No. 21-400

In the

United States Court of Appeals for the Second Circuit

ALEX CANTERO,
individually and on behalf of all others similarly situated,
Plaintiff–Appellee,

v.

BANK OF AMERICA, N.A.,
Defendant–Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
No. 1:18-cv-4157 (Mauskopf)

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Bank Policy Institute ("BPI"), 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

Amici respectfully submit this brief in support of Defendant-Appellant.[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 parties have consented to the filing of this *amici curiae* brief. *See* Fed. R. App. P. 29(a)(2). 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's members have an interest in ensuring that the National Bank Act of 1864 ("NBA") and other banking laws are interpreted fairly and consistently to protect national banks from burdensome and conflicting State regulation and to ensure marketplace stability. *Amici* therefore regularly submit *amicus curiae* briefs in cases, like this, that involve significant issues concerning preemption under the NBA.

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 New York General Obligations Law § 5-601—which requires banks to pay a minimum interest rate of 2% "or a rate prescribed by the superintendent of financial services" on mortgage escrow accounts—this Court's decision could impact State attempts to set price controls on many other core national bank products, such as loan rates and checking account interest.

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 5-601 with the interference in prior Supreme Court decisions to determine whether Section 5-601 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. Based on *Cantero*, this Court should hold that Section 5-601 is preempted.

First, the required "comparative analysis" establishes that the NBA preempts State-imposed price controls. As certain Justices explained at the *Cantero* oral argument, State-imposed price controls intrude on national banks' core powers to a far greater extent than laws the Court previously found to be preempted. *See infra* at 8, 14. Mortgage

escrow accounts are a fundamental part of the banking business because they help homeowners meet certain obligations, enabling lenders to mitigate risks from taxes, liens, and potential property damage or loss. By imposing what Justice Kavanaugh—who wrote the unanimous *Cantero* opinion—suggested was comparable to a "tax," *see Cantero* Tr. at 13-14, on that activity national banks face additional costs that must be offset by passing on increased costs to borrowers, or originating fewer loans altogether. Because of the "significant interference" State-imposed pricing schemes therefore have on national banks' operations, federal courts consistently find 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). And while this is true for any mandatory price scheme, the detrimental impacts on banks are even more stark here because Section 5-601 grants broad discretion to the New York Department of Financial Services ("DFS") to set whatever pricing it deems appropriate.

Second, Plaintiffs' theory of *Cantero* should be rejected, as it would effectively require a bank-by-bank, rate-by-rate analysis to determine the cost of compliance, which is the opposite of the "practical"

or "common sense" approach mandated by the Supreme Court. Indeed, the Court rejected Plaintiffs' argument that lower courts must amass a factual record demonstrating the law's effects before determining preemption. 602 U.S. at 221.

Third, the Office of the Comptroller of the Currency ("OCC")'s 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).

Finally, the Supreme Court has clarified that 15 U.S.C. § 1639d, by which Congress amended the Truth in Lending Act ("TILA"), plays no role in the analysis where, as here, the loans are not governed by TILA. *See* 602 U.S. at 211 n.1.

I. STATE-IMPOSED PRICING SCHEMES "SIGNIFICANTLY INTERFERE" WITH NATIONAL BANK POWERS AND ARE PREEMPTED.

The Supreme Court has confirmed that "[i]f the state law prevents or significantly interferes with the national bank's exercise of its powers, the law is preempted." 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 are to conduct a "nuanced comparative analysis" between the State law at issue and the Supreme Court's precedents and "make a practical assessment of the nature and degree of the interference caused by a state law." *Id.* at 219-20. To do so, courts must consider "the text and structure of the laws, comparison to other precedents, and common sense." *Id.* at 220 n.3.

A. Section 5-601's Interference Far Exceeds The "Paradigmatic Example Of Significant Interference."

In assessing the "significance" of State-level interference, precedent is instructive: "[i]f the state law's interference with national bank powers is more akin to the interference" where preemption was found, "then the state law is preempted." *Cantero*, 602 U.S. at 220. The "paradigmatic example of significant interference" is *Franklin National Bank of Franklin Square* v. *New York*, which involved a New York law

prohibiting banks from "using the word 'saving' or 'savings' in their advertising or business." *Id.* at 216 (citing 347 U.S. 373, 374 (1954)). The *Franklin* court held that the law interfered with banks' statutory powers "to receive savings deposits," even though it "did not bar national banks from receiving savings deposits, or even from advertising that fact"; it merely prevented the use of a single word ("savings") in advertising. *Id.* (citation omitted).[2]

Section 5-601 interferes with a national bank's power to a far greater extent than New York's advertising law. As Justice Kavanaugh said at oral argument, "the pricing of the product almost by definition interfere[s] more with the operations of a bank than something that affects advertising." *Cantero* Tr. at 13. He continued, "[t]hat sounds like

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[2] Plaintiffs and their *amici* urge this Court to ignore *Franklin* and rely on two lower court cases, *Jamaica Savings Bank* v. *Lefkowitz*, 390 F. Supp. 1357 (E.D.N.Y. 1975) ("*JSB*") and *Federal National Mortgage Association* v. *Lefkowitz*, 390 F. Supp. 1364 (S.D.N.Y. 1975) ("*FNMA*"), but neither decision is an NBA preemption case. *JSB* involved a constitutional attack under the U.S. Constitution's contract, due process, and equal protection clauses. And although *FNMA* involved a Supremacy Clause question, the court found that the mortgages at issue—unlike here—were acquired on a secondary market and "created under the laws of New York State." *Id.* at 1370. The State regulation therefore did not burden "the activity of the federal instrumentality." *Id.* at 1370-71. In any event, neither decision considered *Franklin* or undertook the type of analysis the Supreme Court has now mandated.

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 later 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 36-37.

This is just "common sense," and is illustrated perfectly by State pricing controls like Section 5-601, which impact national banks' power to "administer home mortgage loans." *See Cantero*, 602 U.S. at 210 (NBA "expressly supplies national banks 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 incidental powers) (citing 12 U.S.C. §§ 24, 371(a)). Indeed, Congress has recognized the importance of this national bank real estate lending power by specifically making the OCC—and not any State authority—its exclusive regulator. *See* 12 U.S.C. § 371(a) ("[A]ny national banking association may 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.").

As all parties agree, mortgage escrow accounts have become a critical tool in administering home mortgage loans. By ensuring that certain property-related obligations are paid on time, mortgage escrow accounts "protect[] the loan collateral (the home) against tax foreclosure or uninsured damage," *Cantero*, 602 U.S. at 211, and help national banks "manage credit risk exposures," *see* 76 Fed. Reg. at 43,557. These accounts have become ubiquitous in the U.S. housing market because of the benefits offered to both lenders and borrowers; in 2016 alone, nearly six million mortgage originations (79% of the total) included an escrow account. *See* FHFA & CFPB, A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations 1, 27, 30 (2018).

By imposing the pricing terms under which national banks may offer escrow accounts, Section 5-601 significantly interferes with national banks' power to administer home mortgage loans. 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). By requiring national banks to pay a prescribed interest rate on these accounts—an ability inherent in the accounts' establishment and maintenance—the law interferes with the flexibility needed to effectively manage risk and offer products with sufficient returns, undermining the "safety and soundness" of national banks.[3] In fact, the interference caused by Section 5-601 is even more stark because it grants unfettered discretion to the DFS to set whatever pricing it deems appropriate. *See supra* at 3 (citing N. Y. Gen. Oblig. Law Ann. § 5-601).

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[3] This case is therefore distinguishable from "the primary example of a case where state law was not preempted," *Anderson National Bank* v. *Luckett*, which considered a law requiring banks to relinquish deposit funds deemed abandoned to the State. *See Cantero*, 602 U.S. at 217 (citing 321 U.S. 233 (1944)). Although collecting deposits is a national banking power, "an inseparable incident" of that power is the "obligation to pay" those deposits "to the persons entitled to demand payment" according to State law. 321 U.S. at 248-49. The Kentucky law merely allowed the State to "demand payment of the accounts in the same way and to the same extent that the depositors could," and thus interfered with *no* banking power. *Id*. at 249.

B. Plaintiffs Cannot Avoid The Inescapable Conclusion That Section 5-601 Is Preempted.

Plaintiffs attempt to skirt this obvious conclusion by arguing that (i) Defendant-Appellant must furnish additional evidence to show a "material effect" on its operations, Pl. Br. at 20; (ii) this case is unique because it does not involve the "exercise of an express banking power," Pl. Br. at 4, 8-9; and (iii) there is no significant interference because other banks have been complying with the law, Pl. Br. at 8-9 (citing *Cantero* Tr. 56). All these arguments fail.

First, Plaintiffs suggest that, purportedly relying on *Franklin*, Defendant-Appellant must "attempt to make [an] evidentiary showing as the case proceeds" into the cost of compliance with New York's law. Pl. Br. at 20; *see id.* at 7 (arguing there was a "large record" in *Franklin* on the "real-world" consequences). But the analysis in *Franklin*—or any of the identified cases in *Cantero*—did not require a "large record" to determine whether the law was preempted. Rather, the *Franklin* court, while acknowledging that the trial court "accumulated a large record," 347 U.S. at 376, found no need to consider that record and decided based on the fact that the law interfered with a national bank's power to offer savings accounts and advertise for them. Plaintiffs point to no other

Supreme Court case that looked at a factual record to determine if a State law is preempted under the NBA.

Indeed, *Cantero* rejected Plaintiffs' argument that such a factual record is needed and instead directed courts to conduct a "practical" and "common sense" analysis. The Court observed that in prior decisions, it "reached its conclusions about the nature and degree of the state laws' alleged interference with the national banks' exercise of their powers based on the text and structure of the laws, comparison to other precedents, and common sense." 602 U.S. at 220 n.3. Under Plaintiffs' proposed approach, whether a rate interferes with bank powers would vary based on current interest rates, market conditions, and even a specific bank's financial situation. This constantly variable and subjective standard is not what the Supreme Court meant when it directed courts to use common sense; in the Court's words, this approach would "yank the preemption standard to the opposite extreme." *Id.* at 221.

Second, whether the power is express or implied is irrelevant; after Bank of America's counsel argued that "[w]hat interest you charge is so fundamental to a banking product and the banking power that it

would seem absurd to say a state could dictate the interest rate on something like a savings account just because that's an incidental power," Justice Thomas replied, "I agree with you on that." *Cantero* Tr. at 85; *see Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007) (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").

Third, whether other banks—national or State—*can* comply with the law is irrelevant. *See* Pl. Br. at 8-9. 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 Federal Savings & Loan Association* v. *De la Cuesta*, 458 U.S. 141 (1982) was preempted even though the appellant could "readily" comply with the State law). Indeed, as the Supreme Court has confirmed, 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." *Cantero*, 602 U.S. at 214.

C. OCC's Regulations Support The Conclusion That Section 5-601 Significantly Interferes With National Bank Powers.

The Supreme Court has invited this Court to consider the impact of the OCC's preemption regulations, *see* 602 U.S. at 221 n.4, which further support preemption of Section 5-601. In 2004, the OCC published a final rule listing certain State laws preempted by the NBA. This list was based upon 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 was made in accordance with *Barnett*. *Id.* Relevant here, this list included State laws "concerning … [e]scrow accounts" for real estate loans. 12 C.F.R. § 34.4(a)(6).[4]

[4] 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. 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.

Plaintiffs' suggestion that the OCC's determinations are "irrelevant" because it "did not exercise its authority to make a preemption determination under Dodd-Frank" should be rejected. *See* Pl. Br. at 9-10 (citing *Cantero* U.S. Br. at 6-7 nn.3-4). The thrust of this argument is that the OCC failed to consider "the impact" of State laws on a "case-by-case basis" post-Dodd-Frank. *See Cantero* U.S. *Amicus* Br. at 15. But Dodd-Frank imposed procedural requirements for certain OCC preemption determinations moving forward; *prior* OCC determinations were not overruled. *See* 12 U.S.C. § 25b(c); *see also Cantero* BPI *et al. Amicus* Br. at 6 (citing Senators' Carper & Warner letter to the OCC explaining that "[Section 25b] is not intended to retroactively repeal the OCC's 2004 preemption rulemaking"). These consistent and long-standing regulations should therefore be carefully considered under *Skidmore*. *See Loper Bright Enterp.* v. *Raimondo*, 144 S. Ct. 2244, 2259 (2024) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)).

D. The TILA Amendment Is Not Applicable To This Preemption Analysis.

Plaintiffs and their *amici* further urge this Court to consider TILA's Section 1639d in its preemption analysis, arguing that the

provision reflects Congress's view that banks can comply with interest-on-escrow laws. *See* SSB & AARMR *Amicus* Br. at 6-7; *see also* Pl. Br. at 17-18. But in *Cantero*, the Supreme Court noted, "[a]ll parties agree that § 1639d does not apply to the mortgages in this case," and thus the TILA provision is inapplicable to this preemption analysis. 602 U.S. at 211 n.1.

CONCLUSION

For these reasons, *Amici* respectfully request that this Court reaffirm that the NBA preempts Section 5-601.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the length limitation of Circuit Rule 29.1(c) because this brief, inclusive of Appendix A hereto, contains 3495 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.

Dated: New York, New York
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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)