No. 22-529

IN THE

Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, and ILANA HARWAYNE-GIDANSKY, individually and 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 *AMICUS CURIAE* FLAGSTAR PLAINTIFFS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae are plaintiffs William Kivett and Bernard and Lisa Bravo, and the certified classes they represent (collectively, "Flagstar Plaintiffs"), in *Flagstar Bank, N.A. v. Kivett*, No. 22-349 ("*Flagstar*"). The Flagstar Plaintiffs hold a large judgment against Flagstar Bank[2] for the 2% interest on mortgage escrow accounts that are due to them under California's state interest-on-escrow (IOE) law, which is similar to the New York IOE law at issue in this case.

Alongside this case, *Flagstar* was considered for certiorari on the preemptive effect, if any, of the National Bank Act (NBA) following the enactment of Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Instead, the Court granted certiorari in this case, leaving the *Flagstar* petition pending its outcome. The Flagstar Plaintiffs therefore have a direct interest in how this case is resolved.

While supporting the petitioners, the Flagstar Plaintiffs offer a different perspective. In *Flagstar*, the preemption issue was decided on cross-motions for summary judgment where a well-developed evidentiary record showed as a matter of fact that state IOE

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[1] No party has authored this brief in whole or in part, and no one other than *Amicus Curiae* have paid for the preparation or submission of this brief.

[2] Shortly after filing its certiorari petition, Flagstar Bank converted itself from a federal thrift into a national bank. *See* Letter to Hon. Scott S. Harris, Clerk of the Court (Dec. 8, 2022), No. 22-349.

laws did not prevent or significantly interfere with Flagstar Bank's operations.

SUMMARY OF ARGUMENT

In contrast with the preemption finding at the pleading stage in this case, in *Flagstar* the district court decided against preemption on cross-motions for summary judgment, based on a well-developed evidentiary record. Unless this Court holds that all state IOE laws are preempted *per se*, the district court's determination in *Flagstar,* and the Ninth Circuit's affirmance, should not be disturbed.

As the *Cantero* petitioners and United States Solicitor General have elaborated in this case, state consumer financial laws are not lightly preempted. In Dodd-Frank, Congress intended case-specific determinations based on factfinding, as occurred in *Flagstar*. To strike down a state IOE law under the Supremacy Clause, the proponent of preemption must present proof arising from real-world experience. Conclusory assertions and policy objections are not enough.

The *Flagstar* litigation illuminates the practicality and fairness of this approach. The *Flagstar* summary judgment proceedings illustrate that it can be done. This approach is fair to all involved. A bank claiming a preemption defense is fairly held to the burden of presenting evidence of the significant interference necessary for NBA preemption.

KIVETT V. FLAGSTAR BANK[3]

A. Most Mortgage Servicers Routinely Comply With State IOE Laws

In 2018, when the Flagstar Plaintiffs initiated their action, compliance with California's IOE statute was already close to the norm. *See* Cal. Civ. Code § 2954.8. For example, Wells Fargo and JPMorgan Chase, two of the largest loan servicers in California, had been complying with California's IOE statute for several years at least with respect to loans originated after the effective date of Dodd-Frank. SER-122-124; SER-99.[4] Further, a large portion of mortgages are serviced by and/or on behalf of non-bank owned entities that have never had any claim to preemption in the first instance. SER-122-124; SER-96.

Lusnak v. Bank of Am., N.A., 883 F.3d 1185 (9th Cir. 2018), seemed to end any residual debate. Reversing the grant of a motion to dismiss, the Ninth Circuit held that California's IOE statute was not *per se* preempted by the NBA and that the contrary opinion of the Office of the Comptroller of the Currency ("OCC") was not relevant because it violated Dodd-Frank's requirements. Rather than continuing to litigate the issue, Bank of America settled its California state IOE liabilities and agreed to pay IOE on all covered mortgages in California going forward. SER-122-

[3] This overview is a summary. For a fuller discussion of the factual and procedural background in *Flagstar*, see Brief in Opposition of Respondents to Petition for Writ of Certiorari at 3-9, No. 22-349.

[4] These record citations are to the Ninth Circuit excerpts of record in No. 22-349.

124. CitiMortgage soon followed. *Ibid.* Flagstar Bank was an outlier in refusing to comply with California state IOE law.

This ease of compliance alone debunks sweeping arguments that state IOE laws constitute significant interferences with banking powers *per se*. The issue in a very real sense has already been adjudicated within the industry that, having already complied, cannot now claim adverse practical consequences without demonstrating them on a factual level.

Holding that state IOE laws are entirely preempted would upend a stable status quo where mortgage servicers routinely comply with state IOE laws. As the first and only appellate court to strike down a state IOE law, the Second Circuit imagined a problem that does not exist.

Indeed, states enacted IOE laws for good reasons. No one buying a personal residence should be compelled, by a glaring imbalance of bargaining power, to give interest-free loans to banks.

B. The Evidence In *Flagstar* Showed No Significant Interference With Bank Operations.

On cross-motions for summary judgement, Flagstar Bank took the position that its preemption defense turned on an evidentiary record and was not strictly a legal determination. At that time, it argued that *its* compliance with California's IOE law "prevents or significantly interferes" with *its* exercise of *its* banking powers. 12 U.S.C. § 25b(b)(1).

The record on summary judgment, however, showed the opposite. When deposed, Flagstar Bank officials could identify no interference, much less significant interference, resulting from state IOE law compliance. 2-ER-136-200; 2-ER-201-207; 2-ER-226-239; SER-132-135; SER-136-142; SER-39, 50, 71-88, 132-142. Its witnesses testified, for example, that they had no reason to believe further compliance with California state IOE law would cause Flagstar Bank to cease using mortgage escrow accounts (SER-91), result in any impact to loan origination or servicing businesses (SER-91-92), or cause any costs that would interfere with its ability to service loans (SER-92).

Further undermining its significant interference claim, Flagstar Bank's witnesses also testified that, for most of its loans, it was already paying IOE in compliance with applicable state laws, including California's IOE law. 1-ER-57-60. As the witnesses explained, Flagstar Bank's business model involves securitizing its loan and servicing rights as separate assets, and selling them to non-bank investors, such as hedge funds. SER-13-15, SER-20-21, SER-58-59; SER-21-22, SER-70. In the process, Flagstar acquires the separate contractual right and obligation to "subservice" these loans on behalf of the non-bank owners of the servicing rights. *Ibid.* On these subserviced mortgages—80% of its mortgage servicing business—Flagstar Bank routinely complied with state IOE laws and then charged that expense to the servicing asset owners. SER-61-62.

Nevertheless, Flagstar Bank asserted its affirmative defense that the California IOE law should be preempted because its compliance would prevent or

significantly interfere with its banking operations. After careful consideration and review of the evidentiary record before it, the district court granted summary judgment for the Flagstar Plaintiffs. Pet. App. 26, No. 22-349. The Ninth Circuit affirmed in an unpublished memorandum. *Id.* at 3-4.

In a turnabout from its position in the lower courts, Flagstar has now taken the position that the NBA preempts state IOE laws *per se*, even where a developed evidentiary record shows the absence of any significant interference with banking operations. *See* Petition for a Writ of Certiorari at 15, No. 22-349. With Flagstar's attempt to prove significant interference (largely from its own business records) falling flat in the district court, the only way Flagstar can prevail on preemption is if this Court holds that state IOE laws are preempted *per se*.

ARGUMENT

I. Eschewing a *Per Se* Approach, Congress Enacted a Framework Requiring a Factual Showing of Significant Interference for NBA Preemption.

Petitioners have detailed the flaws undermining the Second Circuit's *per se* approach to preemption in this case. The Flagstar Plaintiffs concur. The amorphous concept of "control," deriving the Second Circuit believed from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), leapfrogs one-hundred years of legal evolution and is unhelpful to deciding this case.

Congress explicitly set the applicable preemption standard in Dodd-Frank itself. As petitioners explain, "Congress intended a preemption regime in which: (1) factfinding would be necessary to show significant interference; and (2) such factfinding could (and perhaps often would) be made by the Office of the Comptroller of the Currency (OCC) in the first instance." Brief of Petitioners at 38. "When the OCC has made the necessary findings and its reasoning is persuasive, a court may defer to the OCC's preemption determination." *Ibid.* "But when the OCC has not made the necessary findings, the court must make the preemption determination—and its accompanying factual findings—itself." *Ibid.* That is precisely what the district court did in *Flagstar*.

Preemption questions often involve questions of fact. See *Merck Sharp & Dohme Corp. v. Albrecht,* 139 S. Ct. 1668, 1680 (2019). Although preemption will typically be decided by the judge, not jury, courts facing fact-intensive preemption questions must "resolve subsidiary factual disputes that are part and parcel of the broader legal question" of preemption. *Ibid.* The Solicitor General articulates the proper analytical touchstone for this case. The statutory language requires the court to "assess the law's likely practical effect on national banks' ability to exercise" banking powers. Brief for the United States as *Amicus Curiae* at 9. In the IOE context, this inquiry "requires a practical assessment of the degree to which … interest-on-escrow laws will impair national banks' ability to make mortgage loans and to administer associated escrow accounts." *Id.* at 13.

II. The *Flagstar* Litigation Illustrates That Fact-bound Preemption Analysis Is Workable and Fair.

Flagstar shows that a fact-bound preemption inquiry is workable in practice. Preemption in *Flagstar* was resolved on cross-motions for summary judgment where both sides received an untrammeled opportunity to present their evidence. The *Flagstar* court, with each side's evidence before it, made a fact-based determination as to whether the California IOE law substantially interfered with Flagstar's operations or powers such that it was subject to NBA preemption.

This analytical approach is fair to the banking industry. As *Flagstar* confirms, to claim an affirmative defense of preemption, banks are well positioned to make an evidentiary showing of any significant interference. Flagstar Bank was unable to do so, but this does not mean that another bank, if so encumbered, could not prove significant interference on a different record.

CONCLUSION

The Court should hold that state IOE laws are not *per se* preempted and reverse the decision of the Second Circuit Court of Appeals. On that basis, the certiorari petition in *Kivett v. Flagstar* should be denied so that the trial court's evidence-based decision on summary judgment and the Ninth Circuit's affirmance are not disturbed.

Respectfully submitted,

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