

Nos. 26-1354, 26-1371, 26-1440, 26-1441

**IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

**ILLINOIS BANKERS ASSOCIATION, AMERICAN BANKERS
ASSOCIATION, AMERICA'S CREDIT UNIONS, & ILLINOIS CREDIT
UNION LEAGUE,**

Plaintiffs-Appellants and Cross-Appellees,

v.

**KWAME RAOUL, in his official capacity as Illinois Attorney General,
*Defendant-Appellee and Cross-Appellant.***

On Appeal from the United States District Court
for the Northern District of Illinois, Case No. 24-cv-7307
The Honorable Virginia M. Kendall, District Court Judge

**BRIEF OF AMICUS CURIAE TEN NONPROFIT
ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE
AND CROSS-APPELLANT**

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INTEREST OF AMICUS CURIAE

American Economic Liberties Project (“AELP”) is a nonprofit organization that works to promote competition, combat monopolistic corporations, and advance economic liberty for all.

Americans for Financial Reform Education Fund is a nonprofit organization formed in the wake of the 2008 financial crisis to advocate for policies that shape a fair and stable financial sector.

Demand Progress Education Fund is a nonprofit organization that educates and mobilizes its members and the general public about matters pertaining to the democratic nature of our nation’s governance structures and the impacts of corporate power over our economy and democracy.

Main Street Alliance is a national network of 30,000 small business owners organizing to reclaim economic and political power for local communities.

Merchants Payments Coalition (“MPC”) is a group of retailers, supermarkets, restaurants, drug stores, convenience stores, gas stations, online merchants, hotels, and other businesses focused on reforming the U.S. payments system to make it more transparent and competitive. The mission of the MPC is to lower interchange fee costs and drive innovation.

National Association of Consumer Advocates is a nonprofit association of more than 1,600 attorneys and consumer advocates committed to representing consumers’ interests.

National Community Reinvestment Coalition is a nonpartisan, nonprofit organization dedicated to increasing the flow of capital into underserved communities.

New Jersey Appleseed Public Interest Law Center, Inc., is a nonprofit organization dedicated to advancing social and economic justice through legal advocacy, policy reform, and community education. It has a strong interest in preserving state authority to enforce consumer protection laws, as expansive federal preemption would threaten New Jersey's robust legal framework and impair its efforts to protect consumers.

Open Markets Institute is a nonprofit organization dedicated to promoting fair and competitive markets and safeguarding American political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity.

U.S. PIRG is a federation of independent, state-based, citizen-funded Public Interest Research Groups; PIRG advocates for the public interest, speaking out for the public and standing up to special interests on problems that affect the public's health, safety, and wellbeing.

No counsel for any party authored this brief in whole or in part. No party, party's counsel, or any other person or entity other than Amici, their members, or their counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the catastrophic global financial crisis of 2007–08, Congress significantly curtailed the situations in which the National Bank Act (“NBA”), 12 U.S.C. § 1 *et seq.*, preempts state consumer financial laws’ application to national banks.¹ In the lead-up to that crisis, the Office of the Comptroller of the Currency (“OCC”) asserted increasingly broad preemption authority, permitting national banks to ignore state laws designed to, *inter alia*, constrain subprime lending. Consequentially, collapsing mortgage-lending standards “lit and spread the flame of contagion and crisis,” ultimately helping to bring about the global crisis and the deepest recession since the Great Depression. FINANCIAL CRISIS INQUIRY COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xxiii (2011).

Recognizing that states are capable of addressing consumer financial abuse more quickly than Congress, the national legislature articulated two narrow situations in which the NBA preempts the consumer financial protection laws enacted by the states. *First*, preemption occurs where a state consumer financial law discriminates against national banks vis-à-vis banks chartered by that state, preserving a level playing field between state and national banks. *See* 12 U.S.C. § 25b(b)(1)(A). *Second*, preemption occurs where a state consumer financial law prevents or significantly interferes with national banks’ ability to directly provide

¹ Where relevant, discussion of the NBA generally also applies to the Home Owners’ Loan Act, 12 U.S.C. § 1464 *et seq.*, and the Federal Credit Union Act, 12 U.S.C. § 1757 *et seq.*, and discussion of banks similarly applies to thrifts and credit unions.

banking services, ensuring national banks can engage in the banking business. *See id.* § 25b(b)(1)(B). Congress also made clear that the NBA does not preempt state consumer financial laws’ application to nonbanks who facilitate national banks’ provision of services. *See, e.g., id.* § 25b(h)(2).

It is for these reasons that the NBA—in particular, 12 U.S.C. § 24(Seventh) (allowing national banks to make loans and offer deposit accounts) and OCC regulations promulgated thereunder—does not preempt the application of interchange fee provisions of the Illinois Interchange Fee Prohibition Act (“IFPA”), 815 ILCS §§ 151/150-1 *et seq.*, to payment card networks or national banks.²

This brief makes three key arguments. First, NBA preemption is limited to the two situations described above. Section 25b(b)(1)(A) prevents a state consumer financial law from discriminating against national banks vis-à-vis banks chartered by that state, ensuring parity between national and state banks and continuing a policy Congress first adopted in 1864. Section 25b(b)(1)(B) stops state consumer financial laws from preventing or significantly interfering with national banks’ direct exercise of their powers, restoring states’ ability to protect their residents following years where OCC regulations preempted their efforts.

Second, the NBA does not preempt state consumer financial laws’ application to nonbanks. The plain language of the NBA’s preemption provisions make clear that they apply only to national banks and not to national banks’ nonbank

² References to the IFPA in this brief refer only to the provisions that prohibit “interchange fee[s] on the tax amount or gratuity of an electronic payment transaction[.]” 815 ILCS 151/150-10.

subsidiaries, affiliates, and agents, *see* 12 U.S.C. §§ 25b(b)(1), 25b(h)(2). It cannot be the case that the NBA preempts state laws' application to companies with which national banks have non-fiduciary services *but not* to companies with much closer and direct ties to banks' activities. In addition, section 24(Seventh) is part of a larger "corporate law" regime for national banks that prescribes rules governing national banks' formation, obligations, and closures, akin to the Delaware General Corporation Law. The U.S.'s corporate law should not be interpreted as preempting state laws' application to firms operating entirely outside that regime. Amicus OCC's arguments to the contrary are simply its latest aggressive and inaccurate preemption proposal, and this Court should reject them.

Third, the NBA does not preempt the IFPA's application to either national banks or card payment networks, as neither of the two situations described in section 25b(b) have been met. The law does not discriminate against national banks vis-à-vis Illinois state-chartered banks; it treats national banks, out-of-state state banks, and home-state state banks identically.

Moreover, the IFPA does not prevent or significantly interfere with national banks' exercise of their lending and deposit-taking powers. It is nonbank card payment networks that set interchange fees—not national banks—and section 25b and the "corporate law" structure of the NBA make clear that section 24(Seventh) does not preempt state laws' application to nonbanks. In addition, the NBA does not preempt state laws when national banks are not exercising their federally granted powers, as is the case here: by letting nonbank card network companies determine

interchange fee rates, national banks are acting neither in accordance with relevant OCC regulations, *see* 12 C.F.R. § 7.4002(b)(1) (requiring non-interest fees to be set “by each bank on a competitive basis and not on the basis of any agreement”), nor in ways that are “necessary” to the banking business, 12 U.S.C. § 24(Seventh). Finally, the IFPA cannot be preempted following the “practical assessment” the Supreme Court requires lower courts to undertake, *Cantero v. Bank of America*, 602 U.S. 205, 219 (2024). National banks are capable of recovering expenditures through other means. In addition, the IFPA is comparable to the Massachusetts statute at issue in *McClellan v. Chipman*, 164 U.S. 347 (1896), which the Court held not preempted, and is easily distinguishable from the four cases the *Cantero* Court identified as examples of appropriate preemption.

ARGUMENT

I. NBA Preemption is Limited to Two Narrow Situations.

The United States operates what is known as the dual banking system, wherein both the federal and state governments charter banks. National banks are chartered under the NBA, which grants them certain enumerated powers and “all such incidental powers as shall be necessary to carry on the business of banking.” 12 U.S.C. § 24(Seventh). Simultaneously, national banks are generally “subject to the laws of the State” in which they operate. *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869). Indeed, national banks are “governed in their daily course of business far more by the laws of the State than of the nation,” including laws relating to “contracts,” “acquisition and transfer of property,” “collect[ion of] debts,” and “liability to be sued for debts.” *Id.*

Against this backdrop, Congress articulated three scenarios in which state consumer financial laws are preempted as applied to national banks. First, such a law is preempted if its “application ... would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State.” 12 U.S.C. § 25b(b)(1)(A). Second, such a law is preempted if it “prevents or significantly interferes with the exercise by the national bank of its powers,” and the preemption determination is “made by a court” or by the OCC “on a case-by-case basis.” *Id.* § 25b(b)(1)(B). Third, such a law is “preempted by a provision of Federal law other than title 62 of the Revised Statutes.” *Id.* § 25b(b)(1)(C).³

The legislative history and text of Dodd-Frank’s preemption language help elucidate Congress’s twin goals in NBA preemption: preventing discrimination against national banks and ensuring national banks can directly engage in the banking business.

A. Preemption occurs where state law discriminates against national banks.

Section 25b(b)(1)(A) prevents each state from discriminating against national banks vis-à-vis banks chartered by that state. With this provision, Congress intended to ensure parity between national and state banks, continuing a policy Congress first adopted in 1864.

Because legislators expected national banks to face “possible unfriendly State legislation” that would disadvantage federally-chartered institutions, the NBA

³ Title 62 of the Revised Statutes consists of much but not all of the NBA. *See* 12 U.S.C. § 21 *note* (identifying the location of the sections of Title 62 of the Revised Statutes in the U.S. Code).

included various provisions “intended to give them a firm footing in the different States where they might be located” with “at least equal advantages in” competition with state banks. *Tiffany v. National Bank of Mo.*, 85 U.S. 409, 412 (1874). More recently, Congress has enacted laws granting to state banks the rights afforded to national banks, *see, e.g.*, 12 U.S.C. § 1831d, and generally limiting state banks’ permissible activities to those of national banks, *see, e.g., id.* § 1831a. As one scholar has explained, “the historic value of dual banking lies in its ability to provide an escape valve from arbitrary or discriminatory chartering and regulatory policies at either the state or Federal level.” W. BROWN, *THE DUAL BANKING SYSTEM IN THE UNITED STATES* 59 (1968).

By allowing preemption of a state consumer finance law if its “application ... would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State,” Congress simply preserved national and state banks’ ability to compete on a level playing field. 12 U.S.C. § 25b(b)(1)(A).

B. Preemption occurs where state law prevents or significantly interferes with national banks’ direct provision of banking services.

Section 25b(b)(1)(B) prevents state consumer financial laws from “prevent[ing] or significantly interfer[ing] with the exercise by the national bank of its powers,” while requiring the preemption determination to be “made by a court” or by the OCC “on a case-by-case basis.” 12 U.S.C. § 25b(b)(1)(B). Congress intended for this provision to restore states’ ability to regulate the activities of national banks for the protection of their residents, while not inhibiting banks from “carry[ing] on the business of banking.” *Id.* § 24(Seventh).

From Congress’s enactment of the NBA in 1864, courts applied “ordinary preemption principles” when determining whether certain state consumer financial laws applied to national banks and thrifts. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 27 (1996). In *Barnett Bank*, the Court held states may regulate national banks insofar as “doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.” *Id.* at 33.

In the 1990s, however, the OCC and its sister agency, the Office of Thrift Supervision (“OTS”), which regulated federally chartered thrifts, began asserting increasingly broad preemption authority. In 1996, the OTS enacted a regulation codifying its understanding that “any state laws that purport to affect the lending operations of federal [thrifts] are preempted.” *Lending and Investment*, 61 Fed. Reg. 50591 (Sept. 30, 1996). In 2004, the OCC enacted similar regulations, declaring preempted state laws that “obstruct, impair, or condition a national bank’s exercise of its lending, deposit-taking, or other powers granted to it under Federal law.” *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904 (Jan. 13, 2004).

These OCC- and OTS-promulgated preemption principles far exceeded the “does not prevent or significantly interfere with” limitation articulated by the Supreme Court in *Barnett Bank*, and in doing so allowed national banks and thrifts to abuse their borrowers and other customers, including those who borrowed to obtain subprime mortgages. National banks and thrifts were permitted to ignore state laws that, for example, prohibited the extension of loans without regard for

borrowers' ability to repay and restricted prepayment penalties and balloon payments. See Giang Ho & Anthony Pennington-Cross, *The Impact of Local Predatory Lending Laws*, Federal Reserve Bank of St. Louis Working Paper No. 2005-049 (2005), Appendix 1, <http://research.stlouisfed.org/wp/2005/2005-049.pdf>. Although Congress could have enacted similar laws at the federal level, it failed to fill the void left by regulators' egregious claims of preemption.

Ultimately, the predatory actions of national banks and thrifts caused the subprime mortgage crisis and the deepest recession since the Great Depression. Between 2006 and 2008, the default rates for one-to four-family residential mortgages originated by national banks and thrifts were significantly higher than those made by state-chartered banks and thrifts, see KATHLEEN C. ENGEL & PATRICIA A. MCCOY, *THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS* 163 (2011), and loans originated by national banks in states with anti-predatory lending laws were more likely to default if made after the OCC's 2004 preemption rules than before. See LEI DING ET AL., *THE PREEMPTION EFFECT: THE IMPACT OF FEDERAL PREEMPTION OF STATE ANTI-PREDATORY LENDING LAWS ON THE FORECLOSURE CRISIS* ii (2010) <https://ourfinancialsecurity.org/wp-content/uploads/2010/03/UNC-CCC-Preemption-Effect-Impact-of-Federal-Preemption-on-Foreclosure-Crisis.pdf>. As the Congressionally-established Financial Crisis Inquiry Commission noted, "collapsing mortgage-lending standards," facilitated by OCC and OTS efforts to "preempt[] state regulators from reining in

abuses,” “lit and spread the flame of contagion and crisis.” FINANCIAL CRISIS INQUIRY COMM’N at xxiii.

In response, and as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376, Congress greatly narrowed the instances in which the NBA preempts state consumer financial laws by codifying the *Barnett Bank* standard into the NBA, *see* 12 U.S.C. § 25b(b)(1)(B) (“State consumer financial laws are preempted ... in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank*...”).⁴ Congress also expressly provided that the NBA “does not occupy the field in any area of State law.” *Id.* § 25b(b)(4).

This history demonstrates Congress’s intent to allow for the greater application of state consumer financial laws to national banks—indeed, the Senate Banking Committee explicitly noted that it endeavored to “undo[] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004.” S. Rep. 111-176, at 175. Consequentially, state consumer financial laws can regulate national banks so long as their powers can be exercised; that is, these laws apply insofar as they do not prevent or significantly interfere with national banks’ provision of the services that Congress has authorized them to provide. Legislators recognized that states “are much closer to abuses and are able to move more quickly when necessary to address them” than Congress. *Id.* at 174. If courts prevent state

⁴ Congress also abolished the OTS and transferred all functions and rulemaking authority over federal thrifts to the OCC. *See* 12 U.S.C. § 5412(b)(2)(B).

consumer protection laws from applying to national banks, it is unlikely that Congress will be capable of acting in a timely manner in response.

The Supreme Court understood this when it reviewed Section 25b in *Cantero v. Bank of America*, 602 U.S. 205 (2024). It explained that courts must make “a practical assessment of the nature and degree of the interference caused by a state law,” with evaluations “based on the text and structure of the laws, comparison to other precedents, and common sense.” *Id.* at 219–20, 220 n.3.

II. The NBA Does Not Preempt State Law’s Application to Nonbanks.

Despite the clarity of Congress’s intent, amicus OCC proposes a preemption analysis that is aggressively broad and dramatically wrong. The OCC argues that “the preemption inquiry is properly focused on the nature and degree of the state law’s interference with the exercise of national bank powers, regardless of whether this interference is *direct or indirect*.” Brief of Amicus Curiae OCC, Docket No. 24, at 10 (emphasis added). Because card payment networks provide services to national banks, the agency alleges that the IFPA is preempted on the basis that regulating these networks would interfere with national banks’ exercise of their corporate powers, “includ[ing] ‘loaning money’ and ‘receiving deposits,’ 12 U.S.C. § 24(Seventh), and national banks may offer credit and debit cards as part of their exercise of these powers.” *Id.* at 11. This argument is absurd. Congress intended to limit the preemption standard in section 25b to the application of state laws to national banks only, not to companies that do business with national banks. To hold otherwise would greatly expand federal preemption of state consumer financial laws beyond what Congress reasonably would have contemplated.

A. If the NBA cannot preempt state laws for national banks' subsidiaries, affiliates, and agents, it cannot preempt state law for wholly-separate companies.

Congress limited the NBA's preemption standard to state laws' effects on national banks. The standard provides that state consumer financial laws are preempted when they "have a discriminatory effect on *national banks*" or "prevent[] or significantly interfere[] with the exercise by the *national bank* of its powers." 12 U.S.C. § 25b(b)(1)(A)–(B) (emphasis added). Nothing in these provisions indicate a congressional intent for the NBA to preempt state laws' application to entities other than nonbanks.

Moreover, Congress went to great lengths to make clear in section 25b that the NBA does not preempt the application of state law to national banks' subsidiaries, affiliates, and agents that are not themselves national banks. Section 25b contains one provision that excludes national banks' subsidiaries and affiliates from the scope of the NBA's preemption, *see* 12 U.S.C. § 25b(b)(2); another affirmatively mandating that courts apply state consumer financial laws to national banks' subsidiaries and affiliates, *see id.* § 25b(e); and a third that prescribes a rule of construction for the NBA, declaring that no provision "shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank," *id.* § 25b(h)(2).

Congress enacted these provisions in response to abuses by national banks' state-chartered, wholly-owned subsidiaries. In the lead-up to the financial crisis, national banks utilized nonbank subsidiaries to perform mortgage origination activities; they relied on OCC regulations to preempt the application of state

consumer financial protection laws to such subsidiaries, *see* 12 C.F.R. § 7.4006 (2006), and on corporations' limited liability to protect themselves from their subsidiaries' potential losses. *See* FINANCIAL CRISIS INQUIRY COMM'N, at 112–13. Section 25b makes abundantly clear that national banks cannot evade state laws by relying on nonbank subsidiaries, affiliates, and agents; the OCC acknowledged as much when it rescinded Rule 7.4006 in response to “the new section 12 U.S.C. 25b adopted by the Dodd-Frank Act.” *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43556, 43558 (July 21, 2011).

Admittedly, Congress did not clearly provide that the NBA does not preempt state laws' application to completely separate companies. But it likely did not see a need. It simply cannot be the case that the NBA *does not* preempt state laws' application to nonbank companies that national banks fully own, affiliate with (*i.e.*, are owned by the same parent company), or hire as agents, but *does* preempt those same laws' application to nonbank companies that national banks do not own or control but with which national banks have non-fiduciary service contracts. If the OCC's argument is adopted, the outcome would be both absurd and one that the Dodd-Frank Act's drafters never would have contemplated, let alone desired.

B. Federal corporate law cannot preempt state laws' application to corporations not covered by that law.

The conclusion that section 25b preemption is limited to national banks is also found in the structure of the preemption standard, which limits its application to only certain provisions of the NBA that constitute a “corporate law” regime for national banks. Clauses (b)(1)(A) and (B) must be contrasted with clause (C), which

permits preemption by “a provision of Federal law other than title 62 of the Revised Statutes.” *Id.* § 25b(b)(1)(C). Because clause (C) allows all federal laws other than Title 62 of the Revised Statutes to preempt state consumer financial laws as normal, clauses (A) and (B) must be read as applying only to the provisions of title 62. *See Expressio Unius est Exclusio Alterius*, Black’s Law Dictionary (12th ed. 2024) (“to express or include one thing implies the exclusion of the other”).

Title 62 of the Revised Statutes consists of much but not all of the NBA. *See* 12 U.S.C. § 21 *note* (identifying the location of the sections of Title 62 of the Revised Statutes in the U.S. Code). For the most part, Title 62’s provisions constitute a “corporate law” regime for national banks that details national banks’ formation, obligations, and closures. *See* Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1375–78 (2021). Provisions of Title 62 govern, *inter alia*, national banks’ formation, 12 U.S.C. §§ 21–23, 35–36, 215c; their rights, obligations, and limitations, *id.* §§ 24–29, 81–92; the responsibilities and liabilities of their owners and directors, *id.* §§ 52–62, 66, 71, 72–76; and their conservatorships, receiverships, and dissolutions, *id.* §§ 181, 182, 192–94, 196.⁵

These provisions are akin to the Delaware General Corporation Law, and 12 U.S.C. § 24 is directly comparable to 8 Del.C. §§ 121–127, which provide corporations their general and specific powers. In particular, section 24(Seventh),

⁵ Other provisions govern the means by which the OCC conducts oversight of national banks, 12 U.S.C. §§ 16, 93–93a, 481–485; and various criminal law provisions involving banks and money, 18 U.S.C. §§ 8, 333, 334, 475, 656, 709, 1004–05.

which authorizes national banks “to carry on the business of banking,” 12 U.S.C. § 24(Seventh), is comparable to Delaware’s section 122(12), which authorizes Delaware corporations to “[t]ransact any lawful business which the corporation’s board of directors shall find to be in aid of governmental authority.” 8 Del.C. § 122(12).

Clauses (A) and (B) of the preemption standard appropriately apply to the statute that purportedly preempts the IFPA, section 24(Seventh), because it is part of Title 62 of the Revised Statutes. But that statute must be placed in context of a corporate law regime, rather than as a part of a “regulatory” statute. In claiming that section 24(Seventh)’s grant of authority to national banks preempts the IFPA’s application to card payment networks, the OCC argues that the U.S.’s corporate law preempts state law’s application to firms operating entirely outside that regime. That cannot possibly be the case.

C. The OCC’s brief is simply its latest aggressive and inaccurate preemption proposal.

That the OCC argued for an aggressive and erroneous preemption standard in this case is not an anomaly; the agency has a history of making broad claims regarding its preemptive authority that contrast with statute and Supreme Court caselaw.

The clearest examples of this phenomenon are the OCC’s 2004 preemption rules, with which it declared preempted all state laws that “obstruct, impair, or condition” national banks’ powers. *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904 (Jan. 13, 2004) (emphasis added). Of

course, the Supreme Court had held that the correct standard was whether state law would “prevent or significantly interfere with” those powers, *Barnett Bank*, 517 U.S. at 33.

Even after Congress repudiated the OCC’s preemption rules in Dodd-Frank, the agency continued to defend them. When promulgating rules to implement various provisions of the Dodd-Frank Act in 2011, the agency argued that section 25b’s adoption of the *Barnett Bank* standard “does not mean, however, that the 2004 preemption rules ... have become invalid.” *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43556 (July 21, 2011). Rather, it explained that the rules were “preserved” because they were “adopted consistent with such a conflict preemption justification.” *Id.* This conclusion is bizarre; a regulator cannot adopt rules facially inconsistent with Supreme Court precedent on the grounds that the *justification* it provided for those rules was consistent.

In 2021, the OCC filed an amicus brief before the Second Circuit in *Cantero* declaring that “even narrowly targeted state restrictions can impermissibly burden a national bank’s exercise of its powers.” Brief of Amicus Curiae OCC, *Cantero v. Bank of America*, 2021 WL 2477066, at *8. To that end, it argued that “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,” but not others. *Id.* at *19. Although this preemption theory was adopted by the Second Circuit, it was unanimously rejected by the Supreme Court, which explained

that such a “categorical test ... would preempt virtually all state laws that regulate national banks” and required instead a “nuanced comparative analysis.” *Cantero v. Bank of America*, 602 U.S. 205, 220–21 (2024).

Finally, the OCC has recently proposed preemption regulations in a way that utterly fails to comply with section 25b’s requirements. The agency has proposed categorically preempting state laws that require banks to pay interest on mortgage escrow account balances, *see Notice of proposed rulemaking; Preemption Determination: State Interest-on-Escrow Laws*, 90 Fed. Reg. 61093 (Dec. 30, 2025). In doing so, however, the OCC fails to heed section 25b’s mandate that the agency proceed on a “case-by-case basis” and consider “the impact of a particular State consumer financial law on any national bank that is subject to that law[.]” 12 U.S.C. §§ 25b(b)(1)(B), (b)(3). *See also* Arthur E. Wilmarth, *Policy Brief: The OCC’s Unlawful Proposal to Preempt State Interest-on-Escrow Laws Reveals That the Agency’s Ultimate Goal Is to Revive Its Illegal De Facto Field Preemption Regime for National Banks*, GWU Legal Studies Research Paper No. 2026-17 (2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6304062. The OCC also ignores circuit court cases holding that the NBA *does not* preempt such state laws, *see Conti v. Citizens Bank, NA*, 157 F.4th 10 (1st Cir. 2025); *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025).

The OCC claims that its “judgment as to whether a state law prevents or significantly interferes with a national bank’s exercise of its federally authorized powers is entitled to ‘weight’ by a reviewing court.” Br. at 9. That is only true,

however, “to the extent it rests on factual premises within [the agency’s] expertise.” *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98, n. 8 (1983), quoted by *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024). The fact that the OCC has a history of taking patently wrong positions should counsel this Court against accepting its interpretation of section 25b at face value.

III. The NBA Does Not Preempt the Interchange Fee Provisions of the IFPA.

A. The IFPA does not discriminate against national banks vis-à-vis home-state banks.

Section 25b(b)(1)(A) prevents each state from discriminating against national banks vis-à-vis banks chartered by that state. That is not the case with the IFPA, which treats Illinois-chartered state banks, out-of-state state banks, and national banks alike. The law prevents all “issuer[s]” and “acquirer bank[s]” from receiving or charging interchange fees on taxes and tips in Illinois, regardless of their chartering status. *See* 815 ILCS 151/150-10(a). Therefore, preemption under this provision is inapplicable.

B. The IFPA does not prevent or significantly interfere with national banks’ direct provision of banking services.

The IFPA does not “prevent[] or significantly interfere[] with” national banks’ direct engagement in the banking business for two reasons.

First, as the District Court noted, “third parties set the fees,” not banks. *Illinois Bankers Ass’n v. Raoul*, 2026 WL 371196, at *13 (N.D. Ill. Feb. 10, 2026). Interchange fees are set by payment card networks, which are their own companies and provide services for banks. The two largest domestic networks, Visa and

Mastercard, are publicly-traded companies that are completely unaffiliated with national banks, while the third and fourth largest networks, American Express and Discover, are nonbank affiliates of national banks.⁶ Section 24(Seventh) cannot be read as preempting the application of state consumer financial laws to these firms—even though they provide services for national banks—because 12 U.S.C. § 25b(h)(2) explicitly prohibits the preemption of state laws’ application to national banks’ nonbank subsidiaries and agents, and the statute cannot be read as applying to firms chartered outside the NBA. Accordingly, state law is not preempted when national banks rely on nonbanks to provide services, such as charging interchange fees.⁷

Second, even if national banks *did* charge interchange fees, state consumer financial laws are not preempted when national banks are not “exercis[ing]” their federally-granted “powers,” as is the case here. *Id.* § 25b(b)(1)(B). Congress has granted national banks the powers of “loaning money” and “receiving deposits,” as well as “all such incidental powers as shall be necessary to carry on the business of

⁶ See Visa Inc., Annual Report (Form 10-K) (Nov. 06, 2025), <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001403161/000140316125000089/v-20250930.htm>; Mastercard Incorporated, Annual Report (Form 10-K) (Feb. 11, 2026), <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001141391/000114139126000013/ma-20251231.htm>. See American Express, 2025 Resolution Plan Public Section 7 (Oct. 2025), <https://www.federalreserve.gov/supervisionreg/resolution-plans/american-express-3g-20251001.pdf>; Capital One Financial Corporation, Interim Title I Plan Submission Section 1: Public Section 4 (Oct. 2025), <https://www.fdic.gov/resolutions/2025-capital-one-interim-resolution-plan-public-section.pdf>.

⁷ Importantly, the IFPA’s definition of “interchange fee” is limited to arrangements in which networks have “established, charged, or received” fees “for the purpose of compensating the” issuing bank. 815 ILCS 151/150-5. If card-issuing banks were to set their own rates in a competitive environment, those fees may not be covered by the IFPA at all.

banking.” *Id.* § 24(Seventh). The OCC has promulgated a rule declaring one such incidental power as the authority to “charge ... customers non-interest charges and fees,” 12 C.F.R. § 7.4002(a). However, that incidental power is cabined by the requirement that such “charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement ... with other banks or their officers,” *id.* § 7.4002(b)(1). *See also id.* § 7.4002(b)(2) (“The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank[.]”).

Here, national banks appear to be violating the rule. National banks have outsourced their responsibility to individually “arrive at” the appropriate fees to the payment networks, each of which applies rates to customers regardless of the identity of their issuing and acquiring banks. *See, e.g., Visa Public, Visa USA Interchange Reimbursement Fees* (Oct. 18, 2025), <https://usa.visa.com/content/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf>. By not complying with Rule 7.4002, national banks cannot claim to be exercising a power incidental to their lending and deposit-taking powers.

Although Rule 7.4002 may not be the only means by which national banks earn revenue from their credit and debit card operations, the Supreme Court has cautioned that the scope of activities necessary to the banking business “must be kept within reasonable bounds.” *NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). Price-fixed interchange fees are not “reasonable.” The U.S. banking industry’s reliance on third parties to set

industry-wide rates results in significantly higher interchange fees than those elsewhere in the developed world. For example, European regulators cap interchange fees at 0.30%, whereas U.S. networks frequently impose rates upwards of 3%. U.S. rates are much higher than unregulated foreign interchange rates; credit card interchange fees in Australia as of August 2025 averaged 0.58%, whereas U.S. rates averaged 1.77%. *See Credit and Debit Card Interchange Fees in Various Countries*, Federal Reserve Bank of Kansas City (August 2025 Update), <https://www.kansascityfed.org/research/interchange-fees/>. Importantly, these lower rates have not driven banks into unprofitability—even with 0.30% interchange fees, Europe maintains a robust banking system. U.S. banks’ reliance on payment networks to set and charge fees is anticompetitive, not reasonable, and—because banks have numerous ways to earn revenues, *see, e.g., Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735 (1996) (upholding national banks’ authority to charge certain lump-sum fees as part of the “interest” they are authorized to charge under 12 U.S.C. § 85)—not “necessary to carry on the business of banking.” 12 U.S.C. § 24(Seventh).

Third and relatedly, even if national banks are exercising their powers, the IFPA satisfies the “practical assessment of the nature and degree of the interference” that the *Barnett Bank* preemption standard requires. *Cantero*, 602 U.S. at 219. Obviously, national banks require compensation in exchange for providing credit to customers and debiting their accounts, lest they cease to operate. The IFPA allows them to do so. As Defendant noted, with a hypothetical 2.6%

interchange fee, the issuing bank “would receive \$2 from a \$100 purchase, only \$0.60 less than would be collected without the” IFPA. Combined Principal and Response Brief of Defendant, Docket No. 50 at 28–29.

Relatedly, and although banks operating in other countries are easily able to operate successful card programs with far lower interchange rates, if national banks were to become unable to recoup their expenses from interchange fees alone, they may—and already do—charge other fees on accounts or account activity to compensate. The Consumer Financial Protection Bureau recently noted that credit cardholders paid \$31.3 billion in fees and over \$160 billion in interest payments in 2024, and FDIC data shows that banks received over \$35 billion in deposit account service charges in 2025. CONSUMER FINANCIAL PROTECTION BUREAU, *THE CONSUMER CREDIT CARD MARKET* 40, 60 (Dec. 2025), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2025.pdf; Federal Deposit Insurance Corporation, *Income and Expense: Total Noninterest Income: Service Charges on Deposit Accounts*, retrieved from FRED, Federal Reserve Bank of St. Louis (Apr. 2, 2026), <https://fred.stlouisfed.org/series/QBPQYTNIYSRVDP>. Banks may also provide credit and debiting services to customers through non-interchange means (e.g., cash withdrawals).

Moreover, the IFPA—to the extent it interferes with national banks’ powers at all—is quite comparable to the Massachusetts statute at issue in *McClellan v. Chipman*, 164 U.S. 347 (1896), which the Court held not preempted. That law

prohibited insolvent debtors from granting preferences to favored creditors in the absence of a federal bankruptcy law. The plaintiff national bank argued that the NBA's provisions, which authorized national banks to accept transfers of real property as security for previously-contracted debts or in satisfaction of such debts (now codified at 12 U.S.C. §§ 24(Third), 29), preempted the state law's prohibition against preferential transfers. The national bank contended that the state law undermined the "stability" of national banks by obstructing their ability to "take additional security for an existing debt," via transfers of real property, "whenever necessary for the protection of [the banks'] property and assets." 164 U.S. at 352-53 (summarizing argument of the national bank's counsel).

The Supreme Court rejected this preemption claim, finding "no conflict between" national banks' real-estate authority "and the general and indiscriminating law of the State of Massachusetts subjecting the taking of real estate to certain restrictions, in order to prevent preferences in case of insolvency."

Id. at 361. As the Court explained,

No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which, in case of insolvency, seeks to forbid preferences between creditors.

Id. at 358. In other words, the NBA would not preempt nondiscriminatory and generally applicable state laws that do not significantly undermine the ability of national banks to make loans.

McClellan is directly on point here. The IFPA is a law that regulates the contracts of payment networks, potentially including those networks' contracts with national banks. Even though those contracts may not be as advantageous to national banks as they would be without the law, the IFPA does not prevent or significantly undermine the ability of national banks to make loans and offer deposit accounts.

The IFPA is wholly unlike the laws the Supreme Court has previously found preempted by the NBA. In *Barnett Bank* and *Fidelity Federal Savings & Loan Association v. de la Cuesta*, the Court made clear the NBA preempts state statutes that forbid national banks from exercising their expressly-granted rights, which is not the case here. *Barnett Bank* held preempted a Florida law on the grounds that “the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids,” 517 U.S. at 31. Similarly, *Fidelity Federal* preempted a state law that restricted federal thrifts' right to exercise mortgages' due-on-sale clauses as explicitly permitted by Federal Home Loan Bank Board (“Board”) regulation for the purpose of bolstering the solvency and stability of federal thrifts. 458 U.S. 141 (1982). These cases are inapposite to the current case, as even if national banks are exercising their powers—and as explained above, they are not because no authority has given national banks explicit authority to receive fees set by card networks—the IFPA does not “expressly forbid[]” national banks from engaging in lending or deposit-taking.

Moreover, the *Fidelity Federal* Court gave great weight to the fact that the rule’s “preamble unequivocally expresses the Board’s determination to displace state law,” *id.* at 158, in recognition that “Congress invested the Board with broad authority to regulate federal [thrifts] so as to effect the statute’s purposes, and plainly indicated that the Board need not feel bound by existing state law.” *Id.* at 162. The instant case is the exact opposite, as Congress made clear that it wanted the OCC—unlike the Board—to feel bounded by state law. *See* 12 U.S.C. § 25b(b)(1)(B) (codifying the *Barnett Bank* standard); *id.* § 25b(b)(5)(A) (denying the OCC *Chevron* deference to preemption determinations); *id.* § 25b(b)(4) (denying field preemption to the NBA).

The IFPA is also unlike the statutes at issue in *First National Bank of San Jose v. State of California*, 262 U.S. 366 (1923), and *Franklin National Bank v. People*, 347 U.S. 373 (1954), both of which would have disadvantaged some or all national banks vis-à-vis their competitors. In *First National*, the Court held preempted a California law requiring deposits unclaimed for over twenty years to escheat to the state, explaining that depositors “might well hesitate to subject their funds to possible confiscation” by a California-headquartered bank. 262 U.S. at 370. And in *Franklin National*, the Court held preempted a New York law that prohibited commercial banks, including national banks, “from using the word ‘saving’ or ‘savings’ in their advertising or business,” 347 U.S. at 374, thus prohibiting national banks from advertising a service they legally offered. In both cases, state law unfairly disadvantaged certain national banks against their

competitors: The *First National* Court feared customers nationwide would prefer banks headquartered outside California to those headquartered within, whereas the *Franklin National* Court feared that New York customers would prefer state-chartered savings banks over national commercial banks.

CONCLUSION

The Court should affirm the lower court's ruling that the NBA does not preempt the IFPA's application to card payment networks and national banks.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by FRAP 32(g), I certify that this brief (1) complies with the word limit of Circuit Rules 29 and 32(b) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 6,722 words; and (2) complies with the typeface requirements of Circuit Rule 32(b) and the type-style requirements of FRAP 32(a)(6). This brief has been prepared using Microsoft Word in Century Schoolbook 12-point font (11-point in footnotes), a proportionally spaced typeface.

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