UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SAUL R. HYMES and ILLANA HARWAYNE-GIDANSKY, on behalf of themselves and all others similarly situated, Plaintiffs, v. BANK OF AMERICA, N.A., and Does 1 through 10, inclusive, Defendants.	No. 18-cv-2352 (RRM) (ARL)
ALEX CANTERO, individually and on behalf of all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.	No. 18-cv-4157 (RRM) (ARL)

BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, THE CONSUMER BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO CERTIFY AN INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Regulations

INTEREST OF *AMICI CURIAE*

Collectively, *amici* believe that mortgage escrow accounts—and certainty as to their regulation—are essential to the success of the nation's real estate markets.[1]

BPI. The Bank Policy Institute ("BPI") is a nonpartisan policy, research, and advocacy group that represents the nation's leading banks and their customers. BPI's member banks employ nearly 2 million Americans, make 72% of the nation's loans, and serve as an engine for financial innovation and economic growth. In New York State alone, BPI's members have nearly three thousand branches, hold over $1.25 trillion in deposits, and have made over $42 billion in mortgage loans.[2] Among BPI's members are national banks that face costly uncertainty about the application of federal preemption to various state-law interest requirements for mortgage escrow accounts.

CBA. The Consumer Bankers Association ("CBA") is the voice of the retail banking industry. Established in 1919, our members' products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

Chamber. The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations

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[1] No counsel for a party authored this brief in whole or in part. No persons other than *amici*, their members, or their counsel contributed money intended to fund this brief's preparation or submission.

[2] *See* Bank Policy Institute, *The Economic Impact of the Bank Policy Institute Members*, available at http://everyday.bpi.com/ (last accessed Nov. 6, 2019) (selecting New York).

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 that raise issues of concern to the nation's business community.

Amici submit this brief to assist this Court's understanding of the need for an immediate appeal of its September 30, 2019 Order ("Order"). *Hymes* v. *Bank of Am., N.A.*, 18-cv-2352 (RRM) (ARL), Dkt. No. 47; *Cantero* v. *Bank of Am., N.A.*, 18-cv-4157 (RRM) (ARL), Dkt. No. 35. In particular, *amici* seek to inform this Court about the consequences of the Order's preemption ruling for mortgage escrow accounts' critical function in the U.S. lending system; the interference that various state-law interest requirements impose on that function; and the likelihood of needless, protracted litigation over such requirements absent interlocutory review.

INTRODUCTION

The National Bank Act ("NBA") preempts state laws that "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion Cty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996); *see also* 12 U.S.C. § 25b(b)(1)(B). The threshold for what constitutes "significant interference" is "not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009). One of the most important powers of national banks is the ability to set the terms and prices on the mortgage loans that they make. *See* 12 U.S.C. § 371(a) (authorizing national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate"); *id.* § 24 (Seventh) (vesting national banks with "all such incidental powers as shall be necessary to carry on the business of banking"); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007) ("Beyond genuine dispute, state law may not significantly burden a national bank's own 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 NBA.").

A key part of millions of mortgages are mortgage escrow accounts, which are designed to aid consumers in managing their tax, insurance, and utility payments and to protect the banks' interest in the underlying collateral property. Relying on the NBA, as well as the interpretation of the Office of the Comptroller of the Currency ("OCC") that the NBA preempts state laws concerning mortgage escrow accounts, 12 C.F.R. § 34.4(a)(6), hundreds of national banks—holding billions of dollars in mortgage escrow accounts—have, for decades, set the terms and prices of the mortgages they issue and their associated escrow accounts. Without such preemption, the pricing and terms of mortgage escrow accounts would be subject to a patchwork of 50 different state regulatory regimes. The NBA was designed to prevent such "unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

This Court's decision that, after the enactment of the Dodd–Frank Act (which adopted the *Barnett Bank* standard), the NBA does not preempt the 2% interest requirement for mortgage escrow accounts found in New York General Obligations Law ("G.O.L.") § 5-601, Order at 2, thus is contrary to settled industry expectations, disregards the NBA as consistently interpreted by the Supreme Court and the OCC, and threatens to disrupt millions of present and future mortgages. Requiring banks to pay interest on mortgage escrow accounts—as this Court and the Ninth Circuit have ordered, *see id.*; *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185, 1188 (9th Cir. 2018)—would force the banks to alter the terms and pricing of the mortgages themselves or reduce the use of mortgage escrow accounts in general. Clearly, this question is of "special consequence," and this Court "should not hesitate to certify an interlocutory appeal." *Balintulo* v.

Daimler AG, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009)).

ARGUMENT

Congress has provided that this Court may certify an order for interlocutory appeal where the order "involves a controlling question of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). When determining whether to certify an order, this Court also "may properly consider the system-wide costs and benefits of allowing the appeal." *Klinghoffer* v. *S.N.C. Achille Lauro Ed Altri–Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990). Here, the Order easily satisfies all these factors. Because Bank of America persuasively addresses the question of why the Order deals with controlling issues of law,[3] *amici* principally address the other factors that courts consider when certifying interlocutory review under § 1292(b).

I. MORTGAGE ESCROW ACCOUNTS ARE A UBIQUITOUS AND ESSENTIAL RISK-MITIGATION TOOL THAT FACILITATE MILLIONS OF LOANS EACH YEAR.

Because the Order risks impacting billions of dollars held in mortgage escrow accounts maintained at national banks, and millions of mortgage loans annually, an immediate appeal would provide Second Circuit precedent for "a large number of cases." *See*, *e.g.*, *Halberstam* v. *Global Credit & Collection Corp.*, No. 15-cv-5696 (BMC), 2016 WL 2596041, at *2 (E.D.N.Y. May 5, 2016); *see also*, *e.g.*, *Aiello* v. *Town of Brookhaven*, 136 F. Supp. 2d 81, 121

[3] *See* Memorandum in Support of Defendant's Motion to Certify The Court's September 30, 2019 Order for Interlocutory Appeal and to Stay Further Proceedings Pending Interlocutory Appeal, *Hymes* v. *Bank of Am., N.A.*, 18-cv-2352 (RRM) (ARL), at 5 (served Oct. 30, 2019) ("Def.'s Mem.").

(E.D.N.Y. 2001) (certification is appropriate to "avoid protracted litigation" (quoting *Koehler* v. *Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996))). Indeed, BPI's member banks alone have originated more than $42 billion in mortgage loans in New York—many of which depend on mortgage escrow accounts to provide security for homeowners and lenders alike.

Mortgage escrow accounts are a fundamental element of the entire mortgage process. As this Court noted, escrow accounts have been required or negotiated in mortgage loans since "at least the middle of the twentieth century." Order at 3. 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. Gen. Accounting Office, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Because a tax lien could be superior to a mortgage lien, banks faced losing all or part of the value of their security interests in foreclosed-upon property. *See* Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998) ("CRS Report"). A homeowner's failure to pay insurance premiums could also seriously jeopardize the value of the collateral in the event of a catastrophic loss. *See* GAO Study at 5.

Mortgage escrow accounts provided a solution to these problems, "enabl[ing] [lenders] to protect their investments" by ensuring "that tax, insurance, and other obligations [were] met." *Id.* These accounts allow tax authorities and insurers to collect payments "more economically," reduce the number of delinquencies and defaults, and avoid the "bad check problem that is associated with dealing with individual taxpayers" and insureds. CRS Report at 3; *see* GAO Study at 5.

The benefits of mortgage escrow accounts redound to homeowners as well, helping them budget funds for necessary expenses and offering a convenient method for paying those

expenses, thus reducing the prospect of losing their homes. *See* GAO Study at 5. Of perhaps even greater importance, this Court acknowledged a key benefit of mortgage escrow accounts is that "lenders are able to offer loans to borrowers at reduced interest rates." Order at 3–4.

Today, national banks hold billions of dollars in mortgage escrow accounts—allowing banks to manage credit risks, make mortgage loans to borrowers with riskier credit profiles, and help borrowers stay current with tax and insurance payments. *See* GAO Study at 5. Indeed, mortgage escrow accounts are crucial to the success of the home mortgage system: in 2016 alone, nearly six million mortgage originations—approximately 79% of the total—"included an escrow account for taxes or homeowner insurance." *See* Fed. Hous. Fin. Agency & Consumer Fin. Prot. Bureau, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 1, 27, 30 (2018).

As a result, the Order's anti-preemption ruling will impact far more than Plaintiffs' own mortgage escrow accounts—the Order could affect the pricing and terms of millions of current and future mortgages, as well as the pricing and terms of their associated escrow accounts. A decision here from the Second Circuit would thus have "precedential value for a large number of cases," *see*, *e.g.*, *Halberstam*, 2016 WL 2596041, at *2, including one that is already pending, *see* Memorandum in Support of Defendant's Motion to Dismiss, *347 Townhouse, LLC* v. *Citibank, N.A.*, No. 19-cv-542 (LAP), Dkt. No. 21, at 3–17 (S.D.N.Y. Apr. 1, 2019) (arguing that the NBA preempts G.O.L. § 5-601). Certification is appropriate to "avoid [such] protracted litigation" and minimize costly uncertainty. *Aiello*, 136 F. Supp. 2d at 121 (quoting *Koehler*, 101 F.3d at 866); *see Klinghoffer*, 921 F.2d at 24.

II. THERE ARE SUBSTANTIAL GROUNDS FOR DISAGREEMENT ABOUT WHETHER G.O.L. § 5-601 IMPOSES A SIGNIFICANT BURDEN ON NATIONAL BANKS' POWERS UNDER THE NBA.

Under § 1292(b), substantial grounds for difference of opinion exist when either: (1) the interlocutory order addresses a difficult question of first impression in the Second Circuit, or (2) there is conflicting authority on the issue. *See*, *e.g.*, *Batalla Vidal* v. *Nielsen*, Nos. 16-cv-4756 & 17-cv-5228 (NGG) (JO), 2018 WL 333515, at *2 (E.D.N.Y. Jan. 8, 2018); *see also Balintulo*, 727 F.3d at 186 (courts "should not hesitate" to certify "new legal question[s]" of "special consequence" (quoting *Mohawk Indus., Inc.*, 558 U.S. at 111)); *Glatt* v. *Fox Searchlight Pictures Inc.*, No. 11-cv-6784 (WHP), 2013 WL 5405696, at *1 (S.D.N.Y. Sept. 17, 2013) (Congress passed § 1292(b) to "assure the prompt resolution of knotty legal problems" (quoting *Weber* v. *United States*, 484 F.3d 154, 159 (2d Cir. 2007))). This Court's Order presents both.

Specifically, the Order concluded that G.O.L. § 5-601's "degree of interference" on national banks' powers under the NBA is "minimal," because it requires interest to be paid "on the comparatively small sums deposited in mortgage escrow accounts." Order at 36. That conclusion—which approved state-law interest imposition at the rate of $2.0 million for every $100 million that national banks hold in mortgage escrow accounts—addressed a question of first impression in the Second Circuit while disregarding the conflicting authority of the OCC.

A. The NBA's Preemptive Effect after the Dodd–Frank Act is a Novel Question in this Circuit.

With respect, the Order reached, at best, a "debatable" conclusion about a "difficult" and novel question in the Second Circuit. *See Batalla Vidal*, 2018 WL 333515, at *2. This Court acknowledged the Order's novel nature when it stated that the preemption of state laws requiring interest to be paid on mortgage escrow accounts "appears to be a question of first impression everywhere other than in the Ninth Circuit." Order at 18.

Moreover, this Court also acknowledged that the Order's conclusion was debatable, as it sought "to reconcile two acts of Congress that, to some extent, speak past each other." *Id.* at 41. During that reconciliation, this Court rejected the views of national banks' primary regulator, finding that OCC regulations were entitled to neither *Chevron* nor *Skidmore* deference. *See id.* at 27–32.[4] But this Court cited no evidence—which the OCC is best positioned to marshal and analyze—to support the Court's conclusion that G.O.L. § 5-601's interference is "minimal" in light of "the comparatively small sums deposited in mortgage escrow accounts." Order at 36. Although this Court noted that "[n]ational banks are free to elect whether to absorb the cost or attempt to pass it along to consumers in the form of heightened fees," *id.* at 39 n.17—a rationale that would excuse even the most punitive state-law requirements—the Order failed to consider the impact of that contemplated activity and whether it could amount to a significant interference. Further, the Order failed even to address how national banks could overcome G.O.L. § 5-601's interference with respect to existing mortgage contracts. Given that state-law interest requirements undeniably impact the billions of dollars that national banks hold in mortgage escrow accounts, which facilitate millions of loans each year to support the U.S. housing market, this Court's conclusion about the interference imposed by G.O.L. § 5-601 certainly meets the standard of being "debatable." *See Batalla Vidal*, 2018 WL 333515, at *2.

This Court sought to support its conclusion with the view that G.O.L. § 5-601 does not impose "anything approaching th[e] level of interference" found in the Supreme Court's NBA preemption precedents, where "application of the state law would have practically nullified a

[4] The question of what level of deference is owed to the OCC is addressed by the parties and the OCC, and so *amici* do not address it here. *See* Def.'s Mem. at 12–16; *Amici Curiae* Office of the Comptroller of the Currency's Memorandum in Support of Defendant Bank of America, N.A.'s Motion for Certification of Interlocutory Appeal, *Hymes* v. *Bank of Am., N.A.*, 18-cv-2352 (RRM) (ARL), Dkt. No. 63, at 5–9 (E.D.N.Y. Nov. 7, 2019) ("OCC *Amicus*").

specific grant of power." Order at 37. But elsewhere, the Order acknowledged that "banks often are unwilling to make secured mortgage loans without these escrow accounts." *Id.* at 33–34 (citation omitted; alteration adopted). For this reason, mortgage escrow accounts are "an integral part of or a logical outgrowth of the lending function." *Id.* at 6 (quoting OCC Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998)). G.O.L. § 5-601 places the viability of that integral function at risk by requiring an interest payment that is nearly *four* times the current average of 0.51% paid by FDIC-insured U.S. depository institutions on 12-month certificates of deposit.[5] As a consequence, the question of significant interference—a preemption standard that is "not very high," *Monroe Retail, Inc.*, 589 F.3d at 283—is "difficult" and "debatable" at the very least. *See Batalla Vidal*, 2018 WL 333515, at *2.

Likewise, the Order supported its conclusion by reasoning that "'significant interference' is not a question of cost—it is not this Court's role to determine the bottom-line impact of escrow interest laws on the business operations of national banks, or to allocate the benefits of mortgage lending between borrower and lender." Order at 37. But, how can a court avoid that responsibility when the level of cost can often be core to the question of significance? Moreover, this Court did precisely that when it acknowledged that "[a] state escrow interest law 'setting punitively high rates' could very well significantly interfere with national banks' power to administer escrow accounts," *id.* at 38 (quoting *Lusnak*, 883 F.3d at 1195 n.7), and implicitly assumed that a 300% higher rate was not punitive. In drawing the line between acceptable and unacceptable costs, this Court borrowed from a footnote in *Lusnak* that cited no authority for its

[5] *See* Fed. Deposit Ins. Corp., *Weekly National Rates and Rate Caps – Weekly Update*, available at https://www.fdic.gov/regulations/resources/rates/ (last accessed Nov. 6, 2019) (showing average national rate paid by U.S. depository institutions on 12-month certificates of less than $100,000).

judicially-invented limiting principle, and applied *Lusnak*'s limiting principle in this case implicitly to determine "the bottom-line impact of escrow interest laws on the business operations of national banks." *See* Order at 37; *Lusnak*, 883 F.3d at 1195 n.7. *Amici* respectfully submit that choosing the Ninth Circuit's *ipse dixit* over the OCC's considered and long-held views was "debatable" as well. *See Batalla Vidal*, 2018 WL 333515, at *2. At bottom, federal courts have no expertise in determining what level of state law-imposed interest rates on certain products constitutes significant interference.

This Court also starts down a very slippery slope. This Court's reasoning would permit New York to impose minimum, and above-market, rates on a host of different types of deposit accounts. Even if it could be argued that no one rate represented "significant interference," collectively they undeniably would amount to the "unduly burdensome and duplicative state regulation" that the NBA preempts. *See*, *e.g.*, *Watters*, 550 U.S. at 11.

Accordingly, courts have repeatedly recognized that any state-law imposition on the pricing or other terms of a national bank's products constitutes significant interference. *See*, *e.g.*, *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 (11th Cir. 2011) (check cashing fees for non-account holders); *Monroe Retail, Inc.*, 589 F.3d at 284 (account service fees); *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525, 534 (1st Cir. 2007) (gift card expiration dates and fees). This Court distinguished that line of cases because "none featured a law like section 1639d(g)(3)," but instead "relied on comprehensive OCC rules, interpretive letters, and the like to discern congressional intent." Order at 38. But at the same time, the Order found that G.O.L. § 5-601 "applies equally to the time periods before and after Dodd–Frank became effective." Order at 41 n.18. Thus, even assuming the Dodd–Frank Act blessed state-law interest requirements for mortgage escrow accounts (a point *amici* join Bank of America and the OCC in disputing), this Court's failure to

justify state-law imposition on the pricing and terms of a national bank's products before the Dodd–Frank Act was—in the face of unanimous authority to the contrary—undeniably "debatable." *See Batalla Vidal*, 2018 WL 333515, at *2.

B. The Order Conflicts with the OCC's Interpretation of its Own Preemption Regulation.

This Court's Order also conflicts with the views of the OCC on whether state-law interest requirements on mortgage escrow accounts significantly interfere with the operations of a national bank. *See* 12 C.F.R. § 34.4(a)(6) ("A national bank may make real estate loans . . . without regard to state law limitations concerning . . . [e]scrow accounts, impound accounts, and similar accounts."); OCC *Amicus* at 10.

These substantial grounds for difference of opinion will fester in the district courts without interlocutory review, perpetuating costly uncertainty in the nation's mortgage markets until the Order is eventually appealed.

For example, other New York courts may disagree that a required interest rate of 2% for mortgage escrow accounts imposes merely a "minimal" degree of interference on national banks' power over mortgage escrow accounts. *See id.* In fact, other New York courts may conclude that a 300% increase constitutes the sort of "punitively high rate[]" that even this Court acknowledged the NBA may preempt. *See id.* at 38 (quoting *Lusnak*, 883 F.3d at 1195 n.7).

Moreover, judges throughout the Second Circuit—where numerous national banks, large and small alike, conduct business—may disagree with this Court's conclusion about the level of interference imposed by state-law interest requirements for mortgage escrow accounts. For example, in Connecticut, where BPI's members have originated more than $8 billion in mortgage

loans,[6] state law requires interest to be paid on escrow accounts at a rate "not less than the deposit index." Conn. Gen. Stat. § 49-2a. And in Vermont, where BPI's members have originated more than $700 million in mortgage loans,[7] state law requires "the same conditions as the lender's regular savings account, if offered, and otherwise at a rate not less than the prevailing market rate of interest for regular savings accounts offered by local financial institutions." Vt. Stat. Ann. tit. 8, § 10404(b). Courts in these states may well agree with the OCC that state-law requirements on mortgage escrow accounts, including any mandated interest payments, significantly interfere with national banks' core lending powers. *See* 12 C.F.R. § 34.4(a)(6).

In all events, the Second Circuit will eventually be called on to decide the NBA's preemptive effect on state laws requiring interest to be paid on mortgage escrow accounts. Failing to certify the Order risks spawning years of "protracted litigation" over various state-law interest requirements, *see Koehler*, 101 F.3d at 866—to say nothing of the future proceedings in these cases (and labor of this Court and the parties) that would be mooted by the Second Circuit's reversal of the Order after final judgment. Congress enacted § 1292(b) to prevent precisely these kinds of imbalances between "system-wide costs and benefits." *See Klinghoffer*, 921 F.2d at 24.

CONCLUSION

Section 1292(b) was enacted to ensure the immediate review of new and consequential legal questions, such as the NBA's preemptive effect on state laws that affect the pricing of national banks' products. Here, the Order risks affecting millions of loans and billions of dollars held by national banks based on this Court's resolution of a novel legal question.

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[6] *See* Bank Policy Institute, *The Economic Impact of the Bank Policy Institute Members*, available at http://everyday.bpi.com/ (last accessed Nov. 6, 2019) (selecting Connecticut).

[7] *See* Bank Policy Institute, *The Economic Impact of the Bank Policy Institute Members*, available at http://everyday.bpi.com/ (last accessed Nov. 6, 2019) (selecting Vermont).

Delaying the Second Circuit's eventual review of this legal question would only encourage protracted litigation, increasing the costs of uncertainty for national banks, homeowners, and the mortgage market as a whole. Accordingly, this Court should grant Bank of America's motion for certification—allowing the Second Circuit to minimize uncertainty for courts, market participants, and homeowners by providing definitive guidance on a disputed and far-reaching legal question.

Respectfully submitted,

Dated: November 7, 2019

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CERTIFICATE OF SERVICE

I certify that on November 7, 2019, I caused a true and correct copy of the foregoing to be served via electronic mail on all counsel of record in the above-captioned cases.

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