STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2023AP000125

Bank of America, N.A.,
Plaintiff-Respondent,
v.
Jean-Pierre C. Riffard,
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF MILWAUKEE COUNTY
Case Nos. 2021CV005071 and 2021SC019448
The Honorable Kashoua Kristy Yang Presiding

BRIEF OF THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND WISCONSIN BANKERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory Authorities

Other Authorities

SUMMARY

Congress enacted the National Bank Act of 1864 ("NBA") so that a unified body of federal law—rather than "unduly burdensome and duplicative state regulation"—would govern national banks. *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 10–11 (2007). Under the NBA, national banks operate under the federal government's "paramount authority," *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and are supervised by the Office of the Comptroller of the Currency ("OCC"), *see* 12 U.S.C. § 24.

In the landmark case of *Barnett Bank of Marion County, N.A.* v. *Nelson*, the Supreme Court held that the NBA preempts any state regulation that "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers." 517 U.S. 25, 33 (1996). Importantly, the "level of interference that gives rise to preemption" under *Barnett Bank* "is not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009). In 2010, Congress codified the *Barnett Bank* standard into law through the Dodd-Frank Act. *See* 12 U.S.C. § 25b(b)(1)(B).

In its decision below, the Circuit Court of Milwaukee County correctly held that the NBA preempts the so-called "notice-to-cure" provisions of the Wisconsin Consumer Act ("WCA"). These notice-to-cure provisions require banks to provide notice to a defaulted borrower and to restore that borrower's rights under the loan agreement "as though no default had occurred" if the borrower cures the default within fifteen days. Wis. Stat. §§ 425.104, 425.105. As such, these provisions prohibit lenders from accelerating a loan upon default, thus forcing lenders to continue their relationship with defaulting borrowers. The Circuit Court correctly recognized that these provisions limit a bank's ability to set the terms of its own credit and are therefore preempted as to national banks.

Contrary to the NBA, established caselaw, and OCC regulations, interpretations, and guidance, Appellant argues that these provisions are not preempted because they purportedly pertain only to debt collection—supposedly an exclusive province of state law—and thus do not interfere with federally granted banking powers. That argument rests on a profound misunderstanding of the NBA and the impact of notice-to-cure laws on banks' lending operations. If the WCA is allowed to restrict national banks' ability to accelerate loans upon default, the WCA will deny national banks an important tool to manage their credit risks. Further, national banks would be subject to a fifty-state patchwork of regulatory regimes with different requirements for providing default notices and different cure rights, thus defeating the NBA's purpose of creating a uniform regulatory structure for national banks. Finally, forcing national banks to comply with the WCA's notice-to-cure provisions would increase the risks of extending credit to Wisconsin borrowers with lower credit scores, thus creating higher interest rates and/or reduced availability of loans to lower-credit Wisconsin borrowers.

ARGUMENT

I. THE NBA PREEMPTS THE WCA NOTICE-TO-CURE PROVISIONS BECAUSE THEY SIGNIFICANTLY INTERFERE WITH NATIONAL BANKS' ABILITY TO SET CREDIT TERMS.

A. WCA Sections 425.104 and 425.105 Regulate Credit Terms.

Conceding that the NBA preempts state laws that restrict a national bank's ability to set the terms of credit on its loans (*see* Appellant's Br. at 18), Appellant seeks to characterize the WCA's provisions as mere "debt collection" rules, which Appellant claims are not preempted. In doing so, Appellant ignores that the notice-to-cure requirements do not simply govern *how* banks may collect on a defaulted loan, but rather impede national banks' management of credit risk by impairing a bank's ability to determine *whether* a loan may be called due.

National banks have limited tools to minimize credit risk, *i.e.*, the risk of not fully recovering on a loan.[1] Accelerating the maturity of a loan upon default is one of the only means banks have to discontinue the lender-borrower relationship.[2] Wisconsin's statute thus would deprive national banks of this critical credit risk management tool and interfere with the flexibility national banks need to "manage credit risk exposures," OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011), thus significantly interfering with national banks' ability "to carry on the business of banking," *Watters*, 550 U.S. at 6 (quoting 12 U.S.C. § 24). The OCC has warned of the risks of such regulation by states:

> [S]tate laws that would affect the ability of national banks to underwrite and mitigate credit risk, [and] manage credit risk exposures, . . . such as laws concerning . . . loan amortization and repayment requirements, [or] *circumstances when a loan may be called due and payable* . . . would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks.

OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. at 43,557 (emphasis added).

The impact of removing this risk mitigation tool cannot be overstated. If lenders cannot accelerate a loan upon default, banks would be forced to maintain a credit relationship with a borrower who has already defaulted and could, going forward, default and temporarily cure multiple times, thus causing significant servicing costs and credit issues. Worse, if the loan is revolving credit (such as the

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[1] *See* Philip E. Strahan, "Borrower Risk and the Price and Nonprice Terms of Bank Loans," FEDERAL RESERVE BANK OF N.Y. (October 1999), *available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr90.pdf, at 2.

[2] *See* 1 Sandra Schnitzer Stern, *Structuring & Drafting Commercial Loan Agreements* § 8.16 (2022).

credit agreement at issue here), then, depending on the terms of the loan, Wisconsin's notice-to-cure law could *obligate* national banks to extend *new* credit to a borrower who defaulted, so long as the borrower is able to cure that initial default within fifteen days.

The OCC has issued rules providing that the NBA preempts state laws concerning "[t]he terms of credit, . . . [and] term to maturity of [a] loan, including the circumstances under which a loan may be called due and payable." 12 C.F.R. § 7.4008(d)(4). And in 2003, the OCC issued a Determination and Order holding that Georgia statutes giving borrowers the right to cure a default on a mortgage—thus restoring their position "as if the default had not occurred"—regulate the terms of credit, and thus were preempted. OCC, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,276–77 (Aug. 5, 2003); *see also Capital One, N.A.* v. *Browder*, 2011 WL 13269115, at *6–7 (N.D. Ga. Apr. 6, 2011) (adopting the OCC's order).

Likewise, in 2018, the Wisconsin Department of Financial Institutions issued a letter concluding that notice requirements pertaining to a consumer's default on a loan or the acceleration of that loan "are governed by federal law." Wis. Dep't of Fin. Inst., Letter to Kohn Law Firm S.C. (Aug. 31, 2018). Although not binding on the parties to this appeal, this expert determination emphasizes the impermissibility of the WCA's intrusion into national banking powers. (*See* Respondent's Br. at 31-32.)

The Western District of Wisconsin, too, has held that state laws limiting a bank's ability to call a loan due cannot, as Appellant contends, be fairly characterized as mere "debt collection" statutes. In *Lako* v. *Portfolio Recovery Associates*, the court found that "the WCA goes beyond debt collection and sets conditions on the lending relationship between the creditor and the borrower . . . [t]hus . . . affecting the *terms* of credit itself." 2021 WL 3403632, at *6–7 (W.D.

Wis. Aug. 4, 2021) (emphasis in original). Accordingly, these laws were "expressly preempted" as to national banks by 12 C.F.R. § 7.4008(d)(4). *Id.* at *7; *see also* Respondent's Br. at 26-31.

Because WCA Sections 425.104 and 425.105 go beyond simply requiring a notice of default and affect the terms of credit and repayment, they are different from the sorts of state laws governing "rights to collect debts" in the cases relied upon by Appellant: *Epps* v. *JP Morgan Chase Bank, N.A.*, 675 F.3d 315 (4th Cir. 2012), and *Aguayo* v. *U.S. Bank*, 653 F.3d 912 (9th Cir. 2011). While *Amici* do not necessarily agree with the outcome of these cases, they are plainly distinguishable from this case.

As an initial matter, the loans at issue in *Epps* and *Aguayo* involved loans with fixed amounts and maturity dates, where the indefinite extension of credit was not contemplated. *See Aguayo*, 653 F.3d at 925 ("There is no loan at this juncture, but merely an outstanding debt U.S. Bank has sought to recover . . . ."). By contrast, credit card agreements like that at issue here contemplate offering credit to borrowers for an indefinite term. Moreover, those cases involved laws regulating the conditions under which a lender can repossess secured collateral on a consumer loan. But, as discussed above, the WCA provisions at issue here affect *whether* a loan may be called due at all, and thus are preempted because they affect the terms of credit.

B. Even if Viewed as Debt Collection Provisions, Notice-to-Cure State Laws Are Still Preempted.

Even if the WCA provisions are (incorrectly) viewed as procedural debt-collection provisions, they are still preempted if they are inconsistent with "the decision of the Supreme Court of the United States in *Barnett Bank*," *i.e.*, if they significantly interfere with national bank powers. 12 U.S.C. § 25b(b)(1)(B); 12 C.F.R. § 7.4008(e). That preemption standard is clearly met here, where the

WCA not only inhibits national banks' right to collect a loan, but also substantively alters the terms of their credit agreements. *See Lako*, 2021 WL 3403632, at *7 ("Although the [WCA] provisions do relate in part to debt collection, they go beyond that by imposing conditions on the terms of credit within the lending relationship" and thus "significantly interfere with a national bank's exercise of its lending powers.").

The OCC has also refuted the argument that labeling notice-to-cure provisions as debt-collection laws ends the preemption analysis. In publishing the NBA preemption rules in 2004, the OCC explained that preemption analysis is driven by the *effect* of a state law on national bank powers rather than the "label a state attaches to its laws":

> [L]aws related to the transfer of real property may contain provisions that give borrowers the right to "cure" a default upon acceleration of a loan . . . . [T]his could be seen as part of the state laws governing foreclosure, which historically have been within a state's purview. However . . . to the extent that this type of law limits the ability of a national bank to adjust the terms of a particular class of loans once there has been a default, it would be a state law limitation "concerning . . . (2) The schedule for the repayment of principal and interest; or (3) The term to maturity of the loan . . . . " 12 CFR 34.4(a). In such a situation, we would be governed by the effect of the state statute.

OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1912 n.59 (Jan. 13. 2004).[3] The preemption analysis is the same for state laws governing the rights to collect debts. Because the WCA's notice-to-cure provisions directly affect a national bank's ability to set the terms of credit, the NBA preempts them.

[3] The OCC preemption rule concerning real-estate loans analyzed here, 12 C.F.R. § 34.4(a), is identical in all relevant respects to the OCC preemption rule governing non-real estate loans, 12 C.F.R. § 7.4008(d). The OCC's analysis of 12 C.F.R. § 34.4(a) thus informs the interpretation of 12 C.F.R. § 7.4008(d).

Indeed, courts regularly find state laws that effectively dictate the terms on which national banks offer or manage credit or other banking products to be preempted under the NBA, even if enacted in the guise of procedure. *See Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 378-79 (1954) (state law prohibiting use of the word "savings" in advertising by national banks is preempted); *1409 W. Diversey Corp.* v. *JPMorgan Chase Bank, N.A.*, 2016 WL 4124293, at *2 (N.D. Ill. Aug. 3, 2016) ("[A]llowing a state common law to micro-manage the deposit procedures of [national] banks would intrude far into the realm reserved for federal law.").

Appellant urges the court to follow the decision in *Boerner* v. *LVNV Funding LLC*, 358 F. Supp. 3d 767, 777–78 (E.D. Wis. 2019), which held that the NBA did not preempt WCA Sections 425.104 and 425.105 because they concern debt collection. Reliance on this decision would be misguided. *First*, the *Boerner* court presumed without analysis that the WCA's right-to-cure provisions pertain only to debt collection and thus fall under the OCC's savings clause, without considering the reality that these provisions impact credit terms. *Second*, the court relied on cases involving state laws governing collection-related activities but failed to consider contradictory cases and OCC guidance specifically addressing state notice-to-cure requirements. That authority confirms preemption where state notice-to-cure requirements directly affect the terms of credit, as here. *Third*, the court then considered whether the WCA's notice-to-cure provisions are preempted under *Barnett Bank*, but applied a much higher standard examining whether there is an "irreconcilable conflict" between the WCA and the NBA, rather than assessing whether the WCA provisions significantly interfere with national bank powers—the clear *Barnett Bank* standard. Finding no irreconcilable conflict, the court incorrectly held that the WCA is not preempted under *Barnett Bank*. *Fourth*, in conducting the *Barnett Bank* preemption analysis, the court focused solely on the WCA's *notice* requirement—concluding that this was incidental to a national bank's lending

authority—and failed to consider the effect that the right-to-cure provision has on credit terms and credit risk management.

C. Applying Notice-to-Cure Requirements to National Banks Would Subject Them to a Fifty-State Regulatory Framework and Defeat the NBA's Purpose of Fostering Uniform Regulation.

Appellant also ignores the significant interference with national bank powers that would result from reversing the decision below and subjecting national banks to a patchwork of different state laws imposing notice-to-cure requirements. The U.S. Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11; *see also Talbot* v. *Bd. of Cty. Comm'rs of Silver Bow Cty.*, 139 U.S. 438, 443 (1891) (describing the national banking system as having "uniform and universal operation through the entire . . . country"). Yet, if state laws like the WCA notice-to-cure provisions are not preempted by the NBA, instead of employing standardized loan products and nationwide loan servicing programs, national banks would be forced to establish different lending programs to comply with differing state notice-to-cure provisions.

Several states have adopted notice-to-cure statutes similar to the WCA provisions at issue here, and the extent of the right to cure granted to borrowers in these states differs. For instance, the Wisconsin legislature determined that the right to cure a default does not apply to borrowers that received notice of and cured a default on the loan twice in the preceding year. Wis. Stat. § 425.105. By contrast, West Virginia's right to cure does not apply if the borrower receives notice of default on the same obligation three or more times.[4] In Iowa, borrowers lose their right to cure after receiving notice of default only once in the preceding year.[5]

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[4] W. Va. Code § 46A-2-106.

[5] Iowa Code § 537.5110.

Meanwhile, Maine and New Mexico permit borrowers the right to cure a default regardless of the frequency of prior defaults.[6] Imposing these myriad state regulations on national banks would significantly interfere with their ability to make loans by substantially increasing the costs and administrative burden of servicing loans on a national basis.

Applying differing notice-to-cure provisions to national banks will necessarily defeat Congress's intention that they should operate their lending products under *uniform*, nationwide standards. As the OCC has recognized, "[t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure." OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908.

II. A RULING THAT THE NBA DOES NOT PREEMPT THE WCA NOTICE-TO-CURE PROVISIONS WILL HARM WISCONSIN BORROWERS.

Banks use various contract terms, fees, and interest rates to mitigate the risks associated with extending unsecured credit.[7] In particular, credit risk associated with higher-risk borrowers may be "limited by shortening the contractual maturity of loans."[8] But if this important tool of credit risk mitigation—loan maturity acceleration—were impaired and banks could be forced to extend new

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[6] Me. Stat. tit. 14, § 6111; N.M. Stat. Ann. § 58-21A-6. *See also* Colo. Rev. Stat. § 5-5-111 (borrowers lose their right to cure after receiving notice of default once in the preceding year); Mass. Gen. Laws ch. 244, § 35A (right to cure a default only "once during any 5-year period.").

[7] Strahan, *supra* n.1.

[8] *Id.* at 6.

credit to borrowers who already defaulted, national banks would have to manage credit risk by other means, including by charging borrowers higher interest rates or curtailing lending to higher-risk borrowers. "[L]oans more likely to end in default and loans where collection in default is more difficult carry higher interest rates than other loans."[9] Although restricting credit would be felt broadly given the ubiquity of consumer credit loans, lower-income Wisconsin borrowers would be most acutely affected because lending to these borrowers involves higher credit risk.

Moreover, restrictions on the availability of consumer credit and higher borrowing costs would hinder consumer investment and spending, and reduce access to revolving credit—a cash flow management instrument on which many borrowers, particularly lower-income consumers, rely.[10] "Credit availability is a crucial ingredient in any advanced economy's recipe for economic growth because credit can support investment in productive enterprises and can smooth household spending from fluctuations in income."[11] As such, reversing the decision below would have broader detrimental impacts on Wisconsin's economy overall.

CONCLUSION

Amici respectfully request that this Court affirm the Circuit Court's Order.

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[9] *Id.* at 7.

[10] *See* James McAndrews, Fed. Reserve Bank of N.Y., Credit Growth and Economic Activity After the Great Recession, Remarks at the Economic Press Briefing on Student Loans (Apr. 16, 2015), *available at* https://www.newyorkfed.org/newsevents/speeches/2015/mca150416.

[11] *Id.*

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. §§ 809.19(2)(a) and 809.19(7)(b) and that contains, at a minimum: (1) a table of contents; and (2) a copy of any unpublished opinion cited under § 809.23(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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