IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SAUL R. HYMES and ILANA HARWANE-GIDANSKY, on behalf of themselves and all others similarly situated, Plaintiffs, v. BANK OF AMERICA, N.A., *et al.*, Defendants.	Civil Case No.: 2:18-cv-02352 (RRM/ARL)
ALEX CANTERO, on behalf of themselves and all others similarly situated, Plaintiffs, v. BANK OF AMERICA, N.A., *et al.*, Defendants.	Civil Case No.: 1:18-cv-04157 (RRM/ARL)

AMICUS 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

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INTRODUCTION

When Congress enacted the National Bank Act, it "intended to facilitate . . . a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) (quoting Cong. Globe, 38th Cong., 1st Sess. 1451 (1864)). Reflecting this purpose, the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). Similarly, the Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996) ("*Barnett*"). Accordingly, the Office of the Comptroller of the Currency ("OCC" or "Agency") has applied the conflict preemption standard set forth in *Barnett* and issued regulations identifying categories of state law that are preempted, *see* 12 C.F.R. §§ 7.4007(b), 7.4008(d), 34.4(a), and not preempted, *see* 12 C.F.R. §§ 7.4007(c), 7.4008(e), 34.4(b).

The Court's September 30, 2019 Order, ECF No. 47 ("Order"), upsets these settled legal principles. Federal law empowers national banks like Defendant Bank of America, N.A. ("BOA") to engage in the "business of banking" and to exercise "all such incidental powers" thereto. 12 U.S.C. § 24(Seventh). National banks have the express authority to make, arrange, and deal in loans secured by interests in real estate, 12 U.S.C. § 371, and the implied authority to provide, establish, and service escrow accounts, *see generally* OCC Interpretive Letter No. 1041 (Sept. 28, 2005). But in concluding that the National Bank Act does not preempt state laws like New York General Obligation Law § 5-601—which requires "mortgage investing" institutions to pay a defined interest rate on customers' mortgage escrow account balances—the Order represents a significant departure from the OCC's longstanding interpretation of the *Barnett* standard and from many decisions issued by other courts endorsing the OCC's interpretive approach.

Because the *Barnett* standard "is a matter of foundational consequence to the OCC and to the federal banking system," OCC Amicus Br., *Lusnak v. Bank of Am.*, No. 14-56755, 2018 WL 3702582, at *5 ("OCC Amicus Br."), the OCC respectfully submits this memorandum in support of BOA's motion to certify the Order for interlocutory appeal. 28 U.S.C. § 1292(b). The Court's application of the *Barnett* standard—and its treatment of OCC regulations applying this standard to state escrow account interest requirements—raise controlling questions of law that, if resolved on appeal, would "materially affect the outcome" of the instant litigation, *see Buckskin Realty Inc. v. Greenberg*, 552 B.R. 40, 44 (E.D.N.Y. 2016), and "substantially affect[]" other cases raising similar issues, *see Genentech, Inc. v. Novo Nordisk*, 907 F. Supp. 97, 99 (S.D.N.Y. 1995). Appellate review would also resolve "difficult" questions of "first impression" for the Second Circuit. *Osuji v. U.S. Bank, N.A.*, 285 F. Supp. 3d 554, 558 (E.D.N.Y. 2018). Therefore, the OCC urges this Court to certify the Order for interlocutory appellate review.

INTERESTS OF AMICUS CURIAE

The OCC is an independent bureau of the U.S. Department of the Treasury charged with administration of the National Bank Act, 12 U.S.C. § 1 *et seq.*, and oversight of the national banking system. The OCC has comprehensive authority over the chartering, supervision, and regulation of virtually every aspect of national banks' operations, including real estate lending and their authority to offer escrow account services. 12 U.S.C. § 371. The OCC is authorized generally to represent itself in litigation. 12 U.S.C. § 93(d).

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

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

ARGUMENT

Certification for interlocutory appeal is appropriate when a district court's order (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Because the Order turns on issues of first impression concerning preemption principles and administrative deference about which reasonable minds may disagree, it implicates the types of "knotty legal problems" for which § 1292(b) was designed. *See Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007).

I. THE ORDER RAISES IMPORTANT, NOVEL, AND DISPOSITIVE ISSUES ABOUT NATIONAL BANK ACT PREEMPTION

Whether the National Bank Act preempts state laws like Section 5-601 presents "a question of first impression everywhere other than in the Ninth Circuit." Order at 18; *see also Osuji*, 285 F. Supp. 3d at 558 (noting that a substantial ground for difference of opinion exists when "the issue is particularly difficult and of first impression for the Second Circuit" (quoting *Buckskin Realty Inc.*, 552 B.R. at 44)). As the Court correctly notes, the preemption question turns on a pure question of law: whether the National Bank Act preempts Section 5-601. *See Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311 (2d Cir. 2005) (noting that National Bank Act preemption cases "solely involve[] legal issues"). But the Court's ensuing conclusion that state laws like Section 5-601 are not be preempted unless they "practical[ly] abrogat[e]" or "nullif[y]" a national bank's exercise of a federal banking power, Order at 36-37, stands in stark contrast to the preemption standard set forth in *Barnett* and the OCC's—as well as many other federal courts'—interpretation of that standard. *See* OCC Amicus Br., 2018 WL 3702582, at *11-13 (collecting cases).

In *Barnett*, the Supreme Court instructed lower courts to resolve preemption issues by applying a multifaceted evaluative approach that recognizes the different means by which state restrictions may conflict with national bank powers. *See Barnett*, 517 U.S. at 33-34; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that no "infallible constitutional test or exclusive constitutional yardstick" for conflict preemption exists). Although the Court recognized *Barnett*'s "different linguistic formulations," it departed from the OCC's and other courts' views by molding these formulations into a new heightened standard.[1]

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[1] *Compare* Order at 33-37 *with Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 408-409 (6th Cir. 2001) (holding that state restrictions that would "inevitably impose administrative costs

Independence from state direction and control reflects national banks' essential federal character: it protects national banks from local laws that could undermine key aspects of the national banking system.[2] The *Barnett* standard represents an important tool in accomplishing these goals, as the National Bank Act sought to insulate national banks from "the hazard of unfriendly legislation by the States." *See Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873). Given the standard's importance to the national banking system—and given the parties' conflicting views on its proper interpretation and application in this matter—this case presents "exceptional circumstances" warranting immediate interlocutory appeal. *Osuji*, 285 F. Supp. 3d at 558 (citation omitted).

II. THE ORDER CREATES CONFUSION ABOUT THE VALIDITY OF THE OCC'S REGULATIONS

The Court's views concerning the applicability of—and deference owed to—the OCC's preemption regulation, 12 C.F.R. § 34.4, also provide grounds for interlocutory appeal. Specifically, the Court opined that § 34.4 was entitled to deference under *Skidmore v. Swift &*

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on national banks" and possibly cause these banks to "reduce its business with its own customers" would "significantly interfere[]" with the exercise of a national bank power); *Cline v. Hawke*, 51 Fed. App'x 392, 397 (4th Cir. 2002) (determining that state restrictions which increased bank operating costs and substantively affected national banks' ability to solicit and sell insurance products were preempted under *Barnett*); *Mass. Bankers Ass'n, Inc. v. Bowler*, 392 F. Supp. 2d 24, 28 (D. Mass. 2005) (concluding that state restrictions which "increase[d] the banks' administrative costs" and otherwise "significantly curtail[ed] the banks' ability to . . . sell insurance products" were preempted).

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

Co., 323 U.S. 134 (1944), *i.e.*, to the extent of the regulation's "thoroughness, consistency, and persuasiveness," Order at 27-28 (quoting *Wyeth v. Levine*, 555 U.S. 555, 576 (2009)). After concluding there was "no evidence" the OCC "had engaged in a careful, considered analysis of whether the [National Bank Act] preempts state laws limiting escrow accounts," the Court declined to apply the OCC's regulation to the facts of this case. Order at 29.[3] Each step of the Court's reasoning, however, raises important and difficult questions for which a substantial ground for difference of opinion exists.

First, the Order risks undermining the Comptroller's role as the primary regulator of national banks by failing to grant the OCC's regulation any measure of real deference. This lack of deference is significant, as Congress charged the OCC with the regulation of national banks and the interpretation and enforcement of the National Bank Act. *See* 12 U.S.C. § 1, *et seq.*; *see also, e.g.*, *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971). Furthermore, the OCC's regulations and interpretations govern virtually "[e]very aspect" of national banks' affairs. *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979) ("National banks are perhaps as meticulously regulated as any industry."). The Order's decision to limit § 34.4's force and scope, however, creates

[3] The OCC has explained that its "judgments concerning state provisions that interfere with national bank powers are grounded in its supervisory judgment regarding the potential effect of those interactions on bank activities." OCC Amicus Br., 2018 WL 3702582, at *10. As relevant here, the OCC brought this judgment to bear when identifying state restrictions on national bank real estate lending powers that would be preempted, "reflecting the OCC's 'experience with types of state laws that can materially affect and confine—and thus are inconsistent with—national bank real estate lending powers.'" *Id.* at *14 (quoting Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1911). Informed by its past litigation experience with the *Barnett* analysis, the OCC therefore determined that the list of preempted state limitations included, among other provisions, those pertaining to escrow accounts. *Id.* at *10, 14 (citing 12 C.F.R. §§ 34.4(a)(6)).

substantial uncertainty about whether national banks can safely rely on these regulations and interpretations, no matter how reasonably based.

Second, other courts may reasonably disagree with how the Court applied *Skidmore* deference to the OCC's preemption regulation. Under the Supremacy Clause, OCC regulations "have no less pre-emptive effect than" the National Bank Act itself. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Where, as here, Congress has "directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *See id.* at 153-54; 12 U.S.C. § 93a..[4] Reflecting this approach, the Supreme Court instructs courts to set aside regulations preempting state law only if they are "'unreasonable, unauthorized, or inconsistent with' the underlying statute." *de la Cuesta*, 458 U.S. at 154 (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981)). Stated differently, "if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute," courts will "not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (internal quotation marks and citation omitted). And although the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") provides that the Agency's opinion regarding the degree to which state law conflicts with a national bank power receives a variable degree of deference under *Skidmore*, see 12 U.S.C. § 25b(b)(5)(A), this

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

provision did not represent a change to existing law, *see* OCC Amicus Br., 2018 WL 3702582, at *15 n.2, and the Agency's conclusions are still entitled to "some weight."[5]

The Court does not claim to apply this standard to § 34.4. Instead, the Court suggests that the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), somehow lessened the amount of deference due to the Agency. Order at 28. But other courts may take a different view on *Wyeth*'s applicability to the OCC's preemption regulation or the deference due to the Agency. For example, *Wyeth* expressly distinguished regulations with the force of law from other agency statements, such as material in regulatory preambles, outlining the agency's views on the impact of state law on federal objectives. 555 U.S. at 577 (noting that the case concerned "an agency's mere assertion" that a state law was preempted rather than "an agency regulation with the force of law"). Similarly, courts have endorsed the OCC's preemption regulations both before and after the Dodd-Frank Act's enactment.[6] Courts have also specifically upheld 12 C.F.R. § 34.4 and approved of the OCC's categorical evaluation of state laws preempted by the National Bank Act.[7] For these reasons, the appropriate deference due to the OCC's preemption

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[5] *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (noting that agencies are "uniquely qualified" to comprehend the likely impact of state requirements when their delegated authority concerns subject matters that are "technica[l]" and "the relevant history and background are complex and extensive").

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

[7] *See, e.g.*, *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 556-57 (9th Cir. 2010); *Powell v. Huntington Nat'l Bank*, 226 F. Supp. 3d 625, 639-52 (S.D. W. Va. 2016); *Simon v. Bank of Am., N.A.*, No. 10-cv-00300-GMN-LRL, 2010 WL 2609436, at *5-6 (D. Nev. June 23, 2010); *McSwain v. Wells Fargo Home Mortg., Inc.*, No. 2:10-CV-630 JCM (PAL), 2010 WL 2540280, at *1-2 (D. Nev. June 16, 2010); *Acosta v. Wells Fargo Bank, N.A.*, No. C 10-991 JF (PVT), 2010 WL 2077209, at *6 (N.D. Cal. May 21, 2010); *Watkins v. Wells Fargo Mortg.*, No. 3:08-0132, 2008 WL 2490306, at *4 (S.D. W. Va. June 29, 2008); *Smith v. Wells Fargo & Co.*,

regulations—and the applicability of those regulations to this case—represent issues ripe for interlocutory appeal.[8]

III. INTERLOCUTORY APPEAL WOULD CLARIFY THE SCOPE OF NATIONAL BANKS' AUTHORITY TO PROVIDE, ESTABLISH, AND SERVICE ESCROW ACCOUNTS

Finally, the Court should grant BOA's motion to certify because the case would "substantially affect[] a large number of cases" concerning the National Bank Act's preemptive scope. *See Genentech, Inc.*, 907 F. Supp. at 99. Although national banks must comply with certain categories of state law, federal regulation of national banks is otherwise intended to be consistent and uniform across the country.[9] Preemption provides this consistency and uniformity; it allows consistent and uniform application of federal standards to national bank operations irrespective of where the bank or its customers are located. *See Tiffany*, 85 U.S. at 413. In contrast, applying multiple variations of state and local requirements to national bank

No. 08 Civ. 0564 (LAK), 2008 WL 11404524, at *1 (S.D.N.Y. Apr. 2, 2008); *Johnson v. Chase Manhattan Bank, USA, N.A.*, No. 07-526, 2007 WL 2033833, at *5-6 (E.D. Pa. June 11, 2007).

[8] The Dodd-Frank Act amended the Truth in Lending Act ("TILA") such that "creditors," if "prescribed by applicable State or Federal law," must "pay interest" to consumers "on the amount held in any . . . escrow account that is subject to" the relevant TILA provision, 15 U.S.C. § 1639d(b). 15 U.S.C. § 1639d(g)(3). Plaintiffs, however, concede that BOA is not required to offer them escrow account services. *See* Order at 11 n.5; *see also* 15 U.S.C. § 1639d(b). Similarly, § 1639d(g)'s title—"Administration of *mandatory* escrow or impound accounts"—suggests that § 1639d(g)(3)'s terms may not apply to Plaintiffs' escrow accounts, irrespective of any interaction these amendments might have with the National Banking Act or the OCC's implementing regulations. *See* 15 U.S.C. § 1639d(g) (emphasis added).

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

operations and customers in different locations creates an environment of business uncertainties, unnecessary costs, and potential liabilities.

To be sure, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law. *See* Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004) (codified at 12 C.F.R. pts. 7 and 34). National banks' compliance with these laws does not affect the content or extent of their federally authorized activities. *Id.* Instead, these laws establish the legal infrastructure that surrounds and supports national banks' ability to do business. *Id.*

Here, the OCC has determined that federal law empowers national banks to offer escrow account services. 12 C.F.R. § 34.4(a)(6). This power does not fall within the purview of any of the types of laws through which states retain the power to regulate national banks. 12 C.F.R. § 34.4(b). Therefore, requiring national banks to comply with laws like Section 5-601 risks allowing states to impose "costly operational and administrative burdens on national banks' lending activities" in a manner contrary to Congressional intent. *See, e.g.*, *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Ca. 2002).

CONCLUSION

For these reasons, the OCC respectfully supports BOA's request that this Court certify its September 30, 2019 Order for interlocutory appeal to the United States Court of Appeals for the Second Circuit.

Dated: November 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 7, 2019, I caused the attached Memorandum in Support of Defendant Bank of America's Motion for Certification of Interlocutory Appeal to be served via the Court's Electronic Case Filing system on all counsel of record in the above-captioned cases.

Dated: November 7, 2019

Respectfully submitted,

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