No. 26-517

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 AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 1:25-cv-2336 (Gonzalez)

BRIEF OF THE BANK POLICY INSTITUTE AND AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING DEFENDANT–APPELLEE AND REVERSAL IN PART

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Bank Policy Institute ("BPI") and American Bankers Association ("ABA") (collectively, "*Amici*") state that they are not subsidiaries of any other corporation. *Amici* are nonprofit trade groups and have no shares or securities that are publicly traded.

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STATEMENT OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 29, the Bank Policy Institute ("BPI") and the American Bankers Association ("ABA") (collectively, "*Amici*"), respectfully submit this brief in support of Defendant-Appellee and reversal in part of the district court's ruling.[1]

BPI. BPI is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. BPI produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

ABA. Founded in 1875, the ABA is the voice of the nation's $24.1 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard $19.2 trillion in deposits, and extend $12.7 trillion in loans.

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[1] The undersigned counsel certify that no party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person or entity, other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Amici have a substantial interest in maintaining a predictable and uniform preemption framework under the National Bank Act of 1864 ("NBA"). *Amici's* members operate under that framework and depend on consistent preemption standards that allow national banks to function as national institutions—pricing their products and services according to business judgment rather than a patchwork of conflicting state mandates. *Amici* possess institutional expertise on these issues and routinely appear as *amici curiae* in cases raising questions critical to the U.S. banking system, including questions of federal preemption under the NBA. This brief will assist this Court by providing unique insight into the broader regulatory and commercial context at issue, while also offering practical perspectives regarding the potential consequences of permitting state-by-state pricing restrictions to proliferate unchecked.

SUMMARY OF ARGUMENT

This appeal presents an issue of exceptional importance to the uniform application of NBA preemption: whether a state may prohibit national banks from exercising their federally conferred power to assess certain non-interest fees. The answer is no. Although the district court dismissed the complaint for a different reason (on First Amendment grounds), in doing so it incorrectly rejected NBA preemption as a basis for ending this case. For two reasons, this Court should reverse the district court's decision regarding NBA preemption and hold that the NBA preempts New York General Business Law § 399-zzz.

First, the district court's erroneous preemption ruling failed to conduct the "nuanced comparative analysis" that *Cantero* v. *Bank of America, N.A.*, 602 U.S. 205, 220 (2024), requires. This Court can and should correct that critical error now. Under *Cantero*, courts must make a "practical assessment of the nature and degree" of a state law's interference with national banking powers by considering "the text and structure of the [relevant] laws," the Supreme Court's preemption precedents, and "common sense"—a purely legal analysis. *Id.* at 219–20, 220 n.3. The district court conducted no such analysis, instead adopting wholesale a single pre-*Cantero* district court decision, which also failed to analyze any of the precedents that *Cantero* identified. *Hastings* v. *TD Bank, N.A.*, 2026 WL 555036, at *2–3 (E.D.N.Y. Feb. 27, 2026) (adopting *Manship* v. *T.D. Bank, N.A.*, 2021 WL 981587 (N.D.N.Y. Mar. 16, 2021)). Regardless of how this Court rules on the First Amendment, which *Amici* do not address herein, this Court should resolve the NBA preemption issue and apply *Cantero*. Indeed, this Court is well situated to correct this purely legal error and should do so to prevent disruption and confusion in the banking industry, preserve national banks' longstanding power to charge fees (including on deposit accounts), maintain the uniform nationwide framework that the NBA established to protect against encroachment by inconsistent state mandates, and avoid any doubt about how to apply its most recent *Cantero* decision.

Second, the district court reached the wrong result under *Cantero*'s two-step analysis, which asks first whether the state law affects national banks' exercise of their federally authorized powers and, if so, whether it prevents or significantly interferes with those powers.

Under the first step, federal law expressly grants national banks the power to "receiv[e] deposits" and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). Consistent with this statutory authority, the OCC has long confirmed that federal law grants national banks the power to "charge . . . non-interest charges and fees." 12 C.F.R.

§ 7.4002(a);[2] National Bank Non-Interest Charges and Fees, 91 Fed. Reg. 22,989, 22,991 n.12 (Apr. 29, 2026) (codified at 12 C.F.R. § 7.4002) (power to charge fees encompasses "fees related to both debit and credit accounts"). Section 399-zzz would prohibit national banks from exercising that power by barring them from "charg[ing] a consumer an additional rate or fee . . . when the consumer chooses to . . . receive a paper billing statement."[3] N.Y. Gen. Bus. L. § 399-zzz. The district court held that paper statement fees are somehow not national bank powers under § 7.4002 because they do "not involve a banking concept or principle." *Hastings*, 2026 WL 555036, at *2–3. That limiting standard appears nowhere in the text of § 7.4002, is inconsistent with the regulation's purpose, and effectively rewrites federal law. Nor does this standard appear in *Cantero* or in the numerous previous Supreme Court

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[2] The OCC amended 12 C.F.R. § 7.4002 in April 2026, and the amended rule went into effect on June 30, 2026. *See* National Bank Non-Interest Charges and Fees, 91 Fed. Reg. 22,989. *Amici* analyze the version of § 7.4002 that was in effect at the time of the district court's decision.

[3] The district court did not address whether § 399-zzz, which by its terms applies to "paper billing statement[s]," encompasses bank deposit account statements that report transactions and balances but are not associated with a payment. *Amici* address NBA preemption on the assumption that § 399-zzz applies.

or appellate court decisions on preemption. The district court thus stripped national banks of a statutorily conferred power by misreading a regulation.

Under the second *Cantero* step, the district court's analysis of significant interference cannot be reconciled with the Supreme Court's decision. Rather than meaningfully assessing the nature and degree of § 399-zzz's interference with national banking powers, the district court summarily concluded that there could be no significant interference because banks could "circumvent the statute" by relabeling fees as credits. *Id*. at *2. In other words, the district court's paradoxical position is that a statute that cannot be circumvented is less enforceable than a statute that can be circumvented. Once again, this is a novel standard for evaluating the scope of preemption and for statutory analysis more generally. The availability of workarounds has never been the test for NBA preemption. Properly applied, *Cantero*'s comparative framework leaves no doubt that § 399-zzz significantly interferes with national banks' powers, and must therefore be preempted.

ARGUMENT

I. THIS COURT SHOULD CONDUCT A PREEMPTION ANALYSIS UNDER *CANTERO*'S MANDATORY FRAMEWORK.

The framework for NBA preemption is well established. Under *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996), the NBA preempts any state law that "prevents or significantly interferes with the exercise by the national bank of its powers." *Cantero*, 602 U.S. at 209. To determine whether a state law "prevents or significantly interferes" with national bank powers, courts "must" conduct a "nuanced comparative analysis," including a "practical assessment of the nature and degree of the interference caused by a state law" guided by "the text and structure of the laws, comparison to other [cited] precedents, and common sense." *Id.* at 219–20, 220 n.3.

The district court ignored this mandate and failed to conduct the analysis required by *Cantero*. *Hastings*, 2026 WL 555036. Instead, it adopted the analysis and conclusion in *Manship* v. *T.D. Bank, N.A.*, 2021 WL 981587, a district court opinion issued prior to *Cantero*, to conclude that state-law prohibitions on paper statement fees are not preempted by the NBA. *Hastings*, 2026 WL 555036, at *3. But like the district court here, *Manship* never analyzed *Barnett Bank* or any other relevant Supreme Court precedents that *Cantero* requires. *Manship*, 2021 WL 981587, at *6–7.

After finding that § 399-zzz was not preempted, the district court dismissed the complaint on First Amendment grounds. *Hastings*, 2026 WL 555036, at *3–6. But regardless of how it rules on the First Amendment, this Court should reach the preemption issue and apply *Cantero* notwithstanding the district court's failure to do so. NBA preemption "arguments are purely legal and do not depend on resolution of any factual disputes over the effect of [the state law] on the bank's business." *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185, 1194 n.6 (9th Cir. 2018); *Rose* v. *Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 n.4 (9th Cir. 2008) (refusing to remand for discovery because "no amount of discovery would change the central holding that Congress intended for the NBA to preempt [the state law at issue]"); *Cantero*, 602 U.S. at 221 (rejecting petitioners' argument that would have required a fact-intensive inquiry); *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 376–77 (1954) (deciding preemption issue without analyzing "large record" from the trial court). Remand is "unnecessary where, as here, the only question before [the Court] 'is one of law, well within this Court's purview.'" *Jack* v. *Barr*, 966 F.3d 95, 97 (2d Cir. 2020) (quoting *Genego* v. *Barr*, 922 F.3d 499, 502 (2d Cir. 2019)). This Court should thus resolve the legal question of preemption now.

The stakes extend well beyond paper statement fees. As explained below, TD Bank charges those fees in New York based on a longstanding and broad grant of authority: that as part of their express power to "receiv[e] deposits" and to exercise "all such incidental powers" needed for that and other activities "necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), national banks have the power to charge fees connected to deposit accounts and other "loan-related fees." Interpretive Rulings, 60 Fed. Reg. 11,924, 11,929 (Mar. 3, 1995) (confirming that "[t]he authority of a national bank to charge [non-interest] fees is well established").

Courts, in turn, have consistently held that state-imposed limitations on such fees—for example, ATM fees, overdraft charges, account service fees, and other fees associated with deposits and other core banking products—substantially interfere with national bank powers and are therefore preempted. *See, e.g.*, *Bank of Am.* v. *City & Cnty. of S.F.*, 309 F.3d 551 (9th Cir. 2002) (non-depositor ATM fees);

Baptista v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (non-account holder check-cashing fees); *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (account service fees); *Deming* v. *Merrill Lynch & Co.*, 528 F. App'x 775 (9th Cir. 2013) (loan administrative and compliance fees); *Montgomery* v. *Bank of Am. Corp.*, 515 F. Supp. 2d 1106 (C.D. Cal. 2007) (nonsufficient funds and overdraft fees); *Martinez* v. *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010) (underwriting and tax service fees); *NNDJ, Inc.* v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-accountholder official check-cashing fees); *Pereira* v. *Regions Bank*, 918 F. Supp. 2d 1275 (M.D. Fla. 2013), *aff'd*, 752 F.3d 1354 (11th Cir. 2014) (check-cashing and settlement fees); *Powell* v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D. W. Va. 2016) (late fees).

Permitting states, in the wake of *Cantero*, to carve out categories of non-interest fees from national banks' federally conferred authority would disrupt decades of settled law on preemption and upend bank expectations and operations. It would expose national banks to a wide variety of, and often differing, state laws seeking to regulate, restrict, prohibit, or require fees and payments. Illinois, for example, has enacted the Interchange Fee Prohibition Act, which prohibits interchange fees on certain aspects of transactions, and other states have followed with similar proposals. *See* 815 Ill. Comp. Stat. Ann. 151/150-10(a); *see also* S.B. 512, 158th Gen. Assemb., 2025-2026 Reg. Sess. (Ga. 2026); H.B. 8212, 2026 Leg. Sess. (R.I. 2026). Other fee restrictions have likewise proliferated: Rhode Island, for example, has prohibited paper statement fees for consumers over age 65, and New York has proposed prohibiting fees for paper statements required for certain benefits applications. *See* R.I. Gen. L. § 6-40.1-2; S.B. S4228, 2025-2026 Reg. Sess. (N.Y. 2025).

A ruling on preemption in this case is critical to uphold the uniform national framework that Congress enacted the NBA to preserve, and to prevent the "[d]iverse and duplicative" laws that "the NBA was designed to prevent." *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13–14 (2007); *see also Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10 (2003) (NBA preserves "[u]niform rules" to protect national banks against "possible unfriendly State legislation"). Without preemption here, diverse state laws regulating fees will disrupt the national banking system, which is meant to be "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903).

II. SECTION 399-zzz SIGNIFICANTLY INTERFERES WITH NATIONAL BANK POWERS.

"If [a] state law . . . significantly interferes with [a] national bank's exercise of its powers, the law is preempted" under the NBA. *Cantero*, 602 U.S. at 220. The analysis proceeds in two steps. First, courts must "ask whether the state law affects 'the exercise by the national bank of its *powers*,'" as opposed to merely affecting a bank. *Cantero* v. *Bank of Am., N.A.*, 175 F.4th 201, 209 (2d Cir. 2026) ("*Cantero II*") (emphasis added). Then, courts "consider whether the state law 'prevents or significantly interferes' with those powers by analyzing two factors: (1) the 'nature' of the state law's interference, and (2) the 'degree' of interference." *Id.* (quoting *Cantero*, 602 U.S. at 220 & n.3). Analyzing the nature and degree of interference demands a "nuanced comparative analysis," including a "practical assessment" "based on the text and structure of the laws, comparison to other [cited] precedents, and common sense." *Cantero*, 602 U.S. at 219–20, 220 n.3.

Properly applied, *Cantero* compels the conclusion that the NBA preempts § 399-zzz.

A. Section 399-zzz Plainly Affects a National Bank Power—the Power to Charge Deposit Account and Loan-Related Fees.

This first step of the *Cantero* analysis should have been straightforward. The NBA expressly authorizes national banks to "receiv[e] deposits" and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). As a matter of plain text, that statutory authority encompasses the power to assess fees for deposit-related services, such as the paper statement fees in this case, and to charge other loan-related fees.[4] *See Best* v. *U.S. Nat'l Bank of Or.*, 739 P.2d 554, 560–61, 563 (Or. 1987) (explaining historical power to charge account service fees); Interpretive Rulings, 60 Fed. Reg. at 11,929 (banks may charge "deposit account service charges

[4] As the NBA itself makes plain, 12 U.S.C. § 24 (Seventh), and as confirmed by OCC regulations, national banks' power to charge fees is not limited to fees for deposit accounts, but also encompasses other types of fees, including "loan-related fees." Interpretive Rulings, 60 Fed. Reg. at 11,929; National Bank Non-Interest Charges and Fees, 91 Fed. Reg. at 22,991 n.12 ("§ 7.4002 permits national banks to charge non-interest charges and fees related to both debit and credit accounts."). *Amici's* analysis focuses on the deposit account-related fees at issue in this action.

and loan-related fees" under § 7.4002). A law like § 399-zzz that expressly prohibits a kind of deposit-related fee clearly "affects" the NBA-granted power to charge such fees. *Cantero II*, 175 F.4th at 209.

If the statutory language were not enough, the OCC has regularly confirmed that charging fees for deposit accounts is an NBA-granted power. In 1983, the OCC clarified that charging "deposit account service charges" is part of national banks' "authority to take deposits" under 12 U.S.C. § 24 (Seventh). Interpretive Ruling Concerning National Bank Service Charges, 1983 WL 110730, 48 Fed. Reg. 54,319, 54,319 (Dec. 2, 1983). It made the same point in 1995 and 1996 in enacting 12 C.F.R. § 7.4002, which confirmed national banks' power to "charge [their] customers non-interest charges and fees, including deposit account service charges." Interpretive Rulings, 61 Fed. Reg. 4,849, 4,869 (Feb. 9, 1996); *see* Interpretive Rulings, 60 Fed. Reg. at 11,929 ("The authority of a national bank to charge [deposit account service charges] is well established."). To *Amici's* knowledge, no party has ever successfully challenged the OCC's determination that national banks have the power, under the NBA itself, to charge their customers charges and fees, including deposit account service charges.

Thus, although "[s]tate laws that merely affect banks, rather than banking powers, are not typically preempted," § 399-zzz is no such law. *Cantero II*, 175 F.4th at 210. On its face, § 399-zzz affects national banks' statutory authority to charge a form of deposit-account service fee. That should have ended the step-one inquiry and triggered *Cantero*'s significant-interference analysis.

Instead, the district court took a different path, rewriting national banks' power to charge deposit-account-related fees as *limited* by the OCC regulation, 12 C.F.R. § 7.4002, which *confirms* banks' power to impose such fees (among other non-interest fees). *Hastings*, 2026 WL 555036, at *2–3. Such a reading is not only convoluted, but also produces an untenable legal result. The OCC cannot limit powers granted by Congress in the NBA. *See generally Sawyer* v. *United States*, 10 F.2d 416, 420 (2d Cir. 1926) ("Authority to make rules and regulations necessary for carrying out the purposes of a legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right given by the act."); *Marsano* v. *Laird*, 412 F.2d 65, 69 (2d Cir. 1969) ("[A]n express statutory right cannot be impaired by administrative action or regulation."). And even if it could, it did not.

The text and purpose of 12 C.F.R. § 7.4002 are contrary to the district court's reading.

1. <u>Section 7.4002(b) does not limit national banks' power to charge non-interest fees.</u>

Section 7.4002 provides that, without qualification, "[t]he establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2). As the OCC explained, § 7.4002 confirms national banks' "basic authority to impose non-interest charges and fees, including deposit account service charges" and provides that "the amount and *type* of fees established by a national bank are decisions committed to the business judgment of the bank." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,787 (July 2, 2001) (emphasis added).

Section 7.4002(b) separately lists four factors illustrating "safe and sound banking principles," which reflect "a process requirement to be implemented by the bank." *Id.* Those factors are "(i) [t]he cost incurred by the bank in providing the service; (ii) [t]he deterrence of misuse by customers of banking services; (iii) [t]he enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and (iv) [t]he maintenance of the safety and soundness of the institution." 12 C.F.R. § 7.4002(b)(2)(i)–(iv). According to the OCC, if a bank considers those "factors in setting its non-interest charges and fees," then it "faces no supervisory impediment to exercising the authority to set charges and fees." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. at 34,787. Section 7.4002(b) thus governs how the OCC supervises national banks' exercise of their fee authority; it neither narrows the scope of national banks' authority nor furnishes content to the preemption test.

The district court and the *Manship* court, however, effectively rewrote national banks' federal power to assess fees by reading § 7.4002 to mean that "a national bank can exercise such power '*only* when [the fees] relate to sound banking judgment and safe banking principles.'" *Hastings*, 2026 WL 555036, at *2 (citing 12 C.F.R. § 7.4002(b) and quoting *Manship*, 2021 WL 981587, at *6–7 (emphasis added)). From there, the district court compounded its mistake by requiring that the exercise of a national banking power must "involve [a] banking concept or principle." *Id.* (quoting *Manship*, 2021 WL 981587, at *7).

But national banks' authority to charge "non-interest" fees, including those related to deposit accounts, is subject to no such limitation. 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." *Baptista*, 640 F.3d at 1198 n.2. Consistent with that objective, the OCC made clear 25 years ago in amending § 7.4002(b) that the regulation "was never intended to limit a national bank's authority to exercise its business judgment." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. at 34,787. And the OCC recently reaffirmed that understanding, explaining that "[f]ederal law grants these powers to national banks '*without relevant qualification*.'" Order Preempting the Illinois Interchange Fee Prohibition Act, 91 Fed. Reg. 23,150, 23,153 (Apr. 29, 2026) (emphasis added). The district court's limitations on national banks' powers to impose paper statement fees thus cannot be reconciled with the NBA or § 7.4002.

2. <u>Paper statement fees reflect national banks' legitimate banking judgment under § 7.4002(b).</u>

Even if § 7.4002 could somehow be construed to limit the scope of national banks' power to charge non-interest fees to so-called "banking concepts," *Hastings*, 2026 WL 555036, at *3, or "banking practices and services," *Manship*, 2021 WL 981587, at *7, paper statements would meet this standard. The power to charge these fees is fundamental to national banks' ability to offer products and services on terms that reflect their business judgment. If a bank cannot recoup the costs of providing a service—such as printing and mailing paper statements—it may choose not to offer that service at all, or with the same frequency, or it may offset the costs elsewhere in ways that could have a negative impact on consumers.[5] *See Kivett* v. *Flagstar Bank, FSB*, 154 F.4th 640, 660 (9th Cir. 2025) (Nelson, J., dissenting) (explaining that price controls require banks to "offset . . . costs to ensure sufficient returns," which could lead to inequitable results).

Indeed, § 7.4002 *instructs* national banks to establish and price the particular type of fee at issue here—deposit account service charges—according to their business judgment. As noted above,

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[5] The Durbin Amendment provides a useful example. *See* 15 U.S.C. § 1693o-2. After Congress capped debit-card interchange fees, banks substantially reduced the availability of free checking accounts, while consumers shifted spending from debit cards to rewards credit cards—offsetting some of the benefits the restrictions were intended to provide. *See* Vladimir Mukharlyamov & Natasha Sarin, Price Regulation in Two-Sided Markets: Empirical Evidence from Debit Cards (Apr. 2025), https://dx.doi.org/10.2139/ssrn.3328579.

§ 7.4002(b)(2) provides that banks establish "non-interest charges and fees in accordance with safe and sound banking principles" if they consider four factors: the cost of the service, deterring customer misuse of banking services, competition, and institutional safety and soundness. 12 C.F.R. § 7.4002(b)(2). Neither the district court nor *Manship* addressed whether banks consider those factors in setting paper statement fees, but they clearly do. National banks may reasonably determine that charging paper statement fees encourages customers to receive electronic statements, reduces and offsets printing and mailing costs, lessens operational burdens associated with producing and distributing millions of physical statements, reduces risks associated with transmitting sensitive financial information through physical mail, and enhances their competitive position as against banks and other financial institutions, such as money market funds not located in New York. Those are precisely the kinds of business judgments that § 7.4002(b) contemplates.

The fact that entities other than "banking institutions" charge paper statement fees makes no difference to whether *national banks* do so as part of their banking power. *See Manship*, 2021 WL 981587, at *7.

Finance companies, mortgage companies, buy-now-pay-later lenders, and pawn shops all extend credit. That does not render "lending money" any less a "core banking function[]." 12 C.F.R. § 5.20(e)(1)(i). Virtually every business (not just banks) advertises its products, but the Supreme Court has made clear that advertising is among the "incidental powers" that the NBA protects against state interference. *Franklin*, 347 U.S. at 377–78. The same logic applies here: the fact that non-banks may—or may not—also charge paper statement fees does not diminish national banks' federally protected authority to do so.

Section 399-zzz interferes with national banks' "broad authority to impose non-interest charges and fees" and their "discretion to make business decisions about how to impose th[o]se charges and fees." National Bank Non-Interest Charges and Fees, 91 Fed. Reg. at 22,990. The remaining question is whether that interference is significant under *Cantero*'s comparative framework.

B. Section 399-zzz Significantly Interferes With National Banks' Power to Charge Non-Interest Fees.

Cantero's "nuanced comparative analysis" requires courts to undertake a "practical assessment of the nature and degree of the interference caused by a state law" "based on the text and structure of the laws, comparison to other precedents, and common sense." 602 U.S. at 219–20, 220 n.3. "If the state law's interference with national bank powers is more akin to the interference in cases like *Franklin*, *Fidelity*, *First National Bank of San Jose*, and *Barnett Bank* itself, then the state law is preempted." *Id.* at 220. By contrast, "[i]f the state law's interference with national bank powers is more akin to the interference in cases like *Anderson*, *National Bank v. Commonwealth*, and *McClellan*, then the state law is not preempted." *Id.*

The Second Circuit's subsequent decision in *Cantero II* on remand from the Supreme Court provides the roadmap. There, this Court held that New York's interest-on-escrow law was preempted because it "targets banks and limits their broad power to set the terms of mortgage-escrow accounts, so it is similar in nature to the preempted laws in *Fidelity* . . . and *Barnett Bank*" and because "its degree of interference on banks' ability to make real-estate loans efficiently is similarly severe to the interference created by the preempted advertising law in *Franklin*." *Cantero II*, 175 F.4th at 206. Section 399-zzz is no different. Properly analyzed under *Cantero*'s framework, § 399-zzz falls squarely on the preempted side of the line.

1. Section 399-zzz is the type of law that is "paradigmatic[ally]" preempted.

Franklin is determinative on this issue of "significant interference." In that case, "[t]he paradigmatic example of significant interference," the Supreme Court struck down a New York law that "prohibited most banks 'from using the word "saving" or "savings" in their advertising or business.'" *Cantero*, 602 U.S. at 216. The law "did not bar national banks from receiving savings deposits, 'or even' from 'advertising that fact.'" *Id.* (quoting *Franklin*, 347 U.S. at 378). Although national banks could still exercise their incidental power to advertise savings accounts (but without using the term "savings"), the Supreme Court struck down the New York law since it "significantly interfered with the banks' power because the banks could not advertise effectively." *Id.* Or, as this Court put it, NBA preemption applied because state law "could not interfere with the national bank's ability to [advertise savings accounts] *efficiently*." *Cantero II*, 175 F.4th at 212 (emphasis in original).

The same principle applies here with even greater force. Section 399-zzz interferes with national banks' ability to efficiently price their services—a more direct interference with banking operations than a restriction on a single advertising term. Indeed, if a restriction on a single word in banks' advertisements constitutes the "paradigmatic example of significant interference," *Cantero*, 602 U.S. at 216, then § 399-zzz's outright prohibition on banks' federal power to charge certain non-interest fees must be preempted. *See Cantero II*, 175 F.4th at 214 (quoting *Kivett*, 154 F.4th at 660 (Nelson, J., dissenting)) ("A 'state law that alters a national bank's pricing almost by definition interferes more with the bank's powers than a simple advertising restriction.'")). And even if § 399-zzz is read only to restrict *how* banks may describe their pricing—requiring them to characterize the economic equivalent of paper statement charges as "credits" for going paperless rather than "fees" for choosing paper—the interference with national banks' pricing discretion remains significant. *See Franklin*, 347 U.S. at 377–78 (a national bank's ability "to let the public know about" its services is necessary to the effective exercise of the power to receive savings deposits).

Fidelity Federal Savings & Loan Ass'n v. *De la Cuesta*, 458 U.S. 141 (1982), is equally instructive. There, federal law "allowed, but did 'not compel, federal savings and loans to include due-on-sale clauses in their contracts,'" but "California law 'limited' that right" to certain circumstances. *Cantero*, 602 U.S. at 216–17 (quoting *Fidelity*, 458 U.S.

at 154–55). The Court held the California law preempted because "the savings and loan could not exercise a due-on-sale clause 'solely at its option,'" and thus the state law "interfered with 'the flexibility given'" by federal law. *Id.* at 217 (quoting *Fidelity*, 458 U.S. at 155). So, too, here: federal law authorizes—but does not require—national banks to charge non-interest fees, and it is therefore impermissible for § 399-zzz to limit national banks' flexibility to determine whether, when, and how to charge for paper statements. *See* National Bank Non-Interest Charges and Fees, 91 Fed. Reg. at 22,990 ("National banks also have the authority to receive compensation for the products and services they provide.").

Finally, in *Barnett Bank*, "federal law authorized national banks to sell insurance in small towns," but "a Florida law prohibited most banks from selling insurance." *Cantero*, 602 U.S. at 214. The Supreme Court affirmed that when federal law grants national banks "a 'broad, not a limited,' power" to engage in an activity, state laws that restrict that power are preempted. *Id.* at 215 (quoting *Barnett Bank*, 517 U.S. at 32). Like the power in *Barnett Bank*, federal law "explicitly grant[s] a national bank an authorization, permission, or power" to charge non-interest fees "with 'no indication that Congress intended to subject that power to local restriction.'" *Id.* (quoting *Barnett Bank*, 517 U.S. at 34–35). Accordingly, "state law c[an]not limit national banks' ability to" exercise that broad power. *Id.* Indeed, that is precisely why courts routinely conclude that state laws restricting national banks' ability to charge fees are preempted. *See supra* pp. 9–10 (collecting cases). This case is no different.

Neither *Hastings* nor *Manship* conducted this "nuanced comparative analysis." *Cantero*, 602 U.S. at 220. Instead, both courts summarily concluded that § 399-zzz does not "significantly interfere" with national banks' powers to charge their customers for paper statements because banks could "circumvent the statute by changing [their] description from a 'fee' to a 'credit.'" *Hastings*, 2026 WL 555036, at *2 (quoting *Manship*, 2021 WL 981587, at *7). But as the Supreme Court's preemption cases above make clear, that reasoning misses the mark. The potential for workarounds does not defeat preemption. *Cantero*, 602 U.S. at 214 ("*Barnett Bank* made clear that a non-discriminatory state banking law can be preempted even if it is possible for the national bank to comply with both federal and state law."). Whether a national bank can devise workarounds to avoid a state law's restrictions (like avoiding the word "savings" in *Franklin*, 347 U.S. at 374, 378–79) is thus irrelevant to the preemption inquiry.

However § 399-zzz is ultimately construed—whether as a prohibition on charging paper statement fees or as a restriction on how banks may communicate their pricing—the result is the same: the statute significantly interferes with national banks' exercise of their federally conferred powers, and NBA preemption applies.

2. <u>The Supreme Court's decisions finding no preemption do not lead to a different result.</u>

As this Court observed, the Supreme Court's decisions finding no preemption involved "generally applicable" state laws that were "part of a generally applicable scheme." *Cantero II*, 175 F.4th at 210. Section 399-zzz is no such law.

In *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), the "primary example of a case where state law was not preempted," "Kentucky law required banks to turn over abandoned deposits to the State." *Cantero*, 602 U.S. at 217. As the Supreme Court explained, the law there was not preempted because it was "as old as the common law itself" and merely required banks to follow "the law of the state where it does business" when it comes to deciding whether funds were abandoned.

Id. at 217–18. Indeed, the Court could not "discern any greater or different effect" of Kentucky's law "from the application of the ancient law of escheat or forfeiture of goods." *Anderson*, 321 U.S. at 252. That generally applicable requirement did not infringe on banking laws or burden bank functions because it did not interfere with banks' ability to establish and maintain deposit accounts or their "obligation to pay [] deposits"; it only told them who is entitled by law to receive them. *Cantero*, 602 U.S. at 217–18.

Similarly, in *National Bank* v. *Commonwealth*, 76 U.S. 353 (1869), a generally applicable Kentucky law that taxed bank stock was not preempted because national banks remain subject to "generally applicable state contract, property, and debt-collection laws" to the extent that they "'in no manner hinder[ed]' [a] national bank's banking operations, and produced 'no greater interference with the functions of the bank than any other' law governing businesses." *Cantero*, 602 U.S. at 218–19. And in *McClellan* v. *Chipman*, 164 U.S. 347 (1896), a generally applicable Massachusetts contract law was not preempted because it only restrained national banks' power to "make [certain] contracts" for fraudulent transfers in "particular and exceptional circumstances," but did not "impair the efficiency of national banks, or frustrate the purpose for which they were created." *Id.* at 358; *Cantero*, 602 U.S. at 219 (citation and alterations omitted).

Section 399-zzz bears no resemblance to those laws. Nor does *Manship*'s declaration that § 399-zzz is "a rule of general application" decide the preemption question. *Manship*, 2021 WL 981587, at *7. The "generally applicable" laws involved in *Anderson*, *McClellan*, and *National Bank* addressed ordinary legal obligations that did not significantly interfere with national banking powers. By contrast, § 399-zzz prohibits banks altogether from exercising their "broad authority to impose non-interest charges and fees," including "how to impose th[o]se charges and fees." *See* National Bank Non-Interest Charges and Fees, 91 Fed. Reg. at 22,990. Section 399-zzz is thus fundamentally different. Rather than affecting bank activities that do not involve banking powers, or only affecting banking powers in an indirect and incidental way, the statute directly prohibits the exercise of a broad, federally conferred banking power every time a bank chooses to assess a paper statement fee. If § 399-zzz could escape preemption merely because it applies to entities other than banks, then no provision of New York's General Business Law would *ever* be subject to preemption—no matter the level of interference with national banks' powers. *Cantero* forbids such an absurd result.[6]

NBA preemption must apply. Federal law provides national banks with broad discretion to determine whether, when, and how to assess fees, including those on deposit accounts, as part of their business judgment. By eliminating an entire category of non-interest fees, § 399-zzz substitutes New York's policy judgments for the business judgments that federal law reserves to national banks. Absent NBA preemption, states could exercise control over pricing, and thus over national banks' core products and services, one fee at a time. That result is fundamentally at odds with the NBA's purpose of shielding national banks from state interference. *McCulloch* v. *Maryland*, 17 U.S. 316, 431 (1819) ("[T]he power to tax involves the power to destroy.").

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6 Even for a "generally applicable" law, "[a] 'nuanced comparative analysis' must balance the different attributes of a state law that favor preemption against those that do not." *Cantero II*, 175 F.4th at 211 n.4. The degree of interference here with such a broad federal banking power supports preemption. *See supra* pp. 23-27.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision in part and hold that the NBA preempts § 399-zzz. Doing so will preserve the uniform national banking system that Congress intended and prevent the state-by-state fragmentation that the NBA was enacted to avoid.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the length limitation of Circuit Rule 29.1(c) because this brief contains 6,097 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Century Schoolbook 14-point font.

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