No. 22-529

IN THE

# Supreme Court of the United States

ALEX CANTERO, ET AL., 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 WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether the National Bank Act's express-preemption provision allows New York to impose on nationally chartered banks banking requirements that differ from federal law.

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## INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus urging the Court to properly interpret express-preemption provisions in federal law. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008).

## INTRODUCTION

Banks are one of the most heavily regulated industries in America. Sundry federal agencies play some role in ensuring that nationally chartered banks comply with intricate statutory and regulatory requirements. The banks spend billions of dollars each year ensuring compliance with these legal requirements. The purpose of these regulations, of course, is to prevent banks from collapsing and harming our nation's economy.

Federal statutory and regulatory requirements more than suffice to ensure the soundness of our nation's federally chartered banks. That is why earlier this century Congress barred States and localities from interfering with the banking operations of federally chartered banks. The National Bank Act's express-preemption provision is meant to ensure that nationally chartered banks focus on complying with federal requirements.

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

But Plaintiffs argue that federally chartered banks also must comply with laws enacted by thousands of local and state governments around the country. In other words, although Bank of America has a federal charter, Plaintiffs argue that the National Bank Act's express-preemption provision does not exempt it from these state-law requirements.

If this Court were to adopt Plaintiffs' and the United States's argument, it would be bad for banks and consumers. Federally chartered banks would have to spend billions more to ensure compliance with these state-imposed requirements. So although consumers may have Wells Fargo accounts in Pennsylvania, those accounts would differ in meaningful ways from the same accounts held by people in New York. Not only would this cause great confusion for consumers, it would also require banks to increase fees and other banking costs to account for greater regulation.

But that is not the only dangerous part about Plaintiffs' and the United States's position. Many statutes have express-preemption provisions that cover the largest and most important sectors of our nation's economy. If this Court vacates or reverses the Second Circuit's decision, all these express-preemption clauses could be challenged. Regulated parties would lack the certainty they currently have that, if they comply with federal law, they need not worry about state regulations that interfere with their operations. Rather, they would have to comply with all state regulations if it is even possible to do so while complying with federal law. This Court should reject this atextual reading of the National Bank Act and affirm the Second Circuit's decision.

## STATEMENT

### I. STATUTORY BACKGROUND

**A.** From 1836—when the Second Bank of the United States expired—until 1863, States controlled banking in America. This meant that banks flourished in some locations but were illegal in others. It also meant that oversight was uneven and fraudsters successfully stole people's hard-earned money. Although the system was flawed, the extent of the problems with this system were not immediately apparent in peacetime.

During the Civil War, President Abraham Lincoln and Treasury Secretary Salmon Chase realized that the unreliability of paper money and the lack of adequate money made fighting the war much tougher than it should have been. So they pushed to reform the nation's banking laws and Congress acquiesced.

In 1863, Congress passed the National Currency Act, ch. 56, 12 Stat. 665. This law created a system of nationally chartered banks. To encourage banks to seek a national charter, the National Currency Act also imposed hefty taxes on state-chartered banks. Although this managed to accomplish many of Congress's goals, it quickly became clear that further action was needed.

A year later, Congress passed the National Bank Act, ch. 106, 13 Stat. 99. Recognizing that New York had the most robust banking industry in America, the National Bank Act borrowed from a New York statute to impose strict requirements for those

seeking a national charter. For example, banks must have a minimum level of capital and keep significant funds in reserve.

Again, the National Bank Act did not accomplish one of Congress's main goals—eliminating paper currency issued by state-charted banks. So in subsequent years, Congress increased the tax on those notes. *See Veazie Bank v. Fenno*, 75 U.S. 533, 538-39 (1869). This essentially eliminated paper currency issued by state-chartered banks.

**B.** Under the National Bank Act, the Office of the Comptroller of the Currency is charged "with superintendence of national banks." *Nationsbank of North Carolina, v. Variable Annuity Life Ins.,* 513 U.S. 251, 254 (1995). States may not regulate national banks in a way that conflicts with the National Bank Act's preemption clause. *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 534 (2009).

After the 2008 financial crisis, Congress sought to clarify the scope of National Bank Act preemption in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Under the amended statute, a state consumer-protection law is preempted if it "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B).

Congress did not create this preemption standard. Rather, it expressly adopted the test announced by this Court in *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996). That test, announced fourteen years before Dodd-Frank's passage, still governs the preemption inquiry.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

**A.** Federally chartered banks may provide escrow services for their customers. OCC Interpretive Ltr. No. 1041 (Sept. 28, 2005). This means that along with paying principal and interest, borrowers also pay lenders for property taxes, homeowner insurance, and other costs. The lender then ensures that these funds are timely distributed. The arrangement helps both sides because it prevents property taxes from becoming delinquent and ensures sufficient funds to cover the mortgage if the house is destroyed by fire.

There are, of course, costs to this arrangement. Borrowers are essentially forced to give the lender a loan; the escrow accounts normally carry a significant balance. And lenders must track the bills to be paid from escrow and then distribute those funds. But in the end, both sides agree that the benefits outweigh the costs of this arrangement.

Thirteen States, however, prefer to interfere with the market. They have passed laws that require lenders to pay money on escrow accounts. New York is among them. *See* N.Y. Gen. Oblig. Law § 5-601. The OCC, recognizing that these laws flout the National Bank Act's preemption provision, promulgated regulations clarifying that nationally chartered banks need not comply with these state laws. 12 C.F.R. § 34.4(a)(6).

**B.** Bank of America made home loans to Alex Cantero and Saul Hymes and Ilana Harwayne-Gidansky to buy houses in New York. As part of the mortgage agreements, Plaintiffs agreed to make

escrow payments to cover their property taxes and insurance costs. When Bank of America did not pay them interest on their escrow accounts, Plaintiffs sued. The District Court denied Bank of America's motion to dismiss but the Second Circuit reversed. It held that Section 25b(b)(1)(B) codified this Court's pre-Dodd-Frank standard for preemption. Pet. App. 26a. Under that standard, the National Bank Act preempts state interest-on-escrow statutes. This Court granted certiorari to resolve a circuit split on this important question about the scope of the National Bank Act's express-preemption provision.

## SUMMARY OF ARGUMENT

This Court's decision will affect many express-preemption provisions in federal law. A ruling for Plaintiffs would cause uncertainty for businesses and consumers in many industries and would have major negative consequences.

**A.1.** The two largest health-insurance providers in America are employers and Medicare. The laws governing those providers both have express-preemption provisions meant to ensure that States and localities cannot interfere with the functioning of those systems. These preemption provisions have done a good job of promoting health insurance. But there would be fewer incentives for companies to offer plans if this Court were to reverse the Second Circuit here.

**2.** For the past four decades, the federal government has heavily regulated the tobacco industry. This regulation aims to keep consumers safe by providing them with appropriate information and

limiting the activities of tobacco companies. These regulations involve a careful balancing of many factors. So Congress did not want States and localities passing their own conflicting regulations. This system has worked well but is at risk if this Court reverses here.

**3.** Modern aviation is a technical marvel that keeps our economy running smoothly. One reason the aviation industry works is because airlines need not comply with differing state and local laws about routes and services. It is also why airline travel is so safe. But all that could be in jeopardy if the Court upends well-settled precedent on express-preemption provisions.

**B.** Vacating or reversing the Second Circuit would jeopardize all these express-preemption provisions. Plaintiffs and the United States want to make broad express-preemption provisions like that in the National Bank Act function like impossibility preemption. If this Court goes down that road, there is no stopping at just the National Bank Act. This Court has rejected such attempts at narrowing express-preemption provisions before and should do so again here.

## ARGUMENT

### THIS CASE HAS FAR-REACHING EFFECTS FOR FEDERAL PREEMPTION OF STATE AND LOCAL LAWS.

This case focuses on how to apply the National Bank Act's express-preemption provision. But the Court's decision will have far-reaching implications. There are many statutes with similar express-

preemption provisions. If this Court were to overturn decades of precedent and rule for Plaintiffs, the status of those preemption provisions would be uncertain. This Court should not go down that path. Rather, it should reaffirm basic preemption principles that have served our nation well for over 200 years.

### A. Consumers And Businesses Rely On Many Federal Express-Preemption Statutes.

Preemption is critical to a functioning national economy. For many industries that operate across state lines, it would be too expensive to comply with different requirements in each State or even every locality. Congress has recognized this fact many times and passed express-preemption provisions to protect parties who comply with federal-law requirements.

Some examples show the possible ramifications of a decision for Plaintiffs.

**1.i.** The Employee Retirement Income Security Act preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court has ensured that this "express pre-emption clause receives the broad scope Congress intended." *Gobeille v. Liberty Mut. Ins.,* 577 U.S. 312, 320 (2016). The broad reading of ERISA's preemption provision has been critical to ensuring that workers receive good benefits.

Plans governed by ERISA provide health-insurance coverage for over 177 million Americans. Katherine Keisler-Starkey & Lisa N. Bunch, *Health Insurance Coverage in the United States: 2020*, U.S.

Census Bureau, 4 (Sept. 2021), https://perma.cc/83GH-8AAG. "[E]mployers rely on ERISA preemption to more efficiently offer their employees all forms of ERISA-covered benefits, including disability, pension (both defined benefit and defined contribution), and important ancillary benefits like life insurance." Brief of Amici Curiae the American Benefits Council et al. Supporting Petitioner at 13, *The ERISA Indus. Comm. v. City of Seattle*, 143 S. Ct. 443 (2022) (per curiam) (No. 21-1019), 2022 WL 566392.

This Court has recognized that "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). By "afford[ing] employers the advantages of a uniform set of administrative procedures governed by a single set of regulations," ERISA's preemption provision ensures employers need not confront "the task of coordinating complex administrative activities." *Id.*

As described in § B below, reversing or vacating the Second Circuit's decision would lead to a watering down of ERISA's preemption provision. This would harm employees nationwide. Again, over half of Americans receive their health insurance through employer-sponsored plans. *See* Keisler-Starkey & Bunch, *supra* at 4. Those individuals would be at risk of losing health insurance. And those who kept their health insurance would likely see lower pay or the elimination of other benefits to save money. This is to say nothing of the other benefits covered by ERISA plans. Most employers would have little choice but to

eliminate disability insurance coverage and pensions or reduce pay to cover the increased costs of the labyrinths of state regulations that plans would have to comply with.

**ii.** Most Americans who do not receive their health insurance through their employers are instead covered through Medicare. Older Americans may choose to have their Part A and Part B benefits administered by a Medicare Advantage plan. Those who make this choice are generally more satisfied with their Medicare coverage than those who go with traditional Medicare. *See* Gretchen Jacobson et al., *Medicare Advantage vs. Traditional Medicare: How Do Beneficiaries' Characteristics and Experiences Differ?*, The Commonwealth Fund (Oct. 14, 2021), https://perma.cc/UZ35-R8PF.

But health insurance companies must be willing to offer Medicare Advantage plans for older Americans to enjoy the benefits of those plans. They would be less willing to offer these plans if they also had to comply with requirements imposed by States and local governments. Recognizing this fact, Congress has expressly preempted "any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to [Medicare Advantage] plans which are offered by [Medicare Advantage] organizations." 42 U.S.C. § 1395w-26(b)(3).

This express-preemption provision ensures that enough health insurance companies offer Medicare Advantage plans to satisfy the demand from older Americans. But if this Court were to upset the

Second Circuit's decision here, it could cause health insurance companies to stop offering these plans.

In sum, the two biggest providers of health insurance in this country, employers and Medicare, rely on express-preemption provisions like the one here. A decision for Plaintiffs could cause massive upheaval in the health-insurance sector. This Court should not go down that path. Rather, it should affirm the Second Circuit's well-reasoned decision.

**2.** The Tobacco Control Act likewise preempts any state law "which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards." 21 U.S.C. § 387p(a)(2)(A). The TCA tasks the Food and Drug Administration with maintaining uniform tobacco product standards based on a careful weighing of varied factors, including public health. The express-preemption provision ensures that States and localities may not countermand that regulatory scheme.

Tobacco is one of the most regulated industries in America. Everything from the names manufacturers may give cigarettes to the color of packaging is managed by the FDA through detailed regulations. Congress has decided that some tobacco products pose a risk to the public and that the FDA is the appropriate agency to weigh the costs and benefits of even the smallest change in tobacco standards. *Cf. Magellan Tech., Inc. v. FDA*, 70 F.4th 622, 632 n.6 (2d Cir. 2023) ("the TCA expressly empowers the FDA to perform the comparative analysis").

Congress does not want States to make those calls based on political pressure or incomplete scientific studies. That is why it passed the express-preemption provision that bars States and localities from enforcing these other standards. This is true even if it is possible to comply with both the federal regulations governing tobacco standards and the state-imposed standards. The point is that Congress wanted one set of standards to govern nationwide based on the scientific analysis of one federal agency. In other words, Congress thought that having 50—or even thousands—of agencies making these decisions was a bad idea.

If this Court upends the Second Circuit's decision here, States and localities may impose tobacco product standards that conflict with the available scientific data. This could risk the health and welfare of the residents of those locations. But it would also jeopardize those living in other jurisdictions because companies will not want to make multiple products for different markets.

**3.** The Airline Deregulation Act preempts state laws "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). This Court has held that, under this provision, "[s]tate enforcement actions having a connection with or reference to airline rates, routes, or services are pre-empted." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (cleaned up).

In *Trans World Airlines*, Texas argued that this Court should adopt some form of impossibility preemption when interpreting the ADA's preemption provision. It "suggest[ed] that pre-emption is

inappropriate when state and federal law are consistent." *Trans World Airlines*, 504 U.S. at 386. This mirrors the arguments Plaintiffs and the United States make here. In their view, state banking laws are not preempted if it is possible to comply with both requirements. In other words, if they are not inconsistent, there is no preemption.

This Court soundly rejected that argument and should do so here. As the Court explained, an express-preemption provision like that in the ADA "displaces all state laws that fall within its sphere, even including state laws that are consistent with [the federal law's] substantive requirements." *Trans World Airlines*, 504 U.S. at 387 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) (cleaned up)). *Mackey* was, in turn, an ERISA preemption case.

Airlines have relied on this broad interpretation of the ADA when organizing their operations. One example shows just how broad the ADA's preemption provision is and how airlines rely on that breadth. While many airline passengers may think that flight attendants are there to be servers, federal law requires airlines to use flight attendants to ensure passenger safety. A recent incident in Japan shows just how crucial flight attendants are in ensuring passenger safety. *See* Justin McCurry, *Miracle at Haneda: how cabin crew pulled off great escape from Japan plane fire*, The Guardian (Jan. 3, 2024), https://perma.cc/6W9V-BCCP.

Sometimes, passengers must be told "no" by a flight attendant for their own safety or those of other passengers and crew. In a litigious society, that can

lead to lawsuits for negligent and intentional infliction of emotional distress. But courts have held that those suits are preempted by the ADA. *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 151 (D. Mass. 2019). Even though being told to sit down by a flight attendant does not influence the airline's routes, it is "inextricably related" to the service provided. *Id.*

Airlines rely on decisions like *Covino* when training their cabin staff on proper safety procedures. But it would be impractical to train flight attendants on the intricacies of every State's tort laws. So federal preemption is key to ensuring safety in the air. Again, this is just one part of the ADA's broad preemption provision that would be disputed if this Court were to vacate or reverse the Second Circuit's decision here.

These examples are just the start of the broad implications of this Court's construction of the National Bank Act's express-preemption provision. Others include the Securities Exchange Act, 15 U.S.C. § 78o(i)(1); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b); Pork Promotion, Research, and Consumer Information Act, 7 U.S.C. § 4817(b); Food, Drug and Cosmetic Act, 21 U.S.C. § 360k(a); and Egg Products Inspection Act, 21 U.S.C. § 1052(b). All would face preemption questions if this Court were to vacate or reverse the Second Circuit's decision.

### B. A Ruling For Plaintiffs Would Jeopardize All These Express-Preemption Provisions.

It's true that the language of the statutes discussed above and the National Bank Act differ in some respects. But that does not mean that the Court's ruling here will be limited to the National Bank Act. Plaintiffs' argument seeks to weaken this Court's well-settled express-preemption jurisprudence. Under that jurisprudence, express-preemption provisions are given their common-sense meaning and bar States and localities from interfering with federal regulatory schemes.

There are generally three types of preemption—"field," "express," and "conflict." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). The broadest of these is field preemption, which "occurs when federal law occupies a field of regulation so comprehensively that it has left no room for supplementary state legislation." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018) (cleaned up). Express preemption occurs when Congress "expresses a clear intent to pre-empt state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) (citation omitted). Finally, conflict preemption "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *United States v. Locke*, 529 U.S. 89, 109 (2000).

Here, the National Bank Act expressly preempts state laws that affect the ability of

nationally chartered banks to operate in the manner contemplated by federal law. The other statutes discussed above are also express-preemption provisions. A ruling for Plaintiffs would seriously erode the preemptive effect of these laws.

The National Bank Act's express-preemption provision is broad. It "speaks in special terms that often trigger conflicts: When [it] grants 'powers,' 'both enumerated and incidental,' those powers are 'not normally limited by, but rather ordinarily pre-empt, contrary state law.'" Pet. App. 15a (quoting *Barnett Bank*, 517 U.S. at 32 (cleaned up)). In other words, "federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). Nationally chartered banks do not need States' permission to operate in a manner consistent with federal law. *Barnett Bank*, 517 U.S. at 35.

Soon after the National Bank Act's passage, the Court held that nationally chartered banks' "contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are" also governed by state law. *First Nat'l Bank v. Kentucky*, 76 U.S. 353, 362 (1869). The same holds true today. Usually when a borrower defaults on a loan, the bank sues under state law in state court to collect on the debt. This, however, does not mean that States may regulate the banking operations.

Soon after the Court's decision in *First National Bank*, it limited the scope of that decision. The Court held that "States can exercise no control over [national banks], nor in any wise affect their

operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). The Court has stuck to this rule for the past 150 years. *See, e.g.*, *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (States may not "impair" national banks' ability "to discharge the duties imposed upon them by" federal law.); *First Nat'l Bank in St. Louis v. Missouri ex rel. Barrett*, 263 U.S. 640, 659 (1924) (State laws may not "frustrate the purpose for which the bank was created."); *Watters*, 550 U.S. at 13 (State laws may not "curtail or hinder a national bank's efficient exercise of [a] power."); *cf. Barnett Bank*, 517 U.S. at 37 (the Court was following precedent on the scope of the National Bank Act's preemption clause).

Plaintiffs and the United States, however, want to upend this 150-year-old precedent. Although they phrase their tests differently, both seek a rule that would be closer to that the Court applies in impossibility-preemption cases. The United States claims (at 9) that when deciding whether a State law is preempted by the National Bank Act, "a court must make a practical, case-by-case assessment of the degree to which the state law will impede the exercise of those powers." In essence, this rule would say that a state law is not preempted by the National Bank Act if it minimally impedes the national bank's operations.

In other words, state laws are preempted under the United States's rule only if it is nearly impossible to comply with both the state law and federal law. Although this is not true impossibility preemption, it comes very close to that threshold. But in passing the National Bank Act, Congress did not say that state

laws are preempted only if it is nearly impossible to comply with the state law and federal law. Rather, Congress preempted all state laws that affect a national bank's ability to carry out its banking functions. This broad preemption stems from pre-National Bank Act case law, which said that the degree of interference does not matter for preemption purposes; the intrusion itself is what prompts preemption. *See McCulloch v. Maryland*, 17 U.S. 316, 430-31 (1819).

Plaintiffs' argument is equally flawed. They contend (at 27) that a finding of preemption "requires a factual showing of the degree of interference." Under this proposed test, a state law that interferes with the banking functions of a nationally chartered bank is allowed if it is not impossible to comply with both. The Second Circuit correctly rejected this erroneous interpretation of this Court's precedent and the National Bank Act's text.

Adopting Plaintiffs' proposed theory could wreak havoc on the express-preemption provisions discussed above. For example, ERISA preempts any state law related to a plan. *See* 29 U.S.C. § 1144(a). Courts have interpreted this express-preemption provision broadly. "ERISA preempts a state law claim if the claim requires the court to interpret or apply the terms of an employee benefit plan." *Laborers' Pension Fund v. Miscevic*, 880 F.3d 927, 931 (7th Cir. 2018) (cleaned up).

The reason that courts have interpreted ERISA's express-preemption provision in this way is the same reason this Court has interpreted the National Bank Act's preemption provision to cover

state laws that affect banking operations. This Court has "not hesitated to apply ERISA's pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations." *FMC Corp. v. Holliday*, 498 U.S. 52, 59 (1990) (citation omitted). This is because "an employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State. * * * The administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent." *Fort Halifax Packing Co.*, 482 U.S. at 11 (quotation omitted).

The express-preemption provisions of both the National Bank Act and ERISA are designed to avoid the administrative headaches of complying with different state regulations. Courts have therefore interpreted the express-preemption provisions to bar any state law that regulates banking operations of a nationally chartered bank or requires interpreting an ERISA plan. This does not mean, of course, that all state laws affecting banks or ERISA plans are preempted. Laws, for example, that govern garnishment to enforce alimony and child support orders are not preempted. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983) (citation omitted). That is because they do not touch on ERISA plans or the powers of nationally chartered banks.

The same holds true for the other express-preemption provisions discussed above. Congress passed each provision because it found impossibility preemption inadequate to protect the national interest while finding field preemption unnecessary (or possibly unconstitutional). Plaintiffs and the

United States, however, want this Court to disregard these policy decisions and hold that express-preemption provisions like the National Bank Act's apply only when complying with both state and federal law is nearly impossible.

So this case has broad implications beyond that of National Bank Act preemption. If this Court waters down the express-preemption provision in the National Bank Act, a flood of challenges to other express-preemption provisions will follow. Plaintiffs will use the decision here to ask courts to limit the scope of those other express-preemption provisions. This is bad for everyone except the plaintiffs' bar. The Second Circuit correctly held that New York's interest-on-escrow law is preempted by the National Bank Act.

## CONCLUSION

This Court should affirm.

Respectfully submitted,

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