No. 22-529

In the Supreme Court of the United States

ALEX CANTERO, ET AL., PETITIONERS

v.

BANK OF AMERICA, N.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF UNITED STATES CHAMBER OF COMMERCE AS AMICUS CURIAE SUPPORTING RESPONDENT

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER OF COMMERCE
1615 H St. NW
Washington, DC 20062

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Nicole Welindt
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Ave.
Palo Alto, CA 94301

Counsel for Amicus Curiae

QUESTION PRESENTED

Does the National Bank Act preempt the application of state escrow-interest laws to national banks?

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The question presented is critical to the U.S. banking system, and is therefore of significant interest to the Chamber and its members. The preemption standard Petitioners advocate would significantly interfere with national banks' mortgage lending functions, undermine national banks' vital place in the banking system, and create uncertainty and costs in the marketplace. Because businesses rely on a functioning dual banking system offering a variety of services made possible only by freedom from simultaneous state and federal regulation, the Chamber respectfully urges the Court to affirm the decision of the court of appeals.[*]

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[*] Pursuant to this Court's Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus, its members, or counsel made a monetary contribution to the brief's preparation or submission.

INTRODUCTION

Since Congress enacted the National Currency Act in 1863 and the National Bank Act in 1864 to fund the Civil War, the United States has had a dual banking system. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 665; Act of June 3, 1864, ch. 104 § 8, 13 Stat. 99, 101-02 (codified at 12 U.S.C. § 38). That system not only ensured that the country could pay its war debt, it has also proven to be a critical component in the development of our Nation's economy. The diverse streams of capital the dual banking system makes possible continue to play a crucial role in the leadership of U.S. capital markets worldwide.

National banks serve critical federal functions and, more generally, enable the channeling of funds from savers to borrowers that makes modern economic activity possible. And the differences between national, federally chartered banks and state-chartered banks allow state and federal policymakers to pursue different goals and keep banks vigorously competing for customers, ensuring that individuals and businesses can choose from an array of financial products to select those that best serve their needs. That competition, in turn, allows the marketplace and consumers to inform policymakers at the state and federal levels about which policies are most effective and desirable.

To preserve that essential competition, the National Bank Act preempts state laws that interfere with national banks' powers. In 2010, Congress codified this Court's precedent, set out in more than a century of decisions, holding preempted state regulation that prevents or significantly interferes with national banks' exercise of their federal powers. 12

U.S.C. § 25b(b)(1)(B). That preemption rule preserves the dual banking system, ensuring that national banks are federally regulated and state banks are regulated by state authorities. Preserving the dual banking system means that state banks and national banks can continue innovating and responding to customer preferences.

The question presented focuses on one important national bank power: the use of escrow accounts in mortgage lending. But the Court's answer to the question presented will have important ramifications far beyond mortgage lending. Under this Court's precedent, National Bank Act preemption has turned on straightforward inquiries into the predictable effects of state law on national banks' powers. Yet Petitioners and the federal government now ask the Court to devise a new, fact-intensive standard for National Bank Act preemption that would destabilize the banking industry and impose costs Congress never intended on the Nation's economy. The Court should reject the invitation.

Mortgage escrow accounts arose to protect lenders, borrowers, and the public from the effects of default and foreclosure. They ensure that taxes and insurance premiums are timely paid, preventing costly defaults and tax liens and protecting all involved. But New York's law would steeply increase the cost of offering such accounts by requiring banks to pay interest on those accounts to mortgagors. The practical effects are obvious. Banks will be forced to pass on the increased costs of escrow account interest to customers, or else to stop offering mortgage escrow accounts altogether. No one will benefit. But even more troubling than this policy is Petitioners' theory, which would make it impossible for the marketplace

to play its role in testing the efficacy of New York's policy choice and many others.

Petitioners contend that those practical effects do not meet the preemption standard. According to Petitioners, to show that a state law "significantly interferes" with national banks' exercise of their powers under § 25b, a bank would have to produce specific evidence quantifying the state law's effects.

That's not the test this Court's National Bank Act preemption cases—which § 25b codified—have applied. To the contrary, the Court has routinely determined whether state laws touching on national banks' powers are preempted by assessing the laws' effects more generally, looking to predictable, self-evident economic consequences, rather than requiring expert testimony or data.

Petitioners' novel approach, in contrast, would be unadministrable and would create industry-wide uncertainty, as the Second Circuit recognized below. Banks would need to litigate state by state, statute by statute, leaving them uncertain as to which laws apply and which products they should offer. And courts would be unsure whether the preemption test turns on the evidence one bank might be able to produce in litigation rather than the industry-wide effects of state regulation. The bottom line is that Petitioners' approach would drive up costs for banks, threatening the viability of the dual banking system and destroying the competition, innovation, and customer choice among diverse services that the dual banking system has long promoted.

The dual banking system has long benefitted the U.S. economy and American public. And that system can survive and thrive the way Congress intended, as

a competitive system giving states and consumers policy options and choices among financial products and services, only if the National Bank Act continues to protect national banks from a patchwork of state regulation. The Court should affirm.

SUMMARY OF ARGUMENT

I. Since their creation, national banks have served as a fundamental pillar of the U.S. economy.

A. Congress established the national banking system to provide stable currency when the United States needed it most—during the Civil War. The result was a dual banking system where banks could choose to charter under federal law or state law.

B. The dual banking system allows for increased competition and innovation. National banks can test uniform standards, free from state interference, and states can innovate with state-chartered banks' powers and consumer protections. But these benefits are possible only if the two systems remain separate. The National Bank Act thus preempts state laws significantly interfering with national banks' powers, as this Court's precedent has long recognized.

C. National banks are regulated by the Office of the Comptroller of the Currency (OCC), which Congress created in the same statutes that set up the national bank system. Under the OCC's oversight, national banks have proven reliable. During the Great Recession of 2008, for instance, national banks engaged in a disproportionately small amount of subprime lending—one of the major causes of the financial collapse.

II. Petitioners' approach threatens the dual banking system. It would allow state laws to interfere

not just with national banks' mortgage escrow account practices, but also with many of the powers Congress entrusted to them as national banks. The result would be uncertainty and, in all likelihood, increased costs and fewer options for national banks and customers alike.

A. Petitioners fail to respond to the Second Circuit's concerns with the administrability of their rule. Instead, Petitioners suggest that national banks must litigate whether each state statute is preempted under a fact-intensive standard. But if courts don't know how to consistently apply the rule, national banks will face uncertainty about the applicability of various state laws. National banks should not have to face the costs and uncertainties that this statute-by-statute approach imposes. Neither the National Bank Act nor this Court's caselaw supports Petitioners' fact-intensive approach. In each of the decisions Petitioners and the federal government cite, the Court looked to the self-evident, practical effects of state laws on national banks. That is the approach that Congress codified in 12 U.S.C. § 25b(b)(1).

B. Petitioners' rule would harm customers. The uncertainty Petitioners' rule creates for banks and customers alike would increase national banks' costs of doing business—and, particularly, of offering the very services states seek to regulate. National banks may then reduce their mortgage lending practices in order to avoid litigation costs, or they may pass these costs through to the customer. The consequence is that customers would lose variation among banks and the accompanying benefits of increased competition. Furthermore, these problems are likely to multiply as states attempt to impose more and more requirements on national banks' exercise of their powers.

C. State law interference with mortgage escrow accounts is particularly detrimental, because these accounts benefit borrowers, lenders, and the public. Mortgage escrow accounts maintain a portion of the mortgagor's funds, to ensure timely tax and insurance payments. The accounts protect borrowers against default, protect the lenders against property loss, and protect the public against the economic consequences of increased foreclosure, which played a major role in the Great Recession.

III. The OCC's regulations support finding laws imposing interest requirements on mortgage escrow accounts preempted. In both 2004 and 2011, the OCC considered whether escrow accounts should be insulated from state laws. Both times, it concluded that they should be, because state laws in this area interfere with fundamental elements of national bank practices. The OCC agreed that allowing interference would decrease competition and harm the dual banking system. This Court should reach the same conclusion.

ARGUMENT

I. National banks have long been a valuable and trusted cornerstone of the U.S. economy.

Congress set up the national banking system to provide much-needed federal funds and to create a stable, nationwide currency during the Civil War. Comptroller of the Currency Administrator of National Banks, *National Banks and the Dual Banking System* 7 (2003) [hereinafter OCC Dual Banking System], http://tinyurl.com/f96b3z92. The result was the dual banking system, which endures to this day: banks can charter under state law, subject to state

regulation, or instead choose to charter under federal law, accepting federal regulation. *Id.* at 1.

Precisely because of the differences between state and federal regulation, the dual banking system promotes competition and innovation, and the resulting diversity of choice benefits the public. This competition allows state and federal regulators to learn from one another to identify what kinds of regulations are effective and beneficial for consumers and the economy. What's more, national banks—federally chartered banks—have proven particularly reliable, including during the recent Great Recession.

A. National banks emerged in a time of crisis to serve important federal functions.

The national banking system arose because the United States needed to fund the Civil War. OCC Dual Banking System, *supra*, at 7. By passing two federal statutes in 1863 and 1864, Congress enacted what is known as the National Bank Act, *see Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10-11 & n.3 (2007), which required national banks to buy Treasury securities to ensure that the federal government had funds to finance its war efforts, OCC Dual Banking System, *supra*, at 7. But national banks contributed to the financial stability of the nation even beyond the war: backed by government securities, national banks' circulating notes provided a stable and reliable form of currency for the entire nation. *Id.*

National banks continue to provide valuable federal functions today. They "shall be depositaries of public money," and "may also be employed as financial agents of the Government." 12 U.S.C. § 90. And the banking industry as a whole "plays a critical role in

the United States economy, channeling funds from savers to borrowers and thereby facilitating economic activity." Jay B. Sykes, Congressional Research Service, R45081, *Banking Law: An Overview of Federal Preemption in the Dual Banking System* 1 (2018).

The result of the National Bank Act was the "dual banking system." OCC Dual Banking System, *supra*, at 1. Federally chartered banks are "defined under federal law, operat[ed] under federal standards, and overs[een] by a federal supervisor." *Id.* State-chartered banks, in turn, exert "bank powers established under state law," "operat[e] under state standards," and are "overs[een] by state supervisors." *Id.*

B. The dual banking system promotes competition and benefits customers.

1. A system with both state- and federally chartered banks promotes increased competition and innovation. State-chartered banks "serve as laboratories for innovation and change, not only in bank powers and structures, but also in the area of consumer protection." OCC Dual Banking System, *supra*, at 10 (quoting *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the Subcommittee on Financial Institutions & Consumer Credit of the House Committee on Financial Services*, 108th Cong. (2003) (testimony of Joseph A. Smith, Jr., North Carolina Commissioner of Banks, on behalf of the Conference of State Bank Supervisors)). In state banks, bankers know "the strength or weakness of their local economies and the products to offer to attract new business." Heidi Mandanis Schooner, *Recent Challenges to the Persistent Dual Banking System*, 41 St. Louis U. L.J. 263, 266 (1996) (quoting Jill M. Considine, *A State's Response to the United States*

Treasury Department Proposals to Modernize the Nation's Banking System, 59 Fordham L. Rev. S243, S244 (1991)). State banks are able to introduce new products and strategies because state legislators are particularly "responsive to the needs of their constituents," and state regulators too "know the local community." *Id.* (quoting James B. Watt, The Dual Banking System Now More Than Ever, Address at the Conference of State Bank Supervisors Annual Meeting and Conference 4 (Apr. 15-18, 1994)).

These new products and strategies, if beneficial, can be spread beyond their original state laboratories. The FDIC, for example, was inspired by a particularly effective New York banking law designed to address the ongoing problem of banks failing to meet their obligations. News Release, John D. Hawke, Jr., Comptroller of the Currency, Remarks by John D. Hawke, Jr. Comptroller of the Currency Before the New York State Department of Banking (Oct. 15, 2001) [hereinafter Hawke Remarks], http://tinyurl.com/z6m6ks3p. Though other states similarly set up funding systems to pay out the obligations of failed banks, New York's law had a "key feature … missing" from other states' laws. *Id.* It provided for the appointment of three commissioners to examine banks' financial status and report to the legislature. *Id.* New York's innovation of bank supervision "became a blueprint for the nation." *Id.*

National banks, too, have innovated. National banks serve as a "venue for testing and evaluating the efficiencies and benefits that flow from uniform national standards." OCC Dual Banking System, *supra*, at 10. "Just by way of example, national banks issued the first negotiable certificate of deposit in 1961, securitized loans for the first time in 1984, and introduced

a whole range of new financial products and services to the banking public over the past several decades." Hawke Remarks, *supra*.

Put simply, having some banks regulated by state authorities and others by federal agencies increases competition and allows banks to identify and implement new protections and efficiencies. *See* OCC Dual Banking System, *supra*, at 11-12. Indeed, "the 'very core of the dual banking system is the simultaneous existence of different regulatory options that are not alike in terms of statutory provisions, regulatory implementation and administrative policy.'" *Id.* at 3 (quoting Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 41 (1977)).

2. If states may interfere with national banks' mortgage practices, they will also be able to interfere with many other national banking practices, and the country will lose many of the benefits resulting from the dual banking system. That isn't what Congress intended; it's not something the National Bank Act permits; and it's inconsistent with this Court's caselaw. Indeed, to protect national banks' important functions and unique contributions from "the hazard of unfriendly legislation by the States," *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1873), this Court has long held that the National Bank Act preempts state laws imposing on national banks' powers.

In *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), for example, the Court held that the National Bank Act, which allowed national banks to receive savings deposits, preempted a state law prohibiting banks from using the word

"savings" in advertising. *Id.* at 374. The Court rejected the argument that national banks could use other words to advertise the accounts, reasoning that national banks need to advertise their federally authorized business, and "savings" "aptly describes, in a national sense, the type of business carried on by these national banks." *Id.* at 378; *see also Watters*, 550 U.S. at 12 (describing caselaw).

It is "[b]eyond genuine dispute" that state law "may not curtail or hinder a national bank's efficient exercise" of their "incidental or enumerated" powers conferred by the National Bank Act. *Watters*, 550 U.S. at 13. The OCC has promulgated a list of such powers in the context of real estate loans. 12 C.F.R. § 34.4. As relevant here, that list expressly includes escrow accounts. *Id.* § 34.4(a)(6). In addition, national banks are not subject to state laws on licensing, security property, or access to credit reports. *Id.* § 34.4(a).

C. National banks have proven to be trustworthy.

1. National banks are regulated and overseen by the Office of the Comptroller of the Currency. Created over 150 years ago as "the agency charged by Congress with supervision of the [National Bank Act]," *Watters*, 550 U.S. at 6; *see* Act of Feb. 25, 1863 (National Currency Act), ch. 58, 12 Stat. 665, 665; Act of June 3, 1864 (National Bank Act), § 1, 13 Stat. 99, 99-100 (codified at 12 U.S.C. § 38), the OCC is an independent bureau of the United States Department of the Treasury that "charters, regulates, and supervises all national banks, federal savings associations, and federal branches and agencies of foreign banks," *Who We Are*, Office of the Comptroller of the Currency,

http://tinyurl.com/bde5ud9t; *see also* 12 U.S.C. § 371(a).

National banks are subject to stringent lending requirements. *See* 12 C.F.R. pt. 34 subpart D. For example, national banks' real estate lending policies require annual review and approval by the bank's board of directors, and lending policies must establish, among other things, diversification standards and underwriting standards. 12 C.F.R. § 34.62(b). The OCC may "examine into [a national bank's] manner of conducting business, and enforce an observance of its laws and regulations." *Watters*, 550 U.S. at 14.

2. Given this oversight, it is no surprise that national banks have proven reliable in times of crisis. The Great Recession provides a ready example, when the collapse of "the subprime mortgage market" precipitated "a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020).

The banking industry was implicated in this crisis. "[W]idespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets." Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* xviii (2011) (emphasis omitted).

In the wake of the Great Recession, the OCC undertook a rigorous analysis of subprime lending activity. It found that national banks, compared to state-chartered banks, contributed much less to the subprime lending problem. John C. Dugan, OCC,

Appendix B: Activities of National Banks Related to Subprime Lending 1-2 (2010), http://tinyurl.com/bddn6hpj. "Using the most reliable data available on nonprime mortgage lending, and accurately accounting for corporate organization and regulatory responsibilities," the OCC found that "national banks and their subsidiaries subject to OCC supervision accounted for less than 15 percent of nonprime activity." *Id.* at 2. Given national banks' central role in the mortgage market, that "percentage is strikingly and disproportionately low." *Id.* And "the data show that subprime mortgages originated by OCC-supervised lenders have performed better than other subprime loans, with lower rates of foreclosure." *Id.* By contrast, "nearly three quarters of nonprime mortgages originated at lenders that were wholly or partly the responsibility of state authorities." *Id.* In that case, federal banking practices and regulation worked best.

II. Petitioners' rule threatens to destabilize the banking industry and harm customers.

Petitioners seek to enforce against national, federally regulated banks a New York law requiring banks to pay interest on mortgage escrow accounts. They advocate an amorphous, fact-intensive approach that would require national banks to litigate statute by statute to determine if they are subject to any given state law. But the Court's caselaw does not support such a regime, and national banks should not be subject to its costs and uncertainty. The Court has consistently looked to the self-evident realities of banking, rather than to any expert calculations.

Nor would Petitioners' regime benefit customers. If state law forces national banks to assume more

risks and costs, they are likely to pass the costs on to customers in other ways, or even leave the mortgage lending market altogether. And no competition-promoting alternative will remain, because national banks and state banks alike will be subject to the same state regulatory regime, depriving customers of the competitive benefits of the dual banking system. Moreover, these problems will only increase as States become emboldened to interfere with national banks' powers.

A. Petitioners' rule requires a statute-by-statute approach, imposing unwarranted costs and uncertainty on national banks.

1. Petitioners contend that National Bank Act preemption analysis of New York's law "requires a factual showing of the degree of interference" the state law causes. Pet. Br. 27. The federal government agrees. U.S. Br. 22-23. But Bank of America has identified the practical consequences of New York's law, including the likelihood that certain lenders will leave the market and that banks will raise fees. Resp. Br. 30-31, 48. To the extent that Petitioners are suggesting that Bank of America must provide evidence from economic experts to quantify these consequences, such a rule would create uncertainty and inconsistency as courts struggle to make these determinations case by case and bank by bank. As the Second Circuit recognized, "to implement Plaintiffs' rule, courts would become entangled in questions they are poorly suited to answer." Pet. App. 23a n.8.

Neither Petitioners nor the federal government explains how a court should make these economic determinations. They have no answer to the question posed by the Second Circuit: "If an interest rate of 2%

were not significant interference, what rate would be sufficiently high?" Pet. App. 23a n.8. And here, where the New York Superintendent of Financial Services may raise the interest requirement, how should that possibility factor in the determination? *See* N.Y. Gen. Oblig. Law § 5-601. Petitioners' scheme would require courts to make complicated economic determinations and resolve expert disputes outside of their purview.

What's more, it is not clear under Petitioners' approach what kind of evaluation courts should conduct, and how any given case would ensure that all relevant data is available for the fact-intensive determination. Is the appropriate comparator for level of interference the bank that is a party to the lawsuit? Is it any national bank? How can the court evaluate the effects of the state law on every national bank in the State if only one bank is a party to the lawsuit? Petitioners' approach raises more questions than it answers.

2. National banks should not need to litigate case after case, statute by statute, to know what their obligations are. If litigation must occur statute by statute, banks will face the unfair challenge of either complying with restrictions that they believe are unlawful, or litigating, which costs significant time and money *in each state*. And if *each* national bank must intervene in *any* such suit to protect its interests, litigation costs and the disruption to the national banking system will increase exponentially. National banks would be unable to "plan their business and manage their risks," Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004) (codified at 12 C.F.R. pts. 7 & 34), and they may stop providing affected services altogether. To paraphrase Chief Justice Marshall, under Petitioners' approach, the power to regulate

becomes the power to destroy—leaving everyone worse off. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). With preemption, the dual banking system can flourish, serving customers' varying preferences and needs.

3. This Court's National Bank Act preemption decisions do not contemplate such a fact-intensive and unadministrable process. Petitioners and the United States cite *First National Bank v. Missouri*, 263 U.S. 640 (1924), to support the view that the "significantly interferes with" standard for preemption, 12 U.S.C. § 25b(b)(1)(B), requires Bank of America to make demanding fact-specific showings. Pet. Br. 12; U.S. Br. 18-19. The United States also cites *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), *Watters*, and *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009), to support the notion that courts should take a fact-intensive approach. U.S. Br. 19-20. But none of those decisions supports the position of Petitioners and the United States. Instead, each supports the type of effects inquiry that the Second Circuit conducted here.

In *First National Bank*, the Court held that a state law prohibiting bank branches was not preempted. 263 U.S. at 659. The Court reasoned that the statute did not interfere with national banks' powers because "national banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them." *Id.* The Court did not suggest it was looking to a significant factual record; rather, the Court looked to the law's "self evident" effects on national bank activity. *Id.*

In *Anderson National Bank*, the Court held that the National Bank Act did not preempt a state statute requiring banks to turn over inactive and unclaimed deposits. 321 U.S. at 252. In reaching that conclusion, the Court reasoned that these types of laws do "not infringe or interfere with any authorized function of the bank." *Id.* at 249. The Court did not cite any expert testimony or economic calculation—it simply looked to the types of powers the banks employ and the general consequences of these types of laws.

Similarly, in *Watters*, the Court did not undertake a fact-intensive inquiry when it held that the National Bank Act preempted state licensing, reporting, and visitorial regimes as applied to operating subsidiaries of national banks. *See* 550 U.S. at 7. The Court did not, for example, look to the details of how different banks use operating subsidiaries. Rather, it recognized that operating subsidiaries play many of the functions of the national bank, and so regulation of the operating subsidiaries would also affect national bank powers. *Id.* at 18-19. The Court recognized that "operating subsidiaries have emerged as important instrumentalities of national banks," and that Congress and the OCC have subjected them to the same types of terms and conditions as the national banks themselves. *Id.* at 19-20.

Cuomo is even farther afield. The Court in *Cuomo* was not considering National Bank Act preemption of state laws imposing on national banks' powers. *See* 557 U.S. at 529. Rather, the issue in *Cuomo* was the validity of an OCC regulation that defined "visitorial powers" to include state law enforcement. *Id.* at 525. The Court held that the regulation was an unreasonable application of the National Bank Act, as it would have meant that "the State may not enforce its valid,

non-pre-empted laws against national banks." *Id.* at 529 (emphasis omitted). In short, *Cuomo* addressed the general effects of an OCC regulation on non-preempted state laws. The decision provides no support for the federal government's argument here.

B. Petitioners' rule will increase costs to customers.

Given their effects, laws like New York's significantly interfere with national banks' powers, as this Court's decisions make clear. As discussed above (at 17-19), the Court's precedent looks to general, predictable consequences to answer the preemption question, not to statute-by-statute or case-by-case factfinding. As in its earlier decisions, the Court here need not direct further factfinding to understand the role that mortgage escrow accounts play in the banking industry and the general consequences of allowing a patchwork system of laws regulating these accounts.

Allowing states to enforce mortgage escrow account laws against national banks would unnecessarily complicate the mortgage lending system, driving up costs for lenders and borrowers alike. The Court recently emphasized that "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent." *Watters*, 550 U.S. at 13-14. For over a century, the dual banking system has rested on the idea that it is crucial for national banks to provide "uniform and universal operation through the entire territorial limits of the country." *Talbott v. Silver Bow County*, 139 U.S. 438, 443 (1891). "When national banks are unable to operate under uniform, consistent, and predictable standards, their business

suffers, which negatively affects their safety and soundness." 69 Fed. Reg. at 1908.

If national banks have to protect themselves from the increased costs of such nationwide uncertainty, they will be forced to adjust their practices, ultimately to their customers' detriment. As Bank of America explained, "the threat of hefty fines could pressure national banks to alter the range of services they offer customers." Resp. Br. 30. Lenders reported the same problem to the government decades ago. Comptroller General of the United States, U.S. General Accounting Office, GAO-B-114860, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 25 (1973) [hereinafter GAO Study], http://tinyurl.com/bdzhr6v2. Lenders explained that if interest is required on mortgage escrow accounts, they will have to (1) stop providing mortgages to many individuals or (2) recoup mortgage interest costs through increased rates or fees. *Id.* at 25-26. Neither of those changes benefits customers.

What's more, even where banks think there are strong arguments that a particular state law is preempted, both the banks and customers will lack certainty until the issue is conclusively litigated. *See supra* pp. 15-17. Beyond litigation costs, that uncertainty would further harm customers by making it difficult for customers to understand the protections to which they are entitled when considering whether to choose a national bank or a state bank.

Subjecting national banks to state interference would also harm customers by decreasing competition. With banks acting as laboratories for different types of regulations and restrictions, customers have a variety of banking options. Customers can choose

whether a state bank or national bank best meets their needs. By shielding national banks from state-law interference, National Bank Act preemption preserves the dual banking system, ensuring that national banks do not become too similar to state banks. But without the dual banking system—the consequence of making the preemption standard very difficult to meet, as Petitioners advocate—customers, banks, regulators, and the economy will all suffer. Customers will lose the choices that the regime enables, banks will incur additional costs, and regulators will no longer be able to learn from one another.

If the Court adopts Petitioners' rule, there is no reason that states would stop their interference at mortgage escrow accounts. As this Court's many National Bank Act preemption cases show, states have continually attempted to pass laws regulating national banks. If states may regulate mortgage escrow accounts—a key feature of national banking that must be insulated from interference, 12 C.F.R. § 34.4(a)(6)—they may then move on to regulation of other aspects of national banks' powers. National banks would face greater and greater uncertainty and costs, risking the longevity of the dual banking system. The result would be an economy relying on fewer diverse sources of capital—a serious problem in times of economic stress.

C. State interference with mortgage escrow accounts is particularly harmful, because the accounts benefit all involved.

State interference with mortgage escrow accounts is particularly harmful. Mortgage escrow accounts don't just benefit a small number of individuals. To

the contrary, they benefit borrowers, banks, and even the general public. Consequently, interfering with mortgage escrow accounts' operation will produce significant negative effects.

1. Mortgage escrow accounts benefit borrowers. The accounts are a convenient way to pay insurance and property taxes. *See* Bruce E. Foote, Congressional Research Service, R98-979, *Mortgage Escrow Accounts: An Analysis of the Issues* 2-3 (1998) [hereinafter CRS Mortgage Escrow]. As the Consumer Financial Protection Bureau has observed, it can be difficult to track mortgage, insurance, and tax bills, so it is generally easier for the borrower to pay one monthly bill through the mortgage escrow system. Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4726, 4744-45 (Jan. 22, 2013) (codified at 12 C.F.R. pt. 1026). With banks ensuring that payments are timely made, mortgage escrow accounts reduce credit risks to borrowers. *See* CRS Mortgage Escrow, *supra*, at 2. They also reduce other costs for borrowers. Without the protections of mortgage escrow accounts, banks would take on increased risk. To account for that risk, lenders may have to avoid lending to certain borrowers or require higher down payments and mortgage rates. Resp. Br. 30-31.

2. Mortgage escrow accounts also protect lenders from borrower defaults. Because lenders use mortgage escrow accounts to make sure that tax, insurance, and other obligations are met, the accounts help avoid lapses in insurance coverage and thus ensure protection against uncovered catastrophic losses. CRS Mortgage Escrow, *supra*, at 1-2. "[C]onsumers with an escrow account are much less likely to experience potentially unexpected cost shocks associated with

paying a large property tax and/or home insurance bills, that could lead other consumers to default on their mortgage." 78 Fed. Reg. at 4745. The CFPB has concluded that customers with mortgage escrow accounts have a "lower probability of default and possible foreclosure." *Id.* at 4744. This reduced risk of default also reduces the risk that lenders will lose their security interest. That risk to lenders arises because tax liens are senior to mortgage liens, and without the protection of mortgage escrow accounts, there may be insufficient remaining proceeds after the taxes are collected to pay lenders. GAO Study at 5; CRS Mortgage Escrow, *supra*, at 1.

3. Finally, mortgage escrow accounts protect the public. As the CFPB has recognized, mortgage escrow accounts are associated with a lower risk of default and possible foreclosure. The Great Recession underscores the importance of reducing the risk of default. During the Great Recession, many subprime borrowers—most of whom did not have escrow accounts—defaulted during the first year of their mortgages. Nathan B. Anderson & Jane K. Dokko, Federal Reserve Board, *Liquidity Problems and Early Payment Default Among Subprime Mortgages* 2 & n.4 (2010), http://tinyurl.com/256c92cd. The surge of foreclosures and consequent depressed property values was a major component of the economic crisis. Financial Crisis Inquiry Commission, *supra*, at 389-90.

Mortgage escrow accounts protect the public from economic damage that could result from another wave of foreclosures. As of 2016, 79% of mortgages "included an escrow account for taxes or homeowner insurance." Robert B. Avery et al., *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 27 (2018), http://tinyurl.com/

yc8mp9nr. In fact, the federal government *requires* loans insured or guaranteed by the Federal Housing Administration to include escrow accounts. 24 C.F.R. § 200.84(b).

III. The OCC's regulations support affirmance.

As described above, the OCC is the agency charged with regulating the national banking system. Pursuant to its statutory power, 12 U.S.C. § 93a, the OCC issued regulations regarding preemption in 2004 and 2011. In both instances, the OCC considered how state laws interfere with national bank powers. And in both instances, the agency concluded that state laws concerning mortgage escrow accounts significantly interfere with national banks.

1. In 2004, the OCC issued regulations clarifying that national banks "may make real estate loans" "without regard to state law limitations concerning" "[e]scrow accounts." 12 C.F.R. § 34.4(a). The directive was not an expansion of national banks' historic powers, but a recognition of them. 69 Fed. Reg. at 1908.

When the OCC issued the 2004 regulations, John Hawke, Jr., then–Comptroller of the Currency, provided a statement explaining that the OCC had crafted the regulation to preempt laws that "create higher costs and operational burdens that the banks either must shoulder, or pass on to consumers, or that may have the practical effect of driving them out of certain businesses." Press Release, John D. Hawke, Jr., Comptroller of the Currency, Statement of Comptroller of the Currency John D. Hawke, Jr. Regarding the Issuance of Regulations Concerning Preemption and Visitorial Powers (Jan. 7, 2004), http://tinyurl.com/3t55umw7. He went on to note that "[d]istinctions between state and federal bank

charters, powers, supervision and regulation are not contrary to the dual banking system; they are the essence of it." *Id.*

Similarly, at a congressional hearing reviewing the 2004 regulations, Senior Deputy Comptroller and Chief Counsel Julie L. Williams also noted the importance of the dual banking system to consumer choice and competition. "[T]he dual banking system offers American consumers a choice—those who believe the State system offers greater protections, or desirable variety, are free to make that choice." *Congressional Review of OCC Preemption: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Financial Services*, 108th Cong. 209 (2004) (prepared statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

2. In 2011, after Congress passed the Dodd-Frank Act, the OCC again considered preemption of escrow accounts. It again concluded that national banks should not be subject to state laws regulating mortgage escrow accounts. As the agency explained, those laws "meaningfully interfere with fundamental and substantial elements of the business of national banks." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) (codified at 12 C.F.R. pts. 4, 5, 7, 8, 28, & 34).

In sum, the OCC has consistently stressed the importance of avoiding state interference with the national banking system. *See* OCC Dual Banking System, *supra*, at 22-23. It recognizes that "[r]esistance to preemption is equivalent to resistance to the uniform standards inherent in the national component of the

dual banking system." *Id.* at 22. State laws operating on national bank powers, like the mortgage escrow system, "undermine the uniform, nationwide character of the national banking system." *Id.* at 23. Enabling different standards for national and state banks is a feature, not a bug, of our financial system—and one that Petitioners' novel approach threatens to destroy.

CONCLUSION

The Court should affirm.

Respectfully submitted.

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER OF COMMERCE
1615 H St. NW
Washington, DC 20062

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Nicole Welindt
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Ave.
Palo Alto, CA 94301

Counsel for Amicus Curiae

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