No. 22-529

IN THE

Supreme Court of the United States

ALEX CANTERO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

BANK OF AMERICA, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR FORMER COMPTROLLERS OF THE CURRENCY AND SENIOR OCC OFFICIALS AS *AMICI CURIAE* SUPPORTING RESPONDENT

WILLIAM M. JAY
Counsel of Record
JENNA WELSH
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, DC 20036
wjay@goodwinlaw.com
(202) 346-4000

January 25, 2024

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

Amici are former Comptrollers of the Currency, Acting Comptrollers of the Currency, other senior leaders, and senior legal staff of the Office of the Comptroller of the Currency (OCC). Their collective decades of OCC experience spanned Administrations of both political parties.[2]

Brian P. Brooks served as Acting Comptroller of the Currency from April 2020 until January 2021 under President Trump. During his tenure, the agency released Interpretive Letter #1173, which set out how the OCC interprets preemption standards and requirements.

Robert L. Clarke served as the 26th Comptroller of the Currency from December 1985 until February 1992 under Presidents Reagan and George H. W. Bush. After his term as Comptroller, Mr. Clarke returned to the practice of law.

John C. Dugan served as the 29th Comptroller of the Currency from August 2005 to August 2010. During his five-year tenure as Comptroller, Mr. Dugan led the agency through the financial crisis and recession

[1] No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. Although another attorney from the undersigned law firm appeared on the brief for respondent in the court of appeals, undersigned counsel are not counsel for any party in this Court.

[2] *Amici* submit this brief only for themselves and not on behalf of any current employer or client. Their current positions, where listed, are given solely for purposes of identification.

that resulted in significant regulatory, supervisory, and legislative action, including the negotiation and enactment of the relevant preemption language in the Dodd-Frank Act.

Jonathan V. Gould served as Senior Deputy Comptroller and Chief Counsel of the Office of the Comptroller of the Currency from December 2018 through June 2021. During his time at the agency, Mr. Gould oversaw the OCC's legal and licensing activities.

Eugene Ludwig served as Comptroller of the Currency from April 1993 through April 1998, under President Clinton. During his tenure as Comptroller, Mr. Ludwig spearheaded efforts to modernize the banking industry, and he also led efforts to more vigorously enforce fair lending laws.

Raymond Natter served as Deputy Chief Counsel of the Office of the Comptroller of the Currency from 1995-2004 and also served as Acting Chief Counsel from April-December 1998. During his tenure at the OCC, he was responsible for the development and review of the agency's regulatory undertakings.

Keith A. Noreika served as Acting Comptroller of the Currency in 2017, under President Trump. Before serving in government, he was among the counsel for respondent in *Watters v. Wachovia Bank, N.A.*, No. 05-1342. He is currently Executive Vice President at Patomak Global Partners.

Joseph Otting served as 31st Comptroller of the Currency from November 2017 through May 2020 under President Trump. Prior to his service as Comptroller of the Currency, Mr. Otting served as an executive in the banking industry. Mr. Otting has returned to the private sector where he serves on the board of a number of companies, owns interest in financial services companies, and is active in the financial services industry as a principal in a private capital fund.

Blake J. Paulson served as Acting Comptroller of the Currency in 2021 under Presidents Trump and Biden. Mr. Paulson's career as a National Bank Examiner spanned four decades across multiple roles. Mr. Paulson first joined the OCC in 1986 as a community bank examiner. Other positions he held throughout his OCC tenure included serving as the First Senior Deputy Comptroller for Supervision Risk and Analysis, Chief Operating Officer, Chief National Bank Examiner, Deputy Comptroller of the Central District, and Senior Deputy Comptroller for Midsize and Community Bank Supervision.

Daniel P. Stipano was the OCC's Deputy Chief Counsel from 2000-2016. He also served twice as the agency's Acting Chief Counsel and Senior Deputy Comptroller from October 2004 through August 2005, under President Bush, and again from October through December 2012, under President Obama. Prior to that, Mr. Stipano was the Director of the OCC's Enforcement & Compliance Division from 1995-2000. In his 31 years with the agency, Mr. Stipano served under five Comptrollers of the Currency, in both Democratic and Republican Administrations. As Deputy Chief Counsel and Acting Chief Counsel, Mr. Stipano supervised the OCC's Litigation Division and the preparation of briefs submitted on behalf of the OCC in federal preemption cases, including *Watters v. Wachovia Bank, N.A.*, No. 05-1342, and *Cuomo v. Clearing House Ass'n*, No. 08-453. He is currently a Partner in the Financial Institutions Group at Davis Polk & Wardwell.

John G. Walsh was appointed Acting Comptroller of the Currency in 2010 during the Obama Administration and led the agency during implementation of the substantial regulatory changes mandated by the Dodd-Frank Act from 2010-2012. Mr. Walsh joined the agency in 2005 as Chief of Staff to Comptroller John C. Dugan who was appointed by President George W. Bush. As Acting Comptroller, Mr. Walsh signed the proposed and final rules to implement the regulatory changes arising from the Dodd-Frank Act. These rules included the OCC's current preemption rule which affirmed the longstanding *Barnett Bank* precedent as laid out in the Act. He is currently a Senior Advisor to the Risk and Resilience Practice at McKinsey & Company.

Julie L. Williams served twice as Acting Comptroller of the Currency and was Chief Counsel and First Deputy Comptroller of the Currency for two decades, serving in both Democratic and Republican Administrations. Ms. Williams was first appointed Chief Counsel of the OCC in 1994, was designated the statutory First Deputy in 1997, and was named First Senior Deputy Comptroller in 1999. She served as Acting Comptroller from April 1998 until December 1998, under President Clinton, and again from October 2004 through August 2005, under President Bush. In her role as Chief Counsel, Ms. Williams signed the brief for the United States and the OCC in *Barnett Bank of Marion County, N.A. v. Gallagher*, No. 94-1837, the decision that Congress codified as the touchstone of preemption under the National Bank Act, as well as the government's briefs in other preemption cases such as *Watters v. Wachovia Bank, N.A.*, No. 05-1342, and

Cuomo v. Clearing House Ass'n, No. 08-453. She is currently Senior Counsel at WilmerHale.

Amici have witnessed first-hand the continuity in the OCC's approach to preemption under the National Bank Act, both before and after the Dodd-Frank Act, including in the briefs filed in this Court. Some of them participated personally in the rulemaking relating to interest on escrow accounts in particular. Their decades of experience with the relevant preemption issues gives each of them an interest in the resolution of this case.

Amici have submitted this brief in response to the arguments by petitioners and the Office of the Solicitor General, which ask this Court to break from the longstanding and consistent approach that the OCC has followed for decades. Indeed, petitioners and the government expressly ask the Court to reach an outcome and adopt an analysis that the OCC rejected in the brief it filed below in this very case. Adopting that brand-new approach, and breaking with the longstanding view of the key agency that regulates in the interest of preserving the national banking system, would inject significant uncertainty into a major line of business for many national banks. Indeed, the issue goes well beyond interest on escrow accounts. What is at stake is whether national banks will be able to understand with reasonable certainty what their regulatory obligations are. Under petitioners' current approach, adopting the view expressed for the first time anywhere at the certiorari stage by the Office of the Solicitor General, such predictability would become elusive—if not impossible.

SUMMARY OF ARGUMENT

For decades and across Presidential Administrations, the OCC has consistently performed its role of overseeing and protecting the national banking system and concluded that state law may not compel national banks to pay interest on escrow accounts. OCC is an independent bureau within the Department of the Treasury with its own rulemaking and litigating authority. In exercising that authority, the OCC has consistently taken the position that, under this Court's cases culminating in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996), state laws conflict with a federal power vested in national banks when they attempt to control or hinder the exercise of that power.

Among the powers vested in national banks is the power to engage in real estate lending. OCC has thus repeatedly emphasized that state law cannot control or hinder national banks' activity in real estate lending generally. And, more specifically, the OCC has consistently taken the position that states cannot regulate national banks' escrow accounts, including by requiring that national banks pay interest on those accounts. Indeed, the OCC took that position in two recent amicus briefs in the courts of appeals, including an amicus brief that the OCC filed in the court of appeals *in this case*. Those briefs—the most recent of which was filed June 15, 2021—contain nothing that would surprise any past Comptroller or Chief Counsel from any Administration. Their reasoning, and their conclusion that states cannot require that national banks pay interest on escrow accounts, follow the OCC's track record of adhering to the concept of conflict preemption as applied to the national banking system, as this Court outlined it in *Barnett Bank*.

The OCC's position does not mean, of course, that national banks' real estate lending activity is unregulated. To the contrary, national banks' real estate lending activity is heavily regulated at the *federal* level, which avoids the need for national banks to comply with patchwork state-by-state regulations.

The Department of Justice has, in this case, jettisoned the OCC's consistent position on the question presented—including the OCC's position below—in favor of an analysis that is *so* fact-specific and *so* granular that the Department of Justice cannot even tell this Court whether the relevant New York statute is preempted. Tellingly, *no one* from the OCC appears on the government's brief—a conspicuous omission in light of longstanding practice.

Amici disagree with two particular aspects of the government's brief. First, the government's parsing of the statutory preemption standard fails to treat Dodd-Frank as codifying this Court's cases. Second, the government's conclusion that the preemption analysis requires statute-by-statute and case-by-case factfinding leads to exactly the type of disruptive uncertainty that the Dodd-Frank preemption provision sought to *avoid*. Denying the regulated community and the public any stable answer to recurring questions will be hugely disruptive to the practicalities of conducting a lending business.

ARGUMENT

The position advanced by petitioners, joined by the Department of Justice, bears no resemblance to the understanding of *Barnett Bank* that both regulators and regulated banks have shared for many years. Adopting that position would result in precisely the type of uncertain business environment—with national banks unable to determine their state-by-state regulatory obligations without each bank litigating each law to final judgment—that the authors of Dodd-Frank's preemption provision specifically set out to avoid. Dodd-Frank codified the holdings of this Court's *Barnett Bank* line of cases precisely so that national banks would not face this type of seismic change to the rules of the road.

I. The OCC has faithfully applied this Court's *Barnett Bank* line of cases and has consistently concluded, over decades, that state law may not compel national banks to pay interest on escrow accounts.

A. The OCC's approach to preemption remained steady over time and across Administrations.

The OCC has maintained a steady approach to preemption under the National Bank Act for many years. In its role overseeing and protecting the *national* banking system, the OCC has recognized the importance of "being able to conduct a banking business pursuant to consistent, national standards." 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004). The powers of a national bank are granted by Congress. *See, e.g.*, 12 U.S.C. §§ 371, 24 (Seventh). And the bank's ability to exercise those powers does not depend on state permission.

The consistency in the OCC's approach is not surprising given the OCC's structure, function, and history. The Comptroller is a Senate-confirmed official who serves a term of years, which has often straddled presidential terms. The office is an independent bureau within the Department of the Treasury. It has its own legal staff and its own independent litigating authority. 12 U.S.C. §§ 1, 93(a). And it has explicitly grounded its approach to preemption in the powers granted to national banks by Congress and in the conflict-preemption caselaw of this Court.

Thus, even before codifying its approach, the OCC recognized that under this Court's cases culminating in *Barnett Bank*, state laws "conflict with a Federal power vested in national banks" when they hinder the exercise of that power. 68 Fed. Reg. 46119, 46122-23 (Aug. 5, 2003). And in its own rulemakings, it drew its formulation "directly from applicable Supreme Court precedents." 69 Fed. Reg. at 1910.

So too in the OCC's past filings in this Court—at least, until this case. In briefs co-signed by the OCC's own legal staff, multiple Solicitors General have previously advanced an understanding of *Barnett Bank* just as described above.

The Court's most significant elucidation of the preemption standard between *Barnett Bank* and its codification in the Dodd-Frank Act came in *Watters v. Wachovia Bank*, 550 U.S. 1 (2007). The United States filed an amicus brief, co-signed by the OCC's Chief Counsel and other attorneys, some of the *amici* among them. As the brief explained, "[t]he Court has made clear that the Act preempts state conditions on the exercise of national bank powers even when the conditions fall short of an outright prohibition." U.S. Amicus Br. 28, *Watters, supra* ("U.S. *Watters* Br.") (filed Nov. 3, 2006). Thus, for instance, the brief explained that in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), the state law in question—which "did not bar national banks from receiving savings deposits" but barred national banks from using the word "savings" in advertisements—presented a "'clear conflict'" with the National Bank Act's authorization for banks to receive savings deposits. U.S. *Watters* Br. 28 (citing *Franklin*, 347 U.S. at 377-78). The state law was preempted because it "impaired a national bank's ability" to carry out its statutory powers. *Id.*

As the OCC has long recognized, preemption should operate to preserve "the national character of the national banking system." U.S. *Watters* Br. 22 (quoting 69 Fed. Reg. at 1908). Banks that take on the responsibilities of a federal charter, and adhere to the high standards applicable to a national bank, are entitled "to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws." *Id.* (quoting 69 Fed. Reg. at 1908).

The OCC has devoted many pages of the *Federal Register* to discussing its approach, in part to ensure that the regulated community has a thorough understanding of the ground rules. But at bottom, the OCC set out to accurately describe and apply this Court's holdings, in the line of cases culminating in *Barnett Bank*. *See* 69 Fed. Reg. at 1910 ("The OCC intends this phrase as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in *Hines* and *Barnett,* and not as a replacement construct that is in any way inconsistent with those standards.").

B. The OCC has been notably consistent with respect to the real estate lending power.

The consistency of the OCC's approach has been particularly notable with respect to national banks' power to engage in real estate lending, which "has been extensively regulated at the *Federal* level since the power first was codified" in 1913. 69 Fed. Reg. at 1909; 68 Fed. Reg. at 46124-25. The OCC has always taken the view that state law that impermissibly constrains the real estate lending power is preempted. 69 Fed. Reg. at 1910-11. Escrow accounts are a key aspect of real estate lending, because they protect the collateral and, as a result, the homeowner's ability to borrow at a lower rate than an unsecured loan would require. Thus, the OCC has concluded that states may not require national banks to pay interest on escrow balances. Conditioning the ability to use escrow accounts on paying whatever interest rate the State may choose—often above market—is a direct interference with the lending power.

The specific statutory grant of a real estate lending power underscores the particular importance of allowing national banks to adhere to consistent nationwide standards without being subject to impediments thrown up by a variety of state laws on that issue. The OCC noted that Section 371, which codifies the real estate lending power, is even broader in several respects than other statutes granting powers to national banks which this Court has found preemptive (such as Section 92's grant of power to sell insurance, at issue in *Barnett Bank*). Section 371 refers "expressly and exclusively to the OCC as the entity possessing authority to set *restrictions* and *requirements* that apply to national banks' real estate lending activities." 68 Fed. Reg. at 46124. And whereas state law has long regulated the business of insurance (in general), federal law has long made real estate lending by national banks a subject of *national* concern. *Id.* In this area, therefore there is even less reason to be skeptical of preemption than in *Barnett Bank*, in which this Court confirmed that grants of federal authority "are not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank*, 517 U.S. at 32; *see* U.S. *Watters* Br. 22-23. Thus, in sum, Section 371 in particular "is not a limited permission, that is, it does not authorize national banks to engage in real estate lending only to the extent state law allows." 68 Fed. Reg. at 46124.

But as the OCC has explained, "[p]reemption of state laws governing national banks' real estate lending does not mean that that activity would be unregulated. On the contrary, national banks' real estate lending is pervasively regulated under Federal standards and subject to comprehensive supervision." 68 Fed. Reg. at 46125. Indeed, the premise of the *national* banking system is not that national banks should be unregulated, but that they should be regulated on a nationwide basis. Under Dodd-Frank, national banks are subject to the consumer-protection rules promulgated by the newly created Consumer Financial Protection Bureau. Notably, in Dodd-Frank, Congress declined to require interest on escrow on a nationwide basis, but decided instead to require it only for certain types of loans, through an amendment to the Truth in Lending Act. *See* Resp. Br. 11.

In its last word on National Bank Act preemption before Dodd-Frank, this Court described it as "[b]eyond genuine dispute" that "state law may not significantly burden a national bank's own exercise of its real estate lending power." *Watters*, 550 U.S. at 13. It treated "significantly burden" as synonymous with "curtail or hinder." *Id.*

The OCC has specifically identified state laws concerning "[e]scrow accounts" as among the types of laws preempted by the National Bank Act. 12 C.F.R. § 34.4(a)(6). In the OCC's view, national banks may engage in real estate lending "without regard to state law limitations concerning … [e]scrow accounts," as well as related issues such as "[t]he ability of a creditor to require … risk mitigants" and "[t]he terms of credit." *Id.* § 34.4(a)(2), (4), (6). By ensuring that the collateral securing a loan will be protected by insurance and will not become subject to tax liens, escrow accounts mitigate risk and allow borrowers to obtain credit on more favorable terms than an unsecured loan.

C. Dodd-Frank adopted the *Barnett Bank* standard.

What was previously implied is now express. Congress made a conscious decision to adopt the *Barnett Bank* standard as the preemption rule going forward. The substance of the *Barnett Bank* rule was well understood, and Congress did nothing to displace the OCC's (widely shared) understanding of that decision.

The Senate adopted the express reference to *Barnett Bank* as the touchstone of preemption by a lopsided, bipartisan floor vote, and during conference with the House (which had proposed to change the preemption standard substantially) the Senate insisted on its amendment. The Senate's version prevailed and was adopted and signed by the President.

Before, during, and after the conferees' consideration of the preemption language, the sponsors of the Senate amendment emphasized their intent to keep existing conflict-preemption law intact, including for the sake of stability. *See, e.g.*, H.R. Conf. Rep. No. 111-517, at 875 (2010) (Dodd-Frank "codifies" *Barnett Bank*); 156 Cong. Rec. S3869 (daily ed. May 18, 2010) (statement of Sen. Johnson) ("uniform standard" will "provid[e] certainty to those that offer financial products and those who use the products"); 156 Cong. Rec. S5902 (daily ed. July 15, 2010) (colloquy between Sen. Carper and Chairman Dodd) ("There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case [*Barnett Bank*]").

To be sure, as everyone agrees, Congress did not ratify *every* aspect of pre-existing preemption doctrine. It specifically overruled this Court's holding in *Watters* about the application of National Bank Act preemption to subsidiaries of national banks. *See* 12 U.S.C. § 25b(b)(2). But it did so in a targeted way—entirely consistent with the sponsors' view that this Court's decision in *Barnett Bank* was and should remain the touchstone. Nothing in Dodd-Frank suggested that *Watters* misapplied *Barnett Bank* or was incorrect in its observation that under that line of cases, it is "[b]eyond genuine dispute" that "state law may not significantly burden a national bank's own exercise of its real estate lending power." *Watters*, 550 U.S. at 13. To the contrary, Congress drew a statutory boundary around *Barnett Bank*'s preemption principles—they apply to the national bank itself. Within that boundary, they apply unchanged.

D. The OCC followed Congress's directive in continuing to adhere to the *Barnett Bank* standard.

Petitioners and their amici suggest that the OCC's implementation of *Barnett Bank* since 2011 is somehow unfaithful to Dodd-Frank. That is incorrect. As explained, OCC's view has always incorporated the conflict preemption analysis of *Barnett Bank*. The express *adoption* of that same preemption standard by Congress therefore should not be expected to change OCC's approach substantially. And indeed, the authors of Dodd-Frank's preemption language have expressly confirmed that OCC implemented that language the way they expected. As they emphasized, their goal was stability, not an upheaval. They specifically *opposed* the type of unpredictable and disruptive regime that would result from tossing out the *Barnett Bank* standard, or from focusing on a few specific words from *Barnett Bank* as opposed to the line of this Court's holdings it synthesized.

After Dodd-Frank's adoption, Senators Carper and Warner wrote to OCC in connection with its rulemaking to implement the preemption provision. They emphasized that—as OCC had long recognized—the *Barnett Bank* standard "is not simply the short-hand phrase 'prevent or significantly interfere', but rather the traditional conflict preemption standard as explained by the Court in its holding." Resp. Br. App. 32a. Their legislation "codifies" the holding, not just the shorthand. *Id.* Doing anything else, they emphasized, would not serve the goal of "assur[ing] legal certainty for all parties"—anything less than full ratification of *Barnett Bank*, by name, "would have created an uncertain legal environment in which it would not be clear what laws applied to national banks." *Id.*

The authors also confirmed that, "[c]onsistent with our desire to provide legal certainty to all parties," their legislation "[wa]s not intended to retroactively repeal the OCC's 2004 preemption rulemaking." Resp. Br. App. 32a. The authors particularly rejected the notion that the procedural steps Dodd-Frank set out for making *future* preemption determinations called into question *past* preemption determinations. *Id.* at 32a-33a. They understood that "[t]hrowing the 2004 regulation and other prior administrative and judicial determinations into doubt would not bring certainty to the marketplace, but instead would be disruptive." *Id.* at 33a.

After a letter from the Treasury general counsel took a different position, Senators Carper and Warner wrote a second letter to emphasize that Treasury's position "was, in fact, rejected by Congress." Resp. Br. App. 40a. The statutory preemption standard does not require adherence to "'part of' the legal standard" from *Barnett Bank*; "it says 'the' legal standard." *Id.* at 41a. And the authors stressed, once again, that replacing *Barnett Bank* with some new, partial, and uncertain standard would have been "extremely troublesome"; Congress instead "wished to provide 'certainty' on the issue of the preemption standard." *Id.* at 43a (quoting 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Johnson)).

The OCC confirmed its agreement with the authors' view, both in an interpretive letter in May 2011 and in its final post-Dodd-Frank rulemaking to implement the statute's reference to "*the legal standard for preemp-*

tion in the decision of the Supreme Court of the United States in [*Barnett Bank*]." 12 U.S.C. § 25b(b)(1)(B). As the OCC explained, "'Prevent or significantly interfere' is not 'the legal standard for preemption in the decision'; it is part of the Court's discussion of its reasoning." 76 Fed. Reg. 43549, 43555 (July 21, 2011). The OCC cited the letters from Senators Carper and Warner. *Id.* at 43555 n.31; *see also* OCC Interpretive Ltr. #1132 (May 12, 2011), available at https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2011/int1132.pdf.

Thus, the OCC made minor changes to the verbal formulation of the general standard recited in its regulations, but solely to "remove any ambiguity that the conflict preemption principles of the Supreme Court's *Barnett* decision are the governing standard for national bank preemption." 76 Fed. Reg. at 43556. And it reaffirmed its adherence to the *Barnett Bank* standard, and to "precedents consistent with that analysis." *Id.*

On the specific issue relevant here, the OCC adhered to its prior rulemaking concluding that, under the *Barnett Bank* standard, state escrow law would impermissibly interfere with national banks' lending power. "[B]ased on the OCC's experience with the potential impact of such laws on national bank powers and operations," and after a re-review "to confirm that the specific type of laws cited in the rules" are preempted under "the standard for conflict preemption in the Supreme Court's *Barnett* decision," 76 Fed. Reg. at 43557, the OCC adhered to its longstanding view. Thus, the OCC's regulations continue to provide that national banks need not follow state law on "[e]scrow accounts." 12 C.F.R. § 34.4(a)(6).

E. Under the *Barnett Bank* standard, the OCC has consistently concluded that states may not require national banks to pay interest on escrow accounts.

The consistent understanding of the OCC culminated in two briefs explicitly addressing the question presented, filed in the two circuits that produced the circuit split, including *in the case below*. Those briefs—the most recent of which was filed June 15, 2021, well after President Biden took office—contained nothing that would have surprised any past Comptroller or Chief Counsel from any Administration. They follow the OCC's track record of adhering to the concept of conflict preemption as applied to the national banking system, as this Court outlined it in *Barnett Bank*.

Thus, for instance, in the brief below, the OCC reiterated that under this Court's cases, "[i]ndependence from state direction and control reflects the essential character of a national bank charter: it shields national banks from local laws that could undermine the powers granted to them by federal law." OCC C.A. Br. 7. It emphasized that the district court, at petitioners' urging, had applied a higher bar for preemption that is unfaithful to *Barnett*—under the district court's incorrect view, only state laws that "practical[ly] abrogat[e]" or "nullif[y]" a national bank's exercise of a federal banking power are preempted. *Id.* at 7-8. *Accord* OCC Amicus Br. 5-10, *Lusnak v. Bank of America, N.A.*, No. 14-56755 (9th Cir. filed Apr. 23, 2018) ("OCC *Lusnak* Br."). And it reiterated that "Dodd-Frank preserves the *Barnett* conflict preemption standard," that the OCC's own preemption determinations "expressly adopt the *Barnett* conflict preemption standard," and that OCC's determinations therefore are fully "consistent with the statute." OCC C.A. Br. 8 n.4 (quoting 76 Fed. Reg. at 43556).

Finally, most importantly to participants in the industry, the OCC took a clear position on the issue at stake. Its brief concluded, unambiguously: "application of [New York's interest-on-escrow statute]" to "[the national bank that is respondent here] is preempted by federal law." OCC C.A. Br. 21. *Accord* OCC *Lusnak* Br. 9 ("[A] proper application of *Barnett* should have resulted in the panel affirming the preemption of the California escrow statute.").

II. The Department of Justice has disavowed the consistent view of the expert regulator in favor of its own new parsing of words from *Barnett Bank.*

When this Court invited the views of the United States at the certiorari stage, it got the view of the Office of the Solicitor General—one that surprisingly ignored the view of the OCC entirely, to the point of abandoning in a footnote the on-point regulations of the client agency. That brief, and its longer version filed at the merits stage, insist that the analysis is necessarily *so* fact-specific and *so* granular that the Department of Justice cannot answer the question presented—but that the OCC's answer, for all these years, has been mistaken. The divergence between the Department of Justice's interpretation of the National Bank Act and the longstanding position of the national bank regulator, regarding the regulatory requirements applicable to a significant line of banking business for national banks, has caused significant uncertainty. As explained above, the preemption provision of Dodd-Frank set out to do the opposite: to provide certainty, to codify this Court's conflict-preemption doctrine, and to *avoid* any implication of a clean break or a new standard.

And importantly, this codification of *Barnett Bank* did not by any means leave national banks unregulated. They have always been highly regulated under multiple federal standards, and they are now subject to the federal consumer financial protection framework enacted and consolidated by Dodd-Frank. *See, e.g.*, 12 U.S.C. §§ 5515(c), 5516(d); *see also id.* §§ 5301(18)(A), 1813(a)(1)(A) & (c)(2) (defining agency supervisory and enforcement authority to apply to national banks); Gov't Br. 54-55, *Cuomo v. Clearing House Ass'n*, No. 08-453 (filed Mar. 25, 2009) (describing pre-Dodd-Frank authority).

Perhaps not surprisingly, no one from the OCC appears on the government's brief—a conspicuous omission in light of longstanding practice. The brief nods to the OCC's regulatory role in claiming an interest in this case, U.S. Br. 1, but expressly breaks with the views the OCC has formed as a result of that regulatory role and longstanding experience. In disavowing the OCC's regulations, its legal interpretation, and its recommended treatment of the question presented, including in this case, the Department of Justice asserts only that its view is a "better reflect[ion]" of the standard in the law. U.S. Br. 7 n.4. Nevertheless, though unsurprisingly, it appears that the OCC itself is informing the national banks it regulates that it does not agree with the Department of Justice's interpretation. *See* Resp. Br. App. 45a-46a & n.2 (continuing to cite the OCC regulation disavowed here by the Office of the Solicitor General as providing "examples of the types of state laws that do not apply to national banks").

Amici disagree with two aspects of the government's brief in particular. First, the government's parsing of the statutory preemption standard fails to treat Dodd-Frank as a codification of this Court's cases. Instead, it rests on parsing of particular language from the statute as if it came without any past history or context. That would be an unusual approach to a term of art drawn from judicial decisions even if the statute did not expressly *refer* to those judicial decisions. *See, e.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts."). Here, where Congress took the unusual step of actually citing this Court's decision and approving "the legal standard for preemption" in it, there is even stronger reason to conclude that the statute looks to the substance of the holding, not the snippets of language selected to stand in for it.

That is certainly what the OCC concluded, with the benefit of input from the authors of the preemption language. It devoted significant attention to that point in the rulemaking. *See* pp. 15-17, *supra*. And in pointing out the Ninth Circuit's interpretive errors in the case that eventually produced the circuit split, the OCC made similar points. Indeed, the OCC described as "mistaken" a position similar to the one the Department of Justice takes here. OCC *Lusnak* Br. 5-9, 16-17 (also calling this position a "misreading" and a "fundamental[] misapprehen[sion]") (boldface omitted).[3]

Second, the government's conclusion that the statute prohibits general answers and requires extraordinary granularity leads to exactly the type of disruptive uncertainty that the Dodd-Frank preemption provision sought to *avoid*. The government treats the question whether any particular state statute is preempted, as applied to any individual national bank, under any given circumstances, as if it were a new question to be answered through factfinding. Denying the regulated community and the public any stable answer to recurring questions will be hugely disruptive to the practicalities of conducting a mortgage-lending business.

The government rests its interpretation on an incorrect inference from a *procedural* provision of the statute. That provision applies only to preemption determinations made by the OCC after Dodd-Frank's adoption. 12 U.S.C. § 25b(c). The Department of Justice shrugs that "nothing in the statute suggests that Congress intended *courts* to take a different approach when resolving preemption questions in cases within their jurisdiction." U.S. Br. 15. To the contrary: the adoption of the *Barnett Bank* standard itself confirms that these questions can be answered on the face of the relevant statutes, just as they were in *Barnett Bank*.

---

[3] The government does not actually endorse the key reasoning of *Lusnak*, which—unlike the government, *see* pp. 22-23, *infra*—at least *answered* the preemption question. The Ninth Circuit inferred from a Dodd-Frank provision, which *now sometimes* requires the payment of interest on escrow as a matter of *federal* law, that it has *always* been permissible to *always* require the payment of interest on escrow as a matter of *state* law.

Moreover, the drafters of the preemption provision, their Senate colleagues, and the OCC's final rule all extensively discuss the practical reason why Dodd-Frank would not have employed this procedural language to change the substance of preemption. Their goal was to preserve "certainty," by adopting the holding of *Barnett Bank* as the standard. The sponsors specifically recognized that disapproving every previous preemption regulation would be highly disruptive and undesirable. *See* pp. 13-14, *supra.* The same is true of the government's overly granular proposed standard, under which no national bank could ever be certain that any particular state law—relating to escrow requirements or other functions of the business of banking—would be preempted as applied to *it.* Such a result is fundamentally inconsistent with the decision of Congress reflected in the Dodd-Frank Act and the literally centuries of precedents of this Court supporting that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM M. JAY
Counsel of Record
JENNA WELSH
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, DC 20036
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Amici Curiae

January 25, 2024