No. 21-403

In the

United States Court of Appeals for the Second Circuit

SAUL R. HYMES and ILANA HARWANE–GIDANSKY,
on behalf of themselves and all others similarly situated,

Plaintiffs–Appellees,

v.

BANK OF AMERICA, N.A., *et al.*,

Defendant–Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
No. 2:18-cv-2352 (Mauskopf)

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

Gregg L. Rozansky
THE BANK POLICY INSTITUTE
600 13th Street, N.W.
Suite 400
Washington, DC 20005
(202) 289-4322

H. Rodgin Cohen
Matthew A. Schwartz
Helen F. Andrews
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Amici Curiae

(Additional counsel listed on inside cover)

June 11, 2021

David Pommerehn
CONSUMER BANKERS ASSOCIATION
1225 Eye Street, N.W.
Suite 550
Washington, DC 20005
(202) 552-6366

Thomas Pinder
THE AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 663-5000

Daryl Joseffer
Paul V. Lettow
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

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[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state as follows: (1) neither party's counsel authored the brief in whole or in part; (2) neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Under Federal Rule of Appellate Procedure 29(a)(2), each party to this action, by counsel, has consented to the filing of this *amicus* brief.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

BPI. BPI is a nonpartisan policy, research, and advocacy group that represents the nation's leading banks and their customers. BPI's member banks employ nearly 2 million Americans, make 72% of the nation's loans, and serve as an engine for financial innovation and economic growth. In New York State alone, BPI's members have nearly three thousand branches, hold over $1.6 trillion in deposits, and have made approximately $45 billion in mortgage loans.[2] Among BPI's members are national banks that face costly uncertainty about the application of federal preemption to various state-law interest requirements for mortgage escrow accounts.

ABA. Established in 1875, the ABA is the united voice of America's $17 trillion banking industry, which is comprised of small, regional, and large national and state banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.

CBA. Founded in 1919, the CBA is the trade association for today's leaders in retail banking—banking services geared toward consumers and small businesses. The national and state bank members include the nation's largest financial institutions, as well as many regional banks, which operate in all 50 states,

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2 *See* Bank Policy Institute, *The Economic Impact of the Bank Policy Institute Members*, https://bpi.com/everyday-bpi/ (last visited June 11, 2021).

serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

Chamber. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents the interests of more than 3 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. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Amici have an interest in this case because the District Court's order, by repudiating many decades of consistent judicial precedent, (i) exposes national banks to substantial and non-uniform state requirements in the conduct of mortgage lending—a fundamental banking power, and (ii) substantially interferes with the ability of many of *Amici*'s members to conduct the business of banking in a safe and sound manner under a national regulatory system. The District Court's order also sets a dangerous precedent that could allow not only New York, but other states as well, to regulate the prices and terms of other national bank products and services, which in turn will undermine the banks' ability to manage credit risks, potentially forcing them to charge higher interest rates or simply not provide certain loans at all.

SUMMARY

The District Court's order in *Hymes* v. *Bank of America, N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019) ("Order"), *amended*, 2020 WL 9174972 (Sept. 29, 2020), dramatically alters a fundamental rule of law that had been decisively stated in multiple cases by the U.S. Supreme Court: the National Bank Act ("NBA") preempts states from regulating the rates and terms of a national bank's products and services.[3] Contrary to this well-established rule, the District Court held that New York General Obligations Law ("NYGOL") § 5-601, which requires lenders to pay a designated rate of interest on all mortgage escrow accounts, is not preempted by the NBA. The District Court reached this conclusion without any analysis of the importance of national banks' ability to set rates and terms for their products and services in general, or for mortgage escrow accounts in particular.

Rather, substituting its own economic analysis (which was based on no factual record) for that of national banks and their expert federal regulator, the District Court reached the unsupported conclusion that NYGOL § 5-601's "degree of interference" with national banks' power "is minimal." *Hymes*, 408 F. Supp. 3d at 195. This Order reflects a basic misunderstanding of the NBA's history and goals and binding precedent.

3 *See*, *e.g.*, cases listed in Appendix A hereto.

Congress enacted the NBA in 1864 so that federal law—rather than "unduly burdensome and duplicative state regulation"—would govern national banks. *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 10–11 (2007). At the foundation of the national banking system, Congress established that national banks would operate under the "paramount authority" of the federal government, *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and be supervised by the Office of the Comptroller of the Currency ("OCC"), *see* Act of June 3, 1864, § 8, 13 Stat. 99, 101 (1864) (codified at 12 U.S.C. § 24). As the Supreme Court explained, "we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation." *Easton* v. *Iowa*, 188 U.S. 220, 231–32 (1903).

Soon after Congress enacted the NBA, the Supreme Court began establishing the broad parameters of the NBA's preemption of state law, consistently holding that state attempts to "control" national banks' powers are impermissible, "except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). For well over a century, decisions of the Supreme Court and various federal courts of appeals have recognized that "[n]ational banks are instrumentalities of the federal government," *Davis*, 161 U.S. at 283, and that states "may not curtail or hinder a national bank's efficient exercise" of its powers "under the NBA," *Watters*, 550 U.S. at 13. Thus, "[i]n the years since the NBA's enactment," the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

In the landmark case of *Barnett Bank of Marion County, N.A.* v. *Nelson*, the Supreme Court set out a standard that any state regulation that "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers" is preempted. 517 U.S. 25 (1996). *Barnett Bank* is the standard Congress later codified as part of the Dodd-Frank Act, 12 U.S.C. § 25b(b)(1)(B). Importantly, the "level of interference that gives rise to preemption" under *Barnett Bank* "is not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) (internal quotation marks omitted); *cf. Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 378–79 (1954) (state-law prohibition on the use of the word "savings" in advertising was preempted as to national banks due to its interference with incidental banking powers).

NYGOL § 5-601 is a prime example of the type of state interference with national bank powers that the NBA has long preempted. Banks created mortgage escrow accounts in the mid-1900s as a key tool to protect both homeowners and banks by establishing a mechanism for homeowners to pay their tax and insurance bills in a timely manner, and thus protect their homes from tax seizures or uninsured catastrophe. National banks rely on these accounts to help manage their credit risk on multiple millions of mortgages across the United States. Since the advent of these accounts, national banks have relied on the NBA and OCC regulations to protect their ability to set the rates of interest on the billions of dollars held in those accounts from a mishmash of different state laws and regulations.

The New York-mandated 2% interest rate—which is almost six times the current market rate[4]—constitutes a significant interference with national banks' use of mortgage escrow accounts. Not only is the law a *per se* violation of a national bank's core power to set the rates and prices of lending products and accounts, but if national banks are forced to pay state-mandated interest on escrow accounts, much less a dramatically above-market rate of interest, they will need to balance this requirement by charging higher rates on mortgages or reducing the availability of mortgages to lower-credit borrowers (whose credit would already be at the outer edge of acceptable risk). Moreover, national banks would be subjected to a patchwork of fifty different state regulatory regimes concerning mortgage escrow accounts, thus defeating the NBA's purpose of a uniform national regulatory structure for national banks.

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[4] The average national rate paid on 12-month non-jumbo certificates of deposit (less than $100,000) from 2010 to March 29, 2021 is 0.34%. *See* Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits* (less than $100,000): 12 Month CD, https://fred.stlouisfed.org/series/CD12NRNJ (last visited June 11, 2021).

Accordingly, this Court should reverse the District Court's Order and hold that the NBA preempts NYGOL § 5-601.

ARGUMENT

I. MORTGAGE ESCROW ACCOUNTS ARE A UBIQUITOUS AND ESSENTIAL, CONSUMER-BENEFITING AND RISK-MITIGATING TOOL THAT FACILITATE MILLIONS OF LOANS EACH YEAR.

Mortgage escrow accounts are a fundamental element of the entire mortgage process. In these accounts—which lenders require for the vast majority of new home mortgages—borrowers keep sufficient funds to make tax and insurance payments on their property. Mortgage escrow accounts have been required or negotiated in mortgage loans since "at least the middle of the twentieth century," *Hymes*, 408 F. Supp. 3d at 176, and arose from the traumatic experience of the Great Depression, when homes were foreclosed upon due to homeowners' inability to pay property taxes, *see* 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 be superior to a mortgage lien, not only did homeowners face losing their homes for tax delinquency, but banks faced losing all or part of the value of their security interests in foreclosed-upon property. *See* Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998) ("CRS Report"). A homeowner's failure to pay insurance premiums could also seriously jeopardize the value of the collateral property in the event of an uninsured catastrophe, such as a fire. *See* GAO Study at 5.

Mortgage escrow accounts provided a solution to these problems by allowing tax authorities and insurers to collect payments "more economically," reduce the number of delinquencies and defaults, and avoid the problem of receiving bad checks from individual taxpayers and insureds. CRS Report at 3; *see also* GAO Study at 5. Mortgage escrow accounts thus protect against (i) lenders losing all or part of the value of their security interest in a foreclosed-upon property due to various governmental entities' claims for taxes, and (ii) lenders not encountering loss in the value of the collateral property in case of damage to the property. *See* GAO Study at 5.

The benefits of mortgage escrow accounts redound to homeowners as well, helping them set aside funds for taxes and insurance and offering a convenient method for paying those expenses, thus reducing the prospect of losing their homes. *See id*. Moreover, borrowers also benefit from mortgage escrow accounts because, without such accounts, lenders would face substantially increased risks on mortgage lending, and could be forced either to (i) require borrowers to make higher down payments and/or charge higher mortgage interest rates, or (ii) simply not make loans to certain borrowers with credit profiles that are already at the outer limit of acceptable risk. Thus, as the District Court acknowledged, mortgage escrow accounts enable lenders "to offer loans to borrowers at reduced interest rates." *Hymes*, 408 F. Supp. 3d at 176.

Given these realities, mortgage escrow accounts have become crucial to the success of the modern home mortgage system: in 2016 alone, nearly six million mortgage originations—approximately 79% of the total—"included an escrow account for taxes or homeowner insurance." *See* Fed. Hous. Fin. Agency & Consumer Fin. Prot. Bureau, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 1, 27, 30 (2018).

Recognizing the importance of mortgage escrow accounts to national banks' core lending powers, the OCC—the entity created by the NBA "to oversee nationally chartered banks" and to which "Congress [has] delegated regulation of national banks," *Hymes*, 408 F. Supp. 3d at 175—has explicitly confirmed that state mortgage escrow account laws are preempted as to national banks. In 2004, the OCC published, after notice and comment, a final rule listing which state laws were preempted by the OCC, which included those "concerning . . . [e]scrow accounts" for real estate loans. 12 C.F.R. § 34.4(a)(6); *see also* OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1911 (Jan. 13, 2004); *Watters*, 550 U.S. at 13 (citing the same OCC regulation, 12 C.F.R. § 34.4, as "identifying preempted state controls on mortgage lending"). The OCC created this list based on its "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. at 1911. The OCC also clarified that the rule did not create "any new powers for national banks or any expansion of their existing powers" but rather was "intend[ed] only to ensure the soundness and efficiency of national banks' operations by making clear the standards under which they do business." *Id.* at 1908.

Relying on the NBA, and the OCC's confirmation that the NBA preempts state laws concerning mortgage escrow accounts, national banks have, for decades, set the terms and prices of the mortgages they issue and their associated escrow accounts.

II. STATE LAWS FIXING THE TERMS OF MORTGAGE ESCROW ACCOUNTS CONSTITUTE "SIGNIFICANT INTERFERENCE" WITH NATIONAL BANK POWERS AND SO ARE PREEMPTED BY FEDERAL LAW.

In holding that NYGOL § 5-601 is not preempted by the NBA, the District Court concluded that NYGOL § 5-601 did not "prevent" or "significantly interfere" with national bank powers under the preemption standard of *Barnett Bank*. *Hymes*, 408 F. Supp. 3d at 196. The Order, however, contains no explanation based on the NBA's history, economics, or the realities of banking practice. By subjecting national banks to a mandatory interest rate payment on mortgage escrow accounts, the Order undermines national banks' ability to effectively manage the credit risks associated with mortgage lending—a product that is key to national banks' core banking powers. Furthermore, the District Court's approach subjects national banks to a patchwork of fifty different state regulatory regimes, which would be both duplicative and unduly burdensome, and which the NBA was designed to prevent. *See Watters*, 550 U.S. at 11–12.

A. The Order Wrongly Permits New York to Interfere Significantly with the Ability of National Banks to Set the Terms and Prices on Mortgage Loans.

In finding that NYGOL § 5-601 does not significantly interfere with national bank powers, the Order (i) overlooks that mortgage escrow accounts are a core banking function; (ii) misconstrues the meaning of "significantly interfere" under *Barnett Bank*; and (iii) fails to recognize the significant interference that NYGOL § 5-601 has on national banks' ability to conduct the business of banking, ignoring the OCC's valuable expertise in doing so.

First, there is no doubt that the establishment of mortgage escrow accounts is a power of national banks that is entitled to the NBA's preemptive protection. From the NBA's inception, a national bank's powers have extended beyond specifically designated banking functions—such as "mak[ing], arrang[ing], purchas[ing] or sell[ing] loans or extensions of credit secured by liens on interests in real estate," 12 U.S.C. § 371(a)—to include "all such incidental powers as shall be necessary to carry on the business of banking," 13 Stat. at 101 § 8 (codified at 12

U.S.C. § 24). Consistent with this history, the OCC has confirmed that the NBA protects the incidental power to use escrow accounts in connection with real estate lending and to do so "without regard to state law limitations concerning [such accounts]." *See* OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1916 (promulgating 12 C.F.R. § 34.4(a)(6)). As the District Court acknowledged, mortgage escrow accounts are "an integral part of or a logical outgrowth of the lending function," *Hymes*, 408 F. Supp. 3d at 177 (quoting OCC Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998)), and banks "often are unwilling to make secured mortgage loans without these escrow accounts." *Id.* at 193 (citation omitted). The District Court nevertheless ignored the importance of national banks' ability to set rates of interest on their mortgage escrow accounts.

Second, the District Court improperly sought to justify its conclusion that NYGOL § 5-601 does not significantly interfere with national banks' powers by stating that the law does not impose "anything approaching th[e] level of interference" found in the Supreme Court's NBA preemption precedents, where "application of the state law would have practically nullified a specific grant of power." *Hymes*, 408 F. Supp. 3d at 196. But "nullifi[cation]" is not the standard. As established by *Barnett Bank* and Dodd-Frank, the standard for preemption is "significant[] interfere[nce]," which is "*not* [a] very high" standard. *See Monroe*

Retail, Inc., 589 F.3d at 283 (emphasis added). The District Court's declaration equating significant interference with virtual nullification is unsupported and sets a novel standard that contradicts not only Supreme Court precedent and Dodd-Frank, but also the NBA's purpose of creating a national regulatory structure and preventing states from "impairing the efficiency of national banks to discharge their duties." *Bank of Am.* v. *City & Cty. of S.F.*, 309 F.3d 551, 561 (9th Cir. 2002); *see also Ass'n of Banks in Ins., Inc.* v. *Duryee*, 270 F.3d 397, 409 (6th Cir. 2001) (rejecting an "attempt to redefine 'significantly interfere' as 'effectively thwart'" because it "would render the two prongs of the *Barnett Bank* standard redundant"); *In re TD Bank, N.A.*, 150 F. Supp. 3d 593, 611 n.5 (D.S.C. 2015) ("[T]he 'significant interference' standard should not be conflated with prohibition of a practice.").

Having a state law regulate a national bank's pricing for a product that is a key to that bank's enumerated banking powers is exactly the type of law the NBA was designed to preempt, as any attempt by a state to set prices, or other terms and conditions for national bank products and services, is invalid *per se*. *See* OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) ("[S]tate laws that would alter standards of a national bank's depository business—setting standards for permissible types and terms of accounts and for funds availability, . . . would significantly interfere with management of a core banking business."). It is beyond question that a state law that sought to establish a minimum rate of interest on all deposit accounts would be preempted by the NBA. A state law that purports to set a minimum rate of interest on mortgage escrow deposit accounts should not be any more immune from preemption. In this respect, the Order misconstrues the meaning of "significantly interfere" under *Barnett Bank*, and is thus inconsistent with decisions of the Supreme Court and federal courts of appeals, which hold that a wide variety of state attempts to regulate terms and conditions set by national banks are preempted under the NBA. *See*, *e.g.*, *Franklin*, 347 U.S. at 378–79; *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (state statute regulating national banks' ability to charge non-account holder check-cashing fees preempted by NBA); *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (gift card expiration dates and fees); *Monroe Retail, Inc.*, 589 F.3d 274 (account service fees); *see also* Appendix A (listing federal cases holding that the NBA preempts state regulations of the rates and terms of national banks' products and services).

Further, whatever the full extent of "significantly interfere" may ultimately be determined to mean, that determination was not necessary in this action. There are two aspects of national bank powers that must be covered under the rubric of "significant interference." The first is a state law's direct prevention or limitation on the exercise of the powers granted to national banks under the NBA. The second, as seen here, is a state's indirect prevention or limitation on the exercise of those powers by regulating the rates charged for a bank's products and services. Just as "[a] right to tax, without limit or control, is essentially a power to destroy," *McCulloch* v. *Maryland*, 17 U.S. 316, 391 (1819), the power to limit or require rates involves the power to make the product or service unprofitable or ineffective and thus, ultimately, nonviable. As the OCC warned, "state laws that would affect the ability of national banks to underwrite and mitigate credit risk . . . such as laws concerning . . . escrow standards . . . would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks." OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. at 43,557.

Third, even if NYGOL's rate requirements were not *per se* preempted as to national banks, the specifics of the law make it clearly preempted. If the use of the mortgage escrow accounts to mitigate credit risk is made more costly by subjecting them to state-law rate-setting mandates, national banks will be required either to offset these costs by charging higher interest rates on mortgage loans or deciding that a mortgage loan should just not be made because of the cost. *See* Nathan B. Anderson & Jane K. Dokko, Fed. Reserve Board, *Liquidity Problems and Early Payment Default Among Subprime Mortgages* 2 (2010) (describing 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").

Indeed, as the OCC has explained, "the safety and soundness of banks depends in significant part on their ability to devise" means "appropriate for their needs." OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. 54,319, 54,319 (Dec. 2, 1983). These means include mechanisms, such as escrow accounts, which help prevent or minimize losses that could threaten a bank's safety and soundness. By limiting national banks' ability to devise mortgage escrow account policies that are "appropriate for their needs," *id.*, the District Court's Order undermines their ability to manage credit risks and would force national banks to seek other options, such as charging higher interest rates on mortgages or not providing certain mortgages in the first place. Put simply, allowing states to force national banks to pay differing interest on mortgage escrow accounts—much less forcing them to pay fixed, statutory rates—necessarily interferes with the flexibility national banks need to "manage credit risk exposures," OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. at 43,557, which in turn significantly interferes with national banks' ability "to carry on the business of banking," *Watters*, 550 U.S. at 6 (quoting 12 U.S.C. § 24).

If there were any doubt that allowing states to set rates on mortgage escrow accounts is preempted by the NBA, this Court need look only at NYGOL's universally required rate of 2% on mortgage escrow accounts. Although this rate may seem nominally low, it is actually *six times* higher than the ten-year average of .34% paid by FDIC-insured U.S. depository institutions on certificates of deposit.[5] The District Court's conclusion was based on nothing—there was no factual record or deference to agency expertise—other than the District Court's opinion that a rate of 2% does not substantially interfere with a bank's power to set prices and rates for its mortgage escrow accounts. And where would a court's discretion end and a state-mandated rate constitute "significant interference"—at 2.5%, 3%, 5%?

Instead of applying a subjective view, the District Court should have deferred to the OCC's expert opinion. But the District Court rejected the views of the OCC, deciding that the OCC's regulations were not entitled to any deference.

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[5] *See*, *e.g.*, Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits* (less than $100,000): 12 Month CD, https://fred.stlouisfed.org/series/CD12NRNJ (last visited June 11, 2021).

Hymes, 408 F. Supp. 3d at 190–92.[6] But the level at which state laws regarding mortgage escrow accounts will interfere with a national bank's powers is one the OCC is best positioned to analyze and address. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (noting that an agency was "likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements"). Unlike the District Court, New York State acknowledged that 12 C.F.R. § 34.4(a)(6) "permits national banks and federal savings associations to establish . . . escrow accounts without restriction as to the payment of interest." N.Y. Dep't of Fin. Servs., *Order Issued Under Section 12-a of the New York Banking Law* 1 (Jan. 19, 2018). Indeed, New York adjusted its own law governing escrow account interest rates for state-chartered banks, aligning with the OCC's view that national banks are not subject to state laws

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[6] Because NYGOL § 5-601 should be preempted under the clear language of *Barnett Bank*, *Amici* do not address the District Court's holding that the OCC's interpretation of *Barnett Bank* is not entitled to any deference, though the issue is addressed in the OCC's *amicus* brief. *See Amicus Curiae* Office of the Comptroller of the Currency's Brief in Support of Defendant–Appellant Bank of America, N.A., *Hymes* v. *Bank of Am., N.A.*, No. 21-403, Dkt. No. 45, 7–13 (2d Cir. June 10, 2021) ("OCC *Amicus*"). Regardless, if other courts show a similar unwillingness to acknowledge the OCC's expertise and interpretation of its regulations, then a whole host of problems will arise. *See* OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908 ("When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness."). National banks will have no clarity on which regulations are preempted and instead will be subject to the whim of every court's discrete opinion of what "significant" means.

pertaining to escrow account interest rates. *Id.* Although a state's acknowledgement that an OCC regulation preempts its state law might not technically be determinative of federal preemption of a civil litigant's attempt to apply that law, the District Court's refusal to likewise defer to the OCC regulations emphasizes its departure from the OCC's expertise.

Nor should the District Court have held that the NYGOL does not constitute substantial interference simply because "[n]ational banks are free to elect whether to absorb the cost or attempt to pass it along to consumers in the form of heightened fees," *Hymes*, 408 F. Supp. 3d at 196 n.17—a rationale that would excuse even the most punitive state-law requirements, or, for that matter, any rate-setting requirement. This rationale fails to consider the impact of that contemplated activity and whether it could amount to significant interference. Moreover, the Order failed even to address how national banks could overcome NYGOL § 5-601's interference with respect to existing mortgage contracts.

Finally, the Order also incorrectly, inconsistently, and startlingly reasoned that "'significant interference' is not a question of cost," stating "it is not th[e] [c]ourt's role to determine the bottom-line impact of escrow interest laws on the business operations of national banks, or to allocate the benefits of mortgage lending between borrower and lender." *Hymes*, 408 F. Supp. 3d at 195. But how can a court avoid that responsibility when the level of cost can be core to the question of significance? Moreover, the District Court *did* consider cost when it acknowledged that "[a] state escrow interest law 'setting punitively high rates' could very well significantly interfere with national banks' power to administer escrow accounts." *Id.* at 196 (quoting *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1195 n.7 (9th Cir. 2018)). After drawing this judicially invented line between acceptable and unacceptable costs, the District Court then implicitly applied it to determine the rate prescribed by NYGOL § 5-601 was not punitively high, *id.* at 195—a conclusion outside of judicial expertise and drawn without support. How is a court to determine what mandated interest rate is sufficiently high (or limited interest rate or fee is sufficiently low) to constitute a significant interference with a national bank's powers? The District Court never says, creating confusion and uncertainty for national banks.[7] It is inconceivable that Congress intended for federal courts to be

[7] Judges throughout the Second Circuit may also disagree with the Order's conclusion about the level of interference imposed by state-law interest requirements for mortgage escrow accounts. For example, in Connecticut, state law requires interest to be paid on escrow accounts at a rate "not less than the deposit index." Conn. Gen. Stat. Ann. § 49-2a. And in Vermont, state law requires "the same conditions as the lender's regular savings account, if offered, and otherwise at a rate not less than the prevailing market rate of interest for regular savings accounts offered by local financial institutions." Vt. Stat. Ann. tit. 8, § 10404(b). Courts in these states may well agree with the OCC that these state-law requirements on mortgage escrow accounts, including any mandated interest payments, significantly interfere with national banks' core lending powers. *See* 12 C.F.R. § 34.4(a)(6); Bank Policy Institute, *The Economic Impact of the Bank Policy Institute Members*, https://bpi.com/everyday-bpi/ (last visited June 11, 2021).

in the business of deciding on an ongoing basis—and, presumably, depending on the then-current level of interest rates—when a statutory interest rate is "punitively high" and when it is not. Indeed, the District Court's holding establishes a dangerously broad, even unlimited, precedent: If a state can establish a minimum interest rate on mortgage escrow accounts, then why could it not establish a minimum rate on deposit accounts and maximum rates (or prohibit any charges) for all bank products and services?

B. The Order Risks Turning the Uniform National Banking System into a Fifty-State Banking System.

The Order also invites significant interference with national banks' powers by subjecting national banks to a barrage of different states' mortgage escrow interest rates. Supreme Court decisions have "made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. Yet, the Order would do the very opposite by exposing banks to mortgage escrow laws as to pricing and other terms as each of the fifty States may choose to assert them.

For example, as noted above, two states in this very Circuit, Connecticut and Vermont, have established minimum rates for mortgage escrow accounts that are index-based and floating. *See* note 8. As one other example, Minnesota has adopted a fixed rate in a format similar to New York, but at a higher level—3%. Minn. Stat. Ann. § 47.20. These various rates for mortgage escrow accounts, if applied to national banks, would force national banks to pay inconsistent rates to borrowers depending on their state of residence. As the OCC has recognized, "[t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with [national banks'] ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure." OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908.[8]

III. THE ORDER ERRONEOUSLY INTERPRETS THE TILA AMENDMENT TO OVERRIDE BASIC PREEMPTION LAW.

In its Order, the District Court held that, although a 2010 amendment to the Truth in Lending Act ("TILA") concerning mortgage escrow accounts does not apply to the plaintiffs' loans,[9] the amendment shows that NYGOL § 5-601 is not preempted as to all post-amendment mortgage escrow accounts. *See Hymes*, 408 F.

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8 *See also Talbot* v. *Bd. of Comm'rs of Silver Bow Cty.*, 139 U.S. 438, 443 (1891) (describing the national banking system as having "uniform and universal operation through the entire territorial limits of the country"); *Watters*, 550 U.S. at 11 (making clear that "federal control shields national banking from unduly burdensome and duplicative state regulation"); *Kroske* v. *U.S. Bank Corp.*, 432 F.3d 976, 989 (9th Cir. 2005) (recognizing "the congressional purpose of uniform regulation reflected in the [NBA]").

9 The fact the TILA Amendment does not apply to the regulations at issue in this case renders the Court's extensive analysis of it inappropriate in the first instance. *See* OCC *Amicus*, at 14 n.10.

Supp. 3d at 189. But this reading of the TILA amendment misunderstands basic tenets of the law of preemption.

As *Barnett Bank* makes clear, a finding of a congressional override of national bank preemption is strongly disfavored: "where Congress has not *expressly* conditioned the grant of [a national bank's] 'power' upon a grant of state permission," courts will ordinarily find that "no such condition applies." 517 U.S. at 34 (emphasis added). Accordingly, absent express congressional override of NBA preemption, a state may not condition a national bank's exercise of its powers on, for example, setting prices at certain levels. This result follows because the history of the NBA "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32.

Here, the District Court erred by holding the opposite: that because Congress did not expressly override a national bank's power to set the terms of mortgage escrow accounts, the state *can* condition that power. The key Dodd-Frank Act amendment to TILA reads as follows:

> Applicability of payment of interest. If prescribed by *applicable* State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that *applicable* State or Federal law.

15 U.S.C. § 1639d(g)(3) (emphases added). The District Court reached this result by ignoring the term "applicable" and adding the term "relevant." *Hymes*, 408 F. Supp. 3d at 189. The Court rejected the more common-sense, plain-meaning reading of the statute—that "applicable State . . . law" refers only to non-preempted state law, *id.* at 188, because state laws concerning lending do not apply to national banks. Instead, the District Court incorrectly concluded that Congress's *silence* on the question of state-law preemption in the TILA amendment meant that Congress "did not intend to create a preemption-based exception for national banks" and "evince[d] a clear congressional purpose to subject *all* mortgage lenders to [relevant] state escrow interest laws." *Id.* at 189.

The District Court's conclusion contradicts *Barnett Bank*'s holding that unless Congress "expressly" conditions a national bank's power "upon a grant of state permission," courts will ordinarily find that "no such condition applies." 517 U.S. at 34. But even without *Barnett Bank*'s requirement of a clear congressional intent to override NBA preemption, the language of that statute and the basic principles of statutory interpretation preclude the Order's result.

First, the Court ignores that the law that is "applicable," or even "relevant," to a *national* bank's use of mortgage escrow accounts is the NBA and other *federal* laws and regulations, not state law. And under current federal law, a national bank has the flexibility to decide whether to pay interest (and the rate of interest) on any escrow account as the national bank may choose. Further, the statute used the terms "State *or* Federal" in the disjunctive, and thus the Court should have given each term independent significance. *See Burke* v. *Bodewes*, 250 F. Supp. 2d 262, 267 (W.D.N.Y. 2003). The Court's interpretation entirely ignores this disjunctive language, subjecting national banks to state *and* federal regulations.

Second, there is no reason to find that, by merely referring to "applicable State or Federal law," Congress intended, *sub silentio*, to remove the preemptive protection of the NBA and subject national banks to state, rather than federal, law as to mortgage escrow accounts. *See United States* v. *Locke*, 529 U.S. 89, 106 (2000) ("We think it quite unlikely that Congress would use a means so indirect . . . to upset the settled division of authority [between federal and state law]. We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."). Indeed, as the District Court acknowledged, "Congress knew how to address preemption [directly] when it wanted to." *Hymes*, 408 F. Supp. 3d at 188; *see*, *e.g.*, Dodd-Frank Act, 124 Stat. 1376, 2015 (July 21, 2010) (codified at 12 U.S.C. § 25b(h)(2)) (providing that state law is not preempted as to subsidiaries of national banks that are not themselves national banks).

Third, as noted above, the District Court adopted the strained reading by the Ninth Circuit that the TILA amendment is a reverse preemption provision that can become a reverse-reverse preemption provision if states seek to impose "punitively high rates" on mortgage escrow accounts. *Hymes*, 408 F. Supp. 3d at 196 (quoting *Lusnak*, 883 F.3d at 1195 n.7). But either the TILA amendment reversed NBA preemption or it did not. With no textual support, the Court effectively replaced the settled standard for preemption (significant interference) with a new, novel standard (punitively high). Nothing in the amendment can be read as affording courts the *ad hoc* power to determine when NBA preemption is put aside based on the percentage interest on mortgage escrow accounts required by state law—something Congress never specified in the amendment.

Accordingly, the District Court erred when, contrary to Supreme Court precedent, it held that NYGOL § 5-601 is not preempted by the NBA.

CONCLUSION

For these reasons, *Amici* respectfully request that this Circuit reverse the District Court's Order.

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 6,470 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 Times New Roman 14-point font.

Dated: New York, New York
June 11, 2021

/s/ *Matthew A. Schwartz*
H. Rodgin Cohen
Matthew A. Schwartz
Helen F. Andrews
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Attorneys for Amici Curiae

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)