No. 26-0517

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSHUA HASTINGS,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

TD BANK, N.A.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
Civ. A. No. 25-2336 (Hon. Judge Hector Gonzalez)

BRIEF OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTRODUCTION

A New York state law prohibits any person or entity from charging a customer a fee to receive a paper billing statement. *See* N.Y. Gen. Bus. Law § 399-zzz. In this case, a New York State resident Joshua Hastings ("Hastings") brought a putative class action against a national bank, TD Bank, N.A. (the "Bank"), for allegedly violating that law by charging a three-dollar monthly fee for paper account statements. Below, the Bank moved to dismiss Hastings' complaint arguing that the state law is invalid because it (1) seeks to regulate speech in violation of the First Amendment; and (2) is preempted by the National Bank Act. 12 U.S.C. § 1 *et seq.* The Bank also argued that the state law does not apply to its account mailings, which the Bank contends are not billing statements as they do not seek the collection of money.

The district court granted the Bank's motion, dismissing Hastings' suit solely on First Amendment grounds. Although the district court did not need to reach the Bank's preemption argument, it nonetheless opined on the merits of that argument (without applying the relevant Supreme Court framework) finding the state law not preempted. By contrast, the district court did not address the Bank's third argument—i.e., that the state law does not apply to the Bank's paper mailings because they are not billing statements.

The Office of the Comptroller of the Currency (the "OCC") has a strong interest in the proper application of federal preemption to state laws that purport to govern or impose obligations on the national banks and Federal savings associations that it regulates. That interest is best served in this case by ensuring that federal preemption is addressed through a proper application of controlling authorities. Notably, those authorities may soon receive further clarification from the Supreme Court were it to grant certiorari in cases with petitions currently pending before it to resolve a circuit split about the application of those authorities to other state laws.

If this Court decides that it must consider the federal preemption issue in this case, it should remand in the first instance to allow the district court to apply these controlling authorities, which it failed to do below. That said, this Court need not reach preemption in this case. If this Court affirms the district court's decision on First Amendment grounds or adopts the Bank's understanding of the state law's use of the term "billing statements"—issues on which the OCC presently takes no position—addressing preemption would be unnecessary to resolve this matter. Although the Bank has correctly articulated the state of existing federal preemption law in its brief, given the developing nature of controlling preemption authorities, the OCC urges this Court not to address preemption at this time.

STATEMENT OF INTEREST

The OCC is an independent bureau of the U.S. Department of the Treasury charged with, among other duties, the administration of the National Bank Act and the supervision of national banks. *See* 12 U.S.C. § 1 *et seq.* As the administrator of the national banking system, the OCC has a paramount interest in ensuring that the standard for National Bank Act preemption is properly understood and applied.

LEGAL BACKGROUND

When Congress enacted the National Bank Act over 150 years ago, 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)); *see also 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]."). It vests national banks with broad powers, including "all such incidental powers as shall be necessary to carry out the business of banking." 12 U.S.C. § 24 (Seventh). Consistent with this broad grant of authority, the OCC has codified certain national bank powers by regulation, such as the power to "charge non-interest charges and fees, including deposit account service charges . . .." 12 C.F.R. § 7.4002. Accordingly, a national bank may charge a variety of fees in connection with a deposit account. *See id.*; *see also generally SPGGC, LLC v.*

Blumenthal, 505 F.3d 183, 189 (2d Cir. 2007) (observing the broad scope of Section 7.4002 in the context of inactivity fees on gift cards); *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 n.2 (11th Cir. 2011) (observing that "the significant objective of 12 C.F.R. § 7.4002 is to allow national banks to charge fees and to allow banks latitude to decide how to charge them").

Through the National Bank Act, Congress also has limited the role of states in regulating national banks, including by preempting certain state laws. Courts have explored the contours of National Bank Act preemption for more than a century, and in 1996, the Supreme Court synthesized the standard: a state law that prevents or significantly interferes with a Federally authorized power is preempted. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996). In 2024, the Supreme Court reaffirmed the *Barnett Bank* preemption standard and prescribed an analytical framework when applying this standard. *Cantero v. Bank of Am., N.A.* ("*Cantero I*"), 602 U.S. 205 (2024). As discussed in depth below, lower courts have struggled to apply consistently the holding of *Cantero I* to nearly identical state laws. This has led to a circuit split as to whether state interest-on-escrow laws—i.e., laws requiring national banks and others to provide interest on amounts held in customers' mortgage-related escrow accounts—are preempted. *See infra* p. 9.

PROCEDURAL BACKGROUND

In the proceedings below, the district court determined that the state law at issue unconstitutionally infringes on the Bank's commercial speech in violation of the First Amendment. *Hastings v. TD Bank, N.A.*, Civ. A. No. 25-2336, 2026 WL 555036, at *3-6 (E.D.N.Y. Feb. 27, 2026). The district court therefore granted the Bank's motion to dismiss Hastings' complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* at *7.

The district court noted that, in light of its determination that the state law is unconstitutional, it did not need to reach the question of whether the state law applies on its face to national banks or to the Bank's paper statement fee policy—both threshold inquiries in a preemption analysis. *Id.* at *2 n.3 ("Because I have concluded that Section 399-zzz is unconstitutional, *see infra*, I need not reach the question of whether the statute applies to national banks or to Defendant's paper statement fee policy."). Nevertheless, the district court proceeded to evaluate the Bank's preemption defense, ultimately ruling that the National Bank Act did not preempt the state law at issue. *Id.* at *2-3. In so doing, the district court largely adopted the reasoning from an earlier, unreported district court case, *Manship v. T.D Bank, N.A.*, Civ. A. No. 20-0329, 2021 WL 981587 (N.D.N.Y Mar. 16, 2021). *Manship*, however, was decided in 2021—three years before the precedential *Cantero I* decision in which the Supreme Court established an analytical framework for courts to follow when applying the *Barnett Bank* preemption standard. By adopting wholesale the analytical framework from *Manship*, the district court failed to apply the relevant Supreme Court framework.

ARGUMENT

I. If the Court Affirms the Dismissal on First Amendment Grounds, or Based on the Scope of the State Law, It Is Not Necessary to Consider the Preemption Issue.

Should this Court determine that it is appropriate to affirm on First Amendment grounds, or on the Bank's alternative argument regarding the scope of the state law, it may do so without reaching the preemption issue as the Bank's preemption defense is non-jurisdictional. *See Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272-76 (2d Cir. 2005) (distinguishing the non-jurisdictional "ordinary defensive preemption" at issue in this case from the narrow jurisdictional doctrine of "complete preemption" not at issue here). As this Court has often instructed, courts of appeals are "free to affirm a decision on any grounds supported in the record," *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006) (citing *McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000)), and therefore need not reach every alternative basis for affirmance. *See, e.g.*, *Law Offs. of K.C. Okoli, P.C. v. BNB Bank, N.A.*, 481 Fed. App'x 622, 626 (2d Cir. 2012) (summary order) (declining to address preemption defense on appeal because alternative grounds for dismissal were present). Thus, if the Court can affirm on First Amendment or state statutory grounds, it should exercise judicial restraint and avoid opining on the underdeveloped question of preemption in this case.

II. If Resolving the Preemption Issue Is Necessary, the Court Should Remand This Case.

If resolving the preemption issue proves necessary, the Court should remand this case to the district court with instructions to apply controlling Supreme Court and Second Circuit precedents. As noted above, the Supreme Court has clarified that state law is preempted when it prevents or significantly interferes with a national bank's exercise of its federal powers. *Cantero I*, 602 U.S. at 220; *Barnett Bank*, 517 U.S. at 33. The Supreme Court has also explained that the application of this standard must be based on "a practical assessment of the nature and degree of the interference caused by a state law." *Cantero I*, 602 U.S. at 219-20. This "nuanced comparative analysis" should include consideration of *Barnett Bank* and its antecedents and be based on "the text and structure of the laws, comparison to other precedents, and common sense." *Id.* at 220 & n.3. In addition to *Barnett Bank*, the Supreme Court specifically discussed six antecedent cases, noting that they "furnish content" regarding the *Barnett Bank* standard: *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954); *First National Bank of San Jose v. California*, 262 U.S. 366 (1923); *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *McClellan v. Chipman*, 164 U.S. 347 (1896); and *First National Bank v.*

Kentucky, 76 U.S. 353 (1869). *Cantero I*, 602 U.S. at 219-20. Thus, when a court addresses a preemption question in this context, it "must do as *Barnett Bank* did and likewise take account of those prior decisions of th[e] Supreme] Court and similar precedents." *Id.* at 215-16.

In analyzing whether the National Bank Act preempts the state law at issue, the district court did not conduct the nuanced comparative analysis required by *Cantero I*. Indeed, the district court did not cite *Cantero I* at all and did not consider any of the antecedent cases that the Supreme Court directed courts to consider when applying National Bank Act preemption. Instead, the District Court relied heavily on *Manship*, 2021 WL 981587, an unpublished district court decision that predates *Cantero I*. Notably, the district court's opinion in *Manship* turned almost exclusively on a view that paper statement fees do not involve a "banking concept or principle[,]" a view that is divorced from the analysis required by *Cantero I*. *Hastings*, 2026 WL 555036, at *2 (quoting *Manship*, 2021 WL 981587, at *7).

Further, since the district court's ruling, the Second Circuit itself issued a decision on remand from *Cantero I*. *Cantero v. Bank of Am., N.A.* ("*Cantero II*"), 175 F.4th 201 (2d Cir. 2026). In *Cantero II*, this Court embarked on applying the analytical framework described by the Supreme Court in *Cantero I*, providing a roadmap for courts in this Circuit to use in considering questions of National Bank Act preemption. *See id.* at 209-16. The district court did not have the benefit of this decision or this Court's framework for implementing the Supreme Court's directives in *Cantero I*.

Additionally, petitions for writs of certiorari are pending in *Cantero II* and two other cases where courts of appeals have considered whether the National Bank Act preempts state interest-on-escrow laws. *See* Petition for Cert., *Cantero v. Bank of Am., N.A.*, No. 25-1313 (U.S. May 22, 2026); Petition for Cert., *Flagstar Bank, N.A. v. Kivett*, No. 25-1350 (U.S. June 3, 2026); Petition for Reh'g, *Citizens Bank, N.A. v. Conti*, No. 25-1004 (U.S. May 11, 2026). The three appellate courts in these cases reached different conclusions regarding the application of *Cantero I* to nearly identical state interest-on-escrow laws. *See Cantero II*, 175 F.4th at 216 (New York interest-on-escrow law preempted as to national banks under *Cantero I* standard); *Flagstar Bank, N.A. v. Kivett*, 154 F.4th 640, 649 (9th Cir. 2025) (finding *Cantero I* was not irreconcilable with prior Ninth Circuit precedent on preemption, which bound panel to find that California interest-on-escrow law was not preempted); *Conti v. Citizens Bank, N.A.*, 157 F.4th 10, 28 (1st Cir. 2025) (under *Cantero I*, standard Rhode Island interest-on-escrow law not preempted as a matter of law as it applies to national banks).[1]

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[1] Complicating the matter further, the OCC promulgated a new regulation clarifying that national bank powers include whether and to what extent a national bank provides interest on escrow accounts, Real Estate Lending Escrow Accounts, 91 Fed. Reg. 29340, 29345 (May 19, 2026), and issued an administrative order under its statutory authorities finding certain states' interest-on-escrow laws are

With all this in mind, if this Court finds it necessary to consider the Bank's preemption defense, it should remand to the district court with instructions for the district court to assess this issue under the Supreme Court and Second Circuit precedents discussed above. Such an approach would accord with the Supreme Court's view that an appellate court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and this Court's ordinary practice of permitting district courts to address legal questions under the proper framework in the first instance rather than resolving those issues on appeal. *See, e.g.*, *LeChase Constr. Servs., LLC v. Argonaut Ins. Co.*, 63 F.4th 160, 172 n.7 (2d Cir. 2023) (declining to affirm on alternative ground that the district court had not carefully analyzed and inviting the district court to address the issue on remand).

The OCC urges this result given the present posture of this case. The OCC notes, however, that the Bank's merits brief properly articulates the framework for analyzing preemption under *Cantero I* and presents compelling arguments that the state law at issue in this case should be preempted.

* * *

preempted. Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. 29350, 29356–57 (May 19, 2026). Ten states recently filed suit seeking to vacate those administrative actions. *See Oregon v. Off. of the Comptroller of the Currency*, Civ. A. No. 26-1672 (D. Or. Aug. 11, 2026).

CONCLUSION

For the foregoing reasons, if the Court can resolve this matter on the First Amendment or statutory grounds presented by the Bank, it should do so without reaching the issue of preemption. If the Court finds it is necessary to consider preemption, it should remand this case to the district court with directions to apply the applicable Supreme Court and Second Circuit precedents.

Dated August 21, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 32.1(a)(4)(A) because it contains 2,511 words, exclusive of the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font.

Dated August 21, 2026

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CERTIFICATE OF SERVICE

I certify that on August 21, 2026, I caused the attached Brief of the Office of the Comptroller of the Currency as Amicus Curiae in Support of Neither Party to be served via the Court's electronic case filing system Appellate Case Management System on all counsel of record in the above-captioned case.

Dated August 21, 2026

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