No. 14-56755

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:14-cv-01855-GHK-AJW
Hon. George H. King

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MORTGAGE BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, AND THE HOUSING POLICY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF REHEARING *EN BANC*

H. RODGIN COHEN
MICHAEL M. WISEMAN
MATTHEW A. SCHWARTZ
ANDREW K. JENNINGS
MONTAE J. LANGSTON
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004

(212) 558-4000

Attorneys for Amici Curiae

JEREMY R. NEWELL
PAIGE E. PIDANO
THE CLEARING HOUSE ASSOCIATION L.L.C.
1001 Pennsylvania Avenue, N.W.
Suite 720 North Tower
Washington, D.C. 20004
(202) 649-4600

THOMAS PINDER
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5000

STEVEN I. ZEISEL
CONSUMER BANKERS ASSOCIATION
1225 Eye Street, N.W., Suite 550
Washington, D.C. 20005
(202) 552-6380

STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JUSTIN WISEMAN
HELEN KANOVSKY
MORTGAGE BANKERS ASSOCIATION
1919 M STREET N,W., 5TH FLOOR
WASHINGTON, D.C. 20036
(202) 557-2700

RICH FOSTER
FINANCIAL SERVICES ROUNDTABLE &

THE HOUSING POLICY COUNCIL OF THE
FINANCIAL SERVICES ROUNDTABLE
600 13th Street N.W., Suite 400
Washington, D.C. 20005
(202) 289-4322

Of counsel

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Clearing House Association L.L.C. ("The Clearing House"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), the Chamber of Commerce of the United States of America ("Chamber"), the Mortgage Bankers Association ("MBA"), the Financial Services Roundtable ("FSR"), and the Housing Policy Council of the FSR ("HPC"; collectively, "*Amici*") state that they are not subsidiaries of any other corporation. The Clearing House is a limited liability company and as such has no shareholders. Each member of The Clearing House holds a limited liability company interest in The Clearing House that is equal to each other member's interest, none of which is more than a 10% interest. The ABA, CBA, Chamber, MBA, FSR, and HPC are non-profit trade groups and have no shares or securities that are publicly traded.[1]

[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state as follows: (1) neither party's counsel authored the brief in whole or in part; (2) neither party nor their counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person other than *Amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. Under Circuit Rule 29-2(a), each party to this action, by counsel, has consented to the filing of this *amicus* brief.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Clearing House. Established in 1853, The Clearing House is the United States's oldest banking association. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs, and white papers, the interests of its member banks on a variety of systemically important banking issues.

ABA. Established in 1875, the ABA is the united voice of America's hometown bankers—small, regional, and large banks that together employ more than two million women and men, hold nearly $17 trillion in assets, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans.

CBA. Founded in 1919, the CBA is the trade association for today's leaders in retail banking—banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets.

Chamber. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry, and from every region of the country.

MBA. The MBA is the national association representing the real estate finance industry. The MBA works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing for all Americans.

FSR. The FSR represents the largest financial services companies providing banking and payment products and services to the American consumer.

HPC. The HPC is a trade association within the FSR representing thirty of the leading national mortgage finance companies that originate, service, and insure mortgages for U.S. consumers.

Amici have a substantial interest in this action because the panel's decision, by repudiating many decades of consistent judicial precedent, (i) exposes national banks to substantial and non-uniform state requirements in the conduct of their basic banking powers, and thereby (ii) substantially interferes with the ability of many of *Amici*'s members to conduct the business of banking in a safe and sound manner under a national regulatory system.

INTRODUCTION

The Panel's decision in *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018) ("Decision") dramatically alters a fundamental rule of law that had been decisively established in multiple cases by this Circuit and the U.S. Supreme Court: the National Bank Act ("NBA") preempts states from regulating the rates and terms of a national bank's products and services.[2] Contrary to this well-established rule, the Panel here held that California Civil Code § 2954.8, which requires lenders—including, purportedly, national banks—to pay 2% interest annually on mortgage escrow accounts, is not preempted by the NBA. The Panel reached this conclusion without any analysis of the importance of the ability of national banks to set rates and terms for their products and services in general, or for mortgage escrow accounts in particular. Rather, the Panel reached the *ipse dixit* conclusion that Civil Code § 2954.8(a) is not preempted because it presents simply a "[m]inor interference with federal objectives." *See Lusnak*, 883 F.3d at 1194. The Decision reflects a basic misunderstanding of the history and goals of the NBA, and *Amici* urge this Circuit to rehear this highly consequential case *en banc* and reverse the Decision.

Congress enacted the NBA in 1864 so that federal law—rather than "the hazard of unfriendly legislation by the States"—would govern national banks.

---

[2] *See, e.g.*, cases listed in Appendix A hereto.

Tiffany v. *Nat'l Bank of Missouri*, 85 U.S. 409, 413 (1873); *see also Easton* v. *Iowa*, 188 U.S. 220, 231-32 (1903) ("[W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation."). At the foundation of the national banking system, Congress established that national banks would operate under the "paramount authority" of the federal government, *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and that they would be supervised by the Office of the Comptroller of the Currency ("OCC"). *See* Act of June 3, 1864, ch. 106, 13 Stat. 99, 101 § 8 (1864).

Soon after Congress enacted the NBA, the U.S. Supreme Court began defining the broad parameters of the NBA preemption doctrine, holding consistently that state attempts to "control" the powers of national banks are impermissible, "except in so far as Congress may see proper to permit." *Farmers' & Mechanics' Nat. Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). For well over a century, the U.S. Supreme Court has recognized that state attempts to "define" or "control" the powers of national banks are "void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the[ir] efficiency." *Davis*, 161 U.S. at 283. Thus, "[i]n the years since the NBA's enactment," the U.S. 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).

Under the landmark case of *Barnett Bank of Marion Cty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996), the U.S. Supreme Court set out a standard that any state regulation that "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers" is preempted. *Barnett Bank* is the standard Congress later codified as part of the Dodd-Frank Act, 12 U.S.C. § 25b(b)(1)(B), and *Barnett Bank*'s threshold "is not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009); *cf. Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954) (state-law prohibition on the use of the word "savings" in advertising preempted as to national banks due to its interference with incidental banking powers).[3]

California Civil Code § 2954.8 is a perfect example of the type of state interference with national bank powers that the NBA has long preempted. The California-mandated 2% rate—which is well above current market rates (*see* Appellee's Pet. for Reh'g *En Banc*, at 3-4 & n.1)—constitutes a significant interference with a national bank's use of mortgage escrow accounts, which

[3] *Amici* do not address the Decision's holding that the OCC's interpretation of *Barnett Bank* is not entitled to deference, because California Civil Code § 2954.8 should be preempted under the clear language of *Barnett Bank*. *Amici* also do not address whether OCC regulations, including 12 C.F.R. § 34.4, conflict with the California statute. *Amici* understand other briefs will address those issues.

collectively hold billions of dollars and are key tools used by national banks to manage their credit risk on millions of mortgages across the United States. If national banks are forced to pay interest on escrow accounts, they may need to balance this requirement by charging higher rates on mortgages or reducing the availability of mortgages to lower credit borrowers. Moreover, national banks would be subjected to differing escrow rate requirements from different states, thus defeating the NBA's purpose of a national regulatory structure for national banks.

Accordingly, the Decision should be reheard *en banc* and reversed.

ARGUMENT

I. STATE LAWS FIXING THE PRICES OF NATIONAL BANK PRODUCTS AND SERVICES CONSTITUTE "SIGNIFICANT INTERFERENCE" WITH NATIONAL BANK POWERS.

In holding that California Civil Code § 2954.8(a) is not preempted by the NBA because it does not "significantly interfere" with national banking powers, the Panel did not engage in any historical, economic, or functional analysis of mortgage escrow accounts. *See Lusnak*, 883 F.3d at 1194. The Decision thus reflects the dangers of courts disregarding (i) the basic principle that states cannot regulate the rates and terms of a national bank's products or services, and (ii) the views of the OCC, which, after careful analysis, correctly concluded that state laws "concerning . . . [e]scrow accounts" in the context of real estate loans, 12 C.F.R § 34.4(a)(6), "significantly interfere" with national banks' ability to manage their credit risks, thus striking at the core of their ability to manage their banking business. *See also, e.g.*, *Watters*, 550 U.S. at 13 (citing the same OCC regulation, 12 C.F.R. § 34.4, as "preempt[ing] state controls on mortgage lending").

A. The Decision Permits States To Significantly Interfere with the Ability of National Banks To Manage Credit Risks.

In reversing the district court, the Panel broadly concluded that California Civil Code § 2954.8(a) did not "prevent" or "significantly interfere" with national bank powers under the preemption standard of *Barnett Bank*. *See Lusnak*, 883 F.3d at 1194-95. The Panel provided no explanation based in NBA caselaw or history, nor grounded in economics or the realities of banking practice, and was clearly mistaken.[4]

First, there is no doubt that the establishment of mortgage escrow accounts is a key power of national banks that is entitled to the NBA's preemptive protection. From the NBA's inception, a national bank's powers have extended beyond core banking functions—such as "mak[ing], arrang[ing], purchas[ing] or sell[ing] loans or extensions of credit secured by liens on interests in real estate . . . .," 12 U.S.C. § 371(a)—to include "all such incidental powers as shall be necessary to carry on the business of banking." Act of June 3, 1864, 13 Stat. at 101 § 8 (codified at 12 U.S.C. § 24(Seventh)). Consistent with this history, the

4 As discussed below in Part II, the Dodd-Frank Act basis offered for the Decision does not withstand analysis.

OCC has made clear that the NBA protects the incidental power to use escrow accounts in connection with real estate lending and to do so "without regard to state law limitations concerning [such accounts]." *See* OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1916 (Jan. 13, 2004) (promulgating 12 C.F.R. § 34.4(a)(6)).

Second, there is nothing "minor" about mortgage escrow accounts, which are an important and ubiquitous tool that national banks use to manage credit risk in the mortgage lending market. Modern-day mortgage escrow accounts arose from the experience of the Great Depression, when homes were foreclosed upon due to homeowners' "inability to pay property taxes." U.S. General Accounting Office, *Study on the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Because a tax lien is senior to a mortgage lien, a bank stood to lose all or part of its security interest in a foreclosed-upon property because any proceeds from the sale would go first to paying back taxes. *See* Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). Mortgage escrow accounts allowed lenders to reduce this risk by ensuring "that tax, insurance, and other obligations [were] met[,] and thus enabl[ing] them to protect their investments." GAO Study at 5. In doing so, national banks were (and are) able to (i) make mortgage loans to borrowers with lower credit profiles, (ii) help borrowers manage their money to stay current with their tax and insurance payments, and (iii) manage their own credit risks. *See id*.

Today, mortgage escrow accounts are crucial to the home mortgage system: in 2013 alone, over six million mortgage originations (about 80% of the total) "included an escrow account for taxes or homeowner insurance." *See* CFPB, *A Profile of 2013 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 3, 28, 31 (2016). And the sums are considerable: national banks hold billions of dollars in mortgage escrow balances. If the use of these accounts were undermined by subjecting them to state-law controls, national banks would have diminished means to mitigate the credit risks associated with mortgage lending, with substantial consequences—*e.g.*, reduced availability of credit or higher interest rates. *See* Nathan B. Anderson & Jane K. Dokko, Fed. Reserve Board, *Liquidity Problems and Early Payment Default Among Subprime Mortgages* 2 (2010) (describing how "liquidity constraints" among subprime mortgage borrowers, due in part to the absence of escrow accounts, "contributed to the largest financial crisis since the Great Depression").

Third, California's attempt to regulate a national bank's rates for mortgage escrow accounts is a perfect example of why state attempts to control *any* rates for a national bank's products and services are preempted. The Panel concluded that a 2% rate on those accounts—which is an above-market interest rate—is a "minor interference" despite the record containing no support for such a finding and in clear contradiction of the position of the national bank regulator, the OCC. The Decision misconstrues the meaning of "significantly interfere" under *Barnett Bank*, and it is inconsistent with decisions of this and other circuits that state rate regulations of national banks are preempted under the NBA. *See* Appellee's Pet. for Reh'g *En Banc*, at 6-8 (collecting cases); *see also* Appendix A.

Indeed, whatever the full extent of "significantly interfere" may ultimately be determined to mean, that determination was not necessary in this action. There are two aspects of national bank powers that must be covered under the rubric of "significant interference." The first is a state's direct attempt to prevent or limit the exercise of the powers granted to national banks under the NBA. The second, as seen here, is a state's indirect attempt to prevent or limit the exercise of those powers by regulating the rates charged for a bank's products and services. Just as "[a] right to tax, without limit or control, is essentially a power to destroy," *McCulloch* v. *Maryland*, 17 U.S. 316, 391 (1819), the power to limit or require rates involves the power to make the product or service unprofitable or ineffective, and thus, ultimately, nonviable.

At bottom, allowing states to force national banks to pay interest on mortgage escrow accounts—much less forcing them to pay fixed, statutory rates—necessarily interferes with the flexibility national banks need to "manage credit risk exposures." *See* OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,577 (July 21, 2011). "[T]he safety and soundness of banks depends in significant part on their ability to devise" means "appropriate for their needs." OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. 54,319, 54,319 (Dec. 2, 1983). These means include mechanisms, such as escrow accounts, which help prevent or minimize losses that could threaten a bank's safety and soundness. By limiting national banks' ability to devise mortgage escrow account policies that are "appropriate for their needs," the Decision undermines national banks' ability to manage credit risks, and could force national banks to seek other options, such as charging higher interest rates on mortgages or not making certain mortgages in the first place. Indeed, the OCC has aptly warned that "state laws that would affect the ability of national banks to underwrite and mitigate credit risk . . . such as laws concerning . . . 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." OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. at 43,557.

California Civil Code § 2954.8, or laws like it, thus impose significant limits on national banks' flexibility with respect to designing, establishing, and maintaining mortgage escrow accounts. The Decision's holding that such laws withstand NBA preemption invites state interference with national banks' ability to use this important risk management tool in manners "appropriate for their needs." *See* OCC, *Interpretive Ruling Concerning National Bank Service Charges*, 48 Fed. Reg. at 54,319. Indeed, it is ironic that the Panel cites the Dodd-Frank Act as being designed to prevent the loss of homes through foreclosures, *Lusnak*, 883 F.3d at 1189, while its Decision would restrict an approach that has been recognized as reducing foreclosures by helping to ensure timely payments of taxes and other housing costs.

B. The Decision Risks Turning the National Banking System into a Fifty-State Banking System.

The Decision also invites significant interference with national bank powers by subjecting national banks to a patchwork of different states' mortgage escrow interest rates. For example, Connecticut and Minnesota have established different rates for mortgage escrow accounts that, if applied to national banks, would force national banks to pay inconsistent rates to borrowers depending on their state of residence. *See, e.g.*, Conn. Gen. Stat. Ann. § 49-2a (federal reserve deposit index interest rate); Minn. Stat. Ann. § 47.20 (3% minimum interest rate). As the OCC has recognized, "[t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with [national banks'] ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure." OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908.[5]

II. THE TILA AMENDMENT DOES NOT EXPRESS CONGRESS'S INTENT TO OVERCOME NBA PREEMPTION.

In the Decision, the Panel also held that, although a 2010 Dodd-Frank Act amendment to the Truth in Lending Act ("TILA") did not apply to the Appellant's 2008 loan, the amendment means that California Civil Code § 2954.8 is not preempted as to post-amendment mortgage escrow accounts. But this reading of the amendment again misunderstands basic tenets of the law of preemption.

As *Barnett Bank* makes clear, a finding of a congressional override of national bank preemption is strongly disfavored: "Where Congress has not *expressly* conditioned the grant of [a national bank] 'power' upon a grant of state permission," courts will ordinarily find that "no such condition applies." *Barnett Bank*, 517 U.S. at 34 (emphasis added). Accordingly, absent express congressional override of NBA preemption, a state may not condition a national bank's exercise

5 *See also Talbot* v. *Board of Comm'rs of Silver Bow Cty.*, 139 U.S. 438, 443 (1891) (describing the national banking system as having "uniform and universal operation through the entire territorial limits of the country"); *Kroske* v. *U.S. Bank Corp.*, 432 F.3d 976, 989 (9th Cir. 2005) (recognizing "the congressional purpose of uniform regulation reflected in the [NBA]").

of its powers on, *e.g.*, setting prices at certain levels. This result follows because the history of the NBA "is one of interpreting 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." *Id.* at 32.

Here, the Panel erred by holding that the amendment to TILA—which made no "express" mention of national banks or preemption—nonetheless demonstrates Congress's intent to override preemption and allow states to force national banks to pay certain interest rates on mortgage escrow accounts. *Lusnak*, 883 F.3d at 1194-96. Indeed, even without *Barnett Bank*'s requirement of a clear congressional intent to override NBA preemption, the language of the statute and basic principles of statutory interpretation preclude that result. The key Dodd-Frank Act amendment to TILA reads as follows:

> Applicability of payment of interest. If prescribed by *applicable* State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that *applicable* State or Federal law.

15 U.S.C. § 1693d(g)(3) (emphases added).

First, the law that *is* "applicable" to national banks is the NBA and other *federal* laws, not state law. And under current federal law, a national bank has the flexibility to decide whether to pay interest or not (and the rate of interest) on any escrow account as the national bank may choose.

Second, and relatedly, the Panel's interpretation of "applicable" as meaning "existing"—as oppossed to "legally relevant," *Lusnak*, 883 F.3d at 1195—violates a cardinal rule of statutory interpretation by rendering the term "applicable" superfluous. *See Boise Cascade Corp.* v. *EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *see also Applicable*, Webster's Third New International Dictionary (2002) (defining "applicable" as "capable of being applied," "having relevance," and "fit, suitable, or right to be applied"). The Panel explained that Congress included the term "applicable" in the TILA amendment "because not every state has escrow laws." *Lusnack*, 883 F.3d at 1195. But, if a state did not have a law concerning mortgage escrow rates, no law could "apply," and, in any event, § 1693d(g)(3)'s conditional language "[i]f prescribed" already accounts for the potential non-existence of such laws. Instead, § 1639d(g)(3) is only appropriately read in a way that does not render the term "applicable" as superflous: because § 1639d applies to a wide array of lender types, including national banks and nonbank lenders, the word "applicable" accounts for the fact that state escrow account laws do not apply to certain categories of lenders, such as national banks.[6]

[6] *See, e.g., Flagg* v. *Yongers Sav. & Loan Ass'n*, 396 F.3d 178 (2d Cir. 2005)

Third, there is no reason to think that, by referring to "applicable State or Federal law," Congress intended to remove the preemptive protection of the NBA and subject national banks to state, rather than federal, law as to mortgage escrow accounts. *See United States* v. *Locke*, 529 U.S. 89, 106 (2000) ("We think it quite unlikely that Congress would use a means so indirect . . . to upset the settled division of authority [between federal and state law.] We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."). Indeed, Congress knew very well when drafting Dodd-Frank how to expressly address and limit the scope of preemption when it wanted to do so. *See, e.g.*, Dodd-Frank Act, 124 Stat. 1376, 2017 (July 21, 2010) (codified at 12 U.S.C. § 25b(h)(2)) (providing that state law is not preempted as to subsidiaries of national banks that are not themselves national banks).

Fourth, in a footnote, the Panel tacitly acknowledged its strained reading of the TILA amendment when it noted that state laws imposing "punitively high rates banks must pay on escrow balances" may be preempted under the NBA, because they "may prevent or significantly interfere with a bank's ability to engage in the business of banking." *Lusnak*, 883 F.3d at 1195 n.7. In so stating, the Panel

---

(New York 2% escrow account interest requirement preempted as to federal savings and loan associations).

read the TILA amendment—which again says nothing about preemption—as sometimes preempting state laws imposing mortgage escrow rates on national banks, and sometimes not. In addition to inappropriately converting a question of law to one of fact, by its logic this reading recognizes that, contrary to the Panel's holding, the word "applicable" relates to whether a state law is preempted against a national bank—there is simply no other language in the TILA amendment that could achieve this result.

Moreover, it is inconceivable that Congress intended for federal courts to be in the business of deciding, on an ongoing basis—and, presumably, depending on the then-current level of interst rates—when a statutory rate is "punitively high" and when it is not. *Cf. id.* For example, is California's 2% minimum rate "punitively high" when it is over six times the average 0.30% rate for one-year certificates of deposit during the 2010-2016 period? *See* Appellee's Pet. for Reh'g *En Banc*, at 3-4 & n.1.

Accordingly, the Panel erred when, contrary to U.S. Supreme Court precedent, it held that the TILA amendment's non-express provisions applying to creditors in general overrode preemption as to national banks in particular.

CONCLUSION

For these reasons, *Amici* respectfully request that this Circuit grant rehearing *en banc* and reverse the Decision.

Dated: New York, New York
April 20, 2018

Respectfully submitted,

/s/ Matthew A. Schwartz

H. Rodgin Cohen
Michael M. Wiseman
Matthew A. Schwartz
Andrew K. Jennings
Montae J. Langston
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Amici Curiae

Jeremy R. Newell
Paige E. Pidano
THE CLEARING HOUSE ASSOCIATION L.L.C.
1001 Pennsylvania Avenue, N.W.
Suite 720 North Tower
Washington, D.C. 20004
(202) 649-4600

Thomas Pinder
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5000

Steven I. Zeisel
CONSUMER BANKERS ASSOCIATION
1225 Eye Street, N.W., Suite 550
Washington, D.C. 20005
(202) 552-6380

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Justin Wiseman
Helen Kanovsky
MORTGAGE BANKERS ASSOCIATION
1919 M Street N.W., 5th Floor
Washington, D.C. 20036
(202) 557-2700

Rich Foster
FINANCIAL SERVICES ROUNDTABLE &
THE HOUSING POLICY COUNCIL OF THE
FINANCIAL SERVICES ROUNDTABLE
600 13th Street N.W., Suite 400
Washington, D.C. 20005
(202) 289-4322

Of counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Circuit Rule 29-2(c)(2), I certify that:

This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because this brief, inclusive of Appendix A hereto, contains 4,161 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Professional Plus 2010 Times New Roman 14-point font.

Dated: New York, New York
April 20, 2018

/s/ Matthew A. Schwartz
H. Rodgin Cohen
Michael M. Wiseman
Matthew A. Schwartz
Andrew K. Jennings
Montae J. Langston
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: New York, New York
April 20, 2018

/s/ Matthew A. Schwartz
H. Rodgin Cohen
Michael M. Wiseman
Matthew A. Schwartz
Andrew K. Jennings
Montae J. Langston
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Amici Curiae

Appendix A

Deming v. *Merrill Lynch & Co.*, 528 F. App'x 775 (9th Cir. 2013) (loan administrative and compliance fees)

Baptista v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (non-account holder check cashing fees)

Martinez v. *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010) (underwriting and tax service fees)

Monroe Retail, Inc. v. *RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (account service fees)

SPGGC, LLC v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (gift card expiration dates and fees)

Bank of Am. v. *City & Cty. of San Francisco*, 309 F.3d 551 (9th Cir. 2002) (deposit and lending-related service fees)

Powell v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D.W. Va. 2016) (payments ordering and late fees)

Pereira v. *Regions Bank*, 918 F. Supp. 2d 1275, 1276 (M.D. Fla. 2013), *aff'd*, 752 F.3d 1354 (11th Cir. 2014) (check cashing and settlement)

NNDJ, Inc. v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-account holder official check cashing fees)

Metrobank v. *Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (non-account holder ATM fees)