted a California statute that

---

[3] The court below also referred in passing to two cases in which this Court held that state statutes creating penalties for certain banking-related offenses were preempted in their application to national banks. In both cases, however, this Court reached that result only because it concluded that holding otherwise would undermine the NBA's drafters' plan for consistent penalties, *see Farmers' & Mechanics.' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875) (state usury rule preempted because the lawmakers who passed the NBA did not intend asymmetry in the punishment of usurious contracts, and "[a] purpose to produce or permit such a state of things ought not to be imputed to Congress"); *Easton v. Iowa*, 188 U.S. 220, 230-231 (1903) (state penal statute could not apply to national bank officer because Congress had created "apt provisions, sanctioned by severe penalties . . . intended to protect the depositors and other creditors of national banks from fraudulent banking," providing a "symmetrical and complete scheme"), an exercise completely eschewed by the court below.

required dormant deposits to escheat to the state after 20 years of inactivity, without any additional proof that the account had been abandoned. 262 U.S. at 366-67. Crucial to this decision was the determination that the law had a "not . . . immaterial" impact on the operations of national banks because future depositors might "hesitate to subject their funds to possible confiscation." *Id.* at 370. As this Court later observed, its decision in *First National Bank of San Jose* turned on "the effect of the state statute in altering the contracts of deposit in a manner considered so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks." *Luckett*, 321 U.S. at 250. Far from endorsing a per se rule, this Court's opinion in *First National Bank of San Jose* affirmed that preemption turns on a particular statute's "effect on the national banking system." *Id.*

In *Franklin National Bank of Franklin Square*, this Court held that the NBA preempted a New York statute that prohibited all banks, except for state-chartered savings banks and savings and loans, from using the words "saving" or "savings" when advertising their deposit services. 347 U.S at 373. As the court below noted, *Franklin* did not "address the magnitude of the impact of [New York's] law," Pet. App. 20a, but that is because this Court held that the New York statute created a "clear conflict" with federal law, *Franklin*, 347 U.S. at 378. By explicitly permitting national banks to accept savings accounts, this Court reasoned, Congress impliedly gave these banks the "right to let the public know" about their savings accounts. *Id.* at 377-78. Because "[m]odern competition for business" made advertising an essential component of banking, *id.*, the New York law prohibited something that was permitted by federal law.

C. The court below did not faithfully apply this precedent. Rather than investigating the impact of New York's escrow interest statute on the operations of national banks, as those cases instruct, the court below concluded that the law should be preempted simply because it purports to control banks in their exercise of real estate lending. Pet. App. 23a-25a.

The court below did not investigate, for example, whether escrow interest laws "deter [mortgage-holders] from placing their funds in national banks," *Luckett*, 321 U.S. at 252, or whether "[m]odern competition for business" makes refraining from paying escrow interest an essential component of real estate lending, leading to a "clear conflict" with the NBA, *Franklin*, 347 U.S. at 377-378. It also did not consider the fact that national banks have "gone on" for years as mortgage lenders, *First Nat'l Bank,* 263 U.S. at 659, without explicit exemption from escrow interest laws, *see generally* Pet'rs Br. 21-22; Pet. 24 (noting that some national banks continue to comply with state laws like the one at issue here).

Ultimately, the court below embraced a vision of preemption much like the one rejected in *McClellan v. Chipman*, considering a state statute's application in the "broadest sense," rather than analyzing the law's impact on the "purpose for which [national banks] were created." *McClellan*, 164 U.S. at 358.

III. *McCulloch v. Maryland* Does Not Compel a Different Result.

The court below also relied heavily on *McCulloch v. Maryland*'s truism that the "power to tax involves the power to destroy." Pet. App. 4a. To the court below, this statement means that the NBA preempts any state law that purports to control a national bank in the exercise of its powers, no matter the degree of such control. *Id*. at 5a. But this principle does not follow from *McCulloch*, which concerned state taxes that explicitly targeted national banks and clearly threatened their performance of public functions.

A. *McCulloch* concerned a Maryland tax imposed upon the notes of all banks not chartered in Maryland—a category that included only the state branch of the Second Bank of the United States. *McCulloch*, 17 U.S. at 320. There, this Court concluded that the tax was prohibited under the Supremacy Clause, *id*. at 432, because, in the Court's view, any taxation of the Bank would "retard, impede, burden, [and] . . . control" its operations, *id.* at 436.

McCulloch's holding was grounded in a specific and historically contingent conclusion about the precise impact of state taxes on the Second Bank of the United States. Although the Maryland tax at issue was indeed "modest," as the court below noted, Pet. App. 4a, state taxes in other parts of the country were high enough to drive Bank branches from the state, and posed "a real threat to the operation of the Second Bank." Ellis, *supra*, at 65. In Kentucky and Ohio, for example, legislators campaigned on anti-Bank platforms and passed tax measures explicitly targeting local branches of the Bank. *Id.* at 148-50.

Given this context, all parties in *McCulloch* took for granted the premise that allowing state taxes like Maryland's, which were aimed exclusively at the Second Bank, would "destroy" it. Attorneys for the state of Maryland did not dispute this contention, arguing instead that the state's constitutional power to impose taxes was "absolutely unlimited." *McCulloch*, 17 U.S. at 369 (argument of Attorney General Luther Martin for Maryland); *id*. at 346 (argument of Joseph Hopkinson for Maryland) (conceding that the Bank's "profits will be diminished" by the tax, but positing that this was a natural result of the state's "clear, general, absolute and unqualified right of taxation"). And lawyers for the Bank referred explicitly to the discriminatory and destructive tax measures passed in other states when opposing Maryland's tax. *Id.* at 393 (argument of William Pinkney for the Bank) ("Admit the constitutionality of the Maryland tax, and that of Kentucky follows inevitably.").

In short, this Court's ruling in *McCulloch* hinged on an assumption—one perceived as so self-evident that it was uncontested—that allowing the type of state tax in question would "destroy" the Bank of the United States. *Id.* at 864.

B. *McCulloch* also hinged on the unique role played by the First and Second National Banks in the context of the nation's early economy—a role not played by national banks today.

In the early nineteenth century, the First and Second Banks of the United States served unique public functions not served by banks with state charters. They issued currency which served as legal tender for all debts owing to the government. As such, they were "true central bank[s]," because they could manipulate the money supply, thereby endeavoring to provide a stable currency. Felsenfeld & Glass, *supra*, at 41-42. They were also "national banks," because they managed tax collection, debt issuance, and foreign exchange on behalf of the government. *Id.*; Hammond, *supra*, at 128.

Similarly, the NBA's drafters conceived of national banks as public entities with significant government functions. The law was "designed to establish a uniform national currency," Cong. Globe, 37th Cong., 3d Sess. 840 (1863) (Sen. Sherman), and "outsourc[e] the public function of money creation," Menand & Ricks, *supra*, at 1389. In exchange for a federal charter, national banks operated under significant constraints. They were required to receive the notes issued by other national banks "at par"—that is, without a discount rate. *See* Act of June 3, 1864, ch. 106, 13 Stat. 99. National banks were also depositories of public money and agents of the federal government, and authorized to "perform all such reasonable duties" that these roles might require. *Id.* § 45, 13 Stat. at 113. Finally, national banks were required to devote a certain percentage of their revenues to the Treasury, *id.* at § 41, 13 Stat. at 111, leading to lawmakers' assurances that the government would reap "all the profit of the circulation" generated by the Act, Cong. Globe, 37th Cong., 3d. Sess. 1146-47 (1863) (Rep. Alley).

Decades after passing the NBA, Congress created other entities that share national banks' functions, changing the position of national banks in the economy. The Federal Reserve Act of 1913 (FRA) created the Federal Reserve System and endowed it with control over the nation's money supply. Fed. Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified at 12 U.S.C. §§ 21-522). Like the NBA, the FRA envisioned Federal Reserve Banks as "joint ventures with the federal government," and required them to submit to federal regulation and pay a "franchise tax" on their earnings. Menand & Ricks, *supra*, at 1394.

By shifting many features of national banks to Federal Reserve Banks, the FRA "greatly reduced the importance of the distinction between national and nonnational banks." Milton Friedman & Anna Jacobson Schwartz, *A Monetary History of the United States, 1867-1960*, at 196 (1963). Furthermore, the Act charged the Federal Reserve with issuing paper money, gradually phasing out national bank notes, H.R. Rep. No. 63-69, at 17-22 (1913), and further limiting the role of national banks, as opposed to the federal reserve system writ large, in currency creation.

Additionally, in 1933, lawmakers created the Federal Deposit Insurance Corporation (FDIC) system, providing that state banks could opt to receive federal deposit insurance in exchange for federal regulation. Felsenfeld & Glass, *supra*, at 16. The law also authorized FDIC-insured national and state banks to receive deposits of public money, further eroding the distinctiveness of national banks. *See* 12 U.S.C. § 265.

This context undermines the Second Circuit's reliance on *McCulloch*. In *McCulloch*, this Court reasoned that Maryland's tax was invalid because it would jeopardize the Bank's performance of public functions. It noted that a tax on the "operations of the bank" would frustrate the "operation of an instrument employed by the government of the Union" to serve its important financial goals. *McCulloch,* 17 U.S. at 436. Other types of taxes—for example, "a tax imposed on the interest which the citizens of Maryland may hold in this institution"—would be permitted, because they did not "control . . . the operations of the constitutional laws enacted by congress." *Id.*; *Osborn v. Bank of the United States*, 22 U.S. 738, 867 (1824) ("If the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control . . . .").

In *McCulloch*, this Court had no occasion to consider state laws that only affected the functions of the Second Bank that were unconnected with its promotion of federal policy. The Bank was the sole federally chartered bank and was alone responsible for performing many government functions that are now shared by an entire federal banking system. Every operation of the Second Bank was understood to be "inseparably connected" to the Bank's ability to serve the government. *Id.* at 863. For this reason, taxing or "controlling" the bank's business necessarily undermined its "capacity to perform its functions." *Id.* The conclusion that a tax on the bank's private operations would necessarily impair—or destroy—the public functions of the bank was unassailable at the time.

In today's banking system, the link between a bank's private endeavors and its public functions is not so safely assumed. A law constraining the real estate lending operations of a national bank, however far-reaching, may not necessarily "frustrate the purpose for which the national banks were created," *McClellan*, 164 U.S. at 357, in the same way that the tax in *McCulloch* did. This makes it even more essential for courts to carefully consider the degree to which a state law interferes with a bank's "exercise of its powers," *Barnett Bank*, 517 U.S. at 32-34, rather than assuming that any law affecting a national bank's activities significantly interferes with its public functions. The court below failed to do this, however, and ignored the context in which *McCulloch* was decided when drawing on its statement that any state tax purporting to "control" a national bank must be preempted. Pet. App. 18a.

* * *

As this Court long ago observed, national banks should be subject to "the same conditions and restrictions to which all the other citizens of the state are subjected," unless those restrictions substantially impair the banks' performance of their public functions. *McClellan*, 164 U.S. at 358. By declining to evaluate the impact of New York's escrow interest law, the court below sidestepped this Court's precedent and ignored the long history of state banking regulation. This Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

December 15, 2023

* Counsel of Record