No. 21-15667

In the

United States Court of Appeals for the Ninth Circuit

WILLIAM KIVETT, BERNARD BRAVO, and LISA BRAVO,
Plaintiffs–Appellees,

v.

FLAGSTAR BANK, FSB,
Defendant–Appellant.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:18-CV-05131 Hon. William H. Alsup, Judge

BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CONSUMER BANKERS ASSOCIATION, AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Bank Policy Institute ("BPI"), the American Bankers Association ("ABA"), the Chamber of Commerce of the United States of America ("Chamber"), the Consumer Bankers Association ("CBA"), and the Mortgage Bankers Association ("MBA"; collectively, "*Amici*") state that they are not subsidiaries of any other corporation. *Amici* are nonprofit trade groups and have no shares or securities that are publicly traded.

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STATEMENT OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 29, *Amici* respectfully submit this brief in support of Defendant-Appellant and reversal of the District Court's ruling.[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. BPI 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. Established in 1875, 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.

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[1] The undersigned counsel certify that no party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person, other than the *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Chamber. The Chamber is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

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

Amici routinely submit *amicus curiae* briefs in cases that present questions critical to the banking and financial systems, including questions of national preemption under the National Bank Act of 1864.

INTRODUCTION

This appeal presents a federal question with far-reaching consequences: whether the National Bank Act of 1864 ("NBA") preempts a State from imposing price controls on the products and services of national banks. Although this question is presented here in the specific form of California Civil Code § 2954.8(a)—which requires all mortgage lenders to pay interest "at the rate of at least 2 percent simple interest per annum" on borrowers' funds held in escrow—this Court's decision could impact State attempts to set price controls on many other core national bank products, such as loan rates, checking account interest, and service fees.

Following the U.S. Supreme Court's decision in *Cantero* v. *Bank of America, N.A.*, 602 U.S. 205 (2024), this Court is tasked with conducting a "nuanced comparative analysis," comparing the nature of the interference caused by Section 2954.8(a) with the interference in prior Supreme Court decisions to determine whether Section 2954.8(a) is

preempted. If the law "prevents or significantly interferes with the national bank's exercise of its powers" in a manner akin to the interference in cases where the Supreme Court found preemption, then it too is preempted. *Id.* at 220 (citing *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25 (1996)). This analysis entails a "practical assessment" of the State law, accounting for past precedent, the law's text and structure, and, critically, common sense. 602 U.S. at 219 & 220 n.3. Under the mandate in *Cantero*, this Court should reverse the decision below and hold that Section 2954.8(a) is preempted as to national banks.

First, the "comparative analysis" required by the Supreme Court establishes that the NBA preempts State-imposed price controls on national bank products and services. As the Supreme Court has made clear, not all State regulations on national banks will be preempted. But nothing more inevitably significantly interferes with a national bank's ability to provide products and services than mandating rates the bank must or cannot pay. Imposing interest rate controls can force the bank entirely out of the business or at least materially circumscribe the business and force significant changes in the way it is conducted. If a

State can regulate the interest rate a national bank can pay on a mortgage escrow account, why can it not regulate the rate it must pay on a checking account, a savings account, or any other account? Why can the State not limit the rate that a bank can charge on a loan or any other service? Accordingly, as Justice Kavanaugh explained at the *Cantero* oral argument, State-imposed price controls intrude on national banks' core powers to a far greater extent than laws the Supreme Court has found to be preempted in the past. *See infra* at 14-15.

Mortgage escrow accounts are an essential tool for ensuring borrowers meet their obligations, and the interest earned in respect of these accounts is an integral part of managing the costs and risks associated with offering mortgage services. State laws like California's pricing scheme impose what Justice Kavanaugh—who wrote the unanimous *Cantero* opinion—suggested was comparable to a "tax on the bank to sell the product," *see Cantero* Tr. at 13-14, severely limiting a national bank's ability to provide mortgage loans efficiently and effectively. Put simply, pricing mandates impose additional costs and burdens on national banks, which, in the case of escrow accounts, must

be offset by passing on increased costs to borrowers or not originating certain loans.

Although it is difficult to imagine a State action that comes closer to a direct prevention than a limitation on fees or rates a national bank can set, that is not the test. When the Supreme Court and Congress used the phrase "prevent *or* significantly interfere with," they must have meant that a wider range of State actions may be preempted even if they do not actually prevent the exercise of a national banking power. Here, there is no doubt California's price control inherently satisfies that legal standard, as it significantly interferes with a national bank's ability to provide its products and services.

Moreover, if State rules dictate the terms of escrow accounts, national banks would face the untenable burden of managing disparate interest rate requirements State-by-State. This would include determining whether the relevant State law is the location of the borrower, the residential property, the branch where the mortgage loan was made, or the branch where the mortgage escrow account is maintained. Not only does this further increase operational costs, it also

risks undermining the benefits of escrow accounts borrowers would otherwise realize.

Because of the "significant interference" State-imposed pricing schemes have on national banks' operations, federal courts have consistently held that State-imposed pricing schemes are preempted as to national banks. *See, e.g.*, Appendix A (listing federal court cases holding that State-imposed pricing mandates are preempted under the NBA).

Second, Plaintiffs' theory of *Cantero* should be rejected. According to Plaintiffs, Defendant-Appellant is required to accumulate significant evidence showing why the State law impedes the exercise of a national bank power. Pl. Br. at 4, 6-15, 22-23. But this theory would effectively require a bank-by-bank, rate-by-rate analysis to determine compliance, which is the opposite of the "practical" or "common sense" approach mandated by the Supreme Court. Indeed, the Court rejected the *Cantero* petitioners' argument that lower courts must amass a factual record demonstrating the law's effects before determining preemption, and this Court should do the same. 602 U.S. at 221.

Finally, the Office of the Comptroller of the Currency's ("OCC") regulations support the determination that State laws "concerning … [e]scrow accounts" for real estate loans are preempted. *See* 12 C.F.R. § 34.4(a)(6). This is because State laws regulating national banks' ability to "manage credit risk exposures" or "loan-related assets," and "State laws that would alter standards of a national bank's depository business—setting standards for permissible types and terms of accounts," significantly interfere with national banks' management of core business decisions. *See* OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,557 (July 21, 2011).

ARGUMENT

I. MORTGAGE ESCROW ACCOUNTS ARE CRITICAL TOOLS IN THE U.S. BANKING SYSTEM.

Mortgage escrow accounts play an indispensable role in residential mortgage lending, enhancing efficiency and stability within the banking and financial systems. Mortgage escrow accounts can be traced to the Great Depression, when many homeowners could not afford to pay property taxes and lost their homes through foreclosure. U.S. Gen. Accounting Off., *Study of the Feasibility of Escrow Accounts on*

Residential Mortgages Becoming Interest Bearing 6 (1973) ("GAO Study"). Because a tax lien could take precedence over a lender's mortgage lien, lenders were saddled with the real risk that they could lose part or all of the value in their security interest in a foreclosed-upon property. *See* Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). Likewise, homeowners failing to pay insurance premiums could result in insurance coverage lapsing, leading to potential impairment to the investments made by both the lending institution and the borrower. GAO Study at 5. Mortgage escrow accounts were designed to provide a solution to these issues, and so, in response, government agencies began requiring them for certain loans. *See*, *e.g.*, GAO Study at 6.

These escrow accounts have proven beneficial. As the Supreme Court explained, "[w]hen the borrower makes a mortgage payment, the borrower puts money into an escrow account operated by the bank; the bank then uses the funds in escrow to pay the borrower's insurance premium and property taxes on the borrower's behalf." *Cantero*, 602 U.S. at 210. Mortgage escrow accounts thus give homeowners a method to manage the planning and difficulty of making

lump-sum payments required for taxes and insurance. *See* GAO Study at 5; *see also Cantero*, 602 U.S. at 210-11 (explaining that mortgage escrow accounts benefit borrowers by "simplifying expenses and budgeting"). But the utility of mortgage escrow accounts extends far beyond mere convenience. By ensuring that certain property-related obligations are managed effectively, they help "protect[] the loan collateral (the home) against tax foreclosure or uninsured damaged." *Cantero*, 602 U.S. at 211; *see* GAO Study at 5. By mitigating risk against such tax liens and property losses, lenders are able to offer homeowners loans at lower rates and with lower equity.

In light of these benefits, mortgage escrow accounts have become ubiquitous in the U.S. residential mortgage market, with the vast majority of loan originations including escrow accounts. *See* FHFA & CFPB, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 1, 27, 30 (2018) (79% of mortgage originations in 2016 included an escrow account). And several federal agencies continue to require the use of escrow accounts in relation to the purchase or insurance of certain home mortgages. *See, e.g.*, Fannie Mae, *Selling Guide: Fannie Mae Single Family* 221 (2024),

https://singlefamily.fanniemae.com/media/39241/display ("[E]scrow deposits for the payment of premiums for borrower-purchased mortgage insurance (if applicable) are mandatory."); Freddie Mac, *Servicer Guide* § 4201.23 (2019), https://guide.freddiemac.com/app/guide/section/4201.23 (requiring escrow accounts with respect to the collection of borrower-paid mortgage insurance).

II. CALIFORNIA'S PRICE CONTROL "SIGNIFICANTLY INTERFERES" WITH THE EXERCISE OF NATIONAL BANK POWERS.

In *Cantero*, the Supreme Court held that State laws "prevent[ing] or significantly interfer[ing] with the national bank's exercise of its powers" are preempted as to national banks. 602 U.S. at 220. "[T]o determine whether a state law regulating national banks falls on the permissible or preempted side of the significant-interference line," courts must undertake a "nuanced comparative analysis" between the State law and the Supreme Court's jurisprudence. *Id*. at 219-20. That is, courts should "make a practical assessment of the nature and degree of the interference caused by a state law," considering "the text and structure of the laws, comparison to other precedents, and common sense." *Id*. at 219 & 220 n.3.

Applied properly, *Cantero* leads to a clear conclusion: by dictating the interest rates for escrow accounts, the California pricing scheme imposes State terms on fundamental national banking operations, thus restricting national banks' ability to provide a legally authorized product or service. Consequently, Section 2954.8(a) is preempted under the NBA as to national banks.

A. The Required Analysis Confirms That California's Pricing Scheme Is Preempted.

As the Supreme Court explained in *Cantero*, "[i]f the state law's interference with national bank powers is more akin to the interference" where preemption was found (as opposed to not found) in a prior Supreme Court decision, "then the state law is preempted." *Id.* at 220.

Cantero establishes that "[t]he paradigmatic example of significant interference identified by *Barnett Bank*" is *Franklin National Bank of Franklin Square* v. *New York*. *Cantero*, 602 U.S. at 216 (citing 347 U.S. 373 (1954)). In *Franklin*, the Supreme Court considered a New York State law that prohibited banks "from using the word 'saving' or 'savings' in their advertising or business." *Franklin*, 347 U.S. at 374. The Supreme Court held that the NBA preempted this law because it

impaired national banks' power "to receive savings deposits," *id*. at 374, 378-79, even though "the New York law did not bar national banks from receiving savings deposits, 'or even' from 'advertising that fact.'" *Cantero*, 602 U.S. at 216 (citing *Franklin*, 347 U.S. at 378). In other words, national banks were able to comply with the law, and there were no "seriously harmful effects." *People* v. *Franklin Nat'l Bank of Franklin Square*, 305 N.Y. 453, 462 (1953). Even so, the law significantly interfered with national banks' ability to efficiently "engage in a business" and "to let the public know about it." *Cantero*, 602 U.S. at 216 (citing *Franklin*, 347 U.S. at 377-78).[2]

There is no genuine dispute that the interference caused by California's pricing scheme is more significant than the law at issue in

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[2] Although the *Franklin* court acknowledged that the trial court "accumulated a large record," it found no need to take that record into account and made its decision based on the fact that the New York law, as a matter of common sense, interfered with a national bank's power to offer savings accounts and advertise for them. Contrary to Plaintiffs' suggestion, no extensive record is needed. Pl. Br. at 4, 6-15, 22-23 (arguing that a "large record" is required). Plaintiffs point to no other Supreme Court case that required an extensive record to determine preemption. And *Cantero* rejected the argument that a factual record needed to be developed to determine preemption. *See Cantero*, 602 U.S. at 221 (rejecting petitioners' argument for a fact-intensive analysis).

Franklin. As Justice Kavanaugh said at the *Cantero* oral argument, "the pricing of the product almost by definition interfere[s] more with the operations of the bank than something that affects advertising." *Cantero* Tr. at 13. When counsel disagreed, Justice Kavanaugh continued: "Why not? That sounds like significant interference when it's … almost putting a tax on the bank to sell the product, which strikes me as a much more significant interference than simply saying you can't use the word 'savings' in your advertising, which was the issue in *Franklin*." *Id*. at 13-14. And at another point, Justice Kavanaugh asked rhetorically, "[T]ell someone you have to pay out large sums of money collectively, rather than how you describe your product in your advertising, isn't one more significant interference than the other[?]" *Id*. at 37.

The fact that State-imposed price controls significantly interfere with national bank powers is not just common sense but also widely established federal jurisprudence. In *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. 141 (1982), for instance, the Court held that a California State regulation that modified product terms and interfered with "the flexibility" afforded under federal law was preempted. Specifically, federal law allowed (but did not compel) "federal

savings and loans to include due-on-sale clauses in their contracts," but "California law 'limited' that right to circumstances where the federal savings and loan association could make a showing that enforcing the due-on-sale clause was reasonably necessary." *Cantero*, 602 U.S. at 216-17 (citing *Fidelity*, 458 U.S. at 154-55). Although the federal savings and loan association could "readily" comply with the law, it was preempted because it restricted "the flexibility given" under federal law to formulate the terms of mortgage loan instruments. *Id*. at 217.

The significance of *Franklin* and *Fidelity* was recently examined by the Northern District of Illinois in *Illinois Bankers Association* v. *Raoul*, 2024 WL 5186840 (N.D. Ill. Dec. 20, 2024), which is the only post-*Cantero* decision concerning national bank preemption to date. In granting the plaintiff trade associations a preliminary injunction against the enforcement of the Illinois Interchange Fee Prohibition Act ("IFPA"), the district court held that two key provisions of the IFPA—prohibiting interchange fees "on portions of [a credit card transaction] that include Illinois state or local taxes and gratuity," and limiting the distribution or use of card transaction data—were preempted as to national banks. *Id.* at *1. In reaching that decision, the

court analyzed Supreme Court precedent, including *Franklin* and *Fidelity*. With respect to *Franklin*, the court held that restricting banks' advertising is a lesser limitation than "whether the state may restrict … the non-interest fees national banks charge for their services." *Id*. at *10. As the court explained, "a national bank's authority to provide a banking service necessarily carries with it the authority to charge for that service." *Id*. The court further explained that the IFPA "also more dramatically limits national banking powers than the state law did in *Fidelity*," because the IFPA "applies in all instances" and "would thus, 'deprive the [banks] of the flexibility,' that Congress intended they have" in receiving fees. *Id*. (citing *Cantero*, 602 U.S. at 217). In so holding, the district court aligned with federal courts around the country. *See* Appendix A.

Plaintiffs attempt to skirt this unavoidable conclusion by arguing that (i) this case is distinguishable from other Supreme Court precedents because Section 2954.8(a) does not interfere with an "express power"; and (ii) the level of interference is more akin to cases where the Court held that State laws were not preempted. These arguments fail.

First, Plaintiffs argue that Supreme Court cases where preemption was found—including *Franklin* and *Barnett*—are inapposite because they involved an "express power." Pl. Br. at 3, 19-21, 26-27, 30. But this is a distinction without a difference and has been explicitly rejected by the Supreme Court. As the Supreme Court has held, it is "[b]eyond genuine dispute" that States may not burden the exercise of national banks' lending power or "curtail or hinder a national bank's efficient exercise of any other power, incidental *or* enumerated." *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007) (emphasis added).

Second, Plaintiffs argue that this case is less like *Franklin*, and more like *Anderson National Bank* v. *Luckett*, which the Supreme Court has described as "the primary example of a case where state law was not preempted." *Cantero*, 602 U.S. at 217 (citing 321 U.S. 233 (1944)). Pl. Br. at 31-33. But the holding in *Anderson* is premised on the finding that there was no interference with *any* national bank power, not that the interference was somehow minimal. At issue was a Kentucky law requiring banks to relinquish deposit funds deemed abandoned to the State. As the Supreme Court explained, even though collecting deposits is a national banking power, the "obligation to pay" deposits "to the

persons entitled to demand payment" according to State law is "an inseparable incident" of that power. 321 U.S. at 248-49. Because the Kentucky law merely substituted the State as the party entitled to payment and "demand[ed] payment of the accounts in the same way and to the same extent that the depositors could," the Court held that the "demand for payment of an account by one entitled to make the demand does not infringe or interfere with any authorized function of the bank." *Id*. at 249; *cf. First Nat'l Bank of San Jose* v. *Cal.*, 262 U.S. 366, 369-70 (1923) (holding that a similar California law was preempted because it placed conditions on "agreements between national banks and their customers" and thus interfered with "the efficiency of the bank").

Similarly, *Federal National Mortgage Association* v. *Lefkowitz*, 390 F. Supp. 1364 (S.D.N.Y. 1975), is completely irrelevant, as it was not decided under the NBA and its result hinged on the fact that the mortgages at issue—unlike here—had been acquired on a secondary market and were instead "created under the laws of New York State." *Id*. at 1370. Because the burden constituted "state regulation of a legal relationship antecedent to [the plaintiff's] involvement," the Southern District held that the case was distinct from other Supremacy Clause

preemption cases because there was no burden that "fell directly on the activity of the federal instrumentality." *Id.* at 1371.[3]

Plaintiffs' reliance on *National Bank* v. *Commonwealth*, 76 U.S. 353 (1870) and *McClellan* v. *Chipman*, 164 U.S. 347 (1896), fares no better, as those cases implicated generally applicable laws. *See, e.g.*, *Cantero*, 602 U.S. at 219 (citing *Commonwealth*, 76 U.S. at 361-62) (State laws "governing 'their daily course of business' such as generally applicable state contract, property, and debt-collection laws" are not preempted); *Cantero*, 602 U.S. at 219 (citing *McClellan*, 164 U.S. at 358) (a "generally applicable" contract law that in no way impaired "the efficiency of national banks"). Here, in contrast, the California pricing scheme directly affects the terms under which national banks can offer escrow services.

In the end, California's pricing scheme is unlike generally applicable State contract, property, and debt-collection laws that courts have allowed to apply to national banks. Rather, by imposing mandatory interest rates for escrow accounts, California's pricing scheme is clearly

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[3] In any event, *Lefkowitz* did not acknowledge *Franklin* or undertake the type of analysis the Supreme Court has mandated in *Cantero*.

more akin to other pricing schemes that significantly interfere with the operational autonomy of national banks and have been consistently found to be preempted by the NBA.

B. *Cantero* Should Be Applied Without Extensive Factual Development.

The legal framework established in *Cantero* leads to an unequivocal conclusion: Section 2954.8(a) is preempted as to national banks. Despite this, Plaintiffs advocate for a fact-intensive approach. But Plaintiffs' insistence on a fact-intensive inquiry contradicts the Supreme Court's guidance.

To begin, as the Supreme Court explained, the inquiry focuses on the nature of the interference at issue, as a matter of common sense, not on each case's specific facts as to the impact of a specific rate or the feasibility of compliance by banks. *See Cantero*, 602 U.S. at 220 n.3. Indeed, the Court rejected a comparable proposal by the *Cantero* petitioners, as it "would yank the preemption standard to the opposite extreme, and would preempt virtually no non-discriminatory state laws that apply to both state and national banks." *Id.* at 221.

This makes sense. Requiring a national bank to develop extensive factual records, at summary judgment or trial, in order to

demonstrate that various State laws are preempted would inevitably lead to doubt and confusion over what is required of national banks, exposing them to heightened risks of noncompliance and legal challenges. Borrowers could continuously contest whether a bank's practices align with State-specific mandates, resulting in extensive litigation that would drain resources and jeopardize the efficiency and stability of the mortgage market. Such outcomes are precisely what the national charter seeks to prevent, as federal preemption ensures that national banks can operate under a uniform legal framework, free from the patchwork of conflicting State requirements. *See Watters*, 550 U.S. at 11 (observing that the NBA aims "[t]o prevent inconsistent or intrusive state regulation from impairing the national system"). By disrupting the desired uniformity, State-mandated escrow interest rates would threaten the very foundation of the national banking system.

The appropriate standard thus turns on whether the law significantly interferes with national banking powers, which is a *legal question* that does not require prolonged factual investigation. *See, e.g.*, *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (holding State law is

preempted without engaging in detailed fact-finding regarding the law's effects); *Franklin*, 347 U.S. at 374 (same).

Laws like Section 2954.8(a) are perfect examples of why a fact-intensive approach is misguided. The ability to set terms for mortgage escrow accounts, including interest rates, is essential to the "business of banking" and the exercise of specific powers granted to national banks, including "the power to 'make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate'—in other words, to administer home mortgage loans"—and "all such incidental powers as shall be necessary to carry on the business of banking." *See Cantero*, 602 U.S. at 210 (citing 12 U.S.C. §§ 24, 371(a)). As described above, *see supra* at 9-11, mortgage escrow accounts serve critical functions: they ensure timely payments of certain obligations, safeguard the lender's collateral, and promote borrowers' financial stability. That is why, in the OCC's words, these accounts are "an integral part of or a logical outgrowth of the lending function." *See* OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998).

Setting interest rate terms for escrow accounts is a core component of these financial arrangements. As the OCC has explained,

"the safety and soundness of banks depends in significant part on their ability to devise price structures appropriate for their needs." OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. 54,319 (Dec. 2, 1983). Allowing States to impose conflicting requirements on how, when, or whether interest must be paid on escrow accounts would not only result in national banks being stripped of their ability to manage costs and "credit risk exposures," 76 Fed. Reg. at 43,557 (July 21, 2011), but it would disrupt national banks' ability to structure lending products consistently.

If States can impose specific interest rates, national banks would thus face higher underwriting costs to comply with a patchwork of differing State regulations. But banks cannot, without compromising their safety and soundness, offer a product or service that produces insufficient returns. In other words, imposing pricing on national banks creates an untenable situation whereby national banks must either (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 or approaching the outer limit of acceptable risk. Either way, these consequences would

harm homeowners and the U.S. housing market generally. *See* Nathan B. Anderson & Jane K. Dokko, Fed. Reserve Board, *Liquidity Problems and Early Payment Default Among Subprime Mortgages* 2 (2010) (explaining how "liquidity constraints" among subprime mortgage borrowers, due in part to the absence of escrow accounts, "contributed to the largest financial crisis since the Great Depression"). Ultimately, by permitting States to interfere with national banks' ability to set terms on its own products or services, the result would be to decrease the availability and increase the cost of credit, a burden likely borne by borrowers.

There should be no doubt that interest rate setting is inseparable from a national bank's broader authority to conduct mortgage lending—a core banking activity, expressly protected under the NBA. By removing national banks' ability to determine whether to offer interest on mortgage escrow accounts, and if so the rate, California's State law "significantly interferes" with a national bank power, regardless of the specific rate at issue.[4]

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[4] The fact that California's pricing scheme interferes with national

Furthermore, under Plaintiffs' approach, whether a given rate substantially interferes with bank powers would vary based on prevailing interest rates, a particular State's market conditions, and a specific bank's line of business and financial condition. For example, although the 2% minimum rate imposed by California might seem nominally low in today's interest-rate environment, it is more than three times higher than the 0.63% long-term average federal funds effective rate over the ten-year period between 2012 and 2021. *See, e.g.*, Board of Governors of the Federal Reserve System, Federal Funds Effective Rate, http://tinyurl.com/8ar5kwk4 (last accessed Jan. 31, 2025). And because there is no statutory standard for courts to apply in deciding whether the specific rate is unacceptably high, the issue would be inherently subjective from judge to judge. This cannot be what Congress intended in codifying the *Barnett* standard or what the Supreme Court meant

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banks' real estate powers further supports preemption. National banks' power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate" is limited only by "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). Neither Section 1828(o) nor OCC regulations have restricted national banks' ability to set interest rates.

when it directed courts to use "common sense" in preemption determinations.

But even if the specific rate were relevant to the analysis, Plaintiffs and their *amici* are wrong in characterizing this mandatory interest rate as requiring payment of only "comparatively small sums." *See* Pl. Br. at 32; CSBS & AARMR *Amicus* Br. at 20 (arguing the mandatory minimum interest rate is "modest"). This conclusory statement is based upon purported compliance by other banks and impact on competition, none of which is relevant to the analysis.

First, Plaintiffs' argument that Section 2954.8(a) does not "significantly interfere" with national banks simply because Defendant-Appellant has been complying with it is fundamentally flawed. Pl. Br. at 4, 7-8, 15. Put simply, "significant interference" does not require the imposed rate to be so burdensome or costly that it becomes impossible for a bank to operate or continue offering the regulated product. *See, e.g.*, *Cantero*, 602 U.S. at 217 (noting that the State law scrutinized in *Fidelity* was preempted even though the appellant could "readily" comply with the State law). And, as explained in *Cantero*, a "non-discriminatory state

banking law can be preempted even if it is possible for the national bank to comply with both federal and state law." 602 U.S. at 214.

Second, this Court should reject Plaintiffs' *amici*'s suggestion that, if Section 2954.8(a) is preempted, national banks would be afforded some competitive advantage over State-chartered banks. *See* CSBS & AARMR *Amicus* Br. at 2, 25. This is not the relevant standard, nor could it be. If it were, preemption would be precluded in *all* cases where State banks remained covered by the impugned law. By virtue of having a dual banking system, it is inevitable that national and State banks may be subject to different laws, with national banks following "federal oversight and regulation" and State banks following "state oversight and regulation." *Cantero*, 602 U.S. at 210. Accordingly, even though a specific State law may be found to be preempted as to national banks, national banks remain subject to an extensive federal regulatory regime. *See*, *e.g.*, *Cantero*, 602 U.S. at 211 (describing regulations on national banks' operations of escrow accounts under the Real Estate Settlement Procedures Act of 1974); OCC, *Comptroller's Handbook, Mortgage Banking* (Feb. 2014), https://tinyurl.com/5ytdc2e9 (outlining federal guidance for national banks' escrow account activities, which State banks

need not abide by). The NBA preemption regime ensures that national banks are governed consistently by federal law across all States, aligning with the NBA's intent to provide a uniform nationwide regulatory environment for national banks.

In the end, whether a State law "significantly interferes" with national bank powers is "not [a] very high" threshold. *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009). For the reasons stated, this threshold is satisfied easily here.

C. OCC's Regulations Support The Conclusion That California's Pricing Scheme Significantly Interferes With National Bank Powers.

The Supreme Court has also instructed this Court to consider the impact of the OCC's preemption determinations, *see* 602 U.S. at 221 n.4, which support the conclusion that Section 2954.8(a) is preempted as to national banks. Relevant here, after public notice and comment, the OCC published a 2004 final rule listing State laws that are preempted by the OCC, which included State laws "concerning … [e]scrow accounts" for real estate loans. 12 C.F.R. § 34.4(a)(6). Those preemption determinations were 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," OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004), and were made in accordance with the *Barnett* standard. *Id.* And, as explained by the then-Comptroller, this list captures State laws that "impos[e] conditions on lending and deposit relationships" because such laws lead to "higher costs and operational burdens that the banks either must shoulder, or pass on to consumers," and thus "create impediments to the ability of national banks to exercise powers that are granted under federal law." Press Release, John D. Hawke, Jr., Comptroller of the Currency, *Statement of Comptroller of the Currency John D. Hawke, Jr. Regarding the Issuance of Regulations Concerning Preemption and Visitorial Powers* (Jan. 7, 2004), https://www.occ.gov/news-issuances/news-releases/2004/nr-occ-2004-3a.pdf.[5]

Plaintiffs erroneously argue that the OCC's regulations should be ignored because it failed to comply with Dodd-Frank's limits

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[5] During a 2011 rulemaking process, the OCC reiterated the 2004 list was based on the "standard of the *Barnett* decision." *See* 76 Fed. Reg. at 43,556.

on the OCC's preemption authority. Pl. Br. at 26-27, 38 (the OCC only has "limited authority to make a preemption determination under the procedures set forth in Dodd-Frank," based on "substantial evidence"). But Congress did not simply codify the *Barnett* standard in Dodd-Frank; as part of an overall compromise concerning changes to the national bank system, Congress also declined to overrule prior preemption determinations of the OCC. As Senators Carper and Warner, the authors of the Dodd-Frank preemption provision, have explained, "consistent with [the] desire to provide legal certainty to all parties, [Section 25b] is not intended to retroactively repeal the OCC's 2004 preemption rulemaking." *See Cantero* BPI *et al. Amicus* Br. at 6 (citing Senators Carper & Warner's 2011 Letter to the OCC). So although the OCC was restricted to making preemption determinations on a case-by-case basis moving forward, *prior* OCC preemption determinations were not overruled. Moreover, Dodd-Frank did not change the substantive preemption standard. *See Cantero*, 602 U.S. at 214 n.2 ("Because we conclude that Dodd-Frank adopted *Barnett Bank*, and because *Barnett Bank* was also the governing preemption standard before Dodd-Frank, the timing of Cantero's mortgage agreement does not affect the

preemption analysis here."). Thus, the OCC's pre-Dodd-Frank *Barnett* analysis remains equally instructive post-Dodd-Frank.

CONCLUSION

For these reasons, *Amici* respectfully urge the Court to reverse the District Court's order.

Dated: New York, New York
February 13, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) and this Court's Order of December 24, 2024 because this brief, inclusive of Appendix A hereto, contains 5998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Professional Plus 2010 Century Schoolbook 14-point font.

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APPENDIX A

Deming v. *Merrill Lynch & Co.*, 528 F. App'x 775 (9th Cir. 2013) (loan administrative and compliance fees)

Baptista v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (non-account holder check-cashing fees)

Martinez v. *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010) (underwriting and tax service fees)

Monroe Retail, Inc. v. *RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (account service fees)

SPGGC, LLC v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (gift card expiration dates and administrative fees)

Bank of Am. v. *City & Cty. of S.F.*, 309 F.3d 551 (9th Cir. 2002) (deposit and lending-related service fees)

Powell v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D. W. Va. 2016) (payments ordering and late fees)

Pereira v. *Regions Bank*, 918 F. Supp. 2d 1275 (M.D. Fla. 2013), *aff'd*, 752 F.3d 1354 (11th Cir. 2014) (check-cashing and settlement fees)

NNDJ, Inc. v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-account holder official check-cashing fees)

Montgomery v. *Bank of Am. Corp.*, 515 F. Supp. 2d 1106 (C.D. Cal. 2007) (nonsufficient funds and overdraft fees)

Metrobank v. *Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (non-account holder ATM fees)