No. 25-1313

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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* CONFERENCE OF STATE BANK SUPERVISORS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus Conference of State Bank Supervisors is a national association of state officials responsible for regulating state-chartered banks and state-licensed providers of financial services in all 50 States, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.[1]

Amicus has a compelling interest in supporting the petition for certiorari. The decision below held that federal law preempts New York General Obligation Law ("NYGOL") § 5-601. The decision below, unless reversed by this Court, would give national banks an unwarranted competitive advantage over state-chartered and state-licensed mortgage lenders and servicers and seriously impair the States' authority to regulate financial institutions and protect consumers.

SUMMARY OF ARGUMENT

The Second Circuit's majority opinion (majority) determined that NYGOL § 5-601 was preempted. However, the majority did not follow the preemption methodology prescribed by this Court in *Cantero v. Bank of Am., N.A.*, 602 U.S. 205 (2024) (*Cantero*). *Cantero* instructed the Second Circuit (i) to make a "practical assessment of the nature and degree of the interference" allegedly caused by § 5-601, and (ii) to perform a "nuanced comparative

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1. As required by Rule 37.2, all parties received timely notice of *amicus*' intent to file this brief. In accordance with Rule 37.6, *amicus* states that no party's counsel authored this brief in whole or in part, and no person other than *amicus* or its counsel funded its preparation or submission.

analysis" relating § 5-601 to the state laws examined in seven key decisions of this Court. App. 72a-74a.

The Second Circuit majority did not follow *Cantero*'s instructions and instead transformed its previously rejected "control" test into an "efficiency" standard. The majority's new standard presumptively overrides any state law that "impedes" a national bank's ability to exercise its powers "efficiently." App. 20a. The majority refused to consider any "record evidence" of § 5-601's "real-world effects." App. 20a n.5. The dissenting opinion (dissent) correctly described the majority's "efficiency" standard as "a relabeling of the rejected control test," preempting "almost every state law that imposes any restriction on national banks." App. 47a.

Applied correctly, *Cantero's* methodology establishes that NYGOL § 5-601 is a valid, non-preempted consumer protection law. Section 5-601 requires payment of modest interest on escrow balances funded by borrowers, but it does not prohibit or restrict the use of escrow accounts, impair the security provided by those accounts, or dictate how those accounts are administered by national banks. Section 5-601 operates in harmony with federal laws, including the "only if" language of 12 U.S.C. § 25b(b)(1)(B), two provisions of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1610(b) & 1639d(g)(3), and the savings clause in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2616.

The Second Circuit majority cited two regulations issued by the Office of the Comptroller of the Currency (OCC), 12 C.F.R. §§ 34.4(a) & 34.7. The OCC's rules rely on the same erroneous "efficiency" standard as the majority opinion. In conclusory fashion, the OCC's rules sweep aside fourteen state interest-on-escrow laws, thereby violating (i) the OCC's duty to provide "substantial evidence, made on the record of the proceeding," to support the agency's preemption determinations, 12 U.S.C. § 25b(c), and (ii) the OCC's obligation to make preemption determinations on a "case-by-case basis," addressing the specific terms of each preempted law, *id.* § 25b(b)(3)(A). The OCC's invalid rules seek to resurrect the across-the-board preemption regime imposed by the agency in 2004, which this Court rejected in *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 533 (2009) (*Cuomo*), and Congress repudiated in 12 U.S.C. § 25b.

This case provides an ideal vehicle to resolve the direct conflict between the decision below and *Conti v. Citizens Bank, N.A.*, 157 F.4th 10 (1st Cir. 2025), *cert. denied,* 2026 WL 1052171 (April 20, 2026) (*Conti*). The OCC's preemption determination, which endorsed the decision below, magnifies the importance of removing the threat posed by the Second Circuit's decision as well as the OCC's preemption rules to the States' longstanding authority to regulate financial institutions and protect consumers.

ARGUMENT

I. The Second Circuit Did Not Follow the Preemption Methodology Prescribed in *Cantero*.

A. *Cantero* Required the Second Circuit to Make a "Practical Assessment of the Nature and Degree of the Interference" Allegedly Caused by NYGOL § 5-601 with National Banks' Mortgage-Escrow Power.

In its initial decision, the Second Circuit held that NYGOL § 5-601 was preempted because it "would exert control over a banking power granted by the federal government, so it would impermissibly interfere with national banks' exercise of that power." App. 79a. This Court vacated and remanded the Second Circuit's initial decision because it did not conform to "the controlling legal standard" for determining whether state consumer financial laws are "preempted with respect to national banks." App. 65a, 74a. This Court confirmed that the "controlling legal standard" is the "prevents or significantly interferes" test, established in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (*Barnett Bank*), and codified in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 12 U.S.C. § 25b(b)(1)(B). App. 65a-66a.

This Court rejected the Second Circuit's "control" test because it would "preempt virtually all state laws that regulate national banks, at least other than generally applicable state laws such as contract or property laws." App. 73a. This Court held that "[a] court applying [the] *Barnett Bank* standard must make a practical assessment of the nature and degree of the interference caused by a state law" with "the national bank's exercise of its powers." App. 72a. In addition, a court must conduct a "nuanced comparative analysis" of this Court's key precedents and "carefully account for" whether the challenged state consumer financial law is "more akin to" either:

(a) the state laws that significantly interfered with national bank powers and were preempted in *Barnett Bank*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (*Franklin*), *First Nat'l Bank of San Jose v. California*, 262 U.S. 366 (1923) (*San Jose*), and *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) (*Fidelity*); or

(b) the state laws that did not significantly interfere with national bank powers and were upheld in *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944) (*Anderson*), *McClellan v. Chipman*, 164 U.S. 347 (1896) (*McClellan*), and *Nat'l Bank v. Commonwealth*, 76 U.S. 353 (1870) (*Commonwealth*).

App. 72a-74a.

On remand, the Second Circuit majority did not follow *Cantero*'s instructions. Instead, as explained in Part I.B, the majority fashioned a new and equally erroneous test, which presumptively overrides any state law that "impedes" a national bank's ability to exercise its powers "efficiently." App. 7a-8a, 18a, 20a (quote), 23a. As shown in Part I.C, proper application of *Cantero*'s methodology demonstrates that § 5-601 is not preempted because it does not prevent or significantly interfere with national banks' exercise of their mortgage-escrow power.

B. The Second Circuit's "Efficiency" Standard Produced the Same Blanket Preemption Outcome as Its Rejected "Control" Test.

The Second Circuit majority held that "a state law's interference is *severe* when it prevents a bank from *efficiently* exercising its powers *or* makes a bank's product undesirable to consumers." App. 18a (emphasis added). The majority based its finding of preemption solely on the first factor, declaring that § 5-601 "*impedes* national banks' ability to offer [mortgage escrow] accounts *efficiently*." App. 20a (emphasis added). The majority did not rely on the second factor because the "likely effect [of § 5-601] on the attractiveness of a bank's products and services is inconclusive here." App. 25a. As shown below, the majority's "efficiency" standard did not follow *Cantero*'s prescribed methodology and failed to establish that § 5-601 prevents or significantly interferes with any national bank power.

Under the majority's "efficiency" standard, any state law that "impedes" the "efficient" exercise of a national bank's powers is deemed "severe" and presumptively preempted, even if that state law does *not* make the bank's services "undesirable to consumers." App. 18a. The only possible exception would be a "generally applicable" state law that "restricted [national] banks in only 'particular and exceptional circumstances.'" App. 18a n.4 (quoting *McClellan*, 164 U.S. at 358). The majority's reinvented standard violated Dodd-Frank because a state law's impacts on "efficiency" are irrelevant unless they prevent or significantly interfere with a national bank's ability to exercise its powers. 12 U.S.C. § 25b(b)(1)(B).

The Second Circuit majority never demonstrated that § 5-601 prevents or significantly interferes with national banks' mortgage-escrow power as a practical—rather than hypothetical—matter. Indeed, the majority declared that "we do not require record evidence of a law's real-world effects" to find preemption (App. 20a n.5). The majority's refusal to consider the "real-world effects" of § 5-601 echoed the Second Circuit's initial decision, which held that any "state law purport[ing] to exercise control over a federally granted banking power" was preempted, regardless of "the magnitude of its effects." App. 91a-92a.

The Second Circuit majority violated *Cantero*'s instructions by failing to make a "practical assessment of the nature and degree of the interference" caused by § 5-601 with the "exercise" of national banks' mortgage-escrow power. App. 72a. The Second Circuit majority merely asserted, without any "practical" evaluation of § 5-601's "real-world effects," that "a state law's impact on a national bank's efficiency informs the *degree* of the state law's interference with federal law." App. 19a, 19a-20a n.5. The majority's conclusory approach—untethered from the "practical assessment" required by *Cantero*—would again override "virtually all state laws that regulate national banks, at least other than generally applicable state laws such as contract or property laws." App. 73a.

The Second Circuit dissent correctly described the majority's "efficiency" standard as "a relabeling of the rejected control test." App. 47a; *see also id.* ("By reframing the federal grant of power as enabling national banks to exercise discretion and flexibility, suddenly almost every state law that imposes any restriction on national banks at all necessarily conflicts with the federal grant of power so conceived, risking preemption."). The First Circuit held in *Conti* that *Barnett Bank*'s "significantly interferes" preemption standard cannot be satisfied merely by showing that a state law imposes "some burden . . . affect[ing] a bank's flexibility or efficiency." 157 F.4th at 25. If limiting "flexibility or efficiency" were "sufficient grounds for preemption," that outcome "would obviate the need for an inquiry into whether a state law's interference with federal-banking powers was significant," as *Barnett Bank* and Dodd-Frank require. *Id.*

The Second Circuit majority violated *Cantero*'s prescribed methodology by refusing to make a "practical" assessment of § 5-601's "real-world effects" on national banks' exercise of their mortgage-escrow power. App. 19a-20a n.5. The majority's refusal was indefensible in light of its admission that § 5-601's "likely effect on the attractiveness of a bank's products and services is inconclusive here." App. 25a.

C. Proper Application of *Cantero*'s Methodology Demonstrates that NYGOL § 5-601 Is Not Preempted.

1. NYGOL § 5-601 is a valid state consumer protection law that does not conflict with Dodd-Frank, TILA, or RESPA.

The Second Circuit majority incorrectly stated that "no court has enforced compliance with [§ 5-601's] interest-on-escrow requirement." App. 12a. In fact, two different three-judge district courts upheld § 5-601's validity against constitutional challenges in 1975, and this Court summarily affirmed one of those decisions. *Jamaica Sav. Bank v. Lefkowitz*, 390 F. Supp. 1357 (E.D.N.Y.) (*JSB*) (three-judge court), *aff'd without opinion*, 423 U.S. 802 (1975); *Federal Nat'l Mortgage Ass'n v. Lefkowitz*, 390 F. Supp. 1364 (S.D.N.Y. 1975) (*FNMA*) (three-judge court). In addition, the district court below rejected Bank of America's preemption challenge to § 5-601. *Hymes v. Bank of America, N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019) (*Hymes*), *rev'd sub nom. Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022), *vacated and remanded*, 602 U.S. 205 (2024).

As *JSB* and *Hymes* explained, § 5-601 protects consumers by requiring mortgage lenders and servicers to pay reasonable interest on balances that borrowers must maintain in mortgage escrow accounts. Lenders require borrowers to prefund escrow accounts to ensure timely payment of real property taxes and hazard insurance premiums, thereby providing crucial protection for lenders' security interests.[2] The New York legislature determined that "mortgage lenders could 'well afford to pay' at least two percent interest on escrow accounts." *JSB*, 390 F. Supp. at 1363.

2. *JSB*, 390 F. Supp. at 1359-63 (NYGOL § 5-601 "restor[ed] fairness to the relationship between banks and mortgagors" by "creat[ing] a remedy to a problem [the legislature] perceived— the inability of citizens seeking mortgages from mortgage lending institutions to bargain effectively for the use of funds put into" escrow accounts); *Hymes*, App. 147a-149a, 167a, 185a (§ 5-601 responded to mortgage lenders' practice of investing borrowers' funds in escrow accounts "for [lenders'] own benefit, effectively giving themselves an interest-free loan for however long the mortgage escrow account[s] remained in place.").

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), this Court affirmed the States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers." *Id*. at 150. Given the States' "historic police powers," this Court held that "we are not to conclude that Congress legislated the ouster of [a state consumer protection] statute . . . in the absence of an unambiguous congressional mandate to that effect." *Id.* at 146-47 (citation omitted).

There is no congressional mandate for preemption in this case. The Dodd-Frank Act expresses a strong federal policy in favor of applying state consumer protection laws to national banks. Under 12 U.S.C. § 25b(b)(1)(B), a nondiscriminatory state consumer financial law, like NYGOL § 5-601, is preempted "only if" a court or the OCC determines that the state law "prevents or significantly interferes with the exercise by the national bank of its powers". The Second Circuit majority acknowledged Dodd-Frank's "only if" language (App. 10a) but never discussed its significance.

The Second Circuit majority concluded that TILA and RESPA supported its finding of preemption because those statutes do not expressly require Bank of America to pay interest on Plaintiffs' mortgage-escrow balances. App. 21a-23a, 27a. The majority erred by overlooking crucial provisions of TILA and RESPA and Dodd-Frank's "only if" language.

As amended by Dodd-Frank, § 1639d(g)(3) of TILA requires mortgage lenders to pay interest "prescribed by applicable State . . . law" on escrow balances for mortgages specified in § 1639d(b). Section 1639d(g)(3) does not apply to Plaintiffs' mortgages. However, as the Second Circuit dissent and two federal appellate courts pointed out, § 1639d(g)(3) "illuminates 'Congress's view that [state interest-on-escrow] laws would not necessarily prevent or significantly interfere with a national bank's operations.'" App. 50a (quoting *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194-95 (9th Cir.) (*Lusnak*), *cert. denied*, 139 S. Ct. 567 (2018)); *Conti*, 157 F.4th at 24 ("Congress's decision to mandate compliance with state interest-on-escrow laws as to certain mortgages provides some evidence that such laws are not inconsistent with the federal-banking scheme."). Thus, § 1639d(g)(3) manifests a congressional understanding that state interest-on-escrow laws operate in harmony with federal laws and are not incompatible with national banks' mortgage-escrow power.

RESPA, like TILA, does not expressly require Bank of America to pay interest on Plaintiffs' mortgage-escrow balances. App. 63a & n.1. The Second Circuit majority inferred a congressional intent to preempt state interest-on-escrow laws from its view of RESPA's and TILA's "statutory silence" regarding such laws. App. 21a-23a, 27a. The majority erred in drawing that inference, given Dodd-Frank's "only if" language and TILA's and RESPA's savings clauses, which *preserve* the application of state laws that provide greater protection to consumers.

The Second Circuit dissent determined that the "only if" language in Dodd-Frank's preemption standard "establishes a presumption that state laws are not preempted" merely by "congressional silence." App. 50a (quoting 12 U.S.C. § 25b(b)(1)). Similarly, the First Circuit in *Conti* rejected the defendant national bank's argument that "Congress's silence [in TILA and RESPA] reflects a 'deliberate choice' to exempt national banks from having to comply with state interest-on-escrow laws." 157 F.4th at 21. The First Circuit held that such a "congressional intent-by-silence argument . . . would violate the plain text of section 25b." *Id.* at 21-22.

TILA and RESPA are *not* silent about the States' authority to enact laws like NYGOL § 5-601. TILA and RESPA contain savings clauses, which confirm the States' power to adopt laws granting greater protection to consumers than federal law provides. TILA's savings clause states that—except for § 1639's provisions governing "high-cost" mortgages (which do *not* apply to Plaintiffs' mortgages)—TILA

> does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit . . . [15 U.S.C. § 1610(b)].

Thus, § 1610(b) affirms the validity under TILA of state laws like § 5-601, which regulate "charges" that are "permissible . . . in connection with the extension or use of credit." In *Williams v. First Government Mortgage & Investors Corp.*, 176 F.3d 497 (D.C. Cir. 1999), the court rejected a mortgage lender's argument that TILA preempted a D.C. statute's "substantive protections for borrowers against unconscionable loan terms and provisions." *Id.* at 500. The court held that "[n]othing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; *states remain free to impose greater protections for borrowers*." *Id.* (emphasis added); *accord Texaco, Inc. v. Hughes,* 572 F. Supp. 1, 6-8 (D. Md. 1982) (§ 1610(b) supported the court's conclusion that TILA did not preempt a Maryland law barring oil companies from imposing fees on credit card sales by gasoline dealers); *Asociación de Detallistas de Gasolina de Puerto Rico, Inc. v. Puerto Rico*, Civil No. 23-1175 (RAM) (D.P.R. Sept. 22, 2023), 2023 WL 6201398, at *4-*5 (§ 1610(b) supported the court's finding that TILA did not preempt a Puerto Rico law prohibiting cash discounts by gasoline retailers), *aff'd*, 138 F.4th 686 (1st Cir. 2025).

Similarly, RESPA's savings clause provides that RESPA

> does not annul, alter, or affect, or exempt any person subject to the provisions of [RESPA] from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of [RESPA], and then only to the extent of the inconsistency. The [Consumer Financial Protection] Bureau is authorized to determine whether such inconsistencies exist. *The Bureau may not determine that any State law is inconsistent with any provision of [RESPA] if the Bureau determines that such law gives greater protection to the consumer*. . . . [12 U.S.C. § 2616 (emphasis added).]

The First Circuit held in *Conti* that "RESPA does not preclude the enforcement of state laws that grant additional protection to consumers beyond what RESPA provides." 157 F.4th at 20 n.7. The Second Circuit majority clearly erred in inferring any preemptive intent from TILA and RESPA (App. 21a-23a), given § 1639d(g)(3), TILA's and RESPA's savings clauses, and Dodd-Frank's "only if" language.

2. The "practical assessment" required by *Cantero*'s preemption methodology demonstrates that § 5-601 does not "significantly interfere" with national banks' mortgage-escrow power.

In *JSB* and *FNMA*, the district courts rejected challenges to NYGOL § 5-601 under the Contract Clause and the Fourteenth Amendment's Due Process and Equal Protection Clauses. The courts concluded that § 5-601 was a valid state consumer protection law and did not create an unlawful "taking," as it did not impose any net loss on mortgage lenders' escrow operations. *JSB*, 390 F. Supp. at 1361-63; *see also FNMA*, 390 F. Supp. at 1367-70.

The district court in *FNMA* also rejected FNMA's claim that its governing federal statute preempted § 5-601. The court found that the "closest analogy" to FNMA's Supremacy Clause challenge was the national bank's preemption claim rejected in *Anderson*. 390 F. Supp. at 1368. The court in *FNMA* determined that, "[a]s in *Anderson*, the state law at issue here does not discriminate against FNMA as a federal mortgage lending institution" or conflict with any federal statute. *Id.* at 1369. NYGOL § 5-601 "does not regulate how FNMA must keep or invest the escrow funds in its possession," or "interfere directly with [FNMA's] internal management." *Id.* NYGOL § 5-601 "in no way impairs" the use of mortgage escrow accounts "to protect [FNMA's] interest in the mortgaged property." *Id.* Accordingly, the "burdens" placed on FNMA by § 5-601 "seem insignificant" and did not violate the Supremacy Clause. *Id.*

The district court in *Hymes* similarly determined that § 5-601's "degree of interference" with national banks' mortgage-escrow power is "minimal." App. 185a. Section 5-601 "does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use." *Id.* National banks must pay "modest" interest on borrowers' balances in escrow accounts, but § 5-601 permits banks to administer those accounts "relatively unimpaired and unhampered by the state law." App. 166a-167a, 186a.

Thus, a proper "practical assessment of the nature and degree of the interference caused by" § 5-601 (App. 72a) demonstrates that § 5-601 does not prevent or significantly interfere with national banks' mortgage-escrow power. Wells Fargo and other national banks have long complied with § 5-601 and California's similar 2% interest-on-escrow law, furnishing "practical" evidence that neither statute imposes a significant burden on national banks.[3] As the Second Circuit dissent concluded, "[t]here is simply

3. *See Hymes*, App. 166a-167a, 186a; *Lusnak*, 883 F.3d at 1190; Arthur E. Wilmarth, Jr., "On Remand in *Cantero*, the Second Circuit Should Uphold New York's Interest-on-Escrow Law and Reject Bank of America's Preemption Claim," 20 *Rutgers Business Law Review* 76, 108, 125 (2024) [hereinafter Wilmarth, *Cantero*], https://ssrn.com/abstract=5080405.

no way to take a modest interest-on-escrow law like New York's and paint it convincingly as a threat to the efficient functioning of national banks." App. 53a.

3. A "nuanced comparative analysis" of key Supreme Court precedents confirms that § 5-601 is not preempted.

After conducting the "nuanced comparative analysis" prescribed by *Cantero*, App. 72a-74a, the Second Circuit dissent correctly determined that § 5-601's relatively minor impact on national banks' mortgage-escrow power is (i) insignificant compared to the very severe burdens imposed by the state laws that were preempted in *Barnett Bank*, *Franklin*, *San Jose*, and *Fidelity*, and (ii) similar to the insubstantial effects of the state laws that were upheld in *Anderson, McClellan*, and *Commonwealth*. App. 30a-43a.[4] The First Circuit reached the same conclusion—based on the required "nuanced comparative analysis"—regarding Rhode Island's interest-on-escrow statute. *Conti*, 157 F.4th at 16-28.

This Court rejected preemption challenges in *Anderson*, *McClellan*, and *Commonwealth* because the state laws in those cases (i) did not discriminate against national banks or conflict with any federal statutes, (ii) did not significantly impair the exercise of any national bank powers, and (iii) were reasonably designed to achieve valid state goals—protecting long-dormant deposits in *Anderson*, preventing insolvent debtors from making preferential transfers to favored creditors in *McClellan*,

4. *See also* Wilmarth, *Cantero*, *supra* note 3, at 88-110 (2024) (showing, based on an analysis of the seven key Supreme Court precedents identified in *Cantero*, that § 5-601 is not preempted).

and ensuring collection of a lawful state tax on bank shares in *Commonwealth*. Similarly, § 5-601 does not discriminate against national banks, does not conflict with any federal statute, does not significantly impair national banks' mortgage-escrow power, and ensures reasonable treatment for mortgage borrowers who must maintain balances in escrow accounts to protect their lenders' security interests.[5]

II. The OCC's Preemption Rules Are Invalid.

A. The OCC's Regulations Produce the Same Unlawful Blanket Preemption as the Second Circuit Majority Decision.

The Second Circuit majority cited an OCC rule that generally preempts state real estate lending laws—12 C.F.R. § 34.4(a)—and a proposed OCC preemption determination targeting state interest-on-escrow laws. App. 12a, 21a-22a. Following the Second Circuit's decision, the OCC endorsed that decision and adopted its preemption determination in final form. Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. 29350, 29356-57 (2026) (codified at 12 C.F.R. § 34.7). Both OCC regulations violate 12 U.S.C. § 25b and are invalid.

Section 34.4(a)—adopted in 2004 and revised in 2011—authorizes national banks to make real estate

5. Second Circuit dissent, App. 34a-35a n.6, 40a-43a (§ 5-601 is comparable to the state laws upheld in *Anderson*, *McClellan*, and *Commonwealth*); Wilmarth, *Cantero*, *supra* note 3, at 97-110 (same).

loans "without regard to [fourteen categories of] state law limitations," including state laws regulating "[e]scrow accounts." Section 34.7 declares that fourteen state interest-on-escrow laws are preempted because they "restrict a national bank's or Federal savings association's flexibility to decide whether and to what extent to pay interest or other compensation on funds placed in escrow accounts or assess fees for such accounts." 91 Fed. Reg. at 29358.

The OCC based its blanket preemption of state interest-on-escrow laws in § 34.7 on the same erroneous "efficiency" standard as the Second Circuit majority. According to the OCC, (i) "national banks must be permitted to effectively and efficiently exercise the full range of powers granted to them by Congress" (*id.* at 29355); and (ii) a state law "significantly interferes" with a national bank power whenever it "interferes with critical flexibility granted to a national bank under Federal law" or "interferes with a national bank's effectiveness or efficiency in exercising its Federal power" (*id.* at 29354).

The Second Circuit dissent refused to defer to 12 C.F.R. § 34.4(a) because it "offered nothing beyond [its] bare conclusion [of unlawful interference] and vague reference to its authority and experience." App. 55a-56a; *accord, Lusnak,* 883 F.3d at 1192-95 (denying deference to 12 C.F.R. § 34.4(a)). The Second Circuit dissent similarly withheld deference from proposed § 34.7 because its "purported right to flexibility in setting the terms of escrow accounts . . . 'would preempt virtually all state laws that regulate national banks,' contrary to the express directive of the Supreme Court that a more exacting preemption analysis is required." App. 56a-58a (quoting App. 73a).

B. The OCC's Regulations Violate Dodd-Frank's "Substantial Evidence" Requirement.

Under 12 U.S.C. §§ 25b(b)(1)(B) & (c), the OCC may not issue a preemptive rule or order unless the OCC provides "substantial evidence, made on the record of the proceeding," supporting the OCC's conclusion that the state law "prevents or significantly interferes" with the exercise of national bank powers. The OCC's preemption determination (12 C.F.R. § 34.7) did not present any factual evidence to support the OCC's claim that state interest-on-escrow laws significantly interfere with national bank powers. The OCC merely speculated about hypothetical harms that "could" result from enforcement of such state laws. 91 Fed. Reg. at 29356. The OCC's rulemaking did not provide evidence showing that such harms have actually occurred during the half century since the first state interest-on-escrow laws were enacted. Similarly, the OCC's general real estate preemption rule, 12 C.F.R. § 34.4(a), does not cite any evidence to support the OCC's claim that state interest-on-escrow laws are preempted.[6]

The Second Circuit dissent pointed out that—in contrast to *Fidelity*, where the federal agency's regulation explained why "the exact type of restrictions on lenders that California imposed 'would have a number of adverse effects' in the real world"—the "OCC offers no comparable analysis of the impact of interest-on-escrow laws here,

6. *Hymes*, App. 177a-178a (The OCC's 2004 and 2011 rulemakings for § 34.4(a) "do not offer a specific rationale for preempting state laws limiting escrow accounts, and they do not even mention escrow interest laws"); Wilmarth, *Cantero*, *supra* note 3, at 111-13 (§ 34.4(a) violates Dodd-Frank's "substantial evidence" requirement).

and instead relies upon generalizations, which I find unpersuasive." App. 58a-59a. The OCC's rulemaking states that its preemption determination is expected to have an annual impact of less than $100 million on the U.S. economy and is not considered a "significant" or "major" rule. 91 Fed. Reg. at 29357-58.

Like the OCC, the defendant national banks in *Cantero*, *Conti*, and *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025), have not produced evidence demonstrating that state interest-on-escrow laws significantly interfere with their mortgage-escrow operations.[7] In *Conti*, the First Circuit said that "Citizens [Bank] has not developed any substantial argument about the practical effects that arise from the enforcement of the Rhode Island statute on the exercise of federal-banking power." 157 F.4th at 25. The Second Circuit dissent stated that "[n]either Bank of America nor amici have put forward anything prompting concern that any bank will change the availability of escrow accounts . . . if required to pay 2% interest." App. 40a.

Instead of fulfilling its duty to provide "substantial evidence" supporting its preemption determination, the OCC asserted that the "analysis" required by Dodd-Frank is "broadly legal and not factual in nature"[8] and "does not require 'evidence of a law's real-world effects.'"[9] The

7. Wilmarth, *Cantero*, *supra* note 3, at 85-86, 103-08, 121-25.

8. 91 Fed. Reg. at 29354 (quoting *Ill. Bankers Ass'n v. Raoul*, 819 F. Supp. 3d 882, 893 (N.D. Ill. 2026), *vacated and remanded*, 2026 WL 1291987 (7th Cir. May 8, 2026)).

9. *Id.* (quoting Second Circuit majority, App. 20a n.5).

OCC further claimed that "the *Barnett* standard . . . does not require the OCC or a national bank to demonstrate that compliance with State interest-on-escrow laws would cause financial harm," such as "unprofitability or net losses." 91 Fed. Reg. at 29351, 29356 n.77. The OCC admitted that it did not conduct a cost-benefit analysis and "has not relied on any technical studies or data for its analysis in this preemption determination, nor is it required to do so." *Id.* at 29358, 29352 n.22.

In adopting §§ 34.4(a) and 34.7, the OCC violated its duty to support both rules with "substantial evidence." The OCC's rules are devoid of any factual evidence that "a reasonable mind might accept to support [the OCC's] conclusion" that state interest-on-escrow laws are preempted under 12 U.S.C. §§ 25b(b)(1)(B) & 25b(c). *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

C. The OCC's Regulations Violate Dodd-Frank's "Case-by-Case" Requirement.

The OCC must also make each preemption determination on a "case-by-case basis," which must consider "the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms." 12 U.S.C. §§ 25b(b)(1)(B) & (b)(3)(A). Accordingly, the OCC must perform an individualized assessment of the "impact" on national banks of each "particular State consumer financial law" that the OCC intends to preempt, unless the state law has "substantively equivalent terms" to another state law that the OCC has already lawfully preempted. Both OCC rules contravene Dodd-Frank's "case-by-case" mandate.[10]

Section 34.7 preempts fourteen state interest-on-escrow laws without conducting any individualized assessment of the "impact" of each preempted law on national banks' mortgage-escrow power. The OCC acknowledges that the fourteen preempted state laws "vary to some degree," but asserts that "each State law has the same effect: depriving national banks of the flexibility to exercise the discretion that Federal law . . . vests in them." 91 Fed. Reg. at 29356-57.

The OCC's preemption determination ignores important distinctions among the fourteen preempted state laws. New York and California require a 2% minimum annual interest payment, while Rhode Island and Vermont require a lower minimum annual payment based on either (a) the interest rate that mortgage lenders pay on their own regular savings accounts (if offered), or (b) the "prevailing market rate" paid by "local financial institutions" on such accounts. Connecticut and Wisconsin base their required annual interest payments on savings account interest rates and mandate interest payments in 2026 of 0.5% and 0.17%, respectively.[11]

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10. With regard to 12 C.F.R. § 34.4(a), see *Hymes*, 177a-179a (The OCC's "blunderbuss approach to preemption" in § 34.4(a) "run[s] headlong" into Dodd-Frank's "case-by-case" mandate); Wilmarth, *Cantero*, *supra* note 3, at 111-13 (§ 34.4(a)'s preemption of fourteen broad categories of state laws violates Dodd-Frank's "case-by-case" requirement).

11. Arthur E. Wilmarth, Jr., "Policy Brief: The OCC's Unlawful Proposal to Preempt State Interest-on-Escrow Laws Reveals That the Agency's Ultimate Goal Is to Revive Its Illegal

The OCC's failure to assess the "impact" on national banks of each preempted state interest-on-escrow law violated the OCC's duty to make preemption determinations on a "case-by-case basis" under 12 U.S.C. §§ 25b(b)(1)(B) & (b)(3)(A). The OCC's failure to perform a "practical assessment of the nature and degree of the interference" caused by each preempted law also ignored the preemption methodology prescribed in *Cantero*, App. 72a-74a.

D. The OCC's Regulations Seek to Preempt Virtually All State Consumer Protection Laws.

The potential implications of this case extend far beyond state interest-on-escrow laws. The OCC's preemption claims in 12 C.F.R. § 34.7, like the Second Circuit's majority opinion, would give national banks broad immunity from state consumer protection laws. The OCC defended its blanket preemption of state interest-on-escrow laws by asserting that those laws interfere with "national banks' ability to effectively and efficiently exercise their real estate and related escrow powers" in accordance with their "discretion" and "business judgment." *Id.* at 29356. The OCC argued that "national banks must be permitted to effectively and efficiently exercise the full range of powers granted to them by Congress." *Id.* at 29355.

The decision below, unless reversed by this Court, would support the OCC's efforts to revive its discredited

De Facto Field Preemption Regime for National Banks," at 19-20 (Geo. Wash. U. L. Sch. Leg. Stud. Rsrch. Paper No. 2026-17, Feb. 20, 2026), https://ssrn.com/abstract=6304062.

former regime of across-the-board preemption. The OCC created that regime by issuing sweeping preemption rules in 2004, which allowed national banks "to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1908 (2004).

In *Cuomo*, this Court rejected the OCC's rationale for its 2004 preemption rules. This Court held that the OCC's rationale "can be found nowhere within the text of the statute" and "attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws." 557 U.S. at 533.

The Dodd-Frank Act repudiated the OCC's 2004 preemption rules. The Senate Banking Committee explained that, under Dodd-Frank, "[t]he standard for preempting State consumer financial law would return to what it had been for decades, those [sic] recognized by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996)." S. Rep. No. 111-176, at 175 (2010). Dodd-Frank codified *Barnett Bank*'s "prevents or significantly interferes" preemption test for the specific purpose of "*undoing broader standards* adopted by rules, orders, and interpretations issued by the OCC in 2004." *Id.* (emphasis added).

Congress disavowed the OCC's 2004 preemption rules because they helped to cause the global financial crisis of 2007-09, which "nearly crippled the U.S. economy." *Id.* at 2. The Senate Banking Committee determined that a "major cause" of that devastating crisis was the "failure" of the OCC and other federal banking agencies "to stop abusive lending, particularly unsustainable home mortgage lending." *Id.* at 15 (quoting Travis Plunkett's testimony). The Committee condemned the OCC's 2004 preemption rules, which "exempted all national banks from State lending laws, including the anti-predatory lending laws," and "actively created an environment where abusive mortgage lending could flourish without State controls." *Id.* at 16-17.[12]

The OCC's far-reaching preemption claims in 12 C.F.R. § 34.7 confirm the OCC's desire to revive its unbounded 2004 preemption regime, despite the repudiation of that regime by *Cuomo* and Dodd-Frank. The Second Circuit's erroneous majority decision would provide unwarranted support for the OCC's unlawful and dangerous agenda, unless that decision is reversed by this Court.

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12. *Accord*, Financial Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 13, 96-97, 111-13, 126 (2011) (strongly criticizing the OCC's 2004 rules for preempting state anti-predatory lending laws and undermining state efforts to stop predatory subprime mortgage lending), https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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