No. 22-529

IN THE

Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, and ILANA HARWAYNE-GIDANSKY, individually and on behalf of all others similarly situated,
Petitioners,

v.

BANK OF AMERICA, N.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PUBLIC CITIZEN, CONSUMER FEDERATION OF AMERICA, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND PUBLIC JUSTICE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ADINA H. ROSENBAUM
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici curiae are nonprofit organizations that work to protect consumers of financial services. Amici submit this brief because the broad preemption standard adopted by the court below will harm consumers that use national banks.

Public Citizen is a consumer advocacy organization with members in every state. Among other things, Public Citizen appears before Congress, administrative agencies, and courts to advocate for strong consumer financial protections and government accountability.

The Consumer Federation of America (CFA) is an association of nonprofit consumer organizations established in 1968 to advance the consumer interest through research, advocacy, and education. CFA advances pro-consumer policies on issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

The National Association of Consumer Advocates (NACA) is a nonprofit corporation whose members are private, public sector, and legal service attorneys, and law professors and students whose primary practice or area of study is consumer protection law. NACA's mission and purpose is to help promote a fair and just consumer marketplace.

The National Consumer Law Center (NCLC) uses its expertise in consumer law to work for consumer justice and economic security for low-income and other disadvantaged people through policy analysis,

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief.

training, advocacy, and publications. NCLC publishes a series of treatises on consumer law, including a treatise on mortgage lending that addresses National Bank Act preemption.

Public Justice is a national public interest advocacy organization that specializes in precedent-setting and socially significant civil litigation and is dedicated to preserving access to the civil justice system. Public Justice has a long history of fighting federal preemption where it interferes with the ability of consumers to hold corporations accountable for violations of state consumer protection laws.

SUMMARY OF ARGUMENT

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1044, 124 Stat. 1376, 2015 (2010) (codified at 12 U.S.C. § 25b(b)(1)(B)), Congress codified the standard for National Bank Act preemption set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), providing that unless a state consumer financial law has a discriminatory effect on national banks or is preempted by a different federal law, it is preempted only if, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank," it "prevents or significantly interferes with the exercise by the national bank of its powers." Both the statutory text and the background of Congress's enactment of the Dodd-Frank Act demonstrate that Congress intended to codify a narrower form of preemption than that set forth in sweeping preemption regulations issued by the Office of the Comptroller of the Currency (OCC) in 2004. The decision below, however, adopts an

expansive standard for preemption similar to that in the OCC regulations repudiated by Congress.

State laws play an important role in protecting consumers against fraud, abuse, and confusion in the realm of financial services and in supporting financial stability and health. Consequently, broad approaches to National Bank Act preemption of state laws—like the approach adopted by the court below—harm consumers. This Court should reject the Second Circuit's expansive preemption standard and should reverse.

ARGUMENT

I. The sweeping preemption adopted by the court below is contrary to the Dodd-Frank Act.

A. The Dodd-Frank Act expressly defines and limits preemption of state consumer financial laws.

Congress enacted the Dodd-Frank Act following years in which the OCC asserted increasingly broad preemption of state consumer financial laws. This expansive assertion of preemption harmed the states' ability to respond to abuses in the banking world and played a role in the subprime mortgage crisis in the late 2000s. Congress responded by limiting preemption of state consumer financial laws, demonstrating disapproval of the OCC's sweeping interpretation of the scope of National Bank Act preemption.

1. In the United States, some banks are chartered by the federal government and others by states. The National Bank Act grants national banks (those chartered by the federal government) certain

enumerated powers, along with "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). At the same time, national banks are generally "subject to the laws of the State" in which they operate. *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869). As this Court explained in *Barnett Bank*, the National Bank Act does not "deprive States of the power to regulate national banks, where … doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33.

In the years following *Barnett Bank*, however, the OCC issued interpretive letters and regulations purporting to vastly expand the scope of preemption under the National Bank Act. Most notably, in 2004, the OCC issued preemption regulations that stated a much broader standard for preemption than *Barnett Bank*'s "prevent[s] or significantly interfere[s]" standard, 517 U.S. at 33, extending to all "state laws that obstruct, impair, or condition a national bank's ability to fully exercise" its federally authorized powers in four broad areas: real estate lending, 12 C.F.R. § 34.4(a) (2005), other lending, *id.* § 7.4008(d)(1), deposit taking, *id.* § 7.4007(b)(1), and other activities authorized under federal law, *id.* § 7.4009(b). The OCC's regulations omitted *Barnett Bank*'s specification that the state law must *significantly* obstruct a national bank's exercise of its powers to be preempted. Moreover, the OCC's formulation "used the terms 'impair' and 'condition' rather than 'interfere'" and "insisted that banks be able to 'fully' exercise" their federal powers. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1192 n.4 (9th Cir. 2018).

Underscoring the breadth of the OCC's attempt to preempt state law, the 2004 regulations enumerated categories of state law that, in the agency's view, did not apply to national banks. The regulation on real estate lending, for example, listed fourteen wide-ranging categories of laws that the regulation stated national banks did not need to follow, including laws related to licensing, terms of credit, escrow accounts, security property, and advertising and disclosure. 12 C.F.R. § 34.4(a)(1)–(14) (2005). The preamble to the final rule that enacted the regulations stated that these fourteen categories were "non-exhaustive." OCC, Final Rule, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1905 (Jan. 13, 2004) (hereinafter "2004 Rule").

In addition, the regulations listed categories of laws, such as those concerning contracts, criminal law, and zoning, that the regulations stated were not inconsistent with national banks' powers and would apply to those banks "to the extent that they only incidentally affect" the banks' exercise of their powers. 12 C.F.R. § 34.4(b) (2005). In discussing real-estate lending, the OCC explained that, "[i]n general, these would be laws that do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power." 2004 Rule, 69 Fed. Reg. at 1912.

In the 2004 Rule, the OCC declined to declare that its regulations "'occupy the field' of national banks' real estate lending," stating that "the effect of labeling of this nature is largely immaterial." 2004 Rule, 69 Fed. Reg. at 1911. Given the breadth of the OCC's regulations, however, the OCC was effectively seeking

to occupy the field by preempting all laws that affect national banks' exercise of their powers in anything more than an "incidental[]" way. 12 C.F.R. § 34.4(b) (2005). Indeed, the OCC described its regulations as being "substantially identical to the preemption regulations of the [Office of Thrift Supervision (OTS)] that have been applicable to Federal thrifts for a number of years"—regulations that "state explicitly that Federal law occupies the field of real estate lending." 2004 Rule, 69 Fed. Reg. at 1905, 1913; *see* 12 C.F.R. § 560.2(a) (2005) ("OTS hereby occupies the entire field of lending regulation for federal savings associations.").

2. The expansion of OCC preemption was "the product of a symbiotic relationship" between the OCC and national banks.[2] In the late 1990s and early 2000s, the majority of states passed laws to address predatory lending in the mortgage lending context.[3] "[P]reemption gave the OCC," which is almost entirely

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[2] *The Causes and Current State of the Financial Crisis: Hearing Before the Fin. Crisis Inquiry Comm'n* (2010) (testimony of Lisa Madigan, Illinois Attorney General, at 9) (hereinafter "Madigan Testimony"), https://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0114-Madigan.pdf.

[3] *See Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve: Hearing Before the Subcomm. on Domestic Monetary Policy & Tech. of the H. Comm. on Fin. Servs.*, 111th Cong. 165 (2009) (prepared statement of Professor Patricia A. McCoy) (hereinafter "McCoy Testimony"), https://www.govinfo.gov/content/pkg/CHRG-111hhrg53240/pdf/CHRG-111hhrg53240.pdf; Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* 96 (2011) (hereinafter "FCIC Report"), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

funded by national bank fees, "a powerful extra lure to entice lenders to [its] charter[], in the form of relief from state anti-predatory lending laws."[4] Indeed, the Comptroller of the Currency expressly "offer[ed] preemption as an inducement to use a national bank charter."[5] This inducement proved successful. While the growth in total assets supervised by the states and the OCC largely tracked each other until 2004, when the OCC issued its broad preemption regulations, the assets supervised by the OCC rose that year, while the assets supervised by states dropped.[6] In the years immediately following the OCC's promulgation of its regulations, JPMorgan Chase, HSBC, and the Bank of Montreal (Harris Trust) converted from state to national charters,[7] moving more than $1 trillion of banking assets to the federally regulated banking system and increasing the OCC's budget by 15 percent.[8] "By attracting more fee-paying lenders, the OCC generated more revenues for [its] operating budget. In exchange, the growing number of lenders under the OCC's supervision had implicit authorization to expand their subprime offerings without fear of state prosecution."[9]

In 2006, at the height of the risky lending of the 2000s, national banks, federal thrifts, and their operating subsidies made over $700 billion in the

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[4] Kathleen C. Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps* 159 (Oxford Univ. Press 2011).

[5] FCIC Report, supra note 3, at 112.

[6] *See* Engel & McCoy, supra note 4, at 161.

[7] *See id*.

[8] *See* FCIC Report, supra note 3, at 112.

[9] Madigan Testimony, supra note 2, at 9–10.

riskiest types of mortgage loans.[10] Because of the broad preemption asserted by the OCC and OTS, borrowers who received loans from such institutions could not sue their lenders for violating state anti-predatory lending laws, and state officials could not enforce those laws against the lenders.[11] Federal laws and regulations did not fill the void left by the preemption of state consumer protection laws.[12] As the Senate Banking Committee later explained, "federal regulators failed to use their authority to deal with mortgage and other consumer abuses in a timely way, and the OCC and the OTS actively created an environment where abusive mortgage lending could flourish without State controls." S. Rep. No. 111-176, at 17 (2010).

3. The collapse of mortgage-lending standards and the rise of risky loans in the 2000s played a significant role in the financial crisis that came to the fore in 2008.[13] In response to the financial crisis, Congress

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[10] *See* Nat'l Consumer Law Ctr., *Preemption and Regulatory Reform: Restore the States' Traditional Role as "First Responder"* 13 (Sept. 2009), http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

[11] *See* Engel & McCoy, supra note 4, at 162; FCIC Report, supra note 3, at xxiii.

[12] *See* McCoy Testimony, supra note 3, at 163–175; Nat'l Consumer Law Ctr., supra note 10, at 16–19; *Creating a Consumer Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. 82 (2009) (prepared statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America), https://www.govinfo.gov/content/pkg/CHRG-111shrg54789/pdf/CHRG-111shrg54789.pdf.

[13] *See* FCIC Report, supra note 3, at xxiii; S. Rep. 111-76, at 11 ("Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms[.]").

passed the Dodd-Frank Act to, among other things, "promote the financial stability of the United States" and "protect consumers from abusive financial services practices." Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376. The Act includes a section clarifying "state law preemption standards for national banks and subsidiaries" that makes clear that Congress intended to rein in the OCC's broad preemption of state consumer financial laws. *Id.* § 1044, 124 Stat. at 2014–2017 (codified at 12 U.S.C. § 25b).

First, the Dodd-Frank Act specifies that the National Bank Act "does not occupy the field in any area of State law." 12 U.S.C. § 25b(b)(4). Congress thus made clear that a meaningful number of state consumer financial laws survive National Bank Act preemption.

Second, the Dodd-Frank Act provides that, unless a state consumer financial law would have a discriminatory effect on national banks or is preempted by a different federal law, the state law is preempted only if, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). The statute thus establishes that the standard for whether a state consumer financial law is preempted is the standard set forth by this Court in *Barnett Bank*—whether the state law "prevent[s] or significantly interfere[s]" with the national bank's exercise of its powers, 517 U.S. at

33—not whether the law "obstruct[s], impair[s], or condition[s] a national bank's ability to fully exercise its Federally authorized" powers, 12 C.F.R. § 34.4(a) (2005). *See* S. Rep. No. 111-176, at 175 (explaining that the "standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett* …, undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004"); H.R. Conf. Rep. No. 111-517, at 875 (2010) (stating that the bill "revises the standard the OCC will use to preempt state consumer preemption laws").

Third, the statute's preemption provision specifies that OCC preemption determinations must be made "on a case-by-case basis." 12 U.S.C. § 25b(b)(1)(B). Congress thus made clear that the OCC cannot properly declare that sweeping categories of state law are preempted, as it did in the 2004 regulations. Instead, the OCC must conduct an individualized analysis that considers "the impact of a *particular* State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms." *Id.* § 25b(b)(3)(A) (emphasis added) (defining "case-by-case basis"). And Congress included a safeguard to ensure that the OCC does not preempt broad categories of laws by declaring them "substantively equivalent" to laws of other states: The Act provides that, in determining "that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting," the OCC must "consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination." *Id.* § 25b(b)(3)(B).

Fourth, underscoring the factual nature of the inquiry into whether a state law prevents or significantly interferes with national banks' exercise of their powers, the Dodd-Frank Act provides that an OCC regulation or order preempts a state consumer financial law only if "substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank." *Id.* § 25b(c). Congress thus established that, when considering a state law on a case-by-case basis, the OCC cannot simply declare that the state law prevents or significantly interferes with a national bank's exercise of its powers; it must have actual, substantial evidence that the specific law will cause such interference. And even when the OCC has considered a specific state law on a case-by-case basis and has substantial evidence that the state law significantly interferes with a national bank's exercise of its powers, it cannot maintain its preemption determination indefinitely. Instead, it must conduct a review, through notice and comment, of each preemption determination within five years after prescribing or issuing that determination and at least once every five years thereafter. *Id.* § 25b(d)(1).

Finally, Congress provided that courts reviewing preemption determinations made by the OCC "shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." *Id.* § 25b(b)(5)(A). That is, even after placing all the other

restrictions on the OCC's preemption determinations, Congress specified that the OCC's preemption determinations should receive little, if any, deference.

4. Despite Congress's clear intention to codify a narrower form of preemption than that set forth in the OCC's 2004 regulations, the OCC, after enactment of the Dodd-Frank Act, maintained the 2004 regulations with only minor revisions. *See* OCC, Final Rule, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43549 (July 21, 2011). Most notably, although the OCC removed the "obstruct, impair, or condition" language from its regulations, it refused to adopt the "prevents or significantly interferes" standard for preemption that the Dodd-Frank Act expressly stated should apply. *See* 12 U.S.C. § 25b(b)(1)(B). Instead, noting that the Dodd-Frank Act provision referring to the "prevents or significantly interferes" standard begins with the phrase "in accordance with the legal standard for preemption" in *Barnett Bank*, *id.*, which involved conflict preemption, the OCC stated that the relevant "analysis should be a conflict preemption legal standard" not tied to the specific "prevents or significantly interferes" formulation used in *Barnett Bank*. 76 Fed. Reg. at 43555.

Moreover, despite the Dodd-Frank Act's requirement that OCC preemption determinations be made "on a case-by-case basis," 12 U.S.C. § 25b(b)(1)(B), the OCC maintained its lists of preempted categories of state laws. In the regulation on real estate lending, for example, it kept the list of 14 different categories of laws which, it stated, national banks do not need to follow.

In contrast to the OCC, which has rejected the preemption standard established by the Dodd-Frank Act, the U.S. Department of the Treasury has recognized its application. In a comment letter on the proposed rule that led to the OCC's 2011 regulations, the General Counsel of the Treasury Department, writing on the Department's behalf, expressed concern that the preemption standard in the regulations was "not centered on the key language of the Dodd-Frank Act's preemption standard, and instead seeks to broaden the standard."[14] The Department of Treasury's letter explained that "Congress intended that a state consumer financial law may be preempted only if the law 'prevents or significantly interferes' with the exercise of a national bank's powers, as those terms are used in the *Barnett* opinion."[15] The "avoidance of the specific standard," the letter explained, "is inconsistent with the plain language of the text and its legislative history."[16]

B. The opinion below adopts a preemption standard similar to that repudiated by Congress.

The Dodd-Frank Act's detailed provisions on preemption impose substantive and procedural limitations on the preemption of state consumer financial laws, demonstrating a disapproval of the OCC's interpretation of the National Bank Act and the agency's expansive preemptive regime. The opinion below, however, adopts a sweeping

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[14] *See* Letter from George W. Madison, General Counsel, Dep't of the Treasury, to John Walsh, Acting Comptroller of the Currency, at 1 (June 27, 2011).

[15] *Id*. at 2.

[16] *Id*.

interpretation of National Bank Act preemption that is similar to that rejected by Congress.

Below, the Second Circuit held that the National Bank Act preempts the application to national banks of a New York state law setting a minimum 2 percent interest rate on mortgage escrow accounts, regardless of whether the law has a significant impact on national banks' exercise of a banking power. According to the Second Circuit, the question in determining whether the National Bank Act preempts a state law is "whether enforcement of the law at issue would exert control over a banking power." Pet. App. 18a. This question, the court stated, does not depend on "whether the degree of [a] state law's impact on national banks would be sufficient to undermine [a banking] power." *Id.* Rather, as long as the state law purports to exert control over a national bank's exercise of its powers, the state law is preempted, regardless of the size of its effect on national banks. *Id.* at 17a.

Applying that standard to the New York mortgage escrow interest law, the court held that "[b]y requiring a bank to pay its customers in order to exercise a banking power granted by the federal government"—the power to create and fund escrow accounts—"the law would exert control over banks' exercise of that power." *Id.* at 23a. The court stated that the "issue is not whether this particular rate of 2% is so high that it undermines the use of such accounts, or even if it substantially impacts national banks' competitiveness." *Id.* at 23a–24a. Because it determined that the state law exerted control over banks' exercise of a federally granted banking power, the court held that the law was preempted.

The Second Circuit's approach to preemption is similar in both standard and scope to the OCC approach repudiated by Congress in the Dodd-Frank Act. To begin with, what the Second Circuit means by "exerts control" seems to be that the state law conditions the exercise of the power on complying with the state law: The Second Circuit held that the New York mortgage escrow interest law exerted control over national banks' power to create and fund escrow accounts because it "requir[ed] a bank to pay its customers in order to exercise" that power, *id.* at 23a—that is, because it conditioned banks' exercise of that power on compliance with the state law requiring banks to pay interest. In the Dodd-Frank Act, however, Congress chose to codify the "prevents or significantly interferes" standard stated by the Court in *Barnett Bank*, not the "obstruct[s], impair[s], or condition[s]" standard from the OCC's 2004 regulations. The Second Circuit's application of a standard that preempts state consumer financial laws whenever the exercise of national banks' powers is conditioned on compliance with the state law is contrary to both the text of the statute and congressional intent.

The Second Circuit dealt with the "prevents or significantly interferes" standard by effectively declaring it irrelevant. According to the Second Circuit, because *Barnett Bank* stated that it was applying "ordinary legal principles of pre-emption," 517 U.S. at 37, and because the Dodd-Frank Act provision on the standard for preemption of state consumer financial laws references the "legal standard for preemption" in *Barnett Bank*, 12 U.S.C. § 25b(b)(1)(B), Congress did not intend for courts to focus on *Barnett Bank*'s specific standard of whether

the state law "prevents or significantly interferes" with a national bank's powers. Pet. App. 25a–27a. In addition, the court stated that even if it did analyze the "prevents or significantly interferes" language, it would reach the same conclusion because significant can mean "meaningful" or "important" in addition to large in amount. *Id.* at 27a.

The "prevents or significantly interferes" standard in the Dodd-Frank Act, however, reflects an intentional choice by Congress. The drafting history shows, for example, that the Senate passed a version of the bill that referred to the "legal standard of the decision" in *Barnett Bank*, without identifying any particular language from that case. *See* H.R. 4173 (Engrossed Amendment Senate), 111th Cong. 1334 (May 20, 2010). In the final version of the bill, Congress added the "prevents or significantly interferes" language, 12 U.S.C. § 25b(b)(1)(B)—making clear that it was intending to adopt that specific standard and confirming that that standard was the "legal standard for preemption" in *Barnett Bank*, *id.* Congress's decision to codify a specific standard for preemption is meaningful and should have been binding on the court below. By interpreting *Barnett Bank* and the Dodd-Frank Act *not* to require application of a standard that looks at whether the state law prevents or poses a substantial obstacle to national banks' exercise of their powers, the decision below thwarts Congress's considered decision.

In addition to adopting a standard similar to that in the OCC's 2004 regulations, the Second Circuit's approach to preemption is similar to those regulations in scope. Like the OCC regulations, the Second Circuit's preemption standard preempts most, if not

all, state consumer financial laws. The Dodd-Frank Act defines a state consumer financial law as a state law that does not "discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). If all state laws that "requir[ed] a bank" to do something "in order to exercise a banking power granted by the federal government" were deemed to "exert control" over the bank's exercise of that power and therefore to be preempted, Pet. App. 23a, it is difficult to conceive of *any* state consumer financial law that would not be preempted. The Dodd-Frank Act's numerous provisions establishing procedural and substantive limitations on the scope of preemption of state consumer financial laws would not make sense, however, if all such laws were preempted.

* * *

In codifying *Barnett Bank*'s "prevents or significantly interferes" standard and enacting safeguards against categorical preemption, Congress clearly meant to cut back on the scope of preemption of state consumer financial laws embodied in the OCC's 2004 regulations. The Second Circuit's decision, however, treats the careful provisions enacted by Congress as meaningless. This Court should reject the Second Circuit's analysis and hold, consistent with *Barnett Bank*, the Dodd-Frank Act, and congressional intent, that the National Bank Act preempts a state consumer financial law that does not have a discriminatory effect on national banks only if

the state law prevents or has a significant effect on a national bank's exercise of its federal powers.

II. Broad preemption of state consumer financial laws harms consumers.

State laws play an important role in protecting consumers from abuses in the financial services arena. States have a variety of different types of laws that provide protections to consumers: common law, such as duties governing contracts, property, and fraudulent behavior; generally applicable statutory laws, such as those prohibiting deceptive and abusive acts and practices; and statutory laws aimed at addressing specific issues, such as laws addressing overdraft fees, payday loans, or mortgage lending. These state laws help protect consumers from unaffordable or predatory products and promote asset building, financial stability, and financial health as consumers engage in the financial transactions necessary for them to live their lives in the modern world.

Importantly, states are often able to respond to problems that arise sooner than the federal government. As the Senate Banking Committee has explained, states "are much closer to abuses and are able to move more quickly when necessary to address them." S. Rep. 111-176, at 174. For example, foreclosure rescue scams started becoming a big problem around 2004. Many states passed laws addressing such scams between 2004 and 2009, but on the federal level, the Federal Trade Commission did not promulgate a rule addressing the problem until

2010.[17] Allowing states to act as new problems arise provides protection to consumers in the time before the federal government acts and "has the potential to stop [the problems] before they become a widespread, national problem."[18]

Furthermore, "State initiatives can be an important signal to Congress and Federal regulators of the need for Federal Action." S. Rep. 111-176, at 174. State law can then serve as a model for federal action. Broad preemption "undermine[s] creative and effective state efforts," denying the federal government information about which solutions are most effective.[19]

The state anti-predatory lending laws adopted in the decade preceding the 2008 financial crisis provide a good example of how broad preemption of state consumer protection laws deprives consumers of important protections and can harm both consumers and the economy. Those laws contained provisions such as prohibitions on lending to borrowers without due regard for their ability to repay, requirements for loan counseling for borrowers, and restrictions on prepayment penalties and balloon payments.[20] The

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[17] *See* Nat'l Consumer Law Ctr., supra note 10, at 18; FTC, Final Rule, *Mortgage Assistance Relief Services*, 75 Fed. Reg. 75092 (Dec. 1, 2010).

[18] Nat'l Consumer Law Ctr., supra note 10, at 19.

[19] *Review of the National Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. 109 (2004) (prepared statement of Roy Cooper, North Carolina Attorney General), https://www.govinfo.gov/content/pkg/CHRG-108shrg24076/pdf/CHRG-108shrg24076.pdf.

[20] *See* Giang Ho & Anthony Pennington-Cross, *The Impact of Local Predatory Lending Laws*, Federal Reserve Bank of St.

(footnote continued)

laws were associated with a reduction in loans with certain risky features and a reduction in default rates.[21] Preemption, however, deprived borrowers with loans from national banks of "protections that would have encouraged better underwriting and likely reduced the level of foreclosures,"[22] with consequences for both consumers and the economy. In 2006 and 2007, federal thrifts and national banks had the worst default rates among depository institutions for one-to four-family residential mortgages; state banks had the lowest default rates.[23] Loans originated by national banks in states with anti-predatory lending laws after the OCC's preemption regulations were promulgated were more likely to default than those originated beforehand.[24] These defaults harmed borrowers and played a role in the financial crisis.

The New York mortgage escrow interest law at issue here is another important consumer protection. Borrowers who have escrow accounts pay an additional amount on their mortgage each month, and the lender uses that money to pay obligations such as property tax and insurance. "During the period

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Louis Working Paper No. 2005-049 (2005), Appendix 1, http://research.stlouisfed.org/wp/2005/2005-049.pdf.

[21] Alan White et al., *The Impact of State Anti-Predatory Lending Laws on the Foreclosure Crisis*, 21 Cornell J.L. & Pub. Pol'y 247, 249 (2011).

[22] *Id*.

[23] Engel & McCoy, supra note 4, at 163.

[24] Lei Ding et al., Univ. of N.C. Ctr. for Cmty. Capital, *The Preemption Effect: The Impact of Federal Preemption of State Anti-Predatory Lending Laws on the Foreclosure Crisis* ii (2010), https://ourfinancialsecurity.org/wp-content/uploads/2010/03/UNC-CCC-Preemption-Effect-Impact-of-Federal-Preemption-on-Foreclosure-Crisis.pdf.

between when monthly deposits are required and taxes and insurance premiums come due, money belonging to the borrower simply accumulates in escrow." Pet. App. 74a. The mortgage escrow interest law helps ensure that the earnings on the borrower's money support the borrower's financial stability and are not taken by the lender to enrich itself. Instead, interest accrued on the borrower's money goes to the borrower. Under the Second Circuit's opinion, however, national banks will be able to deprive consumers of interest on their own money.

In addition to harming consumers who buy products and services from national banks, preemption can lead to a weakening of consumer protections for consumers who buy products and services from state banks and nonbank entities. Preemption of the application of state laws to national banks creates unequal levels of protection for consumers who buy the same banking product or service, depending on the entity from which they buy it. This disparate level of protection has the effect of encouraging states to weaken the rules that apply to state-regulated entities because they want to give them "competitive parity with their federally chartered counterparts."[25] Indeed, in this case, the Second Circuit noted that "New York began to exempt state-chartered banks from the 2% interest requirement and instead require them to pay only the lesser of 2% and the six-month yield on U.S. treasuries" to "help state banks remain competitive" with national banks. Pet. App. 24a. The disparate treatment of different entities may also dissuade states from regulating because they think that it will

[25] Engel & McCoy, supra note 4, at 162.

be fruitless if they cannot reach a significant number of entities participating in the problematic behavior.[26]

In short, when courts and agencies adopt broad approaches to National Bank Act preemption of state consumer financial laws, consumers are deprived of important protections against dangerous practices and protections that support financial stability in an area of life that can have large effects on their futures. This Court should reject the broad approach to National Bank Act preemption adopted by the Second Circuit below.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

ADINA H. ROSENBAUM
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Amici Curiae

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[26] *See* Nat'l Consumer Law Ctr., supra note 10, at 19.