No. 19-15899

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN MCSHANNOCK, *ET AL.*,

Plaintiffs-Appellees,

v.

JP MORGAN CHASE BANK N.A.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:18-cv-01873-EMC
Hon. Edward M. Chen, U.S.D.J.

**BRIEF OF AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in preserving remedies available to consumers under state laws against unwarranted claims of preemption by federal law. Such claims are frequently based on erroneous assertions that state-law consumer protections are contrary either to the express terms or to the purposes and objectives of federal statutes and regulations. Public Citizen believes that the argument for preemption in this case lacks a fair grounding in the statute and regulation at issue. It therefore submits this brief to assist the Court in considering, in light of the Supreme Court's most recent relevant decisions, whether the defendant-appellant has carried its burden of

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

showing that federal law displaces the unambiguous state-law requirements that defendant-appellant is alleged to have violated.

ARGUMENT

The issue in this case is whether JP Morgan Chase Bank (Chase), a national bank, must comply with a California statute requiring it to pay interest on escrow accounts for mortgages it acquired from a defunct federal savings association. Chase itself is not, and never was, a federal savings association. And binding precedent of this Court holds that the National Bank Act does not excuse national banks from compliance with California's escrow-account interest requirement. *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018). Chase's argument here, however, rests entirely on the counterintuitive proposition that a now-superseded federal regulation preempting application of state lending laws to federal savings and loan associations excuses it from paying interest on the escrow accounts at issue in this case.

Specifically, Chase relies on former 12 C.F.R. § 560.2 (repeal effective Oct. 11, 2018), a regulation promulgated by the Office of Thrift Supervision (OTS), which was the federal agency that regulated savings associations until it was abolished pursuant to the Dodd-Frank Act in

2011, *see* 12 U.S.C. § 5413. Section 560.2 was an exercise of OTS's authority under the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1464(a) (2010), to issue regulations concerning the operation and regulation of federal savings associations. The regulation stated that OTS occupied the field of regulation of lending by federal savings associations, and it purported to preempt state laws imposing regulatory requirements on lending operations of savings associations. According to Chase, OTS's former preemption regulation applies to its conduct in administering mortgages it acquired when, at the urging of federal regulators during the financial crisis of 2008, it purchased assets of Washington Mutual Bank, a failed savings and loan.

Chase's argument would extend the preemptive effect of the regulation beyond the field it purported to preempt, contradicting fundamental principles of preemption law and the terms of the statute and regulation on which Chase relies. Contrary to Chase's assertion, these deficiencies cannot be overcome by invocation of deference to OTS's construction of its regulation under *Auer v. Robbins*, 519 U.S. 452 (1997). The agency constructions to which Chase points the Court cannot satisfy

the limitations on *Auer* deference as clarified in the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

I. This case involves consideration of the scope of preemption under a regulation that no longer exists.

The regulation at issue, 12 C.F.R. § 560.2, together with other former OTS regulations affecting savings associations, was removed from the Code of Federal Regulations by the Department of the Treasury effective October 11, 2018. *See* 82 Fed. Reg. 47083 (Oct. 11, 2017). The Department explained that the regulation was "inoperative" to the extent that it related to administrative functions of the OTS and "superseded" to the extent that it had been replaced by OTS's successor agencies when they "republished … in their own chapters of title 12" the OTS regulations that they would enforce. *Id*. at 47084.

On August 9, 2011, the Office of the Comptroller of the Currency (OCC), the successor to OTS with respect to regulation of savings associations under HOLA, had republished the OTS lending regulations that it would enforce. *See* 76 Fed. Reg. 48949. OCC's counterpart to 12 C.F.R. § 560.2 sets forth a far more limited preemptive scope than the earlier OTS regulation: The OCC regulation provides that "[s]tate law applies to the lending activities of Federal savings associations and their

subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries." 12 C.F.R. § 160.2. That regulation reflects Dodd-Frank's clarification that HOLA "does not occupy the field" of lending regulation for savings associations, 12 U.S.C. § 1465(b), and that the preemptive effect of HOLA must be determined "in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law," 12 U.S.C. § 1465(a). Under that standard, of course, California's requirement of interest on escrow accounts would not be preempted as applied to Chase's administration of the mortgages at issue here. Regardless of whether the issue were properly viewed as one of National Bank Act preemption or HOLA preemption, *Lusnak*'s holding that the "laws and legal standards applicable to national banks," *id.*, do not preempt California's escrow-account interest requirement would control.

II. The requirement that national banks pay interest on escrow accounts for mortgages acquired from savings associations falls outside the field formerly preempted by HOLA's implementing regulations.

A. Although the OTS's preemption regulation is no longer in effect, the district court concluded, and the parties seem to agree, that OTS's defunct regulation remains potentially applicable here because of

another Dodd-Frank Act provision, 12 U.S.C. § 5553, entitled "Preservation of existing contracts." Section 5553 provides that "[t]his title, and regulations, orders, guidance, and interpretations prescribed, issued, or established by the [Consumer Financial Protection] Bureau, shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the … Director of the Office of Thrift Supervision regarding the applicability of State law under Federal banking law to any contract entered into on or before July 21, 2010, by … Federal savings associations … that [were] regulated and supervised by … the Director of the Office of Thrift Supervision." The district court concluded that "[t]his provision on its face preserves the application of the original HOLA preemption scheme established by OTS at 12 C.F.R. § 560.2 to contracts, such as the mortgage agreement between Plaintiffs and Chase here, entered into before July 21, 2010." ER10–11 n.3.

In the view of amicus Public Citizen, that reading of the Dodd-Frank provision is incorrect. Unlike in the cases Chase cites, *see* Chase Br. 9, application of California's interest requirement to the escrow accounts here would not implicate preservation of any existing contract

entered into prior to Dodd-Frank's enactment or the lawfulness of any pre-Dodd-Frank conduct, because the mortgages here provide for payment of interest if required by applicable law. *See* Resp. Br. 11. The mortgages' incorporation of whatever law is applicable obviates the possibility that consideration of the *current* HOLA preemption standard to determine whether California law is applicable to Chase would have the retroactive effect § 5553 was intended to avoid. Put another way, this case concerns the application of law to Chase's ongoing conduct, not the alteration of contract provisions. Nonetheless, because the parties' arguments assume the continuing relevance of OTS's former regulation, this brief will address the issue on the assumption that the outcome turns on the scope of preemption under former 12 C.F.R. § 560.2.

B. The existence and scope of preemption—the displacement of state law by federal law that, under the Supremacy Clause, is "the supreme Law of the Land, … anything in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const., art. VI, cl. 2—is a matter of congressional intent as expressed in statutory text. "Whatever the category of preemption asserted, 'the purpose of Congress is the ultimate touchstone' in determining whether federal law preempts state

law." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1912 (2019) (Ginsburg, J., concurring in the judgment) (quoting *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016)). For this reason, "any '[e]vidence of pre-emptive purpose,' whether express or implied, must therefore be 'sought in the text and structure of the statute at issue.'" *Id.* at 1907 (lead opinion of Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U. S. 658, 664 (1993)).

Accordingly, faced with a claim that federal law preempts an entire field of regulation, a court must examine the relevant statute to determine whether Congress intended to preempt state law and, if so, the scope of the field Congress intended to preempt. Having done so, the court may "find[] pre-emption only where detailed examination convinces [it] that a matter falls within the pre-empted field." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015). Likewise, a litigant claiming preemption based on conflict between state law and the requirements, purposes, or objectives of federal law "must point specifically to 'a constitutional text or a federal statute' that … conflicts with state law." *Va. Uranium*, 139 S. Ct. at 1901 (Gorsuch, J.).

Where, as here, the question is whether a federal regulation has preemptive effect, a court must first consider whether the agency has authority to issue regulations that displace state law. As the Supreme Court has emphasized, only "agency actions taken pursuant to … congressionally delegated authority" can preempt state law. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019). "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. FERC*, 535 U. S. 1, 18 (2002) (quoting *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986)).

Moreover, finding that Congress conferred *some* authority on an agency to preempt state law is not enough: The authority must be sufficient to support the action taken by the agency. That is, the *extent* of any preemption resulting from an agency's action cannot exceed the scope of preemptive authority conferred by statute. "[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Thus, determining the preemptive effect of an agency regulation requires a court "to examine the nature and scope of the authority

granted by Congress to the agency." *Id.* The agency's action can have no preemptive effect outside the limits of the agency's statutory jurisdiction, lest the agency be given "power to override Congress." *Id.* at 375.

Of course, even where Congress has conferred preemptive authority on an agency, preemption does not follow unless the agency has actually exercised that authority. *See Merck*, 139 S. Ct. at 1679. Thus, a court must not only determine the extent of the agency's statutory authority, but also make a "legal determination about the meaning and effect of an agency decision" to determine its preemptive effect, if any. *Id.* at 1680.

Here, Chase's claim of preemption rests on a regulation promulgated by OTS based on authority delegated by HOLA. Until amended in 2010, HOLA delegated to OTS the authority to "provide for the examination, safe and sound operation, and regulation of savings associations." 12 U.S.C. § 1463(a)(1) (2010). "In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services," HOLA empowered OTS to prescribe regulations "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations." *Id.* § 1464(a). OTS invoked this authority in promulgating

the preemption regulation at issue in this case, former 12 C.F.R. § 560.2, which "occupie[d] the entire field of lending regulation for federal savings associations." 61 Fed. Reg. 50951, 50972 (1996).

Without question, HOLA empowered OTS to issue regulations with preemptive effect within the sphere of authority delegated to the agency. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153–54 (1982). Thus, this Court held in *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (2008), that § 560.2 was a proper exercise of OTS's "broad authority to issue regulations governing thrifts" under HOLA. *Id.* at 1004–05; *see also Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963 (9th Cir. 2017) ("HOLA empowered [OTS] to authorize the creation of federal savings and loan associations, to regulate them, and, by its regulations, to preempt conflicting state law").

As this Court also recognized, however, "HOLA [did] not preempt all state laws." *Id.* at 971. OTS's regulatory authority extended only to the "organization, incorporation, examination, operation, and regulation" of savings associations, 12 U.S.C. § 1464(a)(1) (2010), not to the operation and regulation of national banks and other financial institutions. Because the preemptive effect of its regulations was limited by the scope

of its authority and could operate only with respect to matters within its jurisdiction, *see La. Pub. Serv. Comm'n*, 476 U.S. at 374–75, OTS's regulations could preempt state laws only with respect to the operation and regulation of savings associations.

The terms of the OTS regulation adhered to these limits on the agency's authority. The regulation began by invoking OTS's authority to "promulgate regulations that preempt state laws affecting the operations of federal savings associations." 12 C.F.R. § 560.2(a) (2018). And it defined the field it intended to occupy to the exclusion of state law as "lending regulation for federal savings associations." *Id.* Thus, section 560.2(a) provided that "federal savings associations may extend credit as authorized under federal law, … without regard to state laws purporting to regulate or otherwise affect *their* credit activities …." *Id.* (emphasis added). The regulation then listed "[i]llustrative examples" of state laws that were preempted to the extent that they purported to "impose requirements" on savings associations. *Id.* § 560.2(b). Finally, the regulation provided that, even within the otherwise preempted field, certain state laws that "only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the

purposes of paragraph (a) of this section" are not preempted. *Id.* 560.2(c). *See generally Campidoglio*, 870 F.3d at 971–72 (describing structure of preemption inquiry under § 560.2).

The application to a *national bank* of California law requiring mortgage servicers to pay interest on escrow accounts, as permitted by *Lusnak*'s reading of National Bank Act preemption, falls outside the field preempted by § 560.2, regardless of whether the mortgage loan was originated by a federal savings association. Whether a national bank must pay interest on escrow accounts it maintains with respect to mortgages it owns and services is a matter of national bank regulation; it does not implicate the operations of savings associations or the regulation of their activities. Extending the regulation to excuse Chase from paying interest on borrowers' escrow accounts thus would exceed the authority formerly delegated to OTS to regulate operations of savings associations. *See* 12 U.S.C. § 1463(a) (2010); *id.* § 1464(a). Likewise, such a broad reading would go beyond the field of preemption defined by § 560.2(a) itself—"lending regulation for federal savings associations." And it would preempt state laws beyond those targeted by the regulation—namely, laws that regulate or affect savings associations'

"credit activities," *id.*, and that impose "requirements" with respect to such activities, *id.* § 560.2(b).

Recent Supreme Court case law forecloses such an approach to field preemption. As the Supreme Court has instructed, even where federal law defines a field that it occupies to the exclusion of state law, courts must "proceed cautiously" to ensure that state laws outside the field are not preempted. *Oneok*, 135 S. Ct. at 1599. A court must "consider[] the *target* at which the state law *aims* in determining whether that law is pre-empted." *Id.* Where a state law, as applied in a specific case, is aimed at a matter that is "firmly on the States' side of th[e] dividing line," *id.*, it is not preempted.

Here, the desired application of state law is aimed squarely at the target of conduct by a national bank—a matter outside OTS's former jurisdiction and firmly on the states' side of the dividing line established by former § 560.2. Under such circumstances—where "[n]othing suggests that Congress 'intended to cut back on pre-existing state authority outside the [federal agency's] jurisdiction,'" *Va. Uranium*, 139 S. Ct. at 1913 (Ginsburg, J.)—there can be no field preemption. Courts may not

"extend a federal statute to a sphere Congress … chose to leave alone." *Id*. at 1900 (Gorsuch, J.).

The field-preemption analysis is not affected by the speculative possibility that requiring national banks to pay interest on escrow accounts for mortgages acquired from savings associations that originated the mortgages while the preemption regime established by § 560.2 was in effect might have some indirect and incidental effect on savings associations' operations. Field preemption does not bar states from regulating because of the potential for such remote impacts on the preempted field. "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within [an exclusive federal] domain." *Hughes*, 136 S. Ct. at 1298.

Thus, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659 (1995), the Supreme Court held that federal law preempting the field of regulation of ERISA plans did not preempt a state law requiring hospitals to impose surcharges on certain types of health insurers, even though the law might indirectly affect choices of insurance buyers, including ERISA plans. Such an "indirect economic influence," the Court held, did not impermissibly

"function as a regulation of an ERISA plan itself." *Id.* Rather, where a federal law occupies the field of regulation of a particular subject matter, regulation of something outside that field does not fall within the preempted field merely because it may "have an indirect economic effect on choices made by … buyers" whose choices in turn affect regulated entities. *Id.*

Likewise, here, any potential incremental effect that requiring national banks to pay interest on escrow accounts might have on the secondary market for mortgages originated by savings associations would not function as *regulation of savings associations themselves*, and neither HOLA's authorization nor OTS's regulation extended beyond preemption of that field. Indeed, it would be particularly anomalous to find that such an indirect, incidental effect placed a regulation of the activities of a national bank within the sphere of § 560.2, given that § 560.2 did not require preemption even of state laws that apply *directly* to savings associations if their effects on lending operations were only "incidental." 12 C.F.R. § 560.2(c) (2018).

III. Conflict-preemption principles do not call for preemption here.

Because application of the California law at issue falls outside of the field-preemptive scope of § 560.2, and no other federal law or regulation arguably preempts state law expressly in this situation, the only remaining possible source of preemption is implied conflict preemption. *See Va. Uranium*, 139 S. Ct. at 1911–12 (Ginsburg, J.) (cataloging types of federal preemption). But this case is obviously not one where it is impossible for a regulated entity to comply with opposing federal and state requirements or where federal and state laws otherwise directly contradict one another. *See Merck*, 139 S. Ct. at 1672. Thus, the only possible form of conflict preemption that could apply here is so-called "purposes and objectives pre-emption," *Hillman v. Maretta*, 569 U.S. 483, 490 (2013), under which a state law may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Chase and its amici do not explicitly invoke this form of conflict preemption, which remains controversial to the extent that it invites a "freewheeling inquiry into whether state law undermines supposed federal purposes and objectives." *Hillman*, 569 U.S. at 499 (Thomas, J.,

concurring in the judgment). Their policy arguments for invoking preemption despite the facial inapplicability of OTS's field-preemption regulation, however, are effectively purposes-and-objectives arguments—and singularly unpersuasive ones.

The claim of conflict between HOLA's objectives and application of California's interest-on-escrow-accounts law to national banks that acquire mortgages originated by savings associations is based on the assertion that applying the California law will deny such mortgages a tiny competitive advantage in the secondary market. But Chase and its amici point to nothing in HOLA's text or structure, or that of the former OTS regulations, that suggests congressional intent to confer any such competitive advantage. And statutory text and structure are where such evidence of implied "pre-emptive purpose" must be sought in the first instance. *Va. Uranium*, 139 S. Ct. at 1907 (Gorsuch, J.). HOLA, however, did not even expressly permit savings associations to sell mortgages in the secondary market for almost 50 years after it was enacted. *See* Pub. L. No. 95-630, § 1701, 92 Stat. 3641, 3714 (1978) (amending 12 U.S.C. § 1464(c) to authorize such sales). The statute's eventual amendment to provide savings associations the same ability as other mortgage

originators to participate in the secondary market hardly suggests an objective of giving mortgages originated by savings associations an advantage (from the bank's standpoint) over other mortgages when purchased by an entity, such as a national bank, otherwise required to pay interest on mortgage escrow accounts.

Moreover, the claim that requiring a national bank to treat escrow accounts for mortgages acquired from thrifts the same way that the bank treats all other mortgage escrow accounts will somehow harm the competitive position of savings associations (or even impair the ability of regulators to convince banks to acquire the assets of failing savings associations) rests entirely on speculation. Such "speculative" concerns, the Supreme Court has long held, cannot "support pre-emption." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 720 (1985). Where it is "unclear" whether state laws "might have a meaningful impact" on a matter of federal concern, there can be no implied conflict preemption. *Va. Uranium*, 139 S. Ct. at 1909 (Gorsuch, J.). This Court's conclusion in *Lusnak* that paying interest on mortgage escrow accounts will not "significantly interfere with the exercise of national bank powers," 883 F.3d at 1197, similarly suggests that

requiring national banks to pay interest on escrow accounts for mortgages that they acquire from others will have, at most, negligible spillover impact on the mortgage originators.[2]

Finally, any suggestion that the hypothetical indirect effects on savings associations of requiring banks that purchase loans from them to pay escrow interest are significant enough to require preemption is contradicted by § 560.2 itself. Even *within* its preemptive sphere, that regulation recognized that merely incidental effects on lending by savings associations should not trigger preemption. *See* 12 C.F.R. § 560.2(c) (2018). Holding that regulations outside the scope of the regulation's field preemption are nonetheless subject to conflict preemption merely because of such incidental effects runs directly counter to OTS's recognition in § 560.2(c) that incidental effects of state laws do not conflict with HOLA's purposes and objectives.

[2] Predictions that a ruling against preemption in this case will increase costs to *current* borrowers from savings associations are particularly unfounded given that there is no argument that, for loans originated subsequent to Dodd-Frank's effective date, savings associations have any greater exemption from California's interest-on-escrow requirement than national banks.

IV. Chase's reliance on *Auer* deference disregards the limits on that doctrine set forth in *Kisor v. Wilkie*.

Chase's invocation of deference to an agency's construction of its own regulations under *Auer v. Robbins*, 519 U.S. 452, cannot salvage its position. Chase's call for reflexive deference to an agency's assertions about the meaning of its regulations cannot be squared with the Supreme Court's explanation of the limits of *Auer* deference this year in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Kisor emphasizes that "*Auer* deference is not the answer to every question of interpreting an agency's rules." *Id.* at 2414. First, "the possibility of deference can arise only if a regulation is genuinely ambiguous"—"genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* And a finding of ambiguity is only the starting-point, as "not all reasonable agency constructions of those truly ambiguous rules are entitled to deference." *Id.* Even when a regulation leaves room for interpretation, the agency's reading must be justifiable based on its text, structure and history: "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools," and "fall within the bounds of reasonable interpretation." *Id.* at 2416 (internal quotation marks omitted).

The agency construction's "character and context" must also be worthy of deference. *Id.* The construction must be the agency's authoritative position and reflect the agency's exercise of its "substantive expertise." *Id.* at 2417. And, critically, the agency's construction must not only fall within its area of expertise, but also "must reflect fair and considered judgment to receive *Auer* deference." *Id.* (internal quotation marks omitted).

Here, the agency constructions on which Chase relies fail to meet these criteria. First, the regulation at issue is not genuinely ambiguous: The court can ascertain its meaning based on its own language and the scope of authority conferred on the agency by the underlying statute, and those standard tools of construction fail to support application of the regulation to the operations of a national bank.

Even if the regulation were ambiguous, however, deference would be unwarranted here. Neither of the agency constructions invoked by Chase offers a reasoned explanation of how the regulation's language is consistent with preemption of a requirement that a national bank pay interest on escrow accounts associated with mortgages acquired from a savings association. The 2003 OTS opinion letter Chase cites does not

even address the issue, and the 1985 opinion of the Federal Home Loan Bank Board discusses the question only in a single, conclusory sentence that does not purport to interpret § 560.2—indeed, it could not do so, because the regulation had not yet even been promulgated.

Nor does either interpretation present a "fair and considered" explanation, *Kisor*, 139 S. Ct. at 2417, of how application of an escrow-account interest requirement to mortgages no longer owned by a savings association would constitute "regulation" of the savings association or adversely affect sales of its mortgages on the secondary market. The Board letter says no more than that it is the "opinion" of the Board's general counsel that preemption would exist regardless of the sale of the mortgages by the originating savings association. The 2003 OTS letter contains no analysis whatsoever of the effect of requirements concerning escrow-account interest; it says only that "loan terms should not change" when a mortgage is sold, *see* Chase Br. 26–27—a concern not implicated here, where the terms of the loan provide for payment of interest if required by applicable law and thus continue to apply as written regardless of who holds the loan and whether preemption applies to state laws affecting that entity. *Cf. Lusnak*, 883 F.3d at 1198 (noting that a

similar provision could be read to require payment of interest if required by a non-preempted state law).

In short, Chase's position that these agency constructions are "controlling," Chase Br. 25, reflects the "caricature," disavowed by the Supreme Court in *Kisor*, that *Auer* deference is "reflexive." 139 S. Ct. at 2415. As *Kisor* makes clear, *Auer* requires "courts to perform their reviewing and restraining functions," *id.*, and to pay "careful attention to the nature and context of [an agency] interpretation," *id.* at 2414. Here, appeals to deference cannot overcome the absence of support for preemption in the regulation and the underlying statute.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the district court and remand for further proceedings.

Respectfully submitted,

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October 15, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 4,720, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on October 15, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including representatives of all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson