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 *AMICI CURIAE* THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, AND MID-SIZE BANK COALITION OF AMERICA IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Bank Policy Institute ("BPI"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), the Mortgage Bankers Association ("MBA"), and the Mid-Size Bank Coalition of America ("MBCA"; collectively, "*Amici*") respectfully submit this brief as *Amici* in support of the Respondent, Bank of America, N.A.[1]

BPI. BPI is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

ABA. The ABA is the united voice of America's $23.4 trillion banking industry, comprised of small, regional, and large national and State banks that safeguard nearly $18.6 trillion in deposits, and extend more than $12.3 trillion in loans.

CBA. The CBA is the trade association for banking services geared toward consumers and small businesses. Its members include the nation's largest

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[1] Pursuant to Rule 37.6 of this Court, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

financial institutions, as well as many regional banks, which operate in all 50 States and collectively hold two-thirds of the country's total deposits.

MBA. The MBA is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field.

MBCA. The MBCA is a nonpartisan financial and economic policy organization representing more than 100 banks doing business in the United States to provide the perspectives of mid-size banks on financial regulatory policy issues.

Amici respectfully request that this Court affirm the Second Circuit's decision.

SUMMARY OF ARGUMENT

This appeal raises a critical issue for the banking system. Although Petitioners' specific request is for this Court to hold that a particular State law is not preempted under the National Bank Act ("NBA"), Petitioners ultimately advocate a complete upending of this Court's national bank preemption doctrine, on which national banks have relied for 150 years and

which Congress reaffirmed when it enacted Dodd-Frank in 2010.

Contrary to this Court's repeated holdings that States cannot exercise control over a national bank's federally granted power, Petitioners contend that NBA preemption applies only if a national bank can *prove* that a State's or municipality's law regulating that power makes that bank's exercise of it "practically infeasible," *i.e.*, it practically prohibits it. And contrary to this Court's uniform history of making industry-wide NBA preemption determinations as a matter of law, Petitioners would force courts to make preemption determinations based on the specific circumstances of the particular national banks before them in particular States and at particular times. Such a case-by-case preemption doctrine would lead to the re-litigation of prior preemption determination based on the individual circumstances of particular national banks with inconsistent determinations—an outcome that would most benefit plaintiffs' lawyers and create widespread uncertainty in the national banking system. Overall, no national bank could rely on preemption of any State or municipal law without litigation.

Thus, as a practical matter, Petitioners' position would enable every State and municipality to regulate national banks pervasively, including by establishing minimum and maximum interest rates or charges on bank products, and requiring that national bank products and services contain (or not contain) certain terms and conditions. The effect would be to subject national banks to a patchwork of 50 State laws, which

is what Congress intended to prevent in passing the NBA and Dodd-Frank. The uniformity and predictability of a national bank charter would be undermined to the ultimate detriment of bank customers and a sound banking system.

Petitioners seek to justify their novel and unworkable test by misstating the history of NBA preemption. Through the NBA, Congress created a system for chartering national banks and gave them the power to, among other things, accept deposits and to make loans, along with "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). In *Barnett Bank of Marion County, N.A.* v. *Nelson*, this Court summarized the standard from over a century of case law and held that the NBA preempts any State law that "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers." 517 U.S. 25, 33 (1996). The Court's analysis of its earlier decisions made clear that a State may not enact laws that seek to control a national bank's exercise of its federal powers or otherwise significantly interfere with them.

Indeed, *Barnett* highlighted this Court's determination in *Franklin National Bank of Franklin Square* v. *New York* that a State statute governing advertising of a bank product was preempted because it "subject[ed]" a federally granted power—namely, the power to choose how to advertise a product—"to local restriction," *i.e.*, it "condition[ed] federal permission upon that of the State." 517 U.S. at 33, 34-35. This analysis left no doubt that the bar for NBA preemption is exceeded even when a State seeks to

limit a national bank's discretion on how to advertise its products, let alone when it dictates how to price those products or what other basic terms to use. As the Court later characterized the standard in *Watters* v. *Wachovia Bank, N.A.*, "States can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit." 550 U.S. 1, 11 (2007).

In 2010, Congress codified this standard through Dodd-Frank. As part of an overall approach to changing aspects of the banking system, Congress added significant new requirements for all banks, including a revised federal consumer protection regime, and removed NBA preemption protection from national bank subsidiaries. But Congress specifically provided that State consumer financial laws would continue to be preempted as to national banks if, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [*Barnett*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). This text and structure of Dodd-Frank make clear that Congress adopted the complete preemption analysis articulated in *Barnett*, informed by decades of precedent before it, and not simply the isolated, acontextual words "prevents or significantly interferes." A contemporaneous letter from the drafters of the relevant preemption language to the Acting Comptroller of the Office of the Comptroller of the Currency ("OCC") confirmed that Congress intended to codify "the traditional conflict preemption

standard as explained by the Court in its holding in the *Barnett Bank* case." Resp. App. 32a ("Carper & Warner OCC Letter").

Congress also assured stability and predictability on preemption issues by declining to overrule the prior preemption determinations of the OCC, the entity charged with overseeing national banks. *See* Resp. App. 32a (Carper & Warner OCC Letter) ("[C]onsistent with [the] desire to provide legal certainty to all parties, [Section 25b] is not intended to retroactively repeal the OCC's 2004 preemption rulemaking.... [N]othing in [Section 25b] reflects such a retroactive intent."). Going forward, however, from the date of Dodd-Frank's enactment, the OCC would only be able to make preemption determinations for particular state consumer financial laws on a case-by-case basis and with substantial evidence that the State law violates *Barnett*. 12 U.S.C. § 25b(c). Congress thus avoided upending the *status quo* as to national banks, while limiting the method of determining any expansion of preemption.

In the decision below, the Second Circuit properly read *Barnett* and Dodd-Frank and held that New York General Obligations Law Section 5-601 ("NYGOL")—which requires lenders to pay a minimum rate of interest of 2% on funds deposited in a mortgage-escrow account, or any higher amount as State regulators deem appropriate—is preempted because it seeks to "control" a national bank's powers concerning mortgage-escrow accounts, including the power to determine the exact amount of interest (if any) it pays on such accounts. Pet. App. 16a-17a. The Second

Circuit reasoned that, because New York's law "requir[es] a bank to pay its customers in order to exercise a banking power granted by the federal government"—*i.e.*, creating escrow accounts to facilitate mortgage lending—the law prevented banks' full exercise of that power. Pet. App. 23a.

Importantly, the Second Circuit gave effect to the language of *Barnett* and Dodd-Frank by delineating State laws that are not preempted because they do not prevent or significantly interfere with a federally granted power: (i) laws that directly regulate national bank activity, and (ii) laws that apply generally to both banks and other companies, in both instances as long as such laws do not significantly interfere with national banks' powers. Pet. App. 16a; Pet. App. 38a (Pérez, J., concurring).

Petitioners nevertheless contend that the Second Circuit should have analyzed preemption based on a factual determination of whether NYGOL makes it "practically infeasible" for Bank of America to establish mortgage-escrow accounts. Pet. Br. at 35-37. In doing so, Petitioners incorrectly seek to limit the relevant national bank power to the mere establishment of mortgage-escrow accounts, thus ignoring the concurrent and more directly impacted national bank power to establish interest rates on its lending and depository products, which NYGOL indisputably seeks to control here. This Court could easily affirm the decision below on this ground alone.

But even if Petitioners were correct as to the relevant power at issue here, Petitioners give no definition of "practically infeasible" and so do not (and

cannot) suggest what rate of mandatory interest—2.5%, 3%, 5%, 10%—would constitute "practical infeasib[ility]" for Bank of America's business in New York at the time of the lawsuit (or for any other bank, in any jurisdiction, at any time). This has never been the test for preemption since the passage of the NBA, and it is not the standard that Congress intended in passing Dodd-Frank.

This Court should affirm the Second Circuit's decision.

ARGUMENT

I. THE ABILITY TO ESTABLISH AND SET TERMS FOR MORTGAGE-ESCROW ACCOUNTS IS A PART OF A NATIONAL BANK'S BANKING POWERS.

Mortgage-escrow accounts are critical to national banks' core power to make mortgage loans. In these accounts, borrowers keep sufficient funds to make tax and insurance payments on their property as they become due. Modern-day mortgage-escrow accounts arose from the experience of the Great Depression, when homes were foreclosed upon due to homeowners' inability to pay property taxes. U.S. General Accounting Office, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Because a tax lien could be senior to a mortgage lien, a bank stood to lose all or part of the value of its security interest in a foreclosed-upon property because any proceeds from the sale could go first to paying back taxes. *See* Bruce

E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998) ("CRS Report"). A homeowner's failure to pay insurance premiums could also jeopardize the value of the collateral property in the event of an uninsured catastrophe. GAO Study at 5.

Mortgage-escrow accounts solved these problems by allowing tax authorities and insurers to collect payments "more economically," reducing the number of delinquencies and defaults and avoiding the problem of bad checks from homeowners. CRS Report at 3; *see also* GAO Study at 5. The benefits of mortgage-escrow accounts redound to homeowners as well, helping them set aside funds for taxes and insurance and offering a convenient method for paying those expenses, thus reducing the prospect of losing their homes. *See id.* Moreover, borrowers benefit from mortgage-escrow accounts because, without such accounts, lenders would face elevated risks on mortgage lending, and could be forced either to (i) require borrowers to make higher down payments and/or charge higher mortgage interest rates, or (ii) simply not make loans to certain borrowers with credit profiles that are already at the outer limit of acceptable risk.

Mortgage-escrow accounts remain crucial to the home mortgage system: in 2016, the last year for which data is available, nearly six million mortgage originations—approximately 79% of the total that year—"included an escrow account for taxes or homeowner insurance." *See* FHFA & CFPB, *A Profile*

of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations 1, 27, 30 (2018). Several federal agencies that purchase or insure home mortgages now *require* the use of escrow accounts. *See* 24 C.F.R. § 200.84(b)(3) (loans insured by the Federal Housing Administration); Fannie Mae, *Selling Guide: Fannie Mae Single Family* 224 (2023), http://tinyurl.com/4364w8hk; Freddie Mac, *Servicer Guide* § 4201.23 (2019), https://tinyurl.com/2u3rmr4v.

Recognizing the importance of mortgage-escrow accounts to national banks' core lending powers, in 2004, the OCC explicitly confirmed in a final rule that State mortgage-escrow account laws are preempted as to national banks. 12 C.F.R. § 34.4(a)(6); *see also* OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1911 (Jan. 13, 2004). The OCC created this rule in accordance with the standard for NBA preemption set forth in *Barnett*. *See id.* at 1910. The preemption rule was based on the OCC's "experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." *Id.* at 1910-11.

II. THE SECOND CIRCUIT CORRECTLY HELD THAT STATE INTEREST-ON-ESCROW LAWS ARE PREEMPTED BY FEDERAL LAW.

A. Dodd-Frank's Preemption Provision Did Not Alter the NBA Preemption Standard Set Out in *Barnett.*

Congress enacted the NBA in 1864 so that federal law—rather than "the hazard of unfriendly legislation by the States"—governs national banks. *Tiffany* v. *Nat'l Bank of Missouri*, 85 U.S. 409, 413 (1873). The NBA specifically gave national banks the power to accept deposits and to make loans, and also granted national banks "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). Congress further established that national banks would operate under the "paramount authority" of the federal government, *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and be supervised by the OCC, *see* 12 U.S.C. § 24. As this Court explained, the "national banking system [is] normally 'independent, so far as powers conferred are concerned, of state legislation.'" *Barnett*, 517 U.S. at 32 (quoting *Easton* v. *Iowa*, 188 U.S. 220, 229-30 (1903)).

Soon after Congress enacted the NBA, this Court began establishing the broad parameters of the NBA's preemption of State law, consistently holding that State attempts to "control" national banks' powers are impermissible, "except in so far as Congress may see

proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875).

Contrary to Petitioners' novel suggestion—which relies, as do many of Petitioners' citations, on a dissenting opinion for support, *see* Pet. Br. at 10-13 (citing *First Agric. Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 354 (1986) (Marshall, J., dissenting))—Congress's passage of the Federal Reserve Act ("FRA") in 1913 did not diminish the scope of NBA preemption for national banks. The FRA created the Federal Reserve system and gave it responsibility for issuing a national currency, but it did not alter national banks' other powers or this Court's NBA preemption framework. *See* FRA §§ 10, 16, 38 Stat. 252, 260, 265 (1913) (codified at 12 U.S.C. §§ 241, 411). This Court's post-FRA decisions, including *Barnett*, continued to cite to pre-FRA cases when analyzing NBA preemption. *See First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 656 (1924) (citing *First Nat'l Bank* v. *Kentucky*, 76 U.S. (9 Wall.) 353 (1869), and *Davis*, 161 U.S. 275); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 247-48 (1944) (citing *McCulloch* v. *Maryland*, 17 U.S. 316 (1819), and *Davis*, 161 U.S. 275); *Barnett*, 517 U.S. at 32-33 (citing *First Nat'l Bank* v. *Kentucky*, *McClellan* v. *Chipman*, 164 U.S.347 (1896), and *Easton*, 188 U.S. 220). Some decisions have also described national banks as "instrumentalit[ies] of the federal government." *E.g.*, *Marquette Nat'l Bank of Minneapolis* v. *First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978). Although Petitioners argue that the FRA obviated the need for

a robust preemption policy, that notion is ahistorical and has never been endorsed in this Court's decisions.

In *Barnett*, this Court synthesized this Court's decisions construing NBA preemption and articulated a standard consistent with over a century of precedent. *Barnett* first observed that this Court's precedents had "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law." 517 U.S. at 32 (emphasis added). Summarizing those earlier decisions, and applying "ordinary legal principles of pre-emption," the Court noted that a State law would be preempted under the NBA if it "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers." *Id.* at 33, 37.

In the years since *Barnett* was decided, the Courts of Appeals have observed that, in view of the long history of "significant federal presence" in national banking regulation, *Bank of Am.* v. *City & Cnty. Of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002), the presumption against preemption that applies in many other areas of federal legislation is inapplicable to the NBA. *See Barnett*, 517 U.S. at 32; *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 280 (6th Cir. 2009); Pet. App. 15a.

The OCC's 2004 guidelines likewise tracked *Barnett*, setting forth categories of State laws that are preempted because they "obstruct, impair, or condition a national bank's ability to fully exercise" national bank powers, while also identifying a broad range of State laws that are not preempted "to the

extent that they only incidentally affect the exercise of national banks' deposit-taking powers." 69 Fed. Reg. at 1916-17. This latter category includes State criminal law and laws concerning contracts, torts, rights to collect debts, zoning, and taxation. *Id.*

When Congress enacted Dodd-Frank in 2010, it stated that a "State consumer financial law" is preempted only if "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [*Barnett*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). By expressly codifying "the legal standard for preemption" in *Barnett*, Congress instructed courts to apply the "ordinary legal principles of pre-emption" that are described in *Barnett* and set out in this Court's cases since the passage of the NBA. *See* 517 U.S. at 37.

That Dodd-Frank codified the entirety of the preemption analysis described in *Barnett*—instead of establishing some new standalone standard—is clear from the statute's text, structure, and legislative history. Section 25b instructs courts to apply the preemption standard "in the decision" in *Barnett*, and, therefore, the cited language cannot be divorced from the full context of that standard. 12 U.S.C. § 25b(b)(1)(B). The standard also encompasses this Court's recognition in *Barnett* that the NBA preempts State laws seeking to "encroach on" or "condition" the exercise of a national bank power. 517 U.S. at 33-34.

The history of Dodd-Frank confirms that the codified preemption standard was intended to be the traditional conflict preemption analysis described in *Barnett*. The Senate version of the bill had been purposefully amended before passage so that the preemption provision referred to the "legal standard of the decision" in *Barnett*. H.R. 4173, 111th Cong. § 5136C(b)(1)(B) (as passed by Senate, May 25, 2010). Two of the authors of that amendment (Senators Thomas Carper and Mark Warner), in a letter to the OCC, explained that they insisted on inclusion of a reference to *Barnett* to "ensure that the preemption principles in the *Barnett* [] case were preserved." Resp. App. 32a.

After the House and Senate versions of the bill were passed, the conference committee retained the Senate amendment's reference to *Barnett* and incorporated the "prevents or significantly interferes" language from that decision. The conference committee specifically stated that the Conference Report language "codifies" the *Barnett* standard, demonstrating that it did not intend to introduce some new, narrower standard. *See* H.R. REP. NO. 111-517, at 875 (2010) (Conf. Rep.). Later, during the Senate floor debate on the Conference Report, Senator Carper observed that the conference committee had "restate[d] the preemption standard in a slightly different way" compared with the original Senate amendment, but noted that "the conference report still maintains the Barnett standard for determining when a State law is preempted." 156 Cong. Rec. S5870, S5902 (daily ed. July 15, 2010). In response, Senator

Dodd confirmed that this reading was "correct," explaining, "There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [*Barnett*]." *Id.; see also id.* at S5888-89 (Statement of Senator Johnson) ("[I]t is clear that this legislation is codifying the preemption standard expressed by the U.S. Supreme Court in [*Barnett*].").

In their letter to the OCC, Senators Carper and Warner reiterated that "that standard is not simply the short-hand phrase 'prevent or significantly interfere,' but rather the traditional conflict preemption standard as explained by the Court in its holding in the *Barnett* [] case." Resp. App. 32a; *see also* Resp. App. 41a (Carper & Warner Treasury Letter) ("[T]he literal language of [Dodd-Frank] on its face clearly shows the *Barnett* standard was maintained. The statute states 'in accordance with the legal standard for preemption in [*Barnett*]….' It does not say in accordance with 'part of' the legal standard; it says 'the' legal standard.").

Dodd-Frank's legislative history also confirms that Section 25b was "not intended to retroactively repeal the OCC's 2004 preemption rulemaking" or other legal precedents. Resp. App. 32a (Carper & Warner OCC Letter). The drafters of the language in Section 25b requiring the OCC to act on a "case-by-case basis," *see* 12 U.S.C. § 25b(b)(1)(B), (b)(3), confirmed that they did not intend this requirement to apply to preemption determinations dated before the effective date of Dodd-Frank. Any such retroactive application of Section 25b's procedural requirements

would have run counter to Congress's purpose of "provid[ing] certainty to consumers and those that offer consumers financial products," 156 Cong. Rec. S5870, S5889, and would have "disrupt[ed] settled expectations and create[d] considerable uncertainty as to the legal status of prior preemption determinations, including case law," Resp. App. 32a-33a (Carper & Warner OCC Letter). By expressing a desire to preserve existing regulations and case law that were consistent with well-established conflict preemption principles, Congress confirmed that it did not intend to supplant the traditional conflict preemption analysis described in *Barnett*.

The Second Circuit was therefore correct in holding that Section 25b(b)(1)(B) "did not change the preexisting legal standard, but rather explicitly codified it." Pet. App. 26a. Thus, the Second Circuit was justified in "continu[ing] to refer to the longstanding preemption test articulated in cases going back to *McCulloch*" in deciding the scope of NBA preemption. *Id.*

B. Under *Barnett* and Dodd-Frank, a State Law Is Preempted if It Prevents the Exercise of a Banking Power, Without the Need to Analyze the Degree of Interference.

In *Barnett*, this Court applied the "ordinary legal principles of pre-emption" previously established by this Court, and summarized the standard as preempting any State law that "prevent[s] or significantly interfere[s] with [a] national bank's

exercise of its powers." 517 U.S. at 28, 33 (1996). Consistent with the decades of case law on NBA preemption that informed *Barnett's* articulation of the standard, the Second Circuit correctly held that "[t]o determine whether the NBA conflicts with a state law, we ask whether enforcement of the law at issue would exert control over a banking power—and thus, if taken to its extreme, threaten to 'destroy' the grant made by the federal government." Pet. App. 18a (internal citations omitted). "Control" over a banking power certainly encompasses the ability to set the pricing and other essential terms of its exercise. Because NYGOL prevents a national bank from determining the precise interest it pays on accounts, the Second Circuit held that NYGOL is preempted as to national banks.

Petitioners mischaracterize and misapply *Barnett* by arguing that its preemption standard turns on whether a State law presents a "clear practical obstacle" to—*i.e.*, makes "practically infeasible"—a national bank's exercise of its federally granted powers. Pet. Br. at 27, 35-36; *see also* Solicitor General Amicus Br. at 21. But *Barnett* announced no rule that a State may regulate the powers of a national bank unless the regulation amounts to a direct or "practical" prohibition. This Court's cases make clear that the "significantly interferes" language in *Barnett* does not mean that *every* type of State law must reach some undefined degree of interference with national bank powers before it is preempted. Rather, the concept of "significant interference" applies to preempt generally-applicable State laws that, while not

directly affecting national bank powers, still create a significant obstacle to a national bank carrying out those powers. For example, although many State laws governing the formation and enforcement of contracts are validly applied to national banks, such laws may still be preempted under the NBA if they significantly interfere with a national bank power.

The initial question under this Court's preemption analysis is whether the State law seeks to regulate the terms of national bank products and services. If so, the law should be preempted without an analysis of the law's impact on national banks, because it prevents the full exercise of national banks' powers. And there is no subject more at the core of a national bank product or service than pricing terms. As the Second Circuit recognized, "[t]he power to set minimum rates is the 'power to control,' and the power to control is the 'power to destroy.'" Pet. App. 24a (quoting *McCulloch*, 17 U.S. at 431). The NBA precludes States from wielding that "power to destroy" against national banks.

Barnett followed decades of this Court's preemption decisions that consistently turned on *whether* a State law prevents a national bank from fully exercising its federal banking powers, and not on the *magnitude* of the State law's impact on that national power. Where this Court determined that a State law was *not* preempted, it was based on a finding that no national banking power was impaired. The cases Petitioners cite do not, upon a complete reading, support their position.

In *Franklin National Bank*, the Court held that a State law prohibiting the use of the word "savings" in advertising was preempted as to national banks because it interfered with incidental banking powers. 347 U.S. 373, 374 (1954). The Court reasoned that Congress had granted national banks the power to accept savings deposits, and that the State law improperly sought to limit banks' incidental power of advertising those products. *Id.* at 377-78. The Court found "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances." *Id.* at 378. And as Petitioners fail to acknowledge, the Court's analysis stopped once it was clear that the State law impeded a national bank's powers; it made no assessment of the *extent* to which prohibiting the word "savings" in advertising might actually affect national banks' ability to bring in business, or whether substitute terms for "savings" could minimize the impact of the State law. *See id.* at 377.

In *First National Bank in St. Louis* v. *Missouri*, the Court held that a State law prohibiting state and national banks from opening bank branches within the State was not preempted under the NBA. 263 U.S. 640, 659 (1924). The Solicitor General suggests that this Court's holding turned on the "practical effect" of the State law on national banks, but that mischaracterizes the analysis. *See* Solicitor General *Amicus* Br. at 18-19. The Court reviewed no findings of fact on the degree of the Missouri law's impact; it considered the effects of the State law only to

determine *whether* it infringed on *any* national banking power. *Id.* at 659. The Court assessed whether the State law "frustrate[d] the purpose for which the national banks are created, or impair[ed] their efficiency to discharge the duties imposed upon them by the law of the United States." *Id.* at 656. Finding that Congress had not granted national banks the power to open bank branches, the Court's inquiry ended there.

Petitioners and their *amici* cite *Anderson* and *First National Bank of San Jose* v. *California* as evidence of the Court's reliance on a preemption test that looks to the impact of a State law, arguing that the State laws at issue in the two cases were similar but had different effects—but this ignores the stark differences in the *natures* of the two statutes. *See* Pet. Br. at 12-13; Solicitor General *Amicus* Br. at 30-31. In *Anderson*, the Court held that a State law requiring banks to relinquish to the State deposit funds deemed abandoned was not preempted under the NBA, 321 U.S. at 252-53, whereas, in *First National Bank of San Jose,* the Court held that a State law escheating dormant deposits in a national bank was preempted, 262 U.S. 366, 369-70 (1923). The *Anderson* Court pointed out that, unlike the Kentucky statute in *Anderson*—which, as is typical practice in most States, escheated funds that were found to be abandoned subject to a procedure "satisfying constitutional requirements" and in no way altered the terms of bank customer agreements—the California statute in *First National Bank of San Jose* required that accounts merely inactive for 20 years or more could be

escheated to the State, without proof that the accounts were, in fact, abandoned. *See Anderson*, 321 U.S. at 240, 250. Banks ordinarily would *not* forfeit customer funds to the State absent a finding of abandonment. Because the California law altered this aspect of the agreement between banks and their customers, *i.e.*, regulated the *terms* of a national bank product, the law infringed on a national banking power and was thus preempted. *First National Bank of San Jose*, 262 U.S. at 370. With respect to the Kentucky statute in *Anderson*, on the other hand, the Court reasoned that "a demand for payment of an account by one *entitled* to make the demand"—in this case, the State—"does not infringe or interfere with *any authorized function of the bank*." 321 U.S. at 249 (emphasis added). Moreover, the Court perceived "no danger of *unlimited control* by the state over the operations of national banking institutions" by the Kentucky statute. *Id.* Accordingly, the Kentucky statute was not preempted. *Id.* at 252-53.

In the years following *Barnett*, this Court continued the same approach. In *Watters*, this Court held that a Michigan law authorizing a State regulator to exercise visitorial authority over a national bank's subsidiary was preempted because Congress intended to "shield[] national bank[s] from unduly burdensome and duplicative state regulation." 550 U.S. at 11. The Court made clear that States "can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Id.* After establishing that the Michigan law would impermissibly exercise control over

national banks, the Court held that the law was preempted under the NBA without opining on the degree to which the exercise of state visitorial authority would impact the operations of national banks. *Id.* at 14-15.

Notably, Petitioners cite *no* case in which this Court has upheld a State statute seeking to regulate the pricing of a national bank product or service. To the contrary, numerous courts have found analogous State laws regulating the fees that national banks charge on accounts to be preempted, without engaging in detailed fact-finding regarding their effects. *See, e.g.*, *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (charges for non-account holder check-cashing fees); *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (gift card expiration dates and fees); *Powell* v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D. W. Va. 2016) (payments ordering and late fees); *NNDJ, Inc.* v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-account holder official check-cashing fees); *Metrobank, N.A.* v. *Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (non-account holder ATM fees).

C. New York's Interest-on-Escrow Law Is Preempted Under the *Barnett* Standard.

Following a proper reading of this Court's precedents and Dodd-Frank, NYGOL prevents a national bank from exercising its power to determine what interest (if any) to pay on escrow accounts. Allowing such laws to be enforced against national banks would open the door to a patchwork of unduly

burdensome regulation by the 50 States, depriving national banks of the uniformity and predictability that are critical to the effective operation of the national banking system. If such a regime should exist in the United States, it is up to Congress to make that change explicit.

First, there is no doubt that establishing, maintaining, and determining the interest rates for mortgage-escrow accounts are national bank powers entitled to the NBA's preemptive protection. Congress expressly granted national banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the [OCC] may prescribe by regulation or order." 12 U.S.C. § 371(a). The ability to set rates on such products is inherent in making them, and, as neither section 1828(o) nor the OCC regulates the ability of national banks to set interest rates on mortgage-escrow accounts or otherwise conditions that power on state regulation, Section 371(a) alone preempts NYGOL. *See* 12 U.S.C. § 25b(b)(1)(C) (providing a separate basis for preemption for State consumer financial laws that are "preempted by a provision of Federal law other than title 62 of the Revised Statutes").

NYGOL is also preempted through Congress's grant to national banks of "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). Even if using and setting the terms of mortgage-escrow accounts in lending is somehow not a core power of national banks,

it would still be a power incidental to real estate lending and, therefore, protected under the NBA preemption provision. As the U.S. District Court for the Eastern District of New York explained, mortgage-escrow accounts are "an integral part of or a logical outgrowth of the lending function." Pet. App. 76a (quoting OCC Conditional Approval No. 276, at 12 (May 8, 1998)).

NYGOL—which attempts to regulate the pricing terms of a product crucial to a national bank's core lending powers—is exactly the type of law the NBA was designed to preempt. As the OCC explained, "the safety and soundness of banks" depends on their ability to "devise" means "appropriate for their needs." OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. 54,319 (Dec. 2, 1983). These means include mechanisms, such as escrow accounts, which help protect bank customers and minimize losses. Allowing States to set differing minimum interest rates that national banks must pay on balances held in mortgage-escrow accounts necessarily interferes with the power that national banks have to "manage credit risk exposures." OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,557 (July 21, 2011). Burdening mortgage-escrow accounts by subjecting them to costly, State-law rate-setting mandates costs national banks more to mitigate the credit risks associated with mortgage lending. As the Second Circuit observed, "[b]y requiring a bank to pay its customers in order to exercise [its power to create

and fund escrow accounts], the law would exert control over banks' exercise of that power." Pet. App. 23a.

That certain national banks may comply with State laws regulating interest on mortgage-escrow accounts does not change the analysis. *Contra* Flagstar Plaintiffs *Amicus* Br. at 3-4. Whether a national bank can or does comply with a State law is not the preemption standard, and never has been. Nor is compliance with a State law sufficient evidence that it is not preempted, as national banks may be able to comply with laws that nevertheless impermissibly undermine or impede their powers. A bank with only an insignificant portion of its mortgage loans in a State may be able to absorb a minimum interest rate on mortgage-escrow accounts, but a bank with its principal mortgage business in that State could find the requirement untenable.

Permitting States to mandate interest payments on mortgage-escrow accounts would establish a precedent that completely undermines the preemption protection Congress has provided to national banks: If a state can establish a minimum interest rate on mortgage-escrow accounts, then why could it not establish a minimum rate on checking accounts? Or a State law setting maximum fees (or prohibiting charges altogether) for individual bank products and services—which federal courts have uniformly held to be preempted? (*See supra* Section II.B.) Reversing the Second Circuit's decision would thus repudiate decades of NBA preemption practice in the federal courts.

Second, reversing the Second Circuit's decision would invite significant interference with national bank powers by creating a preemption standard that subjects national banks to a patchwork of differing States' laws. This Court's decisions have emphasized that uniform regulation is critical to the national banking system, making clear that "federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. Reversing the Second Circuit's decision would do the opposite by exposing banks to differing mortgage-escrow laws that regulate pricing and other terms, as each of the 50 States may choose to assert them.

For example, other States have established different minimum interest-on-escrow rates that, if applied to national banks, would force them to pay different rates, some fixed and some floating, to borrowers depending on their State of residence. *See, e.g.*, Conn. Gen. Stat. § 49-2a ("not less than the deposit index"); Minn. Stat. § 47.20, subd. 9 (3% minimum rate); Wis. Stat. § 138.051(5) (5.25% minimum rate); Or. Rev. Stat. § 86.245(2) ("at a rate not less than the discount rate"); Vt. St. tit. 8, § 10404(b) ("regular savings account" rate). Subjecting national banks to a "death-by-a-thousand-cuts regime of mortgage-escrow regulation" would thus "undermine the NBA." Pet. App. 22a. As the OCC has recognized, "[t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome,

interferes with [national banks'] ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure." 69 Fed. Reg. at 1908.

If NYGOL and similar State laws were not preempted, the result would be to decrease the availability and increase the cost of credit. National banks would face higher underwriting costs to comply with a patchwork of differing State regulations, and would be required to pay higher interest rates on mortgage-escrow accounts and other products. But banks cannot, without compromising their safety and soundness, offer a product or service that does not produce a sufficient return, and so may need to pass their increased costs on to consumers, or else originate fewer loans altogether. This in turn would harm borrowers, which may be unable to obtain loans, or able to obtain loans only at considerably higher rates.

D. Petitioners' Proposed Approach that Looks to a State Law's Degree of Interference with National Bank Powers Is Unworkable.

Petitioners contend that the preemption analysis mandated by Section 25b looks to a law's practical impact on national banks, and that preemption applies only if the law's degree of interference with national bank powers makes the exercise of those powers "practically infeasible" or presents a "clear practical obstacle" to exercise of those powers. Pet. Br. at 27, 35-37. This is not the standard in the NBA,

Dodd-Frank, *Barnett*, or any of this Court's other decisions. And with good reason.

Petitioners' novel standard would (i) force courts to conduct granular and circumstance-dependent analysis to determine whether a law's *degree* of interference with national bank powers meets the (as-yet-undefined) standard of "practically infeasible" or "practical obstacle," (ii) lead to different preemption results as applied to different banks at different times, and (iii) create uncertainty and confusion for national banks as to which State laws apply to them.

First, by shifting courts' preemption analysis away from control over or curtailment of a national bank power and toward the law's degree of interference with those powers, Petitioners' proposed test would require courts to assess how the law would affect many different individual national banks across a broad variety of factual circumstances. Whether a State law's degree of impact would prevent or make "practically infeasible" the exercise of a national banking power could depend on a bank's particular financial circumstances, the jurisdiction(s) in which it operates, the extent of its operations in the State, the general state of the economy, prevailing interest rates, competition from other banks, and any number of other factors.

As for interest-on-escrow laws like NYGOL, Petitioners' fact-based preemption approach is particularly ill-suited. Under Petitioners' proposed standard, whether a minimum escrow interest rate is so high as to impermissibly interfere with national bank powers would turn on, among other things,

prevailing interest rates and the circumstances of a particular bank in a particular year.

For example, although the 2% minimum rate imposed by New York might seem nominally low in today's interest-rate environment, it is approximately 70% higher than the 1.22% long-term average federal funds effective rate over the last ten years. *See, e.g.*, Board of Governors of the Federal Reserve System, *Federal Funds Effective Rate*, http://tinyurl.com/8ar5kwk4 (last accessed Jan. 22, 2024). If New York's rate is not a significant interference, how would a court decide what rate *would* be high enough? Wherever courts might choose to draw the line, Petitioners' test would require courts to revisit their preemption determinations when interest rates and market conditions inevitably change.

Courts' preemption determinations would be even more difficult for State laws that impose variable rates or empower State regulators to *increase* the minimum interest rate imposed. NYGOL permits just that, allowing the New York superintendent of financial services to increase the minimum interest-on-escrow rate above 2% based on several factors.[2] Even if a court were to approve the application of New York's minimum 2% rate or another State's variable rate to national banks, that preemption determination would

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[2] NYGOL prescribes minimum interest "at a rate of not less than two per centum per year … or a rate prescribed by the superintendent of financial services pursuant to section fourteen-b of the banking law and pursuant to the terms and conditions set forth in that section, *whichever is higher*" (emphasis added).

need to be reconsidered whenever the prescribed minimum interest rates are adjusted or a benchmark rate moves, with attention to the change in circumstances for any particular national bank that would necessarily result. This would lead to substantial uncertainty. It is inconceivable that Congress intended for courts to be in the business of continually deciding—depending on then-prevailing interest rates and other factors—when the degree of a statutory interest rate constitutes significant interference with the creation of mortgage-escrow accounts, and when it does not.

As difficult as it would be for a court to determine an appropriate rate of interest for mortgage-escrow accounts, some State rules would pose vastly more complicated and technical issues. For example, New York's Department of Financial Services recently imposed a broad set of rules governing all mortgage loan servicers in New York, with no exception for national banks. *See* N.Y. COMP. CODES R. & REGS. tit. 3, §§ 419.1-419.14 (2019). The rules govern, among other things, the administration of escrow accounts; how mortgage payments are credited; the format and content of periodic statements, annual statements, and payment histories; fees; loss mitigation measures to avoid foreclosures; and the content and maintenance of books and records. *Id.* Having courts engage in the extremely detailed analyses that would be required to ascertain whether and how each aspect of these rules would impact the operations and lending abilities of national banks, on a bank-by-bank basis, would be inconceivable and

entirely contrary to this Court's tradition of making generally applicable preemption determinations as a matter of law.

One of Petitioners' *amici* contends that the district court in *Flagstar* refused to find preemption of California's interest-on-escrow law only after "careful consideration and review of the evidentiary record before it." *See* Flagstar Plaintiffs *Amicus* Br., at 6. This is wrong: on summary judgment, the district court simply held that it was bound to reject preemption under a prior Ninth Circuit decision, *see Kivett* v. *Flagstar Bank, FSB*, 506 F. Supp. 3d 749, 754 (N.D. Cal. 2020), which itself included no evidentiary analysis, *see Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185, 1194-97 (9th Cir. 2018).

Second, under Petitioners' proposed magnitude test, whether a State law would make it "practically infeasible" for a particular national bank to exercise its banking powers could vary from bank to bank depending on factors such as a bank's size, its financial condition, its customer base (overall and in the State in question), prevailing interest rates, and the general state of the economy. This would lead to different preemption outcomes for different parties even under the *same* State law at the *same* point in time. Even Petitioners' *amici* concede that, though the *Flagstar* court ruled that Flagstar Bank could not show that California's interest-on-escrow law significantly interfered with the exercise of its powers, "this does not mean that another bank, if so encumbered, could not prove significant interference

on a different record." *See* Flagstar Plaintiffs *Amicus* Br., at 8.

Third, given the extremely fact-dependent nature of Petitioners' proposed magnitude test—combined with Petitioners' incorrect argument that Dodd-Frank eliminated all OCC preemption determinations prior to 2011—the outcome that Petitioners advocate would create pervasive nationwide uncertainty about the application of State consumer financial laws to national banks. Each State and municipality would be free to pass laws regulating pricing and every other aspect of a national bank's consumer products and services, provided only that the law does not breach any subjective level of "significant interference." Such a conclusion would make national bank preemption a question requiring judicial determination in *every* case—eviscerating the purpose of NBA preemption, and directly contravening Congress' express intent in Dodd-Frank. The result would be endless legal challenges—a boon for plaintiffs' lawyers upon discovering that all NBA preemption determinations are again up for debate—that would turn on subjective analyses and individual facts and circumstances, as opposed to a coherent, predictable legal scheme. With national banks unable to predict reliably which State laws they need to comply with, they could be forced to comply with *all* State consumer financial laws—even those which have traditionally been preempted by the Courts and OCC regulations—or else risk being found liable for failing to do so.

For all these reasons, the Solicitor General's argument that federal courts are well-equipped to

conduct a degree-of-interference preemption inquiry is unavailing. *See* Solicitor General's *Amicus* Br. at 33-34. The differing effects that State consumer financial laws will have on the diverse population of national banks will be so variable as to render such an analysis impossible, except on a case-by-case basis with subjective, unpredictable, and inevitably conflicting outcomes. Although *Amici* recognize that courts apply legal standards to complex facts in other contexts, the variability of circumstances and frequency of challenges make courts ill-equipped to step into that role for determining NBA preemption of State laws. More important, this is not a role, or a burden on the judicial system, that Congress envisioned when it enacted Dodd-Frank.

CONCLUSION

For the foregoing reasons, this Court should affirm the Second Circuit's decision.

Respectfully submitted.

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