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 JOSEPH R. MASON AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Joseph R. Mason is an academic in the field of financial economics. Dr. Mason holds a Doctor of Philosophy and Master of Science in economics from the University of Illinois at Urbana-Champaign and a Bachelor of Science in economics from Arizona State University. He is currently a Fellow at the University of Pennsylvania's Wharton School of Business. Over the course of a lengthy academic career, he was a tenured Professor of Finance and the Hermann Moyse, Jr. / Louisiana Bankers Association Chair at Louisiana State University, an Assistant and tenured Associate Professor at Drexel University, and adjunct faculty at Georgetown University.[2] His economic training and experience are reflected in his many published academic articles on financial crises, valuation, risk management, and related topics.

Dr. Mason has a substantial interest in filing this brief and ensuring that the Court affirms the decision below. As explained below, the Second Circuit's

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief is adapted from a University of Pennsylvania Journal of Business Law article for which *amicus* served as the lead author. *See* Joseph R. Mason, Robert Kulick, & Hal J. Singer, *The Economic Impact of Eliminating Preemption of State Consumer Protection Laws*, 12 U. Pa. J. Bus. L. 781 (2010).

[2] Dr. Mason files this brief solely in his individual capacity. Institutional affiliations are listed for identification purposes only.

analysis of the scope of National Bank Act preemption furthers principles of economic efficiency, whereas Petitioners' unduly narrow view of preemption would undermine those principles.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has long recognized, the National Bank Act ("NBA") preempts state laws that purport to regulate the terms of national banks' products and services. The Second Circuit's decision in this case faithfully effectuated that principle. In applying the preemption framework outlined in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and later codified by the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 25b(b)(1)—*viz.*, that state laws are preempted if they "prevent or significantly interfere with [a] national bank's exercise of its powers," 517 U.S. at 33—the Second Circuit correctly looked to the "nature of an invasion into a national bank's operations—not the magnitude of its effects," Pet. App. 17a. Applying that standard, the Second Circuit held that the NBA preempts a New York law that would require national banks to pay an interest rate of at least 2% on funds held in mortgage-escrow accounts.

Respondent's brief explains in detail why the Second Circuit's analysis was correct as a matter of law. Petitioners argue, however, that a state law is preempted only if a national bank can make a factual showing that the law either prohibits the exercise of a federally-granted power or comes close to doing so. In other words, Petitioners urge this Court to adopt a standard that would effectively gut NBA

preemption by reducing the preemption analysis to an unpredictable line-drawing exercise in which courts—despite lacking any relevant expertise—would routinely be called upon to make judgments attempting to quantify the magnitude of a state law's effect on a national bank viewed in isolation.

From an economic perspective, curtailing NBA preemption in the manner sought by Petitioners would result in severe adverse consequences. That is because a robust, predictable preemption framework that secures regulatory uniformity is a critical tool for boosting economic efficiency. The Second Circuit's rule would preserve three key economic efficiency benefits generated by preemption. *First*, preemption eliminates state-sponsored protectionism, boosting efficiency by facilitating increased price competition and availability of financial services. *Second*, preemption increases the availability of credit while reducing its price. It does so by limiting the ability of states to impose price controls, which ultimately decrease the level and quality of banking services, increase the prices actually paid by consumers, and inhibit economic growth. Preemption also boosts the availability of affordable credit by removing obstacles to the creation of national credit markets. *Third*, preemption creates a uniform regulatory climate for banks operating across state lines, which in turn increases economic efficiency and social welfare.

Each of these economic efficiency benefits would vanish under Petitioners' weakened form of NBA preemption. The Second Circuit's approach, by contrast, safeguards preemption's economic advantages. With respect to the laws at issue in this case, for ex-

ample, the Second Circuit's correct understanding of preemption protects national banks from being subjected to a chaotic hodgepodge of varied state escrow-interest laws, and instead restores Congress's uniform national policy choice to regulate escrow accounts via federal law, including the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601 *et seq*.

Petitioners' efforts to paint the costs of their approach as the necessary price to pay for increased consumer protection rest on false premises. Economic evidence undermines Petitioners' efforts to paint preemption as a culprit in the 2008 financial crisis. And Petitioners' assertion that preemption means less regulation is simply not true. Rather, preemption simply means *more uniform* regulation, which ultimately furthers the interests of borrowers. Because the Second Circuit's decision secures the economic efficiency benefits of preemption while according with this Court's longstanding bank preemption jurisprudence as codified in Dodd-Frank, this Court should affirm the decision below.

ARGUMENT

I. THE SECOND CIRCUIT'S PREEMPTION ANALYSIS ADVANCES THE NBA'S PURPOSE BY FOSTERING ECONOMIC EFFICIENCY

As this Court has explained, "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking … is precisely what the NBA was designed to prevent." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007). This Court has accordingly "repeatedly made clear" in

"the years since the NBA's enactment" that "federal control shields national banking from unduly burdensome and duplicative state regulation." *Id.* at 11. As that body of case law recognizes, an effective "shield"—that is, a meaningful form of preemption—is essential to realizing the NBA's intended "erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Id.* at 14 (quoting *Easton v. Iowa*, 188 U.S. 220, 229 (1903)).

The Second Circuit's analysis of the scope of NBA preemption accords with these principles. By recognizing that the *Barnett Bank* analysis turns on "the nature of an invasion into a bank's operations—not the magnitude of its effects," the Second Circuit's approach protects against the imposition of "death-by-a-thousand-cuts regime[s]" of regulation by a patchwork of state laws even if each of those laws, when viewed in isolation, may appear to have relatively modest impacts, and allows for predictable preemption rulings without ensnaring courts in difficult line-drawing exercises outside the realm of judicial expertise. Pet. App. 17a, 22a. The Second Circuit's rule thereby preserves the longstanding understanding of NBA preemption's powerful scope and, in doing so, secures three key economic efficiency benefits of preemption: the prevention of state protectionist measures; the increased availability of affordable credit; and the creation of a uniform regulatory environment for multi-state banks.

A. Preemption Eliminates State-Sponsored Protectionism.

It is widely recognized as a matter of economics that the protection of *competitors* rather than *competition* decreases economic welfare. As William Baumol and Alan Blinder emphasize in a widely-used microeconomics textbook, "[c]ompetition is ruthless, unprincipled, uncharitable, unforgiving—and a boon to society, Adam Smith reminds us, precisely because of these qualities that make it a bane to other producers." William J. Baumol & Alan S. Blinder, *Microeconomics: Principles And Policy* 456 (7th ed. 1997) (quoting *Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)). Unfortunately, disadvantaged competitors often seek and obtain protection from competition under the guise of "consumer protection" laws. But that sort of protectionism is ultimately detrimental to both consumers and society as a whole.

Just as protectionism at the international level has been widely understood to reduce consumer welfare, protectionism *within* a country is similarly harmful. UCLA economists Harold Cole and Lee Ohanian identified a historical example of this phenomenon by examining the economic consequences of protecting certain industries and groups of workers during the New Deal. The authors point out that while falling productivity, a diminishing monetary base, and a chaotic banking system wreaked havoc on the economy between 1929 and 1933, these "negative shocks . . . [became] positive after 1933." Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. Pol. Econ. 779, 781 (2004).

So why did these positive factors fail to precipitate an economic recovery? Cole and Ohanian conclude that approximately half of the recovery's weakness can be explained by New Deal policies that allowed industries to collude or create monopolies—thus increasing the prices of their products—in exchange for paying higher wages. The policies protected inefficient incumbent firms and workers who kept their jobs, but at high costs to would-be competitors, the ranks of the unemployed, and consumers.

Many state regulations that have ostensibly been passed to protect consumers have in reality been protectionist measures that favor entrenched local political interests at the expense of the very consumers they are meant to help. And that is especially true in the context of bank regulation. State regulations are more likely than federal regulations to turn protectionist or otherwise be economically inefficient because a state regulator does not internalize the costs that protectionist measures impose on banks that operate both inside and outside of the state; nor does that regulator internalize the costs that such measures impose on the customers of those same banks who reside outside of the state. For example, national banks will endure costs to conform to myriad state rules or entry restrictions—and those costs will ultimately be borne by consumers in the form of higher borrowing costs—but because these costs are spread through the bank's entire national network, they will only partially be borne by the residents of the state that issues a protectionist measure. Although a state regulator should, in theory, internalize the cost to bank customers inside of the state, in practice, state regulators can become unduly influ-

enced by local interests that seek to protect their business from competition to the detriment of banking customers. A national regulator, by contrast, is not only less influenced by local business interests, but also can internalize the positive spillover effects associated with greater competition and enhanced economies of scope and scale.

Robust NBA preemption has been critical to avoiding the severely negative economic consequences of protectionism in the banking sector. A survey of preemption determinations by the Office of the Comptroller of the Currency ("OCC") demonstrates the point. For example, in 1993, the OCC issued an interpretive letter finding that the NBA preempted a Connecticut law that prohibited national banks from selling annuities in the state. *See* Off. of the Comptroller of the Currency, Interpretive Letter No. 623, at 4 (May 10, 1993). The OCC reached a similar conclusion with respect to a Connecticut requirement mandating that national banks dealing in annuities obtain a license from the state. *Id.* In 1996, the OCC issued an interpretive letter that similarly found that the NBA preempted a Texas state law that restricted national banks' ability to sell annuities in the state on the basis that the law "effectively prohibit[ed] national banks from selling annuities as agent[s] in Texas." *See* Off. of the Comptroller of the Currency, Interpretive Letter No. 749, at 2 (Sept. 13, 1996). Other examples abound. *See, e.g.*, Off. of the Comptroller of the Currency, Corporate Decision No. 97-33, at 13 (June 1, 1997) (concluding that the NBA preempted a Wisconsin law precluding out-of-state fiduciaries from acting as fiduciaries within the state); Off. of the Comptroller of the Currency, Cor-

porate Decision No. 98-16, at 6 (Mar. 4, 1998) (same, as to similar Missouri law); Off. of the Comptroller of the Currency, Interpretive Letter No. 939, at 1 (Oct. 15, 2001) (concluding that the NBA preempted a Massachusetts law restricting the ability of out-of-state banks to establish ATMs).

Each of these state initiatives—which one can reasonably infer were adopted at the behest of local political interests to protect against vigorous competition—created inefficiencies in the marketplace by denying consumers added choice and the lower cost associated with more open markets. NBA preemption thwarted those efforts and restored competition, lower prices, and broad access to financial services, thereby maximizing economic efficiency.

B. Preemption Increases The Availability Of Credit While Reducing Its Price.

Preemption has increased the availability of credit and reduced its price by (1) eliminating price controls and (2) promoting uniform national markets.

Price controls. In addition to eliminating protectionist statutes, *see supra* § I.A, preemption has prevented states from effectively imposing price controls on banking products.

There is broad agreement among economists that price controls have harmful economic consequences. *See, e.g.*, Dennis W. Carlton & Jerry M. Perloff, *Modern Industrial Organization* 715 (4th ed. 2005) ("Regulation can reduce the efficiency of competitive markets. In many cities around the world, government agencies regulate apartment rental rates, using rent controls to keep rental rates below the competitive level. As a result, the demand for housing

exceeds the supply."); Michael L. Katz & Harvey S. Rosen, *Microeconomics* 365-66 (3d ed. 1998) (demonstrating that total economic welfare falls as a result of price controls). As Nobel Laureate Milton Friedman observed, both the shortage of housing in New York and the gasoline shortages of the 1970s were caused by well-meaning legislation that imposed price controls. *See* Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* 219 (1980). The "Thrift Crisis" of the 1980s is another vivid example of the distortionary effects of price controls: when the Depository Institutions Deregulation and Monetary Control Act of 1980 deregulated deposit rates but left state-level usury ceilings on interest rates intact, thrift institutions—institutions that specialize in offering savings accounts and originating mortgages—were placed in the untenable position of paying out market rates on deposits while earning only low, capped interest rates on the mortgage loans they extended. *See* Robert Craig West, *The Depository Institutions Deregulation Act of 1980: A Historical Perspective*, Fed. Res. Bank of Kansas City Econ. Rev. (Feb. 1982), at 10, 12. By 1982, leading banking states had eliminated their usury laws. *See* Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 Am. Bankr. L.J. 249, 260-61 (1997). However, because loans are of longer duration than the deposits that fund them, critical damage to the financial industry had already been done, causing the Thrift Crisis to spiral out of control.

Although price control provisions often seem beneficial to consumers in that they guarantee lower prices, economics shows that price controls cause

suppliers to reduce their output. The loss of economic value to consumers created by this reduction in output exceeds any benefits that result from the lower prices, leaving consumers worse off. Economists refer to these losses of output as "deadweight loss" because of the economic value that is destroyed as a result of the dead weight of the regulation. Accordingly, it is reasonable to conclude that preemption decisions striking down state-enforced price controls have increased economic welfare.

Moreover, basic economics demonstrates that price controls have the perverse consequences of actually increasing the prices ultimately paid by consumers. When price controls lower the price companies can charge for their products, they induce the companies to reduce supply. As a result of the shortage, consumers are forced either to pay exorbitant rates in black markets or to bid up the prices of substitutes. *See* Milton Friedman, *Price Theory* 18 (2007). In some cases, rationing will result: among apparently identical customers who are willing to pay the same price, only some will be able to obtain the good or service (such as a loan) due to excess demand in the face of insufficient supply. *See* Dwight Jaffe & Joseph Stiglitz, *Credit Rationing*, *in* 2 Handbook of Monetary Economics 837, 846 (B.M. Friedman & F.H. Hahn eds. 1990) (explaining how price controls on loan rates cause "excess demand for loans," resulting in "credit rationing"). As Dr. Robert Litan has explained, price controls thus generally end up harming they consumers they were intended to protect. *See* Robert E. Litan, *Unintended Consequences: The Risk of Premature State Regulation of Predatory Lending*, Am. Bankers Ass'n (2003).

NBA preemption has operated to eliminate these inefficiencies caused by price controls. Take, for example, the preemption of city-level restrictions on ATM fees. In 2002, the U.S. Court of Appeals for the Ninth Circuit determined that the NBA preempted municipal ordinances in San Francisco and Santa Monica that prohibited banks from charging ATM fees to non-depositors. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 555-56 (9th Cir. 2002). Those ordinances, while they were in place, had caused banks to cease allowing non-depositors to use their ATMs, presumably because restrictions on surcharges eliminated the economic incentive to provide such services to non-customers. *See id.* at 557; *see also, e.g.*, Gautam Gowrisankaran & John Krainer, *Bank ATMs and ATM Surcharges*, Fed. Reserve Bank of San Francisco Econ. Letter 2005-36, Dec. 16, 2005[3] (setting forth empirical evidence that permitting surcharging increases access to ATMs). In essence, then, consumers were denied access to valuable financial services because of lobbying by parochial local concerns. Such "deadweight loss" destroyed the economic value of providing ATM service to non-customers, resulting in an overall loss of consumer benefits.[4] Preemption thus played a

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[3] https://www.frbsf.org/economic-research/publications /economic-letter/2005/december/bank-atms-and-atm-surcharges/.

[4] Ironically, economic logic suggests that, if permitted, such state-level regulation of ATM fees would disproportionately burden smaller banks—the very banks that critics of preemption argue are essential to ensure the health of the banking system. That is because, faced with ATM surcharge restrictions, banks would most likely restrict their ATMs to only customers with accounts at their bank, prompting consumers

critical role in preventing a local municipality from exerting a significant and damaging impact on the provision of financial services in a given area.

National Markets. The promotion of uniform national markets has also increased the availability of credit at reduced cost to millions of American consumers. For example, preemption has helped ensure the efficient functioning of the national market for securitized mortgages.

Securitization is vital to enhancing liquidity in the area of home loans, car loans, credit cards, and commercial loans. As Leon Kendall and Michael Fishman explained in their seminal book on the topic, securitization is "one of the most important and abiding innovations to emerge in financial markets since the 1930s." Leon T. Kendall & Michael J. Fishman, *A Primer on Securitization* 1 (1996). Kendall and Fishman list "standardization of applicable laws" as one of the basic requirements essential for any successful securitization. *Id.* at 7 tbl. 1. Uniform regulations permit securitizers to compile and analyze historical data by region while holding the regulations constant—another necessary condition for a successful securitization. Without uniform lending rules, it is impossible for securitizers to measure the risk of a pool of loans, which in turn complicates the pricing of loans for the secondary market. Absent uniform standards and laws, then, the sales price would be prohibitive and the market would break down.

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desiring quick, reliable access to cash to switch to larger banks to ensure uninterrupted access to ATM machines.

Moreover, disparate state laws in areas concerning what defines a "finance charge" or what constitutes an "acceptable" interest rate further undermine the ability to securitize the cash flows from mortgage loans. The principal payment and the finance charge are two primary cash flows in any securitization. If different jurisdictions define the finance charge differently, needless complexity would be added to the process of securitization.

In the event of such disparate regulation, it would be nearly impossible to convert cash flows from disparately-regulated loans into standardized streams that could be securitized, resulting in significant negative implications for the U.S. economy. Because securitization plays such an important role in increasing liquidity and lowering costs, restrictions on the efficient functioning of the national mortgage market cannot be countenanced. *See, e.g.*, Litan, *supra*, at 18 (observing that state regulations that interfere with the functioning of credit markets often undermine the "democratization" of credit). NBA preemption plays an essential role in fostering the development of national markets for financial products like mortgages and thereby preventing interference with credit markets.

C. Preemption Creates A Uniform Regulatory Climate For Banks Operating Across State Lines.

By allowing banks to operate under a uniform regulatory structure, preemption increases the ability of national banks to operate efficiently throughout the United States. That benefit is especially important in the modern era, as "the Internet and the

advent of technological innovations in the creation and delivery of financial products and services has accentuated the geographic seamlessness of financial services markets." *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43549, 43554 (July 21, 2011). Allowing a patchwork of fifty different state laws to govern national banks' powers under the NBA would wreak havoc on the national marketplace and would have severely negative ramifications for the cost of banking services to everyday consumers.

Under the non-uniform regulatory regimes that would emerge absent a robust form of preemption, national banks operating in several states would be subject to higher regulatory costs. The burden of those heightened compliance costs would be disproportionality borne by small to mid-size banks operating in multiple states. *See* Gary Whalen, *The Wealth Effects of OCC Preemption Announcements After the Passage of the Georgia Fair Lending Act*, Off. of the Comptroller of the Currency Working Paper 2004-4, at 31 (Dec. 2004)[5]; *see also, e.g.*, Gov't Accountability Off., *Sarbanes-Oxley Act: Consideration of Key Principles Needed in Addressing Implementation for Smaller Public Companies*, GAO-06361 (Apr. 2006)[6] (observing in the analogous context of Sarbanes-Oxley regulation that heightened compliance costs were especially burdensome for small companies). In turn, the higher costs associated with a complex

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[5] https://www.occ.gov/publications-and-resources/publications/economics/working-papers-archived/economic-working-paper-2004-4.html.

[6] https://www.gao.gov/assets/gao-06-361.pdf.

thicket of varying regulations would undermine banks' incentives to operate across state lines, causing banks to lose the cost-efficiencies associated with economies of scale and inevitably causing banking customers to face higher prices.

The lifting of state branching restrictions in the 1990s provides empirical evidence of the negative impact of a lack of uniformity on economic efficiencies and consumer benefits. The economic literature reveals that reducing barriers to bank expansion across state lines increased the banking services available to consumers while lowering the price of those services. *See, e.g.*, Jith Jayaratne & Philip E. Strahan, *The Benefits of Branching Deregulation*, 3 Fed. Reserve Bank of N.Y. Econ. Pol'y Rev. (Dec. 1997), at 13, 13-14[7] (finding that "bank efficiency improved greatly" once geographic restrictions on bank branching were lifted, with "the reduction in banks' costs … largely passed along to bank borrowers"); Astrid A. Dick, *Nationwide Branching and Its Impact on Market Structure, Quality, and Bank Performance*, 79 J. Bus. 567, 567, 587-91 (2006) (observing that branching deregulation ultimately allowed "consumers to enjoy larger fee-free networks locally and regionally"). Preemption secures these efficiencies, which accrue to the ultimate benefit of consumers and local economies.

Case studies from two U.S. industries that underwent a change in the uniformity of their regulatory oversight—the wine industry and the wireless tel-

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[7] https://www.newyorkfed.org/medialibrary /media/research/epr/97v03n4/9712jaya.pdf.

ecommunications industry—illustrate the benefits of imposing uniform regulatory standards.

The wine industry. Eight states, including Michigan and New York, erected barriers to out-of-state wineries directly shipping their goods ordered online or by phone to consumers without implementing similar restrictions for in-state wineries. In 2005, this Court struck down the laws as unconstitutional under the Commerce Clause. *Granholm v. Heald*, 544 U.S. 460, 493 (2005). Virginia had previously legalized interstate direct shipping to comply with lower federal court decisions to the same effect. *See* Alan E. Wiseman & Jerry Ellig, *Legislative Action, Market Reaction and Interstate Commerce: Results of Virginia's Natural Experiment with Direct Wine Shipment*, Mercatus Center, at 8 (Dec. 15, 2005).[8] Studying the effects of this change in Virginia, Alan Wiseman and Jerry Ellig observed that, once the law was repealed and in-state distributors and retailers faced out-of-state competition, wine prices at brick-and-mortar stores declined up to 40% relative to prices offered by online retailers. *Id.* at 23. The imposition of uniform regulations thus increased consumer welfare, "not just by facilitating entry by out-of-state sellers, but also by placing competitive pressure on in-state sellers." *Id.* at 29. This result provides empirical support for "theories that predict how government mandated market restrictions inhibit competition and facilitate higher prices, and how the removals of those bans will facilitate more efficient market outcomes." *Id*.

[8] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=836364.

The wireless telecommunications industry. Like banking, the wireless telecommunications industry is characterized by economies of scale, making centralized commercial policy especially important. Because consumers placed great value on the ability to access their carrier's network anywhere in the country, carriers with national networks had a significant competitive advantage. Before 1994, states and the federal government had concurrent power to regulate the services that wireless carriers offered to consumers, with some states—including California and New York—imposing price controls on the nascent industry. *See* Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 Fed. Comm. L.J. 155, 157 (2003). In 1994, the Federal Communications Commission ("FCC") preempted the state laws regulating the industry. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, *codified at* 47 U.S.C. § 332(c)(3)(A). Like the wine industry example set forth above, that development created a "natural experiment" enabling economists to evaluate the effects of a change in policy. Thomas Hazlett's comprehensive review of the literature concerning the effects of the FCC's preemption of state regulation demonstrated that the shift toward uniform, national standards unquestionably increased economic efficiency. Hazlett, *supra*, at 205-221, 223-24. Before preemption, consumers in states that regulated the industry, such as California and New York, paid higher prices. Moreover, state regulations had discouraged rival wireless providers from entering the market and slowed consumer adoption of cellular phones. Just as balkanized state laws hindered the growth of wireless networks and raised cellular prices for everyone,

balkanized state laws stymied the growth of ATM and branch networks, raising the cost of credit and banking services for consumers. Across industries, then, the economic efficiencies unlocked by uniform regulation imposed via preemption are apparent.

II. PETITIONERS' UNDULY NARROW VIEW OF PREEMPTION WOULD ELIMINATE THESE ECONOMIC EFFICIENCY BENEFITS

Recognizing the NBA's goal of achieving the types of benefits detailed above, this Court has made clear that it is "[b]eyond genuine dispute" that "state law … may not curtail or hinder a national bank's efficient exercise" of a "power, incidental or enumerated under the NBA." *Watters*, 550 U.S. at 13. Yet Petitioners urge this Court to adopt a rule that would permit precisely such a curtailment. By seeking to dilute the inquiry whether a state law "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers," *Barnett Bank*, 517 U.S. at 33, into a case-by-case assessment of the effects of isolated laws regardless of the nature of the incursion, Petitioners would entangle courts in line-drawing exercises to which they are ill-suited and usher in an era of weakened preemption and uncertainty. Under that regime, there would be no effective federal check on state regulators and legislature who have been "captured" by local interests, and costly protectionists measures would undoubtedly proliferate. With all manner of varying state incursions on national banks' exercise of their powers remaining on the books, the efficiency benefits that accompany a robust preemption mechanism would vanish, to the ultimate detriment of consumers.

Take, for instance, the New York law at issue in this case, which would require national banks to pay the greater of 2% interest or any "rate prescribed by the superintendent of financial services" on mortgage-escrow accounts. N.Y. Gen. Oblig. Law § 5-601. The Second Circuit's preemption analysis, in accordance with decades of this Court's jurisprudence, was straightforward: the law impermissibly conditions the exercise of national banks' federally-conferred powers on compliance with state law and is thus preempted. That form of analysis fosters predictability and ensures the regulatory uniformity that is a core goal of the NBA. Petitioner's rule, by contrast, would force courts to consider the New York law in isolation and attempt to make the technical assessment whether the magnitude of its effect on Bank of America at the particular point in time of the litigation, without taking into consideration the cumulative burden of a regulatory patchwork of similar but varying laws, was sufficient to trigger an undefined and amorphous threshold for preemption. Based on the outcome of that unpredictable analysis, escrow-interest laws could be allowed to remain on the books in numerous states, notwithstanding that they purport to place conditions on a federally-granted national banking power and interfere with Congress's chosen method of regulating national banks' use of escrow accounts using federal laws such as RESPA. In such a scenario, not only would the efficiency advantages detailed above evaporate, but new inefficiencies would arise: as the supply of mortgage escrow accounts decreases in the face of increased demand from consumers, the resulting suboptimal level of escrow accounts would result in missed tax

and insurance payments, with negative ramifications for borrowers.

Contrary to Petitioners' misleading narrative, these negative effects are not a necessary price to pay for improved consumer protection. Petitioners err, for example, in suggesting that preemption was responsible for the consumer-protection failures associated with the 2008 financial crisis. *See* Pet. Br. at 15-16. The economic evidence is to the contrary, illustrating that the overwhelming majority of subprime mortgage loans were originated by companies that were not subject to preemption. *See, e.g.*, Letter from John Dugan, Comptroller of the Currency, to Elizabeth Warren, Chair, Congressional Oversight Panel, at 4 (Feb. 12, 2009)[9] (stating that only about 12-14% of the non-prime loans originated between 2005-2007 were originated by national banks and their operating subsidiaries, and that the foreclosure rates for loans originated by national banks were substantially lower than those issued by state-regulated entities); Dep't of the Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation*, at 69-70 (June 17, 2009) (noting that 94% of "higher-priced loans" to "lower income borrowers" were originated by lenders not covered by the Community Reinvestment Act, which applies only to banks). More fundamentally, it is fallacious to equate preemption with *less* regulation. Preemption has been used to open markets and to simplify regulatory compliance, but it does not free banks from federal regulation or

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[9] https://web.archive.org/web/20090219023455/http:/www.occ.treas.gov/ftp/occ_copresponse_021209.pdf.

state-level regulations that do not seek to control a bank's exercise of federally granted powers. The optimal public policy solution for national-level problems such as predatory lending is uniform regulation at the federal level.

CONCLUSION

For the foregoing reasons and those set forth in Respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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