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 PROFESSOR DORI K. BAILEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....................................iii

INTEREST OF THE AMICUS CURIAE................. 1

SUMMARY OF THE ARGUMENT......................... 2

ARGUMENT 3

I. The Second Circuit's Preemption of State Law in *Cantero* Upholds Two Hundred Years of Supreme Court Conflict Preemption Precedent. 3

A. *Barnett* is the Seminal Case in the Law of Conflict Preemption. 6

B. The Dodd-Frank Act Broadened Preemption Standards By Establishing the New Discriminatory Effect Preemption Standard. 9

C. The Dodd-Frank Act Codified the Traditional Legal Standard of Conflict Preemption Incorporating the Entire *Barnett* Analysis. 11

D. The State Law Conflicts with a National Bank's Federally Granted Powers and Should be Preempted under the *Barnett* Legal Standard. 16

E. Courts are Ill-Equipped to Determine Questions of Degree When Analyzing Preemption of State Laws. 23

II. The State Law Conflicts with Federal Policy to Deregulate Deposit Interest Rates. 25

III. Preemption of State Consumer Financial Laws Did Not Cause or Contribute to the Subprime Mortgage Crisis or the Financial Crisis. 27

IV. A Narrowing of the *Barnett* Conflict Preemption Standard will have Detrimental Effects on National Banks and Consumers. . 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000 (E.D. Cal. 2002).. 5

Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944)... 5

Ass'n of Banks in Ins. v. Duryee, 270 F.3d 397 (6th Cir. 2001) 5, 13

Bank of Am. v. City of S.F., 309 F.3d 551 (9th Cir. 2002).. 4, 5, 6, 7, 18

Baptista v. JPMorgan Chase Bank, N.A., 640 F.3d 1194 (11th Cir. 2011) *cert. denied*, 132 S. Ct. 253 (2011)... 4

Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25 (1996) 2-4, 6-9, 11-16, 18-20, 22, 25, 30-32, 36

Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767 (1947)....................................... 4

Cantero v. Bank of America, N.A., 49 F.4th 121 (2d Cir. 2022) 2, 3, 16, 18, 22, 25

Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009)... 6

Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 4, 5, 7, 18

First Nat'l Bank of San Jose v. California, 262 U.S. 366 (1923).. 5, 6

Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373 (1954)......... 7, 8, 18, 19, 20, 22

TABLE OF AUTHORITIES

Page(s)

Free v. Bland, 369 U.S. 663 (1962) 5

Hines v. Davidowitz, 312 U.S. 52 (1941) 4, 7

Hymes v. Bank of Am., N.A., 408 F. Supp. 3d 171 (E.D.N.Y. 2019) 16

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 4

M&M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977) 16

McClellan v. Chipman, 164 U.S. 347 (1896) 5

McCulloch v. Maryland, 17 U.S. 316 (1819)...... 3, 25

Nat'l Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869) 3

Osborn v. Bank of the U.S., 22 U.S. 738 (1824) 22

Rice v. Norman Williams Co., 458 U.S. 654 (1982) 4

Ridgway v. Ridgway, 454 U.S. 46 (1981) 5

Rose v. Chase Bank USA, N.A., 513 F.3d 1032 (9th Cir. 2008) 6, 7, 18, 19

Tiffany v. Nat'l Bank of Mo., 85 U.S. 409 (1873) .. 10

United States v. Locke, 529 U.S. 89 (2000) 6

Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005) 6

Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) 18

Wells Fargo Bank of Tex., N.A. v. James, 321 F.3d 488 (5th Cir. 2003) 4, 5

TABLE OF AUTHORITIES

Page(s)

Statutes and Legislative Materials

12 U.S.C. §1 et seq. 27

12 U.S.C. §225a 32

12 U.S.C. §24 .... 16, 17, 18, 19, 21, 22

12 U.S.C. §25b 9, 10, 11, 12, 13, 23, 25

12 U.S.C. §2605(g) 20

12 U.S.C. §371 .... 16, 20

12 U.S.C. §5412 27

12 U.S.C. §92 .... 7, 8, 9, 20

15 U.S.C. §6701(d)(2)(A) 13

156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Johnson) 31

156 Cong. Rec. S5902 (daily ed. July 15, 2010) (colloquy between Sen. Carper and Chairman Dodd) 15

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Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (2010) 2, 9

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Page(s)

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John C. Dugan, Comptroller of the Currency, Remarks before Women in Housing and Finance: The Need to Preserve Uniform National Standards for National Banks (Sept. 24, 2009) 31

Letter from Sen. Thomas R. Carper & Sen. Mark R. Warner to Timothy Geithner, Sec'y of the Treasury (July 8, 2011) 13, 14, 15, 31, 32

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TABLE OF AUTHORITIES

Page(s)

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The Federal Reserve System Purposes and Functions, Conducting Monetary Policy, 21 https://www.federalreserve.gov/aboutthefed/files/pf_3.pdf... 32

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TABLE OF AUTHORITIES

Page(s)

12 CFR §1024.17 .... 20, 21

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U.S. CONST. art. VI, cl. 2 .... 3, 8

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Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 Tul. L. Rev. 1257 (2010).. 30

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TABLE OF AUTHORITIES

Page(s)

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INTEREST OF THE AMICUS CURIAE

Dori K. Bailey is an Adjunct Professor of Law at the Syracuse University College of Law. Professor Bailey teaches banking law, and her scholarship centers on issues in banking law and regulation, federal preemption, and freedom of speech. Professor Bailey is the author of the article *A Defense of the Doctrine of Preemption: Revealing the Fallacy that Federal Preemption Contributed to the Financial Crisis*, published in the University of Pennsylvania Journal of Constitutional Law, 16 U. Pa. J. Const. L. 1041 (2014). She is the recipient of the 2015 American College of Consumer Financial Services Lawyers Annual Writing Competition Award for this article. Professor Bailey is also the author of the article *Preemption Principles: Weighing the Impact of Dodd-Frank*, 34 No. 7 Banking & Fin. Services Pol'y Rep. 1 (2015). Professor Bailey serves as the Chair of the Financial Institutions Regulatory Practice at Bond, Schoeneck & King PLLC and is a member of the firm.[1]

Consistent with Professor Bailey's teaching and scholarship in banking law and federal preemption, she has an interest in the resolution of this case within the appropriate legal framework.

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[1] This brief was authored entirely by the amicus curiae and her counsel, not by counsel for any party. Bond, Schoeneck & King, PLLC, provided its services to the amicus curiae without charge and contributed to the filing costs. Bank of America, N.A. is a client of Bond, Schoeneck & King, PLLC, but played no role in the creation of this brief and offered no compensation or contribution to the preparation or submission of this brief. No other party contributed to the cost of preparing or filing this brief.

SUMMARY OF THE ARGUMENT

This brief addresses the fundamental legal question of whether the National Bank Act preempts a New York State law imposing a requirement on banks to pay interest on escrow deposit accounts. The Second Circuit, in *Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022) ("*Cantero*"), correctly held that the state statute was preempted.

In *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996) ("*Barnett*"), this Court issued the seminal opinion in banking law regarding the traditional legal standard for conflict preemption. Congress later codified the legal standard of *Barnett* in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203,124 Stat. 1376 (2010) (the "Dodd-Frank Act").

This Court should affirm the Second Circuit's opinion in *Cantero* and hold that the imposition of a state law interest payment requirement on escrow deposit accounts is preempted based on the traditional legal standard for conflict preemption analysis in this Court's *Barnett* decision as codified in the Dodd-Frank Act.

ARGUMENT

I. The Second Circuit's Preemption of State Law in *Cantero* Upholds Two Hundred Years of Supreme Court Conflict Preemption Precedent.

The Supremacy Clause of the United States Constitution states that federal law "shall be the supreme [l]aw" of the United States, notwithstanding any contrary state law. U.S. CONST. art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 360-361 (1819) ("By this declaration, the States are prohibited from passing any acts which shall be repugnant to a law of the United States."). Accordingly, the federal government has the power and authority to preempt state law within constitutional bounds. *See* Richard Scott Carnell *et al.*, The Law of Banking and Financial Institutions 92, 95 (4th ed. 2009) ("Within constitutional limits, Congress has supreme authority . . . Congress has very broad authority to regulate national banks, federal savings institutions, and federal credit unions and to preempt any inconsistent state law.").

This Court has held that national banks "are governed in their daily course of business" by certain state laws, including laws governing contracts, debt collections, purchase and sale of property, and liability for debts owed by banks. *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869); *see also* 12 C.F.R. §7.4007(c), 7.4008(e) (2011) (providing that such state laws "apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank*"). If the state statute does not

govern an area of law expressly reserved to the states, the doctrine of preemption may apply within the scope of three established principles: (i) express preemption, (ii) implied or field preemption, and (iii) conflict preemption. *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 253 (2011); *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003); *Bank of Am. v. City of S.F.*, 309 F.3d 551, 558 (9th Cir. 2002); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 226 (2000). As express preemption and field preemption are not at issue in the case below, this brief will focus on conflict preemption.

Conflict preemption applies when the federal law and the state law are in "irreconcilable conflict." *Barnett*, 517 U.S. at 31 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)); *Wells Fargo Bank of Tex.*, 321 F.3d at 491. An irreconcilable conflict occurs when compliance with both the federal law and the state law would be physically impossible. *See Barnett*, 517 U.S. at 31 (declaring physical impossibility to be an "irreconcilable conflict"). Conflict preemption also applies when the state law presents an obstacle to the accomplishment of the objectives and purposes of the federal law. *Barnett*, 517 U.S. at 31; *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153; *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 773 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Bank of Am.*, 309 F.3d at 558. This type of conflict preemption is known as obstacle preemption. Nelson, *Preemption*, 86 Va. L. Rev. at 228-29. Accordingly, obstacle

preemption may occur when the state law is inconsistent with the federal law or, more broadly, when the effects of the state law are a hindrance to or interfere with federal policy. *Id.*; *see also* Carnell *et al.*, at 94.

The law of conflict preemption will apply despite the importance of the state law to the state. *de la Cuesta*, 458 U.S. at 153 ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . ." (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981). This Court has also found that conflict preemption may occur when a federal law or regulation grants a federally chartered institution permission to take certain actions, but the law does not require the federally chartered institution to take those actions. *de la Cuesta*, 458 U.S. at 155. Moreover, conflict preemption applies even when compliance with both the state law and the federal law is possible for national banks, if the state law "infringe[s] the national banking laws or impose[s] an undue burden on the performance of the banks' functions." *Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (quoting *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944)). Conflict preemption is also found when the state law "frustrates the purpose of . . . national legislation, or impairs the efficiencies of . . . agencies of the federal government" to fulfill their mission. *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1008 (E.D. Cal. 2002) (quoting *McClellan v. Chipman*, 164 U.S. 347, 357 (1896)). *See also Wells Fargo Bank of Tex.,* 321 F.3d at 491; *Bank of Am.*, 309 F.3d at 561 (citing *First*

Nat'l Bank of San Jose v. California, 262 U.S. 366, 369 (1923)).

Additionally, conflict preemption in the banking realm is not constrained by a presumption against preemption. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008). This Court has found that a presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also* Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption,"* 84 Tul. L. Rev. 1185, 1195 (2010). "National banking is the paradigmatic example." *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 554 (2009) (Thomas, J., dissenting). Accordingly, "because there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable." *Bank of Am.*, 309 F.3d at 559 (quoting *Locke*, 529 U.S. at 108); *see also Wachovia Bank,* 414 F.3d at 314.

A. *Barnett* is the Seminal Case in the Law of Conflict Preemption.

The seminal case in conflict preemption law for national banks is *Barnett*. Dori K. Bailey, *A Defense of the Doctrine of Preemption: Revealing the Fallacy that Federal Preemption Contributed to the Financial Crisis*, 16 U. Pa. J. Const. L. 1041, 1049 (2014). The federal statute in *Barnett* granted national banks the power to sell insurance in towns with a population not

exceeding 5,000 people. *Barnett*, 517 U.S. at 28 (citing 12 U.S.C. §92). This Court's analysis centered on whether the state statute, which prohibited certain national banks from selling insurance, "st[ood] as an obstacle to the accomplishment" of one of the purposes of the federal statute." *Barnett*, 517 U.S. at 31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court found that grants of "powers" to national banks, regardless of whether such powers are enumerated or incidental, traditionally have been construed "as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett*, 517 U.S. at 32; *see also de la Cuesta*, 458 U.S. at 170 (finding that a federal regulation that permits national banks to include a "due on sale" clause in mortgage loan documents preempts a conflicting state statute that prohibited the acceleration of a debt upon sale of the property); *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375-79 (1954) (holding that a federal statute that permits national banks to accept savings deposits preempts a conflicting state statute that prohibits the word "savings" in advertising); *First Nat'l Bank*, 262 U.S. at 368-69 (finding that the "power" of national banks to receive deposits preempts contrary state escheat law); *Rose*, 513 F.3d at 1037-38 (finding that a national bank's power to make loans preempted a conflicting state law imposing disclosure requirements); *Bank of Am.*, 309 F.3d at 555, 557-60, 561-64 (holding that the National Bank Act preempts conflicting municipal ordinances prohibiting ATM fees for non-depositors).

This Court further found that when Congress has granted a power to national banks, the states should not be permitted to "forbid, or significantly impair," the granted power. *Barnett*, 517 U.S. at 33 ("In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."). However, states could issue laws that would apply to national banks provided those state laws would not "prevent or significantly interfere" with a national bank's exercise of federally granted powers. *Id.*

In *Barnett*, this Court found that the power granted by the federal statute was not expressly conditioned upon state permission; therefore, the federal statute did not include any "indication" that Congress intended to permit the states to restrict that power. *Barnett*, 517 U.S. at 34-35 (citing *Franklin Nat'l Bank*, 347 U.S. at 378). Further, this Court analyzed the literal language of the federal statute, stating that national banks "*may* . . . act as the agent" for insurance sales, to determine whether the federal statute provided a broad or a limited permission. 12 U.S.C. §92 (emphasis added); *Barnett*, 517 U.S. at 32. The Court concluded that the word "may" in the federal statute should have a broad interpretation that is not subject to state permission. *Barnett*, 517 U.S. at 35 (citing *Franklin Nat'l Bank*, 347 U.S. at 343). Additionally, the federal statute was not qualified by any reference to state regulation. *See* 12 U.S.C. §92; *Barnett*, 517 U.S. at 32. The federal statute expressly stated that any "rules or

regulations" applicable to the sales of insurance by national banks would be issued by the Comptroller of the Currency. 12 U.S.C. §92. Applying these legal standards, this Court held that national banks could exercise the federally granted power to sell insurance irrespective of a state law restricting the sale of insurance. *Barnett*, 517 U.S. at 37. Accordingly, the state statute was preempted under the "ordinary legal principles of pre[e]mption." *Id.* at 28, 37-38.

B. The Dodd-Frank Act Broadened Preemption Standards By Establishing the New Discriminatory Effect Preemption Standard.

The Dodd-Frank Act defines a "State consumer financial law" as a state law "that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction . . . with respect to a consumer." 12 U.S.C. §25b(a)(2). A State consumer financial law will be preempted only if one of the following three prongs are met: (i) the "application of a State consumer financial law would have a discriminatory effect on national banks" when compared to the effect of the state law on state-chartered banks, (ii) the State consumer financial law "prevents or significantly interferes" with the exercise of the national bank's powers "in accordance with the legal standard for preemption" in this Court's decision in *Barnett*, or (iii) the State consumer financial law is preempted in accordance with a different federal law. 12 U.S.C. §25b(b)(1).

Congress clearly intended to avoid any kind of discrimination against national banks. The definition of a "State consumer financial law" expressly excludes any state law that "directly or indirectly" discriminates against national banks. 12 U.S.C. §25b(a)(2). Therefore, if a state law directly or indirectly discriminates against a national bank, the law will not be covered by the definition of a "State consumer financial law" and the statute will not apply. *See id.* The first prong of the preemption standard also expressly preempts any State consumer financial law if the "application" of the law "would have a discriminatory effect on national banks." 12 U.S.C. §25b(b)(1)(A). This is a new standard of preemption applied to state consumer financial laws. Inter. Ltr. No. 1132 from John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, to Sen. Thomas R. Carper, at 2 & n.5 (May 12, 2011). Although this is a new preemption standard, this Court has historically noted concerns with state laws creating a potential discriminatory effect on national banks. *See, e.g.*, *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873) (expressing a concern with "expos[ing] [national banks] to the hazard of unfriendly legislation by the States"). By creating the new "discriminatory effect preemption" standard, Congress has broadened the possible ways to preempt a state consumer financial law. Bailey, at 1054, 1067.

C. The Dodd-Frank Act Codified the Traditional Legal Standard of Conflict Preemption Incorporating the Entire *Barnett* Analysis.

The second prong of the Dodd-Frank Act preemption standard, known as "*Barnett* standard preemption," Inter. Ltr. No. 1132, at 2-4, codifies the legal standard of conflict preemption in the *Barnett* decision. *See Barnett*, 517 U.S. 25. The '*Barnett* standard preemption' prong provides that a state consumer financial law will be preempted if the state law "prevents or significantly interferes" with a national bank's exercise of federally granted powers "*in accordance with the legal standard for preemption*" in this Court's *Barnett* decision. 12 U.S.C. §25b(b)(1)(B) (emphasis added).

The Acting Comptroller of the Currency, John Walsh, described his interpretation of the '*Barnett* standard preemption' prong in a letter to Senator Thomas Carper, who together with Senator Mark Warner were the authors of the final Dodd-Frank Act preemption provisions. Inter. Ltr. No. 1132, at 112. As Walsh explained, Congress' use of the phrase "in accordance with the legal standard for preemption" in the *Barnett* decision indicated Congress' intention to use the entire conflict preemption standard in *Barnett*. Inter. Ltr. No. 1132 at 2 (quoting 12 U.S.C. §25b(b)(1)(B)) (citing *Barnett*, 517 U.S. at 31-32). Walsh further explained that the language "prevent[s] or significantly interfere[s]" from *Barnett* is included in the Dodd-Frank Act and, therefore, the analysis for conflict preemption will begin with this phrase. Inter. Ltr. No. 1132, at 2 (quoting 12 U.S.C. §25b(b)(1)(B))

(citing *Barnett*, 517 U.S. at 33). However, Walsh recognized that the '*Barnett* standard preemption' prong requires an analysis of that phrase "in accordance with the legal standard for preemption" in *Barnett*, and therefore should include the complete conflict preemption analysis in *Barnett* and not simply a single phrase. Inter. Ltr. No. 1132 at 2-3 & n.13 (quoting 12 U.S.C. §25b(b)(1)(B)) (citing *Barnett*, 517 U.S. at 33-34).

This interpretation is supported by the plain language of the statute. If Congress' intent was to narrow the conflict preemption standard to the phrase "prevents or significantly interferes," the qualifying phrase, "in accordance with the legal standard for preemption" in *Barnett*, 12 U.S.C. §25b(b)(1)(B), would be superfluous. Bailey, at 1057. Similarly, if Congress intended the phrase "prevents or significantly interferes" alone to be the new standard for conflict preemption, the qualifying phrase could have been "in accordance with" the *Barnett* decision. *Id.* Instead, the statute expressly requires the "prevents or significantly interferes" language to be analyzed in accordance with the "*legal standard for preemption*" in the *Barnett* decision. 12 U.S.C. §25b(b)(1)(B) (emphasis added). Therefore, the plain language of the statute reveals that Congress intended a "legal standard for preemption" that is broader than the single "prevents or significantly interferes" phrase. *Id.*

This interpretation is further reinforced by the procedural requirement in the statute that a finding of preemption requires "substantial evidence . . . in

accordance with the legal standard" of the *Barnett* decision. 12 U.S.C. §25b(c); *see also* Inter. Ltr. No. 1132, at 3 & n.13. This interpretation is further bolstered by statutory and judicial precedent. 15 U.S.C. §6701(d)(2)(A); *Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404-05, 408-10 (6th Cir. 2001) (citing the *Barnett* decision as the preemption standard); *see also* Inter. Ltr. No. 1132, at 3. Congress essentially used the same language in the '*Barnett* standard preemption' prong of the Dodd-Frank Act as in the Gramm-Leach-Bliley Act regarding preemption standards for insurance sales by national banks. 15 U.S.C. §6701(d)(2)(A) ("In accordance with the legal standards for preemption in the [*Barnett* decision], no State may . . . prevent or significantly interfere with the ability of a depository institution . . . to engage . . . in any insurance sales."); *see also* Inter. Ltr. No. 1132, at 3; Letter from Sen. Thomas R. Carper & Sen. Mark R. Warner to Timothy Geithner, Sec'y of the Treasury, at 2 (July 8, 2011) (observing the comparable language in the Dodd-Frank Act and the Gramm-Leach-Bliley Act).

Additionally, the Sixth Circuit preempted certain state licensing laws prohibiting national banks from selling insurance by applying the same *Barnett* "legal standards for preemption" provision in the Gramm-Leach-Bliley Act. *Ass'n of Banks in Ins.*, 270 F.3d at 400-01, 404-05, 408-10; *see also* Inter. Ltr. No. 1132, at 3. It is evident in the analysis of the Sixth Circuit that the "*Barnett Bank* standard" of the Gramm-Leach-Bliley Act incorporates this Court's complete analysis in the *Barnett* decision. *Ass'n of Banks in Ins.*, 270 F.3d at 404-05, 408 (detailing the entire

analysis in *Barnett* and preempting the state law under "traditional *Barnett Bank* standards"); *see also* Inter. Ltr. No. 1132, at 3.

Moreover, Senator Carper issued a statement confirming that the Comptroller's interpretation of the '*Barnett* standard preemption' prong of the Dodd-Frank Act follows the legislative language and his intent. OCC Letter Sketches Implementation Plan For Preemption Regime Under Dodd-Frank, Banking Daily (May 13, 2011), https:// newsletters.aba.com/bcnl/20110527 ("OCC Letter"). Senator Carper explained that the Dodd-Frank Act's '*Barnett* standard preemption' provisions "do not create a brand new preemption standard, but instead clarify that the traditional preemption tests, as laid out by the Supreme Court in the *Barnett* case, continue to apply." OCC Letter (quoting May 13, 2011 statement of Sen. Carper).

Senator Carper and Senator Warner also issued a joint letter verifying that the "*Barnett* standard was maintained." Letter from Carper and Warner, at 1. The Senators confirmed that the "prevents or significantly interferes" formulation "is not a limiting phrase" but instead is "stating the touchstone of the *Barnett* case." *Id.* The Senators underscored that a court should preempt a state consumer financial law if the finding of preemption is "in accordance with the legal standard" of the *Barnett* decision. *Id.* at 2 (quoting 12 U.S.C. §25b(c)). Accordingly, as stated by the Senators, the Dodd-Frank Act "explicitly order[s]" a court to review a preemption determination "based

on the legal standard of *Barnett*, not some part of it." Letter from Carper and Warner, at 2.

The unequivocal intent of Congress was to preserve and codify this Court's conflict preemption standard in the *Barnett* decision. Letter from Carper and Warner, at 1 ("[T]he statute is intended to codify the *Barnett* case."); Inter. Ltr. No. 1132, at 1-2 (citing 156 Cong. Rec. S5902 (daily ed. July 15, 2010) (colloquy between Sen. Carper and Chairman Dodd) ("There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [*Barnett*]."")). The conflict preemption standard is broader than the "prevents or significantly interferes" phrase and includes the whole *Barnett* preemption analysis. Letter from Carper and Warner, at 1-2. If Congress did not intend to maintain this Court's entire conflict preemption analysis in *Barnett*, and instead wanted to fashion a new, narrower "prevents or significantly interferes" standard, "it would have been rejecting not just *Barnett*, but also . . . well over a century of judicial precedent upon which the decision was founded." *See* Office of Thrift Supervision Integration, Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,555 (July 21, 2011) ("Dodd-Frank Implementation").

Accordingly, the Dodd-Frank Act codified the traditional legal standard of conflict preemption in this Court's entire analysis in the *Barnett* decision.

D. The State Law Conflicts with a National Bank's Federally Granted Powers and Should be Preempted under the *Barnett* Legal Standard.

In the National Bank Act, Congress expressly designated certain fundamental or core banking powers. *See* 12 U.S.C. §24, 371. These fundamental banking powers include the enumerated powers to take deposits and make mortgage loans. 12 U.S.C. §24 (Seventh) ("[A] national banking association . . . shall have power . . . [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . . by receiving deposits . . . by loaning money . . . .); 12 U.S.C. §371(a) ("Any national banking association may make, arrange, purchase or sell loans . . . secured by liens on interests in real estate, subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.").

Pursuant to the grant of incidental powers under the National Bank Act, national banks also have the established incidental "power to provide escrow services" in connection with the express powers to provide home mortgage loans and deposit accounts. *See* 12 U.S.C. §24 (Seventh); *Cantero*, 49 F.4th at 126 (citing *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171, 193 (E.D.N.Y. 2019)); *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (finding that incidental powers are those "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act")); OCC Conditional Approval No. 276, 1998

WL 363812, at *9 (May 8, 1998) (explaining that escrow accounts related to home mortgage loans are "an integral part of or a logical outgrowth of the lending function"); OCC, Inter. Ltr. No. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005) ("The OCC has approved banks providing escrow services in a variety of contexts."); OCC, Inter. Ltr. (May 13, 1975) (permitting escrow services "as a proper activity of national banks"). As an "integral part" of a national bank's "lending function," the incidental power to provide escrow accounts has been established as a fundamental banking power. *See* OCC Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998).

The New York General Obligations Law ("GOL") §5-601 requires banks to pay a two percent minimum interest rate on mortgage escrow accounts. GOL §5-601. As a result, a national bank's ability to exercise the fundamental powers to accept deposits, make mortgage loans, and provide escrow services would be subjected to a state requirement. *See* 12 U.S.C. §§24(Seventh), 371(a); GOL §5-601.

In 2018, the New York State Department of Financial Services (the "Department") issued an order revising the minimum rate under the state law for state-chartered banks to "the lesser of two percent or the six-month yield on United States Treasury securities." *Order Issued under Section 12-A of the New York Banking Law*, N.Y.S. Dep't of Fin. Servs. 2 (Jan. 19, 2018), https://www.dfs.ny.gov/system/files/documents/2020/03/wild_20180119_mortgage-escrow_order.pdf (the

"Order"). The Department acknowledged that national banks are permitted "to establish such escrow accounts without restriction as to the payment of interest," and determined the Order was "necessary to achieve or maintain parity between New York State-chartered" banks and national banks. Order at 1. Notably, the state expressly agreed that its own law was preempted. *Id.* at 1; *Cantero*, 49 F.4th at 135.

Applying the legal standard of *Barnett*, as expressly codified in the Dodd-Frank Act, the conflict preemption analysis provides a conclusive determination that the New York law should be preempted. *See* 12 U.S.C. §24b(b)(1)(B); *Barnett*, 517 U.S. 25. As this Court found, grants of powers to national banks, irrespective of whether such powers are enumerated or incidental, have been interpreted "as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett*, 517 U.S. at 32; *see also de la Cuesta*, 458 U.S. at 170; *Franklin Nat'l Bank*, 347 U.S. 375-79; *First Nat'l Bank*, 262 U.S. at 368-69; *Rose*, 513 F.3d at 1037 (citing *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007); *Bank of Am.*, 309 F.3d at 555, 557-60, 561-64. When Congress has granted powers to a national bank, "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett*, 517 U.S. at 33; *Rose*, 513 F.3d at 1037; *Bank of Am.*, 309 F.3d at 561.

Here, as in *Barnett*, the federally granted enumerated and incidental powers to accept deposits, make mortgage loans, and provide escrow services were not expressly conditioned upon state permission,

and thus, the federal statutes do not include any indication that Congress' intent was to permit the states to restrict these powers. *Barnett*, 517 U.S. at 34-35 (citing *Franklin Nat'l Bank*, 347 U.S. at 378) (finding "no indication that Congress intended to make this phase of national banking [to take deposits] subject to" state law); *Rose*, 514 F.3d at 1037 ("Where, as here, Congress has explicitly granted a power to a national bank [to make loans] without any indication that Congress intended for that power to be subject to local restriction, Congress is presumed to have intended to preempt state laws.").

The literal language of the federal statute granting national banks the power to accept deposits provides that "a national banking association . . . *shall have power* . . . [t]o exercise . . . *all* such incidental powers as shall be necessary to carry on the business of banking . . . by receiving deposits . . ." 12 U.S.C. §24 (Seventh) (emphasis added); *see Barnett*, 517 U.S. at 32 (analyzing the literal language of the federal statute). The use of the phrase "shall have power" clearly confirms Congress' intent for national banks to have the unhampered ability to exercise incidental powers without the imposition of state requirements. *See* 12 U.S.C. §24 (Seventh). Additionally, the use of the word "all" to qualify the incidental powers indicates Congress' intention to grant national banks the broad power to exercise all incidental powers "necessary to carry on the business of banking," and there is no indication in the federal statute that the incidental powers are subject to state conditions. *Id.*

Similarly, the literal language of the federal statute granting national banks the power to make mortgage loans provides that "[a]ny national banking association *may* make, arrange, purchase or sell loans . . . secured by liens on interests in real estate, subject to . . . such restrictions and requirements as the *Comptroller of the Currency* may prescribe by regulation or order."). 12 U.S.C. §371(a) (emphasis added). As determined in *Barnett*, the use of the word "may" in the federal statute should have a broad interpretation that is not subject to state requirements. *See id.; Barnett*, 517 U.S. at 35 (citing *Franklin Nat'l Bank*, 347 U.S. at 343). As in *Barnett*, the federal statute here is not qualified by any reference to state regulation. *See* 12 U.S.C. §371(a); *Barnett*, 517 U.S. at 32. Rather, the federal statute expressly grants national banks the power to make mortgage loans "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe . . . ." 12 U.S.C. §92; *see Barnett*, 517 U.S. at 32 (noting that any rules or regulations with respect to insurance sales would be issued by the Comptroller of the Currency).

Further, national banks that provide escrow deposit services are required to comply with the Real Estate Settlement Procedures Act (Regulation X), which sets forth a myriad of requirements to establish and maintain a mortgage escrow account for the purpose of paying taxes, insurance, and other charges related to the property. 12 U.S.C. §2605(g); 12 CFR §1024.17. For example, lenders are required to (i) ensure compliance with certain limitations on the payments into the escrow account at loan settlement

and during the life of the escrow account, (ii) conduct an escrow analysis to determine the initial deposit and monthly payments into the escrow account in accordance with specific requirements, (iii) conduct a subsequent escrow analysis each year to determine the monthly payments for the next year, (iv) provide an initial escrow account statement and annual escrow account statements in conformance with the regulatory requirements, and (v) ensure timely payments of taxes and insurance. 12 CFR §1024.17.

Lenders that provide mortgage escrow services in New York State are responsible for making timely payments of town and county taxes generally billed annually in January, and school property taxes billed in September of each year. N.Y.S. Dep't of Taxation and Fin., Property Tax Bills, https://www.tax.ny.gov/pit/property/learn/proptaxbill.htm. Additionally, payments of insurance premiums are due as specified by the insurer.

The New York law imposing a requirement to pay two percent interest on escrow accounts will significantly interfere with a national bank's ability to exercise the fundamental powers to make mortgage loans, accept deposits, and provide escrow deposit accounts. *See* 12 U.S.C. §24(Seventh), §371(a); OCC Conditional Approval No. 276, 1998 WL 363812, at *9. National banks are already incurring administrative costs in providing escrow deposit accounts. The state requirement to pay two percent interest on these accounts will increase the costs of providing escrow deposit services and negatively impact the ability of national banks to exercise the federally granted

powers to make mortgage loans, accept deposits, and provide escrow deposit accounts.

"[T]he sound construction of the" National Bank Act is "that it exempts the trade of" national banks "from the control of the States." *Cantero*, 49 F.3d at 132 (quoting *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824)). A state law that imposes an impediment on a fundamental or core banking business would significantly interfere with the ability of a national bank to manage that business. Dodd-Frank Implementation, at 43,557. Moreover, a state law that conditions a national bank's exercise of federally granted powers on compliance with a state requirement significantly interferes with a national bank's exercise of those powers. *Barnett*, 517 U.S. at 33-35 (citing *Franklin Nat'l Bank*, 347 U.S. at 374, 378.).

Applying these legal standards, it is evident that the National Bank Act granted national banks the enumerated and incidental powers to make mortgage loans, accept deposits, and provide escrow deposit accounts, regardless of the state law that imposes a condition on the ability of national banks to exercise these federally granted powers. 12 U.S.C. §24(Seventh), §371(a); *see Barnett*, 517 U.S. at 37; OCC Conditional Approval No. 276, 1998 WL 363812, at *9. Accordingly, the New York statute should be preempted under the "ordinary legal principles of pre[e]mption." *See Barnett*, 517 U.S. at 28, 37-38.

Additionally, the New York law should be preempted under the 'discriminatory effect

preemption' prong of the Dodd-Frank Act. *See* 12 U.S.C. §25b(b)(1)(A). As provided in the statute, a State consumer financial law will be preempted if the "application of a State consumer financial law would have a discriminatory effect on national banks" when compared to the effect of the state law on state-chartered banks. *Id.* The revised New York law, if made applicable to national banks, would have a discriminatory effect on national banks compared to state-chartered banks because national banks would be required to pay a minimum of two percent interest on escrow accounts while state-chartered banks are permitted to pay "the lesser of two percent or the six-month yield on United States Treasury securities." *See* GOL §5-601; Order at 2. Therefore, the state law should be preempted.

E. Courts are Ill-Equipped to Determine Questions of Degree When Analyzing Preemption of State Laws.

Petitioners claim that state laws require the payment of a "modest" rate of interest on escrow deposit accounts. Brief of Petitioners, at 21 (December 8, 2023). However, as demonstrated below, data indicates that the actual impact of New York's two percent interest rate requirement on national banks, if applied over the last two fiscal years, would not have been modest. *See* GOL §5-601.

One of the primary ways in which banks earn money is from the "spread, or the difference between the interest rate they pay for deposits and the interest rate they receive on the loans they make." State of

Connecticut, Department of Banking, *ABC's of Banking*, https://portal.ct.gov/DOB/Consumer/Consumer-Education/ABCs-of-Banking---Banks-and-Our-Economy.

For example, in 2022, Respondent earned an average interest rate on its residential mortgage portfolio of 2.88%. Bank of America, N.A., Uniform Bank Performance Report, 1-33, at 6 (Sept. 30, 2023) ("UBPR"). Respondent paid an average interest rate on its interest-bearing funds in deposit accounts of 0.34%. *Id.* Therefore, Respondent earned a "spread" of 2.54% in 2022. *See generally id.* However, if Respondent was required to pay an interest rate of 2% on its escrow deposit accounts, this 2% rate would be 5.88 times the average interest paid on interest-bearing funds of 0.34% and would negatively impact the bank's spread. *See generally id.*

In 2021, Respondent earned an average interest rate on its residential mortgage portfolio of 2.84%. UBPR, at 6. Respondent paid an average interest rate on interest bearing funds in deposit accounts of 0.05%. *Id.* Therefore, Respondent earned a "spread" of 2.79%. *See generally id.* However, if Respondent was required to pay an interest rate of 2% on its escrow deposit accounts, this 2% rate would be 40 times the average interest paid on interest-bearing funds of 0.05% and would have a detrimental impact on the bank's spread. *See generally id.*

The state law would have required Respondent to pay an arbitrary, nonmarket-based interest rate on escrow deposit accounts that is between 5.88 and 40

times the rate of interest paid on its market-based interest-bearing funds in deposit accounts over the last two years. *See generally* UBPR, at 6. Therefore, the 2% state mandated rate is not "modest." The state requirement would adversely impact national banks and would significantly interfere with the ability of national banks to exercise their federally granted powers to make mortgage loans and accept deposits, including escrow deposits.

The state law should be preempted based on the legal analysis of the *Barnett* preemption standard and not on a new standard proposed by Petitioners that relies on the "degree of interference." *See* Brief of Petitioners, at 27. A new preemption standard based on the degree of interference is contrary to the Dodd-Frank Act, this Court's legal standard in *Barnett*, and over two hundred years of legal precedent. *See* 12 U.S.C. §25b(b)(1)(B); *Barnett*, 517 U.S. at 28-38; *McCulloch*, 17 U.S. at 360-361. There is also the danger that a state law appearing to prescribe a "modest" requirement may significantly interfere with the ability of national banks to exercise their federally granted powers as demonstrated above. Courts are ill-equipped to undertake this type of financial analysis to determine the degree of interference of a state law on a national bank's exercise of its federally granted powers. *Cantero*, 49 F.4th at 139 (citing *McCulloch*, 17 U.S. at 430).

II. The State Law Conflicts with Federal Policy to Deregulate Deposit Interest Rates.

Congress passed legislation in the early 1980s to deregulate deposit interest rates. Congress enacted

the Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 96-221, 94 Stat. 132 (1980) to phase out the Regulation Q interest rate ceilings on deposit accounts. Carnell *et al.*, at 24-25. Congress passed this law to address the disintermediation that was occurring due to high inflation as depositors withdrew their funds from banks and invested in money market mutual funds and other investments paying a market rate of interest. *Id.* This disintermediation caused liquidity problems for financial institutions. *Id.*

Congress then passed the Garn-St. Germain Depository Institutions Act, Pub. L. No. 97-320, 96 Stat. 1469 (1982) to accelerate the phase out of deposit interest rate ceilings and permit banks to offer deposit accounts that paid flexible market rates of interest. *Id.* As a result, banks could compete with money market mutual funds and other market-based investments and survive the high interest rate environment that created substantial market pressures during those years. *See generally id.*

The New York law imposing an interest rate requirement on escrow accounts conflicts with the clear intention and policy of Congress to deregulate the interest rates paid on deposit accounts. *See* GOL §5-601.

III. Preemption of State Consumer Financial Laws Did Not Cause or Contribute to the Subprime Mortgage Crisis or the Financial Crisis.

Petitioners argue that federal preemption of state consumer financial laws caused the financial crisis. Brief of Petitioners, at 15-16. However, the notion that federal preemption caused or contributed to the financial crisis is a fallacy. Bailey, at 1093-1103. Federal preemption applies to national banks and federal thrifts, and each of these financial institutions is primarily regulated by a federal banking agency. 12 U.S.C. §1 *et seq.* (establishing the Comptroller of the Currency as the primary regulator of national banks); 12 U.S.C. §5412 (transferring to the Comptroller of the Currency all powers and authorities of the Office of Thrift Supervision relating to federal savings associations). In contrast, preemption generally is not applicable to financial institutions regulated by the states. Statement of John C. Dugan, Comptroller of the Currency, before the Financial Crisis Inquiry Commission, 5 (2010). State regulated lending institutions include state-chartered banks and thrifts, separately-organized affiliates of banks and thrifts under a holding company, and independent mortgage companies not affiliated with a bank or thrift. *See id.* at 5-7. States have the unimpeded ability to establish and enforce mortgage lending laws governing these state regulated lending institutions without the possibility of federal preemption. *See id.* at 5-6.

Even though the states could regulate and enforce mortgage lending laws against state-organized entities, state-regulated lending institutions

originated the "vast majority" of subprime mortgages. *See id.* at 5. During the apex of the mortgage crisis from 2005 to 2007, independent data reveals that 77.9% of the subprime loans were originated by lenders regulated by the states. *Id.* at 8, app. B at 3-4 (noting that data was provided by Loan Performance Corp., now owned by First American CoreLogic, Inc.); *id.* app. B at 4 n.2. Therefore, federal preemption did not apply to lending institutions that originated nearly seventy-eight percent of the subprime mortgages. *See id.* at 8, app. B at 4; *see also* Joseph R. Mason, *et al.*, *The Economic Impact of Eliminating Preemption of State Consumer Protection Laws*, 12 U. Pa. J. Bus. L. 781, 782, 787-88 (2010) ("The overwhelming majority of instances of predatory lending involved loans originated by institutions not subject to preemption, but instead under the purview of state laws."). Contrastingly, national banks and their subsidiaries originated only 10.6% of the subprime loans during this same period. Statement of Dugan, app. B at 4 (noting that federal thrifts and their subsidiaries originated approximately 11.5% of the subprime loans).

Notably, independent mortgage companies originated nearly sixty-four percent of the subprime loans. *Id.* app. B at 2, 4 ("Lenders supervised only by the states originated 63.6 percent of subprime loans during these years . . . ."); *see also* Mason *et al.*, at 803-804 ("Our analysis indicates that the vast majority of subprime loans were originated by lenders outside of the banking system's regulatory apparatus."). The states were the sole regulators of these independent mortgage companies, and federal preemption did not

apply to these nonbank lenders. Statement of Dugan, at 4 ("[M]ortgage lenders that are not affiliated with banks or thrifts are subject only to state supervision."). Representative Barney Frank, co-sponsor of the Dodd-Frank Act, observed that regulated banks did not cause the subprime mortgage crisis; rather, the crisis was caused "[by] loans being made outside of the regular banking system." Representative Barney Frank, Chairman of the House Financial Services Committee, Speech at National Press Club: The "Loan Arrangers" Will Not Ride Again (July 27, 2009), http://www.huffingtonpost.com/rep-barney-frank/the-loan-arrangers-will-n_b_247264.html.
State attorneys general also determined that "[a]lmost all of the leading subprime lenders [were] mortgage companies and finance companies, not banks or direct bank subsidiaries." Julie L. Williams & Michael S. Bylsma, *Federal Preemption and Federal Banking Agency Responses to Predatory Lending*, 59 Bus. Law. 1193 n.29 (2004).

As shown by independent data, federal preemption did not cause or contribute to the subprime mortgage crisis or the financial crisis. Bailey, at 1097-1103. Despite the states' ability to fully enforce state consumer protection laws against state entities without federal preemption, the state-regulated lending institutions originated more than three-quarters of the subprime mortgage loans. *See* Statement of Dugan at 8, app. B at 4; *see also* Mason, *et al.*, 782, 787-788. Clearly, state consumer protection laws did not prohibit or even limit subprime lending as evidenced by the substantial

percentage of subprime loans originated by state-regulated lenders. *See* Statement of Dugan at 8, app. B at 4; *see also* Mason, *et al.*, 782, 787-788. Therefore, the overwhelming percentage of subprime loans originated by state regulated lenders that were subject to state laws, without the possibility of preemption, demonstrates that federal preemption did not cause or contribute to the subprime mortgage crisis or the financial crisis. Bailey, at 1103 ("There is no nexus between federal preemption and the subprime mortgage crisis.").

IV. A Narrowing of the *Barnett* Conflict Preemption Standard will have Detrimental Effects on National Banks and Consumers.

The costs of narrowing federal preemption to a 'prevents or significantly interferes' standard, or even further to a 'degree of interference' standard, would be detrimental to the banking industry. *See* Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 Tul. L. Rev. 1257, 1262 (2010) ("Th[e] multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes.").

In drafting the Dodd-Frank Act preemption provisions, Congress intended to provide "certainty" to the banking industry and to consumers concerning the applicable preemption standard. 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen.

Johnson). A narrowing of federal preemption to a 'prevents or significantly interferes' standard, or further to a 'degree of inference' standard, effectively rejects the *Barnett* legal standard and over two hundred years of legal precedent, and would result in "great uncertainty" in the banking industry. *See* Letter from Carper and Warner, at 3. National banks would need to ensure compliance with "hundreds of differing state and local laws." *Id.* This uncertainty is bound to result in multiple lawsuits, as parties attempt to understand the scope of the new standard. *See id.* ("There can be no doubt this would lead to years of litigation before the new standard was finalized in a way that enabled national banks . . . to plan and deliver products and services without significant legal risk."). National banks also would need "to determine which state's law governs--the law of the state where a person provides a product or service; the law of the home state of the bank; or the law of the state where the customer is located." John C. Dugan, Comptroller of the Currency, Remarks before Women in Housing and Finance: The Need to Preserve Uniform National Standards for National Banks 7-8 (Sept. 24, 2009) http://www.occ.gov/news-issuances/speeches/2009/pub-speech-2009-112.pdf . If the other party disagrees, "litigation in multiple jurisdictions" is likely to occur. *Id.* at 8.

A narrowing of the *Barnett* standard would also result in substantial monetary costs. Letter from Carper and Warner, at 3. National banks would need to determine the state and local laws in all fifty states, modify products and services in each jurisdiction as needed, and monitor every state and local law to

ensure compliance. *See* Comptroller of the Currency, The Importance of Preserving a System of National Standards for National Banks 15 (Jan. 2010), https://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-39c.pdf; *see also* Mason *et al.*, at 802. These "disparate standards would impose significant compliance costs on banks seeking to operate across state lines." Mason *et al.*, at 802.

As compliance costs grow, "some portion of these costs" is expected to be absorbed by consumers, Comptroller of the Currency, at 15, perhaps in the form of higher interest rates on mortgage loans. These higher costs, in addition to the litigation costs, are likely to cause a reduction in the availability of mortgage loans. *See generally* Letter from Carper and Warner, at 3 ("This uncertainty would clearly increase the cost and decrease the availability of bank services, including lending."). A decline in mortgage lending coupled with an increase in borrowing costs would be detrimental to consumers. *See generally id.* The New York law is also likely to impact the Federal Reserve's authority to conduct monetary policy and manage interest rates to influence "the availability and cost of credit in the economy," including efforts "to reduce the cost and increase the availability of credit for the purchase of homes." *See* The Federal Reserve System Purposes and Functions, Conducting Monetary Policy, 21, 28 https://www.federalreserve.gov/aboutthefed/files/pf_3.pdf; 12 U.S.C. §225a.

These detrimental effects can be avoided by maintaining the precedent of the *Barnett* legal

standard of preemption, as codified in the Dodd-Frank Act. Under this standard, the New York law should be preempted.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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