NO. 05-1607

IN THE
Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,
Petitioner,
v.

KATHY KROSKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

Shortly after respondent Kathy Kroske filed her opposition, the Third Circuit decided *Fasano v. Federal Reserve Bank of New York*, ___ F.3d ___, 2006 WL 2193096 (3d Cir. Aug. 3, 2006). In the many decades since states began enacting anti-discrimination statutes, *Fasano* is only the third federal court of appeals ever to have considered the question whether a federal statutory at-pleasure provision preempts a plaintiff's claim under a state anti-discrimination statute. For two reasons, *Fasano* underscores that review should be denied in this case.

First, *Fasano* concerned the preemptive scope of the at-pleasure provision of the Federal Reserve Act, *not* the National Bank Act at issue in this case. Although Ms. Kroske believes that none of the federal at-pleasure provisions preempts state statutory anti-discrimination claims, as explained in the opposition (at 7-10), the differences between the two statutes remain a compelling reason, among others, to deny review in this case.

Second, *Fasano* cited the decision below with approval. It noted in particular the Ninth Circuit's holding that a state-law age discrimination claim is not preempted by the National Bank Act's at-pleasure provision as long as the state-law claim is consistent with "the prohibited grounds for termination under the ADEA." *Fasano*, 2006 WL 2193096, at *9 (quoting *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 989 (9th Cir. 2005)). *Fasano* thus held that the Federal Reserve Act's at-pleasure provision does not preempt a state anti-discrimination law that is consistent with federal law. *Id.* at *10. As a result, *Fasano* preserves the status quo: The total preemption position advanced by petitioner here has been embraced only in the Sixth Circuit's unreasoned 1987 decision in *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir.

1987). Like other courts, *see* Opp. 4, *Fasano* criticized *Leon* for "provid[ing] no analysis to support its conclusion[.]" 2006 WL 2193096, at *8.

In applying its holding, *Fasano* found the plaintiff's state-law claim preempted, in part because the relevant New Jersey anti-discrimination statute imposes a liability standard for proving disability that is considerably more lenient than that imposed by federal law. *Id.* at *11. We recognize that the Third Circuit also relied on differences between New Jersey's administrative exhaustion scheme and available remedies and those provided by federal law. *Id.* at *11-*12. In our judgment, that reference to procedural and remedial differences between state and federal law were not dispositive, and they should have been irrelevant to the court's analysis. Because New Jersey's administrative procedures and remedies do not alter the standard of conduct to which an employer must conform, they are not preempted by federal law. *See* Opp. 18-19.

The Third Circuit's error is not germane here, and not simply because the Third Circuit was attempting to apply the same standard as that enunciated by the court of appeals below. The plaintiff in *Fasano* did not claim age discrimination, as does Ms. Kroske here. Rather, the plaintiff in *Fasano* claimed that she was discriminated against on account of her disability and that, in responding to her complaints, her employer had violated the state whistleblower protection law. As explained in the opposition (at 16-18), particular provisions of the ADEA demonstrate that federal law embraces, rather than conflicts with, state substantive age discrimination law. Those ADEA provisions provide a powerful, and highly specific, reason why state age discrimination laws are not preempted by the National Bank Act's at-pleasure provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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