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.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

AMICUS CURIAE OFFICE OF THE COMPTROLLER OF THE CURRENCY'S BRIEF IN SUPPORT OF DEFENDANT-APPELLANT BANK OF AMERICA, N.A.

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INTRODUCTION

When Congress enacted the National Bank Act[1] over 150 years ago, it "intended to facilitate . . . a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) (quoting Cong. Globe, 38th Cong., 1st Sess. 1451 (1864)). *See Easton v. Iowa*, 188 U.S. 220, 231 (1903) ("It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the [National Bank Act]."); OCC Interpretive Letter No. 872 (Oct. 28, 1999) ("Through the national charter, Congress has established a banking system intended to be both nationwide in scope and uniform in character."); *see also*, *Lacewell v. OCC*, __ F.3d __, 2021 WL 2232109, at *2 (2d Cir. Jun. 3, 2021) (discussing the "dual banking system" and noting that "banks with national banking charters are primarily supervised by federal regulators"). Reflecting this purpose, the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). Similarly, the Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily

[1] 12 U.S.C. § 1 *et seq.*

preempting, contrary state law." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996) ("*Barnett*"). Accordingly, the Office of the Comptroller of the Currency ("OCC" or "Agency") has applied the conflict preemption standard set forth in *Barnett* and issued regulations identifying categories of state law that are preempted, *see* 12 C.F.R. §§ 7.4007(b), 7.4008(d), 34.4(a), and not preempted, *see* 12 C.F.R. §§ 7.4007(c), 7.4008(e), 34.4(b).

The District Court's September 30, 2019 Order, ECF No. 47 ("Order"), upsets these settled legal principles. Federal law empowers national banks like Defendant Bank of America, N.A. ("BOA") to engage in the "business of banking" and to exercise "all such incidental powers" thereto. 12 U.S.C. § 24(Seventh). Congress has granted national banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title…" 12 U.S.C. § 371(a). That express grant of authority is subject only to "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." *Id.* In addition to this express authority, national banks have the implied authority to provide, establish, and service escrow accounts. *See generally* OCC Interpretive Letter No. 1041 (Sept. 28, 2005).

But in concluding that the National Bank Act[2] does not preempt state laws like New York General Obligation Law § 5-601—which requires "mortgage investing" institutions to pay a defined interest rate on customers' mortgage escrow account balances—the District Court's Order represents a significant departure from the OCC's preemption regulations regarding the role of state law in setting forth a national bank's obligation vis-à-vis escrow accounts. More fundamentally, in misapplying the *Barnett* standard and in not applying the OCC's regulation to the facts of these two cases, the District Court has articulated a formulation for determining when a conflict exists between state law and powers granted by the National Bank Act that is at odds with existing law. Because the application of the *Barnett* standard with respect to the National Bank Act "is a matter of foundational consequence to the OCC and to the federal banking system," OCC Amicus Br., *Lusnak v. Bank of Am.*, No. 14-56755, 2018 WL 3702582, at *5 ("OCC Amicus Br."), the OCC respectfully submits this memorandum in support of BOA.

INTERESTS OF AMICUS CURIAE

The OCC is an independent bureau of the U.S. Department of the Treasury charged with administration of the National Bank Act, and oversight of the national banking system. The OCC has comprehensive authority over the

[2] This brief's references to the National Bank Act include 12 U.S.C. § 371, which the OCC also administers.

chartering, supervision, and regulation of virtually every aspect of national banks' operations, including real estate lending and the authority to offer escrow account services. 12 U.S.C. § 371. The OCC is authorized generally to represent itself in litigation. 12 U.S.C. § 93(d).

The Court's Order creates uncertainty regarding national banks' authority to fully exercise real estate lending powers under the National Bank Act; namely, the power to provide, establish, and service escrow accounts for its customers. *See* 12 U.S.C. §§ 24(Seventh) and 371; 12 C.F.R. § 34.4(a)(6). As the agency charged with "primary responsibility for surveillance of 'the business of banking' authorized by § 24(Seventh)," *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995), the OCC has a substantial interest in whether national banks must comply with state laws claiming to place limits on these national bank powers.

The Order also calls into question the applicability and validity of the OCC's interpretation of the National Bank Act and related preemption principles. *See* 12 U.S.C. § 93a (authorizing the OCC "to prescribe rules and regulations to carry out the responsibilities of the office"). Therefore, the OCC has a substantial interest in defending the validity of its regulations and interpretations before this and other courts. *Cf. SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 460 (1940) (recognizing

that a government agency had an "interest in the maintenance of its statutory authority and the performance of its public duties").

ARGUMENT

State law may not significantly burden a national bank's exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the National Bank Act. *Watters*, 550 U.S. at 11. The Supreme Court has "interpret[ed] 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." *Barnett Bank of Marion Cty., N.A. v. Nelson,* 517 U.S. 25, 32 (1996). *See also, Franklin Nat. Bank of Franklin Square v. New York,* 347 U.S. 373, 375–379 (1954). States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with a national bank's exercise of its powers. When state prescriptions do prevent or significantly interfere with the exercise of such powers, enumerated or incidental, under the National Bank Act, the state's regulations must give way. *Barnett*, 517 U.S. at 32–34 (federal law permitting national banks to sell insurance in small towns preempted state statute prohibiting banks from selling most types of insurance); *Franklin Nat. Bank,* 347 U.S. at 377–379 (local restrictions preempted because they burdened exercise of national banks' incidental power to advertise). As is set forth more

fully below, the District Court's order erred in its analysis of the requirements for preemption under the National Bank Act and in its review of the OCC's regulation concerning the applicability of state laws mandating the payment of interest on escrow accounts in the context of real estate lending.

I. THE DISTRICT COURT'S ORDER ERRED IN ITS APPLICATION OF *BARNETT* AND IN FAILING TO APPLY THE OCC'S REGULATION

Whether the National Bank Act preempts state laws like Section 5-601 presents "a question of first impression everywhere other than in the Ninth Circuit." Order at 18. The preemption question turns on a pure question of law: whether the National Bank Act preempts Section 5-601. *See Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311 (2d Cir. 2005) (noting that National Bank Act preemption cases "solely involve[] legal issues"). But the Court's ensuing conclusion that state laws like Section 5-601 are not preempted unless they "practical[ly] abrogat[e]" or "nullif[y]" a national bank's exercise of a federal banking power, Order at 36-37, stands in stark contrast to the preemption standard set forth in *Barnett* and the OCC's—as well as many other federal courts'—interpretation of that standard. *See* OCC Amicus Br., 2018 WL 3702582, at *11-13 (collecting cases).

A. The District Court Erred in Its Application of Barnett

In *Barnett*, the Supreme Court instructed lower courts to resolve preemption issues by applying a multifaceted evaluative approach that recognizes the different means by which state restrictions may conflict with national bank powers. *See Barnett*, 517 U.S. at 33-34; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that no "infallible constitutional test or exclusive constitutional yardstick" for conflict preemption exists). Although the District Court recognized *Barnett*'s "different linguistic formulations," it fatally departed from the OCC's and other courts' views by fashioning these formulations into what is for all practical purposes a new heightened standard. Independence from state direction and control reflects the essential character of a national bank charter: it shields national banks from local laws that could undermine the powers granted to them by federal law.[3] Properly applying the *Barnett* conflict preemption standard is an essential element in allowing national banks to operate as Congress intended; setting a different standard for determining when a state law does or does not significantly interfere with powers granted to a national bank by federal statute will frustrate the bank's ability to operate free from the "hazard of unfriendly legislation by the States." *See Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873).[4]

A conclusion that state laws, such as Section 5-601, are not preempted unless they "practical[ly] abrogat[e]" or "nullif[y]" a national bank's exercise of a

federal banking power, Order at 36-37, is inconsistent with *Barnett*. *Barnett* itself illustrates that even narrowly targeted state restrictions can impermissibly burden a national bank's exercise of its powers sufficient to establish preemption of the restrictions. *See id.* at 34-35 (discussing *Franklin Nat'l Bank*, 347 U.S.at 375-79). In *Franklin,* a New York state statute prohibited the use of the words "saving" or "savings" by any financial institution other than a state-chartered savings bank or savings and loan institution. *Franklin*, 347 U.S. at 374. The Supreme Court

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[3] *See, e.g.*, *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 369 (1923) (stating that "any attempt by a State to define [national banks'] duties or control the conduct of their affairs is void, whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created"); *Talbott v. Bd. of Cty. Comm'rs of Silver Bow Cty.*, 139 U.S. 438, 443 (1891) (stressing that the "entire body of the statute respecting national banks, emphasize[s] that which the character of the system implies,—an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operations within those limits").

[4] Section 25b, which was added to the NBA via the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") in 2010, did not alter or rescind the OCC's preemption regulations because the OCC's regulations are consistent with the statute. When it adopted regulations implementing provisions of the Dodd-Frank Act in 2011, the Agency concluded that because the "Dodd-Frank Act preserves the *Barnett* conflict preemption standard, precedents consistent with that analysis—which may include [the 2004] regulations adopted consistent with such a conflict preemption justification—are also preserved." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43556 (July 21, 2011). The OCC's regulations expressly adopt the *Barnett* conflict preemption standard.

confirmed that national banks have the power to accept savings accounts, which necessarily entails the attendant power to advertise such accounts. *Id.* at 377. Accordingly, despite the fact that state restrictions burdened only the power to advertise using variations on a specific word, the Supreme Court nevertheless held that the naming restriction stated a conflict sufficient to preempt the state statute. *Barnett* itself relied upon *Franklin* for the proposition that "where Congress has not expressly conditioned the grant of a power upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Barnett,* 517 U.S. at 35. Against this backdrop, the Court should conclude that a state law that requires a national bank to pay even a nominal rate of interest on a particular category of account impermissibly conflicts with a national bank's power by disincentivizing the bank from continuing to offer the product. This is sufficient to trigger preemption under *Barnett*. *See Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 408-409 (6th Cir. 2001) (holding that state restrictions that would "inevitably impose administrative costs on national banks" and possibly cause a national bank to "reduce its business with its own customers" would "significantly interfere[]" with the exercise of a national bank power); *Cline v. Hawke*, 51 F. App'x 392, 397 (4th Cir. 2002) (determining that state restrictions which increased bank operating costs and substantively affected national banks' ability to solicit and sell insurance products were preempted under *Barnett*); *Mass. Bankers Ass'n, v. Bowler*, 392 F.

Supp. 2d 24, 28 (D. Mass. 2005) (concluding that state restrictions which "increase[d] the banks' administrative costs" and otherwise "significantly curtail[ed] the banks' ability to . . . sell insurance products" were preempted).

B. The OCC's Regulation Is Entitled to *Skidmore* Deference

The District Court erred when it concluded that the OCC's regulation, 12 C.F.R. § 34.4, was not entitled to any level of deference.[5] While the District Court opined correctly that § 34.4 should be analyzed under the standard of deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court nevertheless incorrectly concluded that there was "no evidence" the OCC "had engaged in a careful, considered analysis of whether the [National Bank Act] preempts state laws limiting escrow accounts," and declined to apply the OCC's regulation to the facts of this case. Order at 29.

The OCC respectfully disagrees with that assessment. As it has previously explained in an amicus submission to the United States Court of Appeals for the

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[5] While the Dodd-Frank Act provides that the Agency's opinion regarding the degree to which state law conflicts with a national bank power receives a variable degree of deference under *Skidmore*, *see* 12 U.S.C. § 25b(b)(5)(A), this provision does not represent a change to existing law, *see* OCC Amicus Br., 2018 WL 3702582, at *15 n.2, and the Agency's conclusions are, at minimum, entitled to "some weight." *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (noting that agencies are "uniquely qualified" to comprehend the likely impact of state requirements when their delegated authority concerns subject matters that are "technica[l]" and "the relevant history and background are complex and extensive").

Ninth Circuit in the *Lusnak* matter, OCC Amicus Br., 2018 WL 3702582, at *10, the OCC's preemption regulations reflect the Agency's "judgments concerning state provisions that interfere with national bank powers" and its "supervisory judgment regarding the potential effect of those interactions on bank activities." A conclusion that the OCC did not engage in a "careful, considered analysis" of whether the National Bank Act preempted state laws limiting escrow accounts is not supported.

First, the regulation at issue, 12 C.F.R. § 34.4(a)(6), *specifically* authorizes national banks to exercise their powers to make real estate loans "without regard to state law limitations concerning… Escrow accounts, impound accounts, and similar accounts…" In drafting the amendment to the regulation in 2003–2004 the OCC specifically identified this general category of state law as one that materially impacts a national bank's exercise of its federally granted authority.

Second, the public record demonstrates that the inclusion of escrow accounts in the list of preempted state laws (among other categories of state law) was the product of a considered application of over 150 years of experience and expertise supervising national banks; it was neither accidental nor an afterthought. For example, the Notice of Proposed Rulemaking that was issued in 2003 states that

> Pursuant to section 371, we [the OCC] propose to amend § 34.4(a) to specify more completely the types of state law restrictions and requirements that are not applicable to national banks. This list, promulgated under our authority under section 371 to prescribe the

> types of restrictions and requirements to which national banks' real estate lending activities shall be subject, reflects our experience with types of state laws that obstruct, in whole or in part, or condition, national banks' exercise of real estate lending powers granted under Federal law. The list is not intended to be exhaustive. Other types of state laws that similarly affect the exercise of national banks' real estate lending powers may be identified. Under the regulation, those would be addressed by the OCC on a case-by-case basis.

Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119, 46,128 (Aug. 5, 2003). After the public notice and comment period was completed, the OCC adopted amendments to 12 C.F.R. § 34.4(a) that added the provision regarding escrow accounts along with several other categories of state law that are preempted. As explained by the OCC -

> Pursuant to our authority under 12 U.S.C. 93a and 371, we proposed to amend § 34.4(a) and (b) to provide a more extensive enumeration of the types of state law restrictions and requirements that do, and do not, apply to the real estate lending activities of national banks. To the five types of state laws already listed in the regulations, proposed § 34.4(a) added a fuller, but non-exhaustive, list of the types of state laws that are preempted, many of which have already been found to be preempted by the Federal courts or OCC opinions. As also explained in the preamble to the NPRM, consistent with the applicable Federal judicial precedent, other types of state laws that wholly or partially obstruct the ability of national banks to fully exercise their real estate lending powers might be identified and, if so, preemption of those laws would be addressed by the OCC on a case-by-case basis.

Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1905 (Jan. 13, 2004).

The OCC undertook a review of its regulations after the passage of the Dodd-Frank Act in 2010. As a result of this review, the OCC reaffirmed its previous conclusions that state laws regarding the establishment and terms of escrow accounts, impound accounts, and similar accounts conflicted with the power of a national bank to make loans secured by real estate. In particular, the OCC reaffirmed that 12 C.F.R. § 34.4 and other similar regulations are "based on the OCC's experience with the potential impact of such laws on national bank powers and operations." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011). The OCC's review of its regulations confirmed that, in the OCC's view, "state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, such as laws concerning … risk mitigation … [and] 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." *Id.*

In short, the record reflects that the OCC engaged in a thorough and considered process, including through notice and comment rulemakings, and brought its expertise to bear when the OCC concluded that state laws that burden a national bank's power to lend, by attempting to condition or to modify such power,

do in fact significantly interfere with the exercise of a national bank's lending authority.

More to the point, the OCC has reasonably concluded that state interest-on-escrow laws significantly interfere with national banks' exercise of their power to establish the terms and conditions of mortgage loans, including the terms on which they will establish and service escrow accounts. The National Bank Act expressly authorizes national banks to "make, arrange, purchase, or sell" loans on real estate, and to exercise all incidental powers necessary to perform an express power. 12 U.S.C. § 371(a); *id.* § 24(Seventh). These powers include the authority to provide, establish, and service escrow accounts, which includes setting the terms and conditions for those accounts. State laws that intrude on those areas may conflict with the lending powers granted to national banks under the National Bank Act and are preempted when they do so.

As noted above, the OCC disagrees with the District Court's formulation that *Barnett* mandates that state laws like Section 5-601 are not preempted unless they "practical[ly] abrogat[e]" or "nullif[y]" a national bank's exercise of a banking power. Order at 36-37. This sets too high of a standard under *Barnett.* Although national banks must comply with certain categories of state law, federal regulation of national banks is otherwise intended to be consistent and uniform

across the country.[6] Preemption provides this consistency and uniformity; it allows consistent and uniform application of federal standards to national bank operations irrespective of where the bank or its customers are located. *See Tiffany*, 85 U.S. at 413. In contrast, applying multiple variations of state and local requirements to national bank operations and customers in different locations creates an environment of uncertainties, unnecessary costs, and potential liabilities.

Third, courts have long recognized that state laws may not significantly burden a national bank's exercise of its real estate lending power. This view represents a particular application of the general principle that state laws may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the National Bank Act. *Watters*, 550 U.S. at 11. The Supreme Court has "interpret[ed] 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." *Barnett Bank,* 517 U.S. at 32. The OCC's regulations and interpretations govern virtually "[e]very aspect" of national banks' affairs. *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168

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[6] *See Easton v. Iowa*, 188 U.S. 220, 231 (1903) ("It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the [National Bank Act]."); OCC Interpretive Letter No. 872 (Oct. 28, 1999) ("Through the national charter, Congress has established a banking system intended to be both nationwide in scope and uniform in character.").

(D.C. Cir. 1979) ("National banks are perhaps as meticulously regulated as any industry.").

Against this background, the District Court's decision to limit § 34.4's force and scope in this area clearly runs contrary to long-standing jurisprudence. Under the Supremacy Clause, OCC regulations "have no less pre-emptive effect than" the National Bank Act itself. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Where, as here, Congress has "directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *See id.* at 153-54; 12 U.S.C. § 93a.[7] Reflecting this approach, the Supreme Court instructs courts to set aside regulations preempting state law only if they are "'unreasonable, unauthorized, or inconsistent with' the underlying statute." *de la Cuesta*, 458 U.S. at 154 (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981)). Stated differently, "if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by

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[7] *See also Burke*, 414 F.3d at 314-15 (stating that the validity of the OCC's preemption regulations depends on "the reasonableness of the OCC's exercise of its regulatory authority"); *Aguayo v. U.S. Bank*, 653 F.3d 912, 919 (9th Cir. 2011) (stating that the OCC's "regulatory authority, which carries the same weight as federal statutes, includes interpretation of state law preemption under the [National Bank Act]").

statute," courts will "not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (internal quotation marks and citation omitted). Here, the District Court improperly accorded the OCC regulation no deference at all in conflict with 12 U.S.C. § 25b(b)(5)(A).

Finally, the District Court's Order risks undermining the Comptroller's role as the primary regulator of national banks by failing to grant the OCC's regulation any measure of real deference. A lack of deference poses a significant threat to the OCC's ability to speak authoritatively to the banking industry regarding the regulation of national banks and the interpretation and enforcement of the National Bank Act. *See* 12 U.S.C. § 1, *et seq.*; *see also, e.g.*, *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971).

In addition, any decision limiting the OCC's preemption regulations is likely to have a significant negative impact on national banks. If the OCC's regulation regarding escrow accounts is rendered ineffective, this result could cause disruption within the banking industry by upsetting long-settled law regarding the applicability of state laws to national bank powers. *See Genentech, Inc. v. Novo Nordisk A/S* 907 F. Supp. 97, 99 (S.D.N.Y. 1995).

C. *Wyeth* Does Not Lessen the Deference Due to the OCC

Notably, this Court has previously held that the OCC preemption regulations – including 12 C.F.R. § 34.4 - were entitled to deference in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005). The District Court's opinion cast doubt on the continued validity of *Burke* based on the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009). The District Court's suggestion that the Supreme Court's decision in *Wyeth* somehow lessened the amount of deference due to the Agency does not withstand scrutiny. Courts have endorsed the OCC's preemption regulations both before and after the Dodd-Frank Act's enactment.[8] Courts have also specifically upheld 12 C.F.R. § 34.4 and approved of the OCC's categorical evaluation of state laws preempted by the National Bank Act.[9]

For these reasons, this Court should conclude that *Skidmore* deference is applicable to the OCC's preemption regulations and, in applying that deference

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[8] *See, e.g.*, *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 886 (D.C. Cir. 1983); *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 531-32 (1st Cir. 2007); *Bank One, Utah v. Guttau*, 190 F.3d 844, 849 (8th Cir. 1999); *Downey v. Wells Fargo Bank, N.A.*, No. 12-11340-DJC, 2014 WL 3510510, at *6 (D. Mass. July 11, 2014); *Campbell v. Specialized Loan Serv., LLC*, No. 13-cv-278-PB, 2014 WL 280492, at *3 (D. N.H. Jan. 23, 2014).

[9] *See, e.g.*, *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 556-57 (9th Cir. 2010); *Powell v. Huntington Nat'l Bank*, 226 F. Supp. 3d 625, 639-52 (S.D. W. Va. 2016); *Simon v. Bank of Am., N.A.*, No. 10-cv-00300-GMN-LRL, 2010 WL 2609436, at *5-6 (D. Nev. June 23, 2010); *McSwain v. Wells Fargo Home Mortg.,*

here, should conclude that 12 C.F.R. § 34.4 preempts New York General Obligation Law § 5-601.[10]

To be sure, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law. *See* 12 C.F.R. § 34.4(b). *See also* Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004) (codified at 12 C.F.R. pts.

Inc., No. 2:10-CV-630 JCM (PAL), 2010 WL 2540280, at *1-2 (D. Nev. June 16, 2010); *Acosta v. Wells Fargo Bank, N.A.*, No. C 10-991 JF (PVT), 2010 WL 2077209, at *6 (N.D. Cal. May 21, 2010); *Watkins v. Wells Fargo Mortg.*, No. 3:08-0132, 2008 WL 2490306, at *4 (S.D. W. Va. June 29, 2008); *Smith v. Wells Fargo & Co.*, No. 08 Civ. 0564 (LAK), 2008 WL 11404524, at *1 (S.D.N.Y. Apr. 2, 2008); *Johnson v. Chase Manhattan Bank, USA, N.A.*, No. 07-526, 2007 WL 2033833, at *5-6 (E.D. Pa. June 11, 2007).

[10] While some have argued that Dodd-Frank Act amendments to the Truth in Lending Act ("TILA") change this analysis, these TILA provisions do not apply here. The Dodd-Frank Act amended TILA such that "creditors," if "prescribed by applicable State or Federal law," must "pay interest" to consumers "on the amount held in any . . . escrow account that is subject to" the relevant TILA provision, 15 U.S.C. § 1639d(b). 15 U.S.C. § 1639d(g)(3). Plaintiffs, however, concede that BOA is not required to offer them escrow account services. *See* Order at 11 n.5; *see also* 15 U.S.C. § 1639d(b). Similarly, § 1639d(g)'s title—"Administration of *mandatory* escrow or impound accounts"— suggests that § 1639d(g)(3)'s terms do not apply to Plaintiffs' escrow accounts, irrespective of any interaction these amendments might have with the National Banking Act or the OCC's implementing regulations. *See* 15 U.S.C. § 1639d(g) (emphasis added). Because the statute does not apply to the mortgages at issued in this case, the District Court's attempt to engraft § 1639d(g)(3) into its *Barnett* analysis is inappropriate. The inapplicability of the statute also undermines any conclusion, in this instance that, the state law is rendered applicable by a federal statute for purposes of 12 C.F.R. § 34.4.(b)(9).

7 and 34). National banks' compliance with these laws does not affect the manner or content of their federally authorized activities. *Id.* Instead, these laws establish the legal infrastructure that surrounds and supports national banks' ability to do business. *Id.*

Here, the OCC has determined by that particular provisions of the National Bank Act empower national banks to offer escrow account services. 12 U.S.C. §§ 24(Seventh) and 371; *see* 12 C.F.R. § 34.4(a)(6). New York General Obligation Law § 5-601 does not fall within the purview of any of the types of laws through which states retain the power to regulate national banks. 12 C.F.R. § 34.4(b). Therefore, requiring national banks to comply with laws like Section 5-601 risks allowing states to impose "costly operational and administrative burdens on national banks' lending activities" in a manner contrary to Congressional intent. *See, e.g.*, *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Cal. 2002).

CONCLUSION

For these reasons, the OCC respectfully submits that the Court should reverse the decision of the District Court and find that application of Section 5-601 to BOA is preempted by federal law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Circuit Rule 32.1(a)(4)(A) because it contains 5,164 words, exclusive of the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font.

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CERTIFICATE OF SERVICE

I certify that on June 15, 2021, I caused the attached Brief in Support of Defendant-Petitioner Bank of America's appeal to be served via the Court's Electronic Case Filing system on all counsel of record in the above-captioned cases.

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