APPENDIX

TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals,
Second Circuit

Nos. 21–400, 21–403

ALEX CANTERO,
individually and on behalf of all others similarly situated,
Plaintiff– Appellee,

SAUL R. HYMES, ILANA HARWAYNE-GIDANSKY,
on behalf of themselves and all others similarly situated,
Plaintiffs– Appellees,

v.

BANK OF AMERICA, N.A.,
Defendant–Appellant.

September 15, 2022

On Appeal from the United States District Court for the Eastern District of New York

Before: LIVINGSTON, *Chief Judge*, and PARK and PÉREZ, *Circuit Judges*.

Plaintiffs in these two putative class actions took out home mortgage loans from Bank of America, N.A. ("BOA"), one before and the other after the effective date of certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The loan agreements, which were governed by the laws of New York, required Plaintiffs to deposit money in escrow accounts for property taxes and insurance payments for each mortgaged property. When BOA paid no interest on the escrowed amounts, Plaintiffs sued for breach of contract, claiming that they were entitled to interest under New York General Obligations Law § 5-601, which sets a minimum 2% interest rate on mortgage escrow accounts. BOA moved to dismiss on the ground that GOL § 5-601 does not apply to mortgage loans made by federally chartered banks because, as applied to such banks, it is preempted by the National Bank Act of 1864 ("NBA"). The district court (Mauskopf, *J.*) disagreed and denied the motion, but this was error. We hold that (1) New York's interest-on-escrow law is preempted by the NBA under the "ordinary legal principles of pre-emption," *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 37 (1996), and (2) the Dodd-Frank Act does not change this analysis. GOL § 5-601 thus did not require BOA to pay a minimum rate of interest, and Plaintiffs have alleged no facts supporting a claim that interest is due. The district court's order is **REVERSED** and the cases are **REMANDED** for further proceedings consistent with this opinion.

Judge Pérez concurs in a separate opinion.

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JONATHAN E. TAYLOR, Gupta Wessler PLLC, Washington, DC (Matthew W.H. Wessler, Gupta Wessler PLLC, Washington, DC; Jonathan M. Streisfeld, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Ft. Lauderdale, FL; Hassan Zavareei, Anna C. Haac, Tycko & Zavareei LLP, Washington, DC; Todd S. Garber, Finkelstein, Bankinship, Frei-Pearson & Garber, LLP, White Plains, NY, *on the brief*), for *Plaintiff-Appellee Alex Cantero*.

Mark C. Rifkin, Daniel W. Krasner, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY, for *Plaintiffs-Appellees Saul R. Hymes and Ilana Harwayne-Gidansky*.

Benjamin W. McDonough, Bao Nguyen, Gregory F. Taylor, Peter C. Koch, Gabriel A. Hindin, Michael K. Morelli, Office of the Comptroller of the Currency, Washington, DC, *for Amicus Curiae Office of the Comptroller of the Currency in Support of Defendant-Appellant*.

H. Rodgin Cohen, Matthew A. Schwartz, Helen F. Andrews, Sullivan & Cromwell LLP, New York, NY; Gregg L. Rozansky, The Bank Policy Institute, Washington, DC; Daryl Joseffer, Paul V. Lettow, U.S. Chamber Litigation Center, Washington, DC; David Pommerehn, Consumer Bankers Association, Washington, DC; Thomas Pinder, The American Bankers Association, Washington, DC, *for Amici Curiae The Bank Policy Institute, American Bankers Association, Consumer Bankers Association, and Chamber of Commerce of the United States of America in Support of Defendant-Appellant.*

PARK, *Circuit Judge*:

In February 1818, the Maryland General Assembly levied a tax of $15,000 per year on "all Banks or Branches thereof, in the State of Maryland, not chartered by the [state] Legislature." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 320 (1819). When the Second Bank of the United States—a federally chartered, majority privately owned bank—refused to pay, Maryland sued. Before the U.S. Supreme Court, the state argued that its modest tax merely "submitted" the bank "to the jurisdiction and laws of the State, in the same manner with other corporations and other property" and that it could be imposed "without ruining the institution, or destroying its national uses." *Id.* at 346. Chief Justice Marshall, writing for the Court, famously rejected this line of reasoning:

> We are not driven to the perplexing inquiry, so unfit for the judicial department, *what degree* of taxation is the legitimate use. . . .
>
> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on [state] government[s] *a power to control* the

> constitutional measures of [the federal government], are propositions not to be denied.

Id. at 430–31 (emphasis added).

The question in these appeals is whether a New York law requiring mortgage lenders to pay a 2% minimum interest rate on mortgage escrow accounts applies to banks chartered by the federal government. As in *McCulloch*, Plaintiffs say that because the law requires payment of only a "modest amount of interest," Appellee's Br. at 35,[1] it may be applied, consistent with federal law, to national banks. But unlike in *McCulloch*, both the state and federal governments here have taken the position that New York's law is preempted. We agree. The minimum-interest requirement would exert control over a banking power granted by the federal government, so it would impermissibly interfere with national banks' exercise of that power. We thus hold that the law is preempted by the National Bank Act of 1864 ("NBA"), 12 U.S.C. § 21 *et seq.*, and we reverse the order of the district court concluding otherwise.

I. BACKGROUND

A. Statutory Framework

1. *National Bank Act of 1864*

The Civil War Congress enacted the NBA "to facilitate . . . a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (cleaned up). A replacement for the bank-chartering regime at issue in *McCulloch*, the NBA

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[1] The parties submitted nearly identical briefing in these two appeals. Unless otherwise noted, brief and appendix citations are to the filings in the lead case, *Cantero*, 21-400.

enabled the federal government to issue bank charters and thereby introduced a "dual banking system" that is "still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10, 15 n.7 (2007); *see id.* at 11; *see also* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 3–8 (1977). Under this system, "both federal and state governments are empowered to charter banks and to regulate the banks holding their respective charters." *Lacewell v. OCC*, 999 F.3d 130, 135 (2d Cir. 2021). Banks may seek a charter from either the state or federal government, and both state and national banks are able to compete—under the constraints of their respective regimes—for consumer business. *Id.*

While state banks are organized under state law, "[n]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). The NBA grants national banks broad powers, functioning as "a complete system for the establishment and government of national banks." *Cook Cnty. Nat'l Bank v. United States*, 107 U.S. 445, 448 (1883). These include certain enumerated powers as well as "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh); *see Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y.*, 742 F.3d 37, 41 n.4 (2d Cir. 2014) (interpreting this grant as conferring the power to engage in "activities convenient and useful in connection with the performance of an express power" (cleaned up)).

One such enumerated power is the power to "make, arrange, purchase or sell loans . . . secured by liens on interests in real estate." 12 U.S.C. § 371(a). The district court recognized, and no party disputes, that banks have the incidental "power to provide escrow services" in connection with home mortgage loans. *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171, 193 (E.D.N.Y. 2019). As the Office of 7 the Comptroller of the Currency ("OCC") has explained, "tax and insurance escrow accounts" affiliated with home mortgage loans are "an integral part of or a logical outgrowth of the lending function." OCC Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998). Lenders use these accounts to require customers to make intermittent payments for property taxes and insurance premiums, ensuring fulfilment of these obligations while "reliev[ing] [mortgagors] of the tasks of paying such regular tax and insurance obligations in a lump sum." *Id.*

2. *Other Federal Statutes*

Among Congress's regulations of national banks are three statutory provisions discussed by the parties here. First, the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2601 *et seq.*, limits the amount banks may require borrowers to deposit in escrow accounts in connection with their home mortgages. Lenders who establish escrow accounts for property tax and insurance payments may not require borrowers to deposit more than is "sufficient to pay such taxes, insurance premiums and other charges." 12 U.S.C. § 2609(a)(1). This provision of RESPA does not mention a *rate of return* on the balance, but rather caps the *amount* that may be required to be contributed.

Second, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), codified a standard for when "State consumer financial laws" are preempted. *Id.* § 1044, 124 Stat. at 2015 (codified at 12 U.S.C. § 25b(b)(1)). Such laws are void if any of the following is true:

> (A) application of a State consumer financial law would have a *discriminatory effect on national banks*, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law *prevents or significantly interferes with the exercise by the national bank of its powers*; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
>
> (C) the State consumer financial law is *preempted by a provision of Federal law other than title 62 of the Revised Statutes.*

Id. (emphases added).

Third, Dodd-Frank amended the Truth in Lending Act ("TILA") to add 15 U.S.C. § 1639d, which includes language implicating certain mortgage escrow accounts. *See* Dodd-Frank § 1461(a), 124 Stat. at 2178–81 (codified at 15 U.S.C. § 1639d). Section 1639d mandates the creation of escrow accounts for certain mortgages, and it provides that for those mandatory escrow accounts, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. § 1639d(g)(3).

3. *N.Y. GOL § 5-601*

The state statute at issue in these appeals is New York General Obligations Law ("GOL") § 5-601, which provides that whenever a "mortgage investing institution . . . maintains an escrow account pursuant to any agreement executed in connection with a mortgage on" certain real estate, the institution "shall . . . credit the [account] with dividends or interest at a rate of not less than two per centum per year . . . or a rate prescribed by the superintendent of financial services."

In 2018, the New York Department of Financial Services changed the minimum rate under GOL § 5-601 for state-chartered banks to "the lesser of two percent or the six-month yield on United States Treasury securities." *Order Issued Under Section 12-a of the New York Banking Law*, N.Y. St. Dep't Fin. Servs. 2 (Jan. 19, 2018), https://www.dfs.ny.gov/system/files/documents/2020/03/wild_20180 119_mortgage-escrow_order.pdf ("2018 Order"). The state explained that the change was aimed at creating "parity" between state- and federal-chartered banks given that "national banks . . . [were able] to establish such escrow accounts without restriction as to the payment of interest." *Id.* at 1. The 2018 Order does not purport to apply to national banks.

B. Factual Allegations

Plaintiff Alex Cantero purchased a house in Queens Village, New York, financed through a home mortgage loan from Bank of America, N.A. ("BOA"), on or about August 3, 2010. Cantero First 10 Amended Complaint ("Cantero FAC") ¶ 29.[2] Plaintiffs Saul Hymes and Ilana

[2] We draw these facts from Plaintiffs' respective complaints,

Harwayne-Gidansky (the "*Hymes* Plaintiffs") purchased a single-family home in East Setauket, New York, also financed through a BOA home mortgage loan, in May 2016. Hymes Compl. ¶ 13. Both mortgage loans required Plaintiffs to deposit money in escrow for property taxes and insurance premiums, and BOA paid no interest on either escrow balance. Cantero FAC ¶¶ 17, 19; Hymes Compl. ¶¶ 13–14.

Cantero's mortgage agreement states that it "shall be governed by Federal law and the law of the jurisdiction in which the [mortgaged property] is located," Cantero FAC ¶ 32, and Cantero alleges that BOA "systematically refuses to pay interest on funds held in escrow," *id.* ¶ 28. The *Hymes* Plaintiffs' mortgage agreement stipulates that it is "governed by federal law and the law of New York State" and also that BOA "will not be required to pay . . . any interest or earnings on the [e]scrow [f]unds unless . . . [a]pplicable [l]aw requires [BOA] to pay interest" on the funds. Hymes Compl. ¶ 43.

All agree that the two relevant provisions of Dodd-Frank—the codification of preemption standards and the TILA amendment— took effect after Cantero's mortgage was executed, but before the *Hymes* Plaintiffs' was.[3]

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which we take as true at the motion to dismiss stage. See *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133, 136 n.1 (2d Cir. 2022).

[3] The preemption-codification provision took effect on July 21, 2011. See Dodd-Frank § 1048, 124 Stat. at 2018 (effective on "designated transfer date"); *id.* § 1062, 124 Stat. at 2039–40 (delegating to the Secretary of the Treasury the power to set the designated transfer date); Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010) (designating July 21, 2011). And Dodd-Frank provided that the TILA amendment would take effect on the earlier of (a) the promulgation of an implementing rule or (b) eighteen months after the designated transfer date,

Plaintiffs concede that Section 1639d (the TILA amendment) does not apply to the mortgages at issue here. *See Hymes*, 408 F. Supp. 3d at 180 & n.5. And BOA does not dispute that Plaintiffs' mortgaged properties are the kind covered by GOL § 5-601 or that GOL § 5-601 is a "State consumer financial law" within the meaning of Dodd-Frank.

C. Procedural History

Plaintiffs sued BOA for breach of contract, unjust enrichment, and related claims in two putative class actions in the Eastern District of New York. Their breach of contract claims, the only cause of action at issue on appeal,[4] turns on whether BOA was required by law to pay a minimum 2% interest rate to Plaintiffs. *See* Cantero FAC ¶ 32; Hymes Compl. ¶ 43. BOA moved to dismiss on the ground that GOL § 5-601 is preempted by the NBA.

The cases were decided together in a single order. The district court proceeded through several steps to "divin[e] congressional intent through regulations and statutory provisions." *Hymes*, 408 F. Supp. 3d at 184. First, the court determined that RESPA—which regulates the amount of money in, but not the interest rate accruing to, escrow accounts—shares a "unity of purpose" with GOL § 5-601. *Id.* at 185. That is relevant, the court reasoned, because Congress "intended mortgage escrow accounts, even those administered by national banks, to be subject to some measure of consumer protection regulation." *Id.*

which would be January 21, 2013. *See* Dodd-Frank § 1400(c)(2)–(3), 124 Stat. at 2136.

[4] Plaintiffs' other claims were dismissed for reasons not relevant here. *See Hymes*, 408 F. Supp. 3d at 199–201.

Second, the court turned to the TILA amendment, Section 1639d. "[A]lthough section 1639d(g)(3) does not govern the specific loans at issue in this case," the court said, "it is nonetheless significant, for it evinces a clear congressional purpose to subject *all* mortgage lenders to state escrow interest laws." *Id.* at 189 (emphasis in original). The section thus "giv[es] insight into Congress's intent." *Id.* at 190.[5]

Finally, the court considered the NBA itself. The court read *Barnett Bank*, 517 U.S. 25, along with prior Supreme Court case law interpreting the NBA's preemptive force, to require a finding of no preemption. It concluded that the "degree of interference" of GOL § 5-601 was "minimal" and was not a "practical abrogation of the banking power at issue." *Hymes*, 408 F. Supp. 3d at 195. It acknowledged that a "state escrow interest law setting punitively high rates could very well significantly interfere with national banks' power to administer escrow accounts." *Id.* at 196 (cleaned up). But the court stated that a different statute, Dodd-Frank's amendment to the TILA, "evinces a policy judgment that there is little incompatibility between requiring mortgage lenders to maintain escrow accounts and requiring them to pay a reasonable rate of interest on sums thereby received." *Id.* The court said it would "give effect to that judgment" by holding that GOL § 5-601 was not preempted by the NBA, and that this holding would allow the court to read the NBA and Section 1639d "harmoniously." *Id.* at 196, 198. The court thus denied BOA's motion to dismiss the breach of contract claim.

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[5] The court also rejected BOA's arguments related to the preemptive effect of OCC regulations, a ground that we do not reach. *See id.* at 190– 93.

The court closely tracked the reasoning of the Ninth Circuit in a similar case involving a California interest-on-escrow law. *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018). In *Lusnak*, the Ninth Circuit also relied on Section 1639d to conclude that California's law was not preempted (including even before Section 1639d was enacted). *See id.* at 1194–96. BOA, which was also the defendant in *Lusnak*, does not try to distinguish that case and argues instead that it was wrongly decided.

After the district court denied BOA's motion to dismiss, BOA moved to certify the preemption question for interlocutory appeal. The district court agreed that there was "substantial ground for difference of opinion" on the merits of its order and granted BOA's motion. *Hymes v. Bank of Am., N.A.*, No. 18-cv-2352, 2020 WL 9174972, at *4–6 (E.D.N.Y. Sept. 29, 2020); *see* 28 U.S.C. § 1292(b). We granted leave to appeal. Review of a district court's denial of dismissal for failure to state a claim, including based on preemption, is de novo. *Doe v. Hagenbeck*, 870 F.3d 36, 41–42 (2d Cir. 2017).

II. DISCUSSION

The district court attempted to resolve this case by—in its own words—"divining" the general legislative purpose of several different statutes. *Hymes*, 408 F. Supp. 3d at 184. The court determined that Congress subjected some types of loans to some types of consumer-protection laws, so there was "little incompatibility" between its objectives and enforcement of state interest-on-escrow laws, and thus GOL § 5-601 was not preempted. *Id.* at 196. The court then applied its preemption determination—based primarily on provisions of the Dodd-Frank Act that have no retroactive effect—to Cantero's mortgage, which predated Dodd-Frank. Finally, when the court looked to the NBA, it relied on an admittedly "limited sample of cases," *Hymes*, 2020 WL 9174972, at *4, even though *Barnett Bank* held that courts should apply long-established "ordinary legal principles of pre-emption," 517 U.S. at 37.

Although the district court correctly noted that in questions of preemption, "the guiding principle is the intent of Congress," *Hymes*, 408 F. Supp. 3d at 198, it erred by failing to employ the normal rules of statutory interpretation. The district court should have read the plain language of the relevant statutes and applied the legal rules that those statutes have incorporated, rather than trying to extrapolate Congress's broader goals from various statutory provisions.

We reverse and hold as follows: First, the NBA preempts GOL § 5-601 under the "ordinary legal principles of pre-emption." *Barnett Bank*, 517 U.S. at 37. That resolves *Cantero*. Second, Dodd-Frank, to the extent it is relevant, merely codified those rules. And that resolves *Hymes*.

A. Ordinary Preemption Rules

1. *Doctrinal Framework*

The Supremacy Clause provides: "[T]he Laws of the United States" made "in Pursuance" of the Constitution "shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Preemption doctrine concerns the question whether, as a matter of statutory interpretation, Congress has enacted a valid law to which a given state rule is "to the 15 Contrary." *See Barnett Bank*, 517 U.S. at 30 ("Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?").

Under "ordinary legal principles of pre-emption," we ask whether the federal and state provisions are in "irreconcilable conflict." *Id.* at 31, 37 (citation omitted). "If there be no conflict, the [NBA and a state law] can coexist, and be harmoniously enforced, but, if the conflict arises, the law of [the state] is from the nature of things inoperative and void as against the dominant authority of the Federal statute." *Davis*, 161 U.S. at 283; *see also Easton v. Iowa*, 188 U.S. 220, 232 (1903) ("[I]t is not our province to vindicate the policy of the [NBA], but to declare that it cannot be overridden by the policy of the State."); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 266–72 (2000) (discussing *McCulloch*'s preemption analysis).

While the principles to be applied are ordinary, the NBA's preemptive force is not. The statute speaks in special terms that often trigger conflicts: When the NBA grants "powers," "both enumerated and incidental," those powers are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank*, 517 U.S. at 32. In other words, Congress's grant of authority to a national bank under the NBA "does not condition federal permission upon that of the State." *Id.* at 35. Moreover, the presumption against preemption "disappears" in the NBA context. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (citation omitted); *see also Watters*, 550 U.S. at 11 ("[F]ederal control shields national banking from unduly burdensome and duplicative state regulation.").

To be sure, national banks are routinely "subject to state laws 16 of general application in their daily business." *Watters*, 550 U.S. at 11. And those laws have full force "to the extent [they] do not conflict with the letter or the general purposes of the NBA." *Id.*; *see also*

Nat'l Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869) ("All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law."); *see also Atherton v. FDIC*, 519 U.S. 213, 223 (1997) ("To point to a federal charter by itself shows no conflict . . . .").

2. *Scope of NBA Preemption*

In *Barnett Bank*, the Court explained that Congress did not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. The district court read "significantly interfere" to mean "practical[ly] abrogat[e]," and it looked to the "impact" and "degree of interference" to determine whether the state law at issue was preempted. *Hymes*, 408 F. Supp. 3d at 194–95. Plaintiffs similarly argue that state laws are preempted by the NBA only if they "prevent the exercise of a national bank's power [or] come close to doing so." Appellee's Br. at 29. And to make that determination, Plaintiffs urge us to look to the "degree of interference," which they claim is "minimal" here because the law requires payment of only a "modest amount of interest." *Id.* at 34–35 (citation omitted).

We reject this approach. *Barnett Bank* did not announce a new rule, but merely applied the "ordinary legal principles of preemption" to the state law at issue. 517 U.S. at 37. Granted, after two centuries of applying those rules to the national-bank context, the 17 Supreme Court has used various formulations to describe when states impermissibly regulate national banks. *See, e.g., Watters*, 550 U.S. at 13 ("curtail or hinder a national bank's efficient exercise of [a] power"); *First Nat'l Bank* *in St. Louis v. Missouri*, 263 U.S. 640, 659 (1924) ("frustrate the purpose for which the bank was created"); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) ("impair their efficiency to discharge the duties imposed upon them by the law of the United States"). But in an unbroken line of case law since *McCulloch*, the Court has made clear that the question is not how much a state law impacts a national bank, but rather whether it purports to "control" the exercise of its powers. *McCulloch*, 17 U.S. at 431; *see also United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (reading McCulloch as a "prohibit[ion] [on] States from interfering with or controlling the operations of the Federal Government"); *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875) ("States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit."); *Watters*, 550 U.S. at 11 (same); *Easton*, 188 U.S. at 230 ("[It] must be obvious that [national banks'] operations cannot be limited or controlled by state legislation . . . ."); *id.* at 238 ("Congress, having power to create a system of national banks, . . . has the sole power to regulate and control the exercise of their operations . . . ."). Control is not a question of the "degree" of the state law's effects on national banks, but rather of the kind of intrusion on the banking powers granted by the federal government. *McCulloch*, 17 U.S. at 430–31.

In other words, state laws with large impacts on a bank's revenue, business decisions, or bottom line may not be preempted, while regulations with modest impacts may be void. It is the nature of an invasion into a national bank's operations—not the magnitude 18 of its effects—that determines whether a state law purports to exercise control over a federally granted banking power and is thus preempted. Plaintiffs' contrary view would be inconsistent with Supreme Court precedent and binding principles of preemption, and it would also lead to untenable doctrinal implications.

a. Supreme Court Precedent and Background Principles

The Supreme Court has held that ordinary conflict preemption doctrine applies to NBA preemption cases. *See supra* at 17. Whether a state law is preempted is thus a question about the scope of the NBA—specifically, the extent to which it "set[s] aside the laws of a State." *Barnett Bank*, 517 U.S. at 30. And "the sound construction of the" NBA, like that of the national-banking scheme preceding it, is "that it exempts the trade of the [banks] . . . from the control of the States." *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).[6]

To determine whether the NBA conflicts with a state law, we ask whether enforcement of the law at issue would exert control over a banking power—and thus, if taken to its extreme, threaten to "destroy" the grant made by the federal government. *McCulloch*, 17 U.S. at 431. We do not endeavor to assess whether the degree of state law's impact on national banks would be sufficient to undermine that power. *See id.*

The Court has articulated this principle in several different ways. For example, it has held impermissible

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[6] The Court has expressly stated on multiple occasions that the NBA "rests on the same principle as the act creating the [S]econd [B]ank of the United States" and that "[t]he reasoning of . . . [*McCulloch*] and [*Osborn*]" applies with full force. *Farmers' & Mechs.' Nat'l Bank*, 91 U.S. at 33; *see also Easton*, 188 U.S. at 229 ("The principles enunciated in [*McCulloch*] and in [*Osborn*], though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.").

state laws that control a national bank's exercise of certain powers while at the same time endorsing the legality of other laws that could have an identical practical effect on the bank's profitability. Most famously, in *McCulloch*, the Court noted that while Maryland could not tax the "operations of the bank," it could tax—without qualification as to how high the rate—the "real property of the bank" as well as "the interest which the citizens of Maryland may hold in [the] institution." 17 U.S. at 436; *see also Nat'l Bank*, 76 U.S. at 359 (distinguishing taxes "upon the shares of the stock of the bank" from taxes "upon the capital of the bank"). A state law with substantial consequences for banks may be valid under the NBA even while far less impactful state laws are void. *See Nat'l Bank*, 76 U.S. at 362 ("[A] Federal officer . . . may be exempted from any personal service which interferes with the discharge of his official duties . . . [but] is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks.").

The Court has also explained that state laws exercising control over national banks—even if their own practical effect may be minimal—are invalid if, when aggregated with similar laws of other states, they would threaten to undermine a federal banking power. In *First National Bank of San Jose v. California*, 262 U.S. 366 (1923), the Court held that a California law escheating deposits in national banks that were dormant for 20 years was preempted. Despite the lengthy period before a seizure could be effected, the Court explained that 20 "[i]f California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years, perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results." *Id.* at 370. And in *McCulloch*, the Court was "not driven to the perplexing inquiry . . . what degree" of taxation would be "legitimate" rather than an "abuse" on the part of the state. 17 U.S. at 430. These cases make clear that the question is not whether a law's "degree of interference is minimal," *Hymes*, 408 F. Supp. 3d at 195, or "punitively high," *id.* (quoting *Lusnak*, 883 F.3d at 1195 n.7). Instead, we ask whether the kind of interference at issue could, taken as a whole, "destroy" the federal government's grant of a banking power. *McCulloch*, 17 U.S. at 431.

For example, in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), the Court held that a New York law barring national banks from using the word "savings" in advertising was preempted. The New York Court of Appeals had reasoned that the law was not preempted because it had no "seriously harmful effects" on the banks, which could easily adapt by using synonyms like "special interest account," "thrift account," and "compound interest account." *People v. Franklin Nat'l Bank of Franklin Square*, 113 N.E.2d 796, 799 (N.Y. 1953). The Supreme Court reversed. It concluded that the law was preempted because "the incidental powers granted to national banks" included "the use of advertising in any branch of their authorized business." *Franklin Nat'l Bank*, 347 U.S. at 377. It found "no indication that Congress intended to make this phase of national banking subject to local restrictions." *Id.* at 378. The Supreme Court did not even address the magnitude of the impact of the law in concluding that New York's law was preempted.

Plaintiffs' reliance on *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), is misplaced. There, the Court held that a Kentucky escheat law for *abandoned* bank deposits was not preempted. But that law did not purport to regulate any bank power—it merely changed which parties could make a claim on a bank account as a background rule of property law. *See id.* at 249 ("A demand for payment of an account by one entitled to make the demand does not infringe or interfere with any authorized function of [a] bank."). The *Anderson* Court distinguished *First National Bank of San Jose*, the dormant-deposits case, by holding that there is a difference in kind between deposits that are merely deemed dormant (no matter how long) and those that are declared abandoned. *See id.* at 250. Laws escheating the latter were fine while those seizing the former were not, the Court explained, because for abandoned deposits, "[s]o long as . . . the power [was] exercised only to demand payment of the accounts in the same way and to the same extent that the [original] depositors could," it could "perceive no *danger of unlimited control* by the state over the operations of national banking institutions." *Id.* at 249 (emphasis added). With respect to dormant deposits, in contrast, the Court could draw no line on how many years of dormancy would render a state seizure permissible—"three years perhaps, or five, or ten, or fifteen"—and so such laws "would be incompatible with the statutory purposes of establishing a system of national banks acting as federal instrumentalities." *Id.* at 251 (citation omitted).

b. Doctrinal Implications

It bears noting that Plaintiffs' position would undermine the NBA's rationales as articulated by the Supreme Court. The Court has warned that "federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. Indeed, Plaintiffs identify thirteen states with some kind of interest-on-escrow laws.[7] Those are in addition to RESPA, which imposes its own federal regulation on mortgage-escrow accounts. *See* 12 U.S.C. § 2609(a). It would undermine the NBA to subject national banks to a death-by-a-thousand-cuts regime of mortgageescrow regulation. *See Easton*, 188 U.S. at 229 ("[The NBA] has in view the erection of a system extending throughout the country, and 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."); *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891) ("[T]he character of the system implies[] an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits . . . .").

Plaintiffs' rule could also be overinclusive, deeming state laws having nothing to do with banking powers to be preempted by the NBA. As Plaintiffs argue, general "criminal, contract, or property laws . . . can have [more] significant consequences for the risk, pricing, and structure of a loan transaction" than laws controlling a banking power. Appellee's Br. at 22 (cleaned up). But that does not mean that such laws are preempted by the NBA merely because their impact on national banks is severe. *See Watters*, 550 U.S. at 11; *Nat'l Bank*, 76 U.S. at 362.

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[7] *See* Cantero FAC ¶ 79 (citing N.Y. Gen. Oblig. Law § 5-601; Conn. Gen. Stat. § 49-2a; Iowa Code § 524.905(2); Me. Rev. Stat. Ann. tit. 33, § 504; Md. Code Ann. Com. Law § 12-109; Mass. Gen. Laws ch. 183, § 61; Minn. Stat. Ann. § 47.20, subdiv. 9; N.H. Rev. Stat. Ann. § 384:16-a *et seq.* (amended requirement now at N.H. Stat. Rev. Ann. § 383-B:3-303(a)(7)(E)); Or. Rev. Stat. §§ 86.205, 86.245; 19 R.I. Gen. Laws § 19-9-2; Utah Code Ann. § 7-17-1 *et seq.*; Vt. Stat. Ann. tit. 8, § 10404; Wis. Stat. § 138.052).

Only laws purporting to control a national bank's exercise of its power are the kind of "possible unfriendly State legislation" covered by the NBA's preemptive force. *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1873).[8]

3. *Application*

In light of the foregoing, we conclude that GOL § 5-601 is preempted. The banking power at issue here is the power to create and fund escrow accounts. Like the regulation in *Franklin National*, GOL § 5-601 would target, curtail, and hinder a power granted to national banks by the federal government. By requiring a bank to pay its customers in order to exercise a banking power granted by the federal government, the law would exert control over banks' exercise of that power. And if taken to a greater degree, state authority to set minimum interest rates could infringe on national banks' power to use mortgage escrow accounts altogether. The issue is not whether this particular rate of 2% is so high that it undermines the use of such accounts, or even if it

[8] Moreover, to implement Plaintiffs' rule, courts would become entangled in questions they are poorly suited to answer. If an interest rate of 2% were not significant interference, what rate would be sufficiently high? *Cf. First Nat'l Bank of San Jose*, 262 U.S. at 370; *see also* Brief of the Bank Policy Institute et al. as Amici Curiae at 17. The district court's order here is a case in point. If we were to consider the magnitude of the minimum rate New York has prescribed, we could not endorse the district court's unexplained conclusion that this rate was "modest." *Hymes*, 408 F. Supp. 3d at 185. Plaintiffs have not pleaded facts showing that 2% is in fact a "modest" rate of interest in this context, and indeed, Plaintiffs have offered no response to BOA's contention that this rate is far higher than the prevailing interest rates for the time period at issue.

substantially impacts national banks' competitiveness. The power to set minimum rates is the "power to control," and the power to control is the "power to destroy." *McCulloch*, 17 U.S. at 431.

This conclusion is consistent with prior statements of the chief banking regulators of New York and of the United States. In 2004, the OCC promulgated an administrative rule purporting to preempt state interest-on-escrow laws. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004) (codified at 12 C.F.R. § 34.4); *see also* Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) (maintaining the rule after Dodd-Frank). We agree with the OCC that the district court "recognized [*Barnett Bank*'s] different linguistic formulations" only to "fashion[] [them] into what is for all practical purposes a new heightened standard." Brief of the OCC as Amicus Curiae at 7 (cleaned up). We also agree that laws like GOL § 5-601 would disrupt "fundamental and substantial elements of the business of national banks." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,557.

Similarly, we are mindful of New York's 2018 Order, in which state regulators also agreed that GOL § 5-601 is preempted. Beginning in 2018, New York began to exempt state-chartered banks from the 2% interest requirement and instead require them to pay only the lesser of 2% and the six-month yield on U.S. treasuries. New York's chief financial regulator justified the change by stating 25 that GOL § 5-601 *did not apply* to national banks and so the change would help state banks remain competitive. If Plaintiffs' view were to prevail, this would have the odd consequence of making the 2018 Order illegal: State banks could avail themselves of a lower minimum interest rate than national banks could. *See* 12 U.S.C. § 25b(b)(1)(A) (establishing that state consumer financial laws are preempted if their "application . . . would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State").

We conclude that, under ordinary preemption rules, GOL § 5- 601 is preempted. Thus, no interest is due to Plaintiffs under "federal law and the law of New York State," Hymes Compl. ¶ 43; *accord* Cantero FAC ¶ 32, and "the contract[s] [do] not commit [BOA] to pay interest to [Plaintiffs] on [these] mortgage escrow account[s]," *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 186 (2d Cir. 2005). This resolves *Cantero*; Plaintiff there failed to state a claim for breach of contract.

B. Dodd-Frank Act

The mortgage loan in *Hymes* was executed after the effective date of certain provisions of the Dodd-Frank Act. All parties seem to agree that these provisions had no effect on the NBA's preemption standards, and so do we. But despite this concession, both sets of Plaintiffs nevertheless raise arguments based on Dodd-Frank. We conclude that all are meritless.

1. *Preemption Standard*

Dodd-Frank provides that "State consumer financial laws" are preempted in three circumstances: (A) if they have a "discriminatory effect on national banks" as opposed to state-chartered banks; (B) if "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [*Barnett Bank*]," the law "prevents or significantly interferes with the exercise by the national bank of its powers"; or (C) if the law "is preempted by a provision of Federal law other than title 62 of the Revised Statutes." 12 U.S.C. § 25b(b)(1). At issue is whether GOL § 5-601 is preempted under subparagraph (B). 9 First, we conclude that subparagraph (B) did nothing more than codify the ordinary rules of preemption. Second, we reject Plaintiffs' arguments based on this statutory language.

a. Codification of the Ordinary Rules

Subparagraph (B) expressly codifies "the legal standard for preemption" in *Barnett Bank*. 12 U.S.C. § 25b(b)(1)(B). Congress thus expressly instructed us to do what we would have done anyway: Apply the "ordinary legal principles of pre-emption" that the Court has interpreted and applied before and since *Barnett Bank*. 517 U.S. at 37. Any ambiguity as to this point is removed by Congress's choice to cite *Barnett Bank* directly. Thus, subparagraph (B) did not change the preexisting legal standard, but rather explicitly codified it.[9] In applying this subparagraph of Dodd-Frank, we thus continue to refer to the longstanding preemption test articulated in cases going back to *McCulloch*.

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[9] For the first time in its reply brief, BOA argues that GOL § 5-601 is preempted under subparagraph (C) because 12 U.S.C. § 371 is "a provision of Federal law other than title 62 of the Revised Statutes." 12 U.S.C. § 25b(b)(1)(C); *see OCC Chief Counsel's Interpretation: 12 U.S.C. § 25b*, Off. Comptroller Currency 2 n.7 (Dec. 18, 2020), https://www.occ.gov/newsissuances/news-releases/2020/nr-occ-2020-176a.pdf. *See generally* 12 U.S.C. § 25b (referring four times to "title 62 of the Revised Statutes or section 371 of this title" and referring five times to only "title 62 of the Revised Statutes"). This argument is forfeited, and we do not address it. *See JLM Couture, Inc. v. Gutman*, 24 F.4th 785, 801 n.19 (2d Cir. 2022).

b. Plaintiffs' Arguments

Plaintiffs agree that Dodd-Frank codified *Barnett Bank*, but they nonetheless suggest that we should look to various features of other portions of the text of Dodd-Frank. This kind of reverse-engineering, however, makes little sense when Congress has codified a preexisting, judicially articulated rule. Congress codified this rule, so we can simply apply the test we have always used.

In any event, the text of the statute leads to the same result. Plaintiffs urge a close textual analysis of the phrase "significantly interferes"—language from Dodd-Frank parroting the Court's opinion in *Barnett Bank*. *See* 12 U.S.C. § 25b(b)(1)(B); *Barnett Bank*, 517 U.S. at 33. But when Congress "ha[s] before it the meaning" a case gave "to the words it selected . . . we give the language found . . . the meaning ascribed [to] it" by that case. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). In turn, Plaintiffs' focus on the words "significantly interferes" in isolation is misguided because "the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) (alteration in original) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). Barnett Bank was explicit that it was applying the "ordinary legal principles of pre-emption," not announcing a new standard. 517 U.S. at 37.

Even under Plaintiffs' interpretive approach, however, their arguments are unpersuasive. Plaintiffs assume that "significantly" must mean of high "degree." Appellee's Br. at 34 (citation omitted). 28 But although "significant" can mean "[f]airly large in amount or quantity," it can also mean "important" or "meaningful"—as in, interference is significant if it is important in relation to the banking power at issue. *Significant*, American

Heritage Dictionary of the English Language (4th ed. 2000); *accord Significant*, American Heritage Dictionary of the English Language (5th ed. 2011). We agree with the OCC that this language is best interpreted, in light of ordinary preemption rules, as referring to laws that "*meaningfully* interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,557 (emphasis added).

Plaintiffs' invocation of *noscitur a sociis* fares no better. See *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion) (explaining that noscitur is the principle that "a word is known by the company it keeps"). Plaintiffs say that because "significantly interferes" is next to "prevents," it must mean "nearly prevent[s]." Appellee's Br. at 31. But if "significantly interferes" must be interpreted in conjunction with "prevents," it could just as easily mean that the state is similarly usurping control over federally granted powers to a federally created entity—not that the regulation is intrusive in degree or that it practically abrogates the power.[10]

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[10] Applying the ordinary rules of preemption does not mean that all "State consumer financial laws" are preempted or that Congress has "occup[ied] the field." 12 U.S.C. § 25b(b)(1), (4). To the contrary, states are generally free to impose restrictions on the transactions engaged in by national banks, in common with those of other corporations doing business within the state. *See, e.g., Nat'l Bank*, 76 U.S. at 362. It is only when state laws control the exercise of powers granted to national banks that those laws conflict with the NBA.

2. *Truth in Lending Act Amendment*

The district court, following the Ninth Circuit in *Lusnak*, 883 F.3d at 1194–96, relied primarily on a statutory provision that has no relevance to this case. Dodd-Frank's amendment to the TILA required that for certain mortgage loans, lenders had to establish an escrow account. For these mortgages, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. § 1639d(g)(3).

All agree that Section 1639d does not apply to Cantero's and the *Hymes* Plaintiffs' mortgage loans.[11] But the district court, like the Ninth Circuit in *Lusnak*, concluded that the TILA amendments somehow reflected Congress's judgment that all escrow accounts, before and after Dodd-Frank, must be subject to such state laws. That is incorrect.

First, the court improperly reasoned that Congress's decision to subject *some* escrow accounts to state interest-on-escrow laws "evince[d] a clear congressional purpose to subject *all* mortgage lenders to state escrow interest laws." *Hymes*, 408 F. Supp. 3d at 189 (emphasis in original); see also *Lusnak*, 883 F.3d at 1196 (suggesting that Section 1639d reflects a more general

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[11] BOA contends that Section 1639d does not even subject covered mortgages to state interest-on-escrow laws, arguing instead that for a state law to be "applicable," it must already be not preempted. Appellant's Br. at 52. Like the concurrence, we read language saying that national banks are subject to state law "to mean what [it] say[s]." *Barnett Bank*, 517 U.S. at 34; Concurrence at 10. But we need not settle this question because Section 1639d has no relevance to this appeal.

judgment against preemption because it shows "Congress's view that creditors . . . can comply with state escrow interest laws without any significant interference with their banking powers"). The court correctly noted that preemption analysis is a question of congressional intent. But to assess congressional intent in the preemption context, we employ the ordinary rules of statutory interpretation. The district court's approach—to note certain exceptions granted by Congress, to infer from those a broader "intent" of Congress, and then to extrapolate further exceptions from there—is not an appropriate means of determining a statute's legal effect. *See Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (applying similar reasoning); *United States v. Lucero*, 989 F.3d 1088, 1098 n.8 (9th Cir. 2021) (remarking that *Holy Trinity Church*'s approach has "long been disfavored"). To the contrary, the enumeration of only some exceptions typically implies the exclusion of others. *See Stow Mfg. Co. v. Comm'r*, 190 F.2d 723, 726 (2d Cir. 1951) (L. Hand, J.) ("That choice must have been deliberate: expressio unius, exclusio alterius."). Here, it is much more "harmonious[]" to read the NBA together with Dodd-Frank as a decision by Congress to carve out an exception from its general rule, rather than expressly imposing a burden on some mortgage loans in order to impliedly impose a burden on all of them. *Hymes*, 408 F. Supp. 3d at 198.[12] "Congress wrote the statute it wrote—

[12] For the same reasons, the district court's reliance on RESPA was misplaced. The fact that one purpose of RESPA is to protect mortgagors does not mean RESPA does so at all costs, endorsing all possible consumer-protection laws. Rather, Congress chose the approach in RESPA—*i.e.,* a cap on the amount that could be required to be put in escrow—*instead of* requiring a floor on the rate of interest such proceeds can accrue. As we have explained:

meaning, a statute going so far and no further." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) (cleaned up).

On this same point, Plaintiffs point to Dodd-Frank's legislative history. Although such consultation is unnecessary where the statutory language is clear, *see Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."), the legislative history here categorically contradicts Plaintiffs' view. The sponsors of Dodd-Frank noted that the new mandate to establish escrow accounts for certain mortgages was targeted at subprime borrowers in the wake of the 2008 Financial Crisis. *See* H.R. Rep. No. 111-94, at 49 (2009) (authored by Rep. Frank) ("Regarding the escrow provisions . . . [the bill] requires all subprime borrowers to have accounts established in conjunction with their mortgages to provide protection against tax liens and the forced placement of insurance, among other

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> RESPA is meant to regulate the amount of money that a borrower is required to deposit in escrow by tying that amount to the costs the escrow fund is meant to secure. RESPA is not, however, designed to reduce the dollar costs of taxes, fees, and insurance premiums. RESPA can, and does, accomplish its task by setting rules on required escrow contributions. That this system may, in the end, be more expensive to borrowers than, say, keeping their money in interest-bearing accounts to pay their own bills, does not violate RESPA's stated goal of "reduc[ing] the amounts home buyers are required to place in escrow accounts." 12 U.S.C. § 2601(b)(3).

Flagg, 396 F.3d at 185. RESPA of course shares a partial "unity of purpose" with all mortgage-escrow regulations, but that does not mean that RESPA imposes all of them on national banks. *Hymes*, 408 F. Supp. 3d at 185.

things."); *id.* at 53 ("[S]ubprime borrowers, even though they are more likely to need budgeting assistance given their weaker credit histories, are less likely than prime borrowers to have escrows."). Having required a certain class of borrowers to open mortgage escrow accounts, it makes sense that Congress also allowed for interest-on-escrow balances to ensure that they would be adequately compensated. It does not make sense to read this provision as effecting a sub silentio sea change.

Second, Cantero's mortgage predated the TILA amendments, so the district court erred by looking to those amendments to determine the correct preemption standard in *Cantero*. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (citation omitted). That is, the court erred by relying on what it thought Congress's intent was in 2010 to ascertain the legal force of the National Bank Act of 1864. The district court correctly acknowledged that Dodd-Frank did not change the preemption rules applicable here, but the next step should have been to look to those preemption rules—not to other contemporaneous provisions enacted by Dodd-Frank. By interpreting Dodd-Frank to determine the scope of preexisting preemption rules, the district court relied on the unstated assumption that Dodd-Frank advanced precisely the same purposes as the preemption standards that it left undisturbed. *See* Hymes, 408 F. Supp. 3d at 196 (seeking to "give effect to" Congress's latest "policy judgment"); *see also Lusnak*, 883 F.3d at 1197 (stating that the preemption test was the same before and after Dodd-Frank after having already used Dodd-Frank to determine whether the test was met). But this assumption was in error. If anything, Congress's decision to carve out certain mortgages and to require banks to pay state-mandated interest on their associated escrow accounts would seem to reflect its understanding that such interest payments were not previously required. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect. . . . The reasonable construction is that the amendment was enacted as an exception, not just to state an already existing rule.").

In short, Dodd-Frank does not change the analysis applicable to this case, so the *Hymes* Plaintiffs have also failed to state a claim for breach of contract.

III. CONCLUSION

When the NBA grants powers "both enumerated and incidental" to national banks, it displaces all state laws that purport to "control" banks' exercise of those powers. *Watters*, 550 U.S. at 11– 12 (citation omitted). Although New York officials have said that the state's interest-on-escrow statute is one such preempted law, Plaintiffs contend otherwise. Their argument is that because the law's minimum interest rate is not very high, applying it to mortgage loans from institutions like BOA would not undermine the national uses to which Congress has put national banks. But in neither the NBA nor in Dodd-Frank did Congress direct us to answer a question "so unfit for the judicial department." *McCulloch*, 17 U.S. at 430.[13]

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[13] BOA also argues that an OCC regulation promulgated under the NBA, 12 C.F.R. § 34.4, preempts GOL § 5-601. But "we hold that the NBA itself—independent of [the] OCC's regulation—preempts the application" of GOL § 5-601 to national banks, so we do not reach that question. *Watters*, 550 U.S. at 21 n.13.

The order of the district court is reversed, and the cases are remanded for further proceedings consistent with this opinion.

PÉREZ, Circuit Judge, concurring:

I join in full this Court's well-reasoned opinion and agree that to resolve these appeals we must apply the "ordinary" principles of conflict preemption and statutory interpretation. Maj. Op. at 15, 29–31. In accordance with binding precedent, this Court correctly holds that the New York law at issue is preempted by the National Bank Act ("NBA") because it significantly interferes with incidental national bank powers. *See Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 376, 378–79 (1954) (construing national banks' enumerated power to "receive deposits" broadly to include the incidental power to advertise such services).

I write separately, however, to address two points on why this Court's opinion leaves ample room for state regulation of national banks. First, states continue to have certain longstanding powers to regulate national banks consistent with the articulation of preemption doctrine in this case. This is because the opinion is rooted in the *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) ("*Barnett Bank*") preemption standard, which only preempts state laws that directly conflict with enumerated or incidental national bank powers conferred by Congress. *Id.* at 32–34, 37. The standard is a narrow question of law and preserves states' vital role in regulating national banks short of laws, like the New York law challenged here, that seek to "control" or otherwise prevent or significantly interfere with national bank powers. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11–12 (2007) (citation omitted).

Second, Congress has subjected national banks to state interest-on-escrow laws when financing certain mortgage loans that are, unlike Plaintiffs', covered by the Dodd-Frank Wall Street Reform and Consumer

Protection Act's ("Dodd-Frank") amendments to the Truth in Lending Act ("TILA").[1] The majority has declined to reach this issue in these appeals, Maj. Op. at 29 n.11, but the plain text of the relevant statute compels the conclusion that Congress *did* intend to subject national banks to these state laws when financing certain mortgage loans covered by those amendments ("covered mortgage loan").[2] *Id.* at 28–33. Any argument to the contrary[3] is foreclosed by this Court's reasoning.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1461, 124 Stat. 1376, 2178–81 (2010) (codified at 15 U.S.C. § 1639d).

[2] To elaborate, a "covered mortgage loan," for the purposes of this opinion, is a loan made by a creditor that must include, in connection with its consummation, certain escrow requirements under 15 U.S.C. § 1639d—including the requirement to pay interest if prescribed by applicable state or federal law. *Id.* § 1639d(b), (g). Subsection (b) of that section sets forth the circumstances when a mortgage loan agreement must comply with these escrow requirements. *Id.* § 1639d(b), (g). Under that subsection, a covered mortgage loan includes a loan that is: (1) required to provide escrow services under "Federal or State law"; (2) "made, guaranteed, or insured by a State or Federal governmental lending or insuring agency"; (3) made with an original principal obligation amount that meets certain statutory formula based on the size of that amount, the "size of the property," and the "average prime offer rate"; or (4) required to provide escrow services "pursuant to regulation." *Id.* § 1639d(b)(1)–(4).

[3] In these appeals, Bank of America, N.A. ("BOA") urged us to go further, arguing that Congress did not intend to subject national banks to state interest-on-escrow requirements under any circumstances. *See* Appellant's Br. at 52; *see also Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191 (9th Cir. 2018) (noting BOA's assertion of the same argument).

I.

Because this Court's opinion is rooted in ordinary conflict preemption principles in *Barnett Bank*, Maj. Op. at 15, it is consistent with longstanding case law that supports "the vital role that state legislation plays in the dual banking system." *Watters*, 550 U.S. at 25 (Stevens, J., dissenting). As this Court notes, these principles tell us that national banks, like any other corporation, are generally subject to the laws of the states in their business and affairs. Maj. Op. at 28 n.10.

For over a century and a half, the Supreme Court has recognized this vital role states play in regulating federally chartered banks. See *Watters*, 550 U.S. at 11 ("Federally chartered banks are subject to state laws of general application in their daily business . . . ."); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (applying state employment discrimination law to federally chartered savings and loan association); *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103 (1939) (applying state law tort claim by depositor against directors of a national bank); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks . . . ."); *Waite v. Dowley*, 94 U.S. 527, 533–34 (1876) (upholding state law requiring all banks, including national banks, to submit lists of shareholders as "not in conflict with any provision of the [NBA]"); *see also Atherton v. FDIC*, 519 U.S. 213, 223 (1997) (collecting cases in various contexts in which state law applied to federally chartered banks).

There is, of course, preemption of state laws that "infringe the national banking laws or impose an undue burden on the performance of the banks' 15 functions." *See Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) (collecting 16 cases); *see also Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875) ("States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit."); *see also Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) ("It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."). The Supreme Court in *Barnett Bank* distilled this century-and-a-half of case law into an "ordinary legal principle[]" holding that states have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33–34, 37.

The essential inquiry is one of conflict preemption which, in these appeals, requires an assessment of whether "[the state's] law stand[s] as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Id.* at 31 (alteration and internal quotation marks omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). We are to ask the narrow question of whether the state law directly conflicts with a national bank's exercise of an enumerated or incidental power conferred by Congress. *See, e.g., Franklin Nat'l Bank*, 347 U.S. at 377–78 (discussing incidental powers). If "the federal and state statutes are incompatible . . . the policy of the State must yield." *Id.* at 374.

This standard requires a finding of preemption in these appeals. As this Court notes, national banks have the incidental power to provide escrow services. Maj. Op. at 23–24. This power is derived from national banks' enumerated power to engage in real estate lending. 12 U.S.C. § 371 (real estate powers); *id.* § 24 (Seventh) (incidental powers). Escrow services are incidental thereto because they are "convenient and useful in connection with the performance of" that power. *Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y.*, 742 F.3d 37, 41 n.4 (2d Cir. 2014) (alterations and internal quotation marks omitted) (quoting *Sec. Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1044, 1049 (2d Cir. 1989)); *see also* BRUCE E. FOOTE, CONG. RSCH. SERV., 98-979, MORTGAGE ESCROW ACCOUNTS: AN ANALYSIS OF THE ISSUES 1 (1998) (discussing the widespread use of escrow accounts in mortgage lending). The state law before us conflicts because it directly conditions the exercise of this power on the payment of interest to the accountholder, Maj. Op. at 23–24, a conclusion New York State's financial regulator has apparently conceded, *id.* at 9, 24 (citing a 2018 order of the New York State Department of Financial Services).

Of course, this conclusion does not imply that every state law that impacts national banks' business interests is preempted. As this Court observes, such a course would have "untenable doctrinal implications," as many permissible state regulations on national banks impose "severe" impacts on such interests. *Id.* at 18, 18 23; *see, e.g., First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659 (1924) (state statute "prohibiting [bank] branches, does not . . . interfere with the discharge of [national bank] duties" because no federal statute authorized national bank branches); see also *McClellan v. Chipman*, 164 U.S. 347, 361 (1896) (permitting state to enforce its prohibition on certain real estate transfers by insolvent transferees against a nationally chartered bank); *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015) (observing that state usury law at issue "might decrease the amount a national bank could charge for its consumer debt in certain states . . . [but] such an effect would not 'significantly interfere' with the exercise of a national bank power"); *Austin v. Altman*, 332 F.2d 273, 276 (2d Cir. 1964) (explaining that a case involving state claims by shareholders of national bank against bank directors for various alleged improprieties was not "a federal matter merely because the bank is chartered under federal law").

Because the state law at issue here conditions the exercise of an incidental power on the payment of monies to escrow accountholders—it is preempted. This conclusion nonetheless preserves states' vital role in our dual-banking system because the analysis asks whether the state law interferes with a congressionally granted national bank power.

II.

Congress, however, has expressed its judgment that national banks must comply with state interest-on-escrow laws when financing certain mortgage loans that are, unlike Plaintiffs', covered by Dodd-Frank's amendments to TILA. *Supra* at 2 n.2. In these appeals, Bank of America, N.A. ("BOA") argued that Congress intended to exempt national banks from compliance with these state laws even when financing covered mortgage loans. Appellant's Br. at 52. This argument is contradicted by the text, foreclosed by this Court's reasoning, and would frustrate Congress's goals in addressing the subprime mortgage crisis.

To infer congressional intent "we employ the ordinary rules of statutory interpretation," Maj. Op. at 29–30, which tell us that "the best evidence of Congress's intent is the statutory text," *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 544 (2012). We first "determine whether the [statutory] language at issue has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the statutory language is unambiguous, and the statutory scheme is coherent and consistent, the "inquiry must cease." *Id.* (citation omitted); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) ("[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one.").

The plain text of Dodd-Frank's amendments to the NBA and TILA reveal an intent to subject national banks to state interest-on-escrow laws when exercising real estate lending powers. With respect to the NBA amendments, this Court concludes that the text is best understood as Congress's "instruct[ion]" to "[a]pply the 'ordinary legal principles of pre-emption'" as articulated in *Barnett Bank*. Maj. Op. at 26 (quoting 517 U.S. at 37). With that unambiguous instruction, there was no need to "extrapolate Congress's broader goals" from amendments to TILA that did not apply to Plaintiffs' mortgage loans. *Id.* at 14. But this Court's analysis leads to another conclusion: these amendments reveal a congressional intent to require national banks to comply with state interest-on-escrow laws when financing covered mortgage loans. *See supra* at 2 n.2. The plain text requires "creditor[s]," without limitation for national banks, to pay interest on an escrow account "[i]f prescribed by applicable State or Federal law." 15 U.S.C. § 14 1639d(g)(3).

Dodd-Frank's dual instructions to apply *Barnett Bank* and comply with state interest-on-escrow laws are wholly consistent. In *Barnett Bank*, the Supreme Court tells us to infer a preemptive intent when the plain text of a statute "explicitly grants a national bank an authorization, permission, or power" with "no 'indication' that Congress intended to subject that power to [state] restriction." *Barnett Bank*, 517 U.S. at 34–35. But the Supreme Court also noted we do not infer preemptive intent when Congress provides an "explicit statement that the exercise of [national bank] power is subject to state law." *Id.* (collecting examples of such explicit statements); *Franklin Nat'l Bank*, 347 U.S. at 378 n.7 (same). In such circumstance, we are compelled to interpret the provision "to mean what [it] say[s]." *See Barnett Bank*, 517 U.S. at 33; see also Maj. Op. at 29 n.11. Congress made such an "explicit statement" by instructing national banks to comply with state interest-on-escrow laws when financing covered mortgage loans.

A.

Dodd-Frank's requirement to comply with state interest-on-escrow laws is codified at 15 U.S.C. § 1639d ("Section 1639d"). That section requires a "creditor" "in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer" to establish an escrow account for the payment of taxes and insurance for covered mortgage loans. *See* 15 U.S.C. § 1639d(a)–(b); *see also supra* at 2 n.2. The term "creditor" is defined broadly to include, as relevant here, an "organization" that "both (1) regularly extends [credit], whether in connection with loans, sales of property or services, or otherwise, consumer credit . . . and (2) is the [organization] to whom the debt arising from the consumer credit transaction is initially payable." *Id.* § 1602(e), (g). Under Section 1639d(g)(3), entitled "[a]pplicability of payment of interest," for all escrow accounts required under Section 1639d(a)–(b), creditors are required to pay interest on monies deposited therein "[i]f prescribed by applicable State or Federal law . . . in the manner as prescribed by that applicable State or Federal law." *Id.* § 1639d(g)(3).

Section 1639d(g)(3)'s interest requirements apply to national banks. The relevant definition for "creditor" is broad. *Id.* § 1602(g). It includes national banks when exercising real estate lending powers, *see* 12 U.S.C. § 371(a), a fact that even BOA does not dispute. For such creditors, the provision uses the mandatory "shall pay interest" when "prescribed by applicable State or Federal law" without any express exception for national banks.[4] 15 U.S.C. § 1639d(g)(3). The provision could therefore be summarized as follows: when applicable state law requires a national bank to pay interest on an escrow account, it must do so in accordance with that law.

The ordinary meaning of the term "applicable," as applied to "State or Federal law," supports this conclusion. *Id.* Interpreting a different statute, the Supreme Court defined the term as follows:

> "Applicable" means "capable of being applied: having relevance" or "fit, suitable, or right to be applied: appropriate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105 (2002). *See*

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[4] It is notable that Congress, in enacting TILA's amendments, knew how to expressly limit the application of its new provisions vis-à-vis existing federal laws. *See, e.g.*, Dodd-Frank tit. XIV, § 1415, 124 Stat. at 2153 (providing that, unless otherwise provided therein, no provision in 15 U.S.C. §§ 1639b, 1639c (as amended) "shall be construed as superseding, repealing, or affecting any duty, right, obligation, privilege, or remedy of any person under any other provision . . . of Federal or State law"). Congress imposed no similar limitation on Section 1639d's application. *See generally* 15 U.S.C. § 1602 (providing relevant definitions and rules of construction); *see also* Dodd-Frank § 1461(a), 124 Stat. at 2178–81.

> *also* NEW OXFORD AMERICAN DICTIONARY 74 (2d ed. 2005) ("relevant or appropriate"); OXFORD ENGLISH DICTIONARY 575 (2d ed. 1989) ("[c]apable of being 11 applied" or "[f]it or suitable for its purpose, appropriate").

Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69 (2011) (alterations in original); *accord Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1195 (9th Cir. 2018) (interpreting Section 1639d).

Defining "applicable" as "relevant" or "having relevance," *see Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171, 187 (E.D.N.Y. 2019) (applying this definition), is consistent with "the neighboring words with which it is associated," *United States v. Williams*, 553 U.S. 285, 294 (2008); ANTONIN SCALIA & BRYAN A. GARNER, THE INTERPRETATION OF LEGAL TEXTS 70 (2012) (noting "[o]ne should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise"). "Applicable" appears ten times in Section 1639d and each use suggests Congress did not intend a specialized meaning beyond simply "relevant." *See, e.g.*, 15 U.S.C. § 1639d(a) (requiring creditors to maintain escrow accounts "for the payment of taxes and hazard insurance, and, *if applicable*, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums" (emphasis added)); *see also id.* § 1639d(j)(2)(A) (requiring lenders to send notice to consumers who waive "escrow services" and include "[i]nformation concerning any applicable fees or costs associated with . . . [the] account" (emphasis added)).[5]

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[5] The use of "applicable" elsewhere in the section does not change the analysis. *Id.* § 1639d(b)(3)(A) (requiring escrow services for

There is no reason to construe "applicable," as BOA argues, to exempt all state interest-on-escrow laws as applied to national banks. Appellant's Br. at 50 (arguing such laws are "preempted" and therefore not "able to be applied"). This proposed interpretation asks too much of the text. The section speaks to "applicable State or *Federal* law," and Congress would not express an intent to exempt preempted laws in a term applying equally to federal law. *Id.* § 1639d(g)(3) (emphasis added). Moreover, Congress's use of a "broad rule" without any express exception is not an invitation to ignore plain text. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) ("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) (noting courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"). As this Court counsels, we do not apply "unstated" purposes in Dodd-Frank to construe the scope of NBA preemption. Maj. Op. at 32. As did Plaintiffs', BOA's argument fails to rebut the presumption that "Congress wrote the statute it wrote—meaning, a statute going so far and no further." *Michigan v. Bay Mills*

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certain mortgage loans "having an original principal obligation amount that . . . does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size" (emphasis added)); *id.* § 1639d(b)(3)(B) (identical usage); *id.* § 1639d(g)(2)(C) (providing that escrow accounts "shall be administered in accordance with . . . the law of the State, if applicable, where the real property securing the consumer credit transaction is located" (emphasis added)); *id.* § 1639d(h)(3) (requiring disclosure of "estimated taxes and hazard insurance, including flood insurance, if applicable" (emphasis added)); *id.* § 1639d(h)(4)–(5) (identical usages).

Indian Cmty., 572 U.S. 782, 794 (2014) (internal quotation marks omitted).[6]

The fact that Congress chose to require national banks to comply with certain state laws via TILA—and not the NBA—does not change the analysis. Congress's decision to place Section 1639d in TILA is logical, given that the section applies to a broad category of creditors, not just national banks, and relates to the terms of residential mortgage loans. *See* 15 U.S.C. § 1601 (congressional findings). Moreover, while the "location" or "manner" of codification is "probative" of congressional intent, *Smith v. Doe*, 538 U.S. 84, 94 (2003), such indicia do not require us to ignore plain text, *see, e.g., Bass v. Stolper, Koritzinsky, Brewster & Neider*, S.C., 111 F.3d 1322, 1328 (7th Cir. 1997) (declining to consider Congress's method of amending a statute when "not faced with statutory ambiguity").[7]

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[6] BOA's reliance on *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta* is also misplaced. Appellant's Br. at 50–51 (quoting 458 U.S. 141, 157 n.12 (1982)). In *de la Cuesta*, the Supreme Court held that a California legal doctrine relating to real estate transactions was preempted by federal regulations and that the parties were bound by these regulations pursuant to a provision specifying that a deed of trust "shall be governed by the law of the jurisdiction in which the Property is located." 458 U.S. at 148 (quoting the deed of trust). The Supreme Court construed the term "law of the jurisdiction" to include federal law because "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." Id. at 157 & n.12 (quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)). Here, there is no authority that would require us to construe "applicable" to have anything to do with preemption.

[7] BOA's argument that Congress did not intend to make national banks comply with state interest-on-escrow laws because it did not follow its "usual approach" and amend the NBA is also

B.

Construing Section 1639d to contain an implied exemption for national banks would undermine Congress's goals in addressing a "financial crisis that nearly crippled the U.S. economy." S. Rep. No. 111-176, at 2 (2010) (authored by Sen. Dodd). That crisis traced its origins to a downturn in the housing market due to "a raft of unsound lending practices . . . ultimately le[a]d[ing] to the failure of a number of companies heavily involved in making or investing in subprime loans." *Id.* at 40. Congress knew that national banks were among the entities responsible. *See* H. Rep. No. 111-94, at 51 (2009) (authored by Rep. Frank) (noting that approximately less than one-quarter of "[s]ubprime lenders" were "regulated by Federal financial regulators such as banks, thrifts, and credit unions").

Some of the deceptive practices that led to the crisis were addressed through Dodd-Frank's amendments to TILA. *Id.* at 49 (noting Congress sought to "mitigat[e] . . . deceptive practices related to escrow accounts, mortgage servicing, and appraisal practices"). Certain lending practices, in Congress's view, were causing subprime borrowers to voluntarily waive escrow services leading to a disproportionately low adoption rate.

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unpersuasive given the plain text. Appellant's Br. at 47–48. Again, the location of an enactment is one of a number of features that is probative of congressional intent, but it is not "dispositive" of the issue. *See Smith*, 538 U.S. at 94. Moreover, BOA's reliance on *Barnett Bank* for this argument is unavailing, as the Supreme Court did not purport to hold that Congress must amend a "federal banking statute" to make "the exercise of [national bank] power . . . subject to state law." 517 U.S. at 34. Rather, *Barnett Bank* reaffirmed that the question of preemption "is basically one of congressional intent." *Id.* at 30. Courts must discern that intent from plain text.

Id. at 53 (noting "approximately 50 percent of all first lien subprime mortgages had escrows, compared to 71 percent of prime loans"). Congress was concerned about the systemic risk this posed to the financial system. Escrow accounts are essential for payment of "property taxes, hazard insurance, and certain other periodic expenses related to the property or the contract." *Id.* Without such services, borrowers may "underestimate the monthly payment actually needed to own a home" and be at risk of "tax liens and property losses." *Id.* at 53–54. With respect to subprime borrowers, these risks were amplified due to their poor financial circumstances:

> In general, subprime mortgages are loans that have more costly terms and conditions than "prime" mortgages (e.g., they may have higher interest rates, additional fees, prepayment penalties, or other features). Many subprime loans were made to borrowers who, due to weakened credit histories, pose higher credit risks. These borrowers may have lower credit scores than prime borrowers or higher debt to income ratios on their properties.

Id. at 51.

Congress addressed these risks through Section 1639d's escrow provisions, which require lenders to maintain escrow accounts on behalf of certain borrowers considered to be "subprime." *See id.* at 49 ("[T]he escrow provisions . . . require[] all subprime borrowers to have accounts established in conjunction with their mortgages . . . ."); *see also id.* at 53 (noting that "subprime borrowers" need escrow accounts for "budgeting assistance given their weaker credit histories").

It would strain credulity to believe Congress intended to exempt national banks from any of its escrow requirements. It is obvious that Congress was aware national banks had a hand in causing the crisis. *Id.* at 51. While it is true that most subprime loans originated from "mortgage brokers and lenders with no Federal supervision," *id.*, these entities were not solely to blame, see FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 22 (2011) (noting that in 2008 BOA acquired Countrywide Financial Corporation, one of the largest subprime lenders); *see also* NAT'L CONSUMER L. CTR., PREEMPTION AND REGULATORY REFORM: RESTORE THE STATES' TRADITIONAL ROLE AS "FIRST RESPONDER" 11 (2009) ("Mortgage lending by national banks, federal thrifts, and their operating subsidiaries made up 31.5% . . . of the most dangerous, subprime loans during the peak year of 2006."). An exemption for national banks from Section 1639d(g)(3)'s requirements would frustrate Congress's goal to address a problem which confronted our nation.

III.

Congress undoubtedly has the power to regulate national banks to the exclusion of states—but has thus far declined to do so. As a result, regulation of national banks has been a matter of both federal and state concern since the passage of the first National Bank Act in 1863. See *Watters*, 550 U.S. at 10–11; *see also Nat'l State Bank, Elizabeth, N. J. v. Long*, 630 F.2d 981, 985–86 (3d Cir. 1980) (tracing the NBA's history). While state law "must usually govern the activities of both national and state banks," *Watters*, 550 U.S. at 25 (Stevens, J., dissenting), the New York law at issue is preempted because it seeks to control the exercise national bank powers conferred by Congress. But that law, as applied to national banks, is not preempted under all circumstances. Congress, through Dodd-Frank, has directed national banks, to comply with state interest-on-escrow laws when financing mortgage loans that are, unlike Plaintiffs', covered by that act. A conclusion made inevitable in light of the text and Congress's goals in dealing with the subprime mortgage crisis—a crisis national banks helped create.

Based on the foregoing, I respectfully concur.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SAUL R. HYMES and ILLANA HARWAYNE-GIDANSKY, on behalf of themselves and all others similarly situated, Plaintiffs, - against - BANK OF AMERICA, N.A., and Does 1 through 10, inclusive, Defendants.	MEMORANDUM AND ORDER ON CERTIFICATION OF ISSUE FOR INTERLOCUTORY APPEAL 18-CV-2352 (RRM) (ARL)
ALEX CANTERO, individually and on behalf of all others similarly situated, Plaintiff, - against –	18-CV-4157 (RRM) (ARL) October 7, 2020

BANK OF AMERICA,
N.A.,
Defendant.

ROSLYNN R. MAUSKOPF, United States District Judge.

Plaintiffs Saul Hymes and Illana Harwayne-Gidansky (the "*Hymes* Plaintiffs"), and plaintiff Alex Cantero (collectively with the *Hymes* Plaintiffs, "Plaintiffs"), bring this pair of putative class actions against Bank of America, N.A. ("the Bank" or "Defendant"), seeking to require the Bank to pay interest, as required by New York General Obligation Law ("GOL") § 5-601, on money Plaintiffs have deposited into mortgage escrow accounts. In a memorandum and order dated September 30, 2019, (the "Prior Order"), the Court denied the Bank's motions to dismiss two of Plaintiffs' four claims on the ground that the National Bank Act ("NBA") preempts GOL § 5-601. The Bank now moves to amend the Prior Order to certify the preemption question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay further proceedings before this Court pending a decision from the Second Circuit. For the reasons set forth below, the motions to amend the Prior Order are granted and the motions to stay are denied without prejudice to renewing the motions before the Magistrate Judge if the Second Circuit grants permission to file the interlocutory appeal.

BACKGROUND

While familiarity with the history of this litigation, the Prior Order, and the instant motions is assumed, the Court will briefly recap the salient points for the convenience of the reader. Plaintiffs are New York homeowners, who entered into a mortgage agreement with the Bank which requires them to make monthly payments (the "Escrow Funds") into mortgage escrow accounts maintained by the Bank. The agreement signed by the *Hymes* Plaintiffs expressly provided that the Bank would not pay interest on the Escrow Funds unless required by "Applicable Law," and defined "Applicable Law" as "federal law and the law of New York State." (*Hymes* Compl. (18-CV-2352 at Doc. No. 1) at ¶ 43.) The mortgage agreement signed by Cantero did not specifically address the issue of whether the Bank would pay interest on Escrow Funds, but provided that the agreement would be "governed by Federal Law and the law of the jurisdiction in which the Property is located." (*Cantero* Am. Compl. (18-CV-4157 Doc. No. 6) at ¶ 32.)

In 2018, the *Hymes* Plaintiffs and Cantero independently commenced the putative class actions at bar. Although the actions were commenced by different law firms, they raised four nearly identical causes of action: breach of contract, unjust enrichment, and violations of GOL § 5-601 and New York General Business Law ("GBL") § 349. The Bank moved to dismiss both actions, principally arguing that both the NBA and regulations enacted by the Office of the Comptroller of the Currency ("OCC") preempted GOL § 5-601, and that the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank") did not affect the preemption analysis.

In the Prior Order (Doc. No. 47 in *Hymes*; Doc. No. 35 in *Cantero*; reported at 408 F. Supp. 3d 171), the Court dismissed Plaintiffs' unjust enrichment and GBL § 349 claims, but denied the Bank's motion to dismiss in all other respects. The Court acknowledged that the question of whether the NBA preempted a state law was "basically one of congressional intent" – that is, whether "Congress, in enacting the Federal Statute, intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State." *Hymes*, 408 F. Supp. 3d at 183 (quoting *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 30 (1996)). Since the parties agreed that Congress had not explicitly spoken to whether the NBA preempts state laws like New York GOL § 5-601, the Court applied the standard for implied preemption set forth in *Barnett Bank*, which permits the States to regulate national banks, provided that the state regulation "does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. Since no one argued that GOL § 5-601 prevented the Bank's exercise of its power to administer mortgage escrow accounts, the question became whether that state law "significant interferes with" the Bank's exercise of its powers. *Hymes*, 408 F. Supp. 3d at 194. The Court noted that the Supreme Court had "never explained in detail what this ['significantly interferes'] standard entails," and therefore looked to other Supreme Court precedent to "illuminate[ ] the standard's contours." *Id.* at 194.

The Court also considered other authorities bearing on the issue of Congressional intent, including OCC regulations and Dodd–Frank. With respect to the OCC regulations – which interpreted the NBA to permit real estate lending "without regard to state law limitations concerning … [e]scrow accounts," 12 C.F.R. § 34.4(a) – the Court held that these regulations were entitled only to Skidmore, rather than Chevron, deference. In so holding, the Court distinguished *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), which gave OCC regulations Chevron deference. The Court held that Burke was "not fully apposite" and that two subsequent events – the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), and the enactment of Dodd–Frank in 2010 – "undermined aspects of its approach." *Hymes*, 408 F. Supp. 3d at 190.

With respect to Dodd–Frank, the Court interpreted 15 U.S.C. § 1639d(g)(3) – which requires creditors to "pay interest to the consumer on the amount held in any impound, trust, or escrow account" "[i]f prescribed by applicable State or Federal law" – to require the Bank to comply with GOL § 5-601. The Court rejected the Bank's argument that the term "applicable" could be read as meaning, "at least in part, 'not preempted.'" *Hymes*, 408 F. Supp. 3d at 186. Rather, the Court held that "Congress meant 'applicable' simply to mean 'relevant.'" *Id.* at 187.

The Instant Motions

Defendant now moves pursuant to 28 U.S.C. § 1292(b) to amend the Prior Order to certify for interlocutory appeal the question of whether the NBA and implementing regulations preempt GOL § 5-601 and similar state statutes which purport to require national banks to pay interest on mortgage escrow accounts.[1] In those motions, Defendant also requests that the Court stay its proceedings pending resolution of the interlocutory appeal by the Second Circuit.

Section 1292(b) provides:

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[1] Separate motions were filed in *Hymes* (Doc. No. 65) and *Cantero* (Doc. No. 51), but those motions are essentially identical. The Court has not considered the proposed *amici curiae* briefs submitted by the OCC and by the Bank Policy Institute, the Consumers Bankers Association, and the Chamber of Commerce.

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Defendant argues that the preemption issue addressed in the Prior Order is a "controlling question of law" since Plaintiffs' remaining claims will be dismissed if federal law preempts GOL § 5-601, and that the preemption defense presents pure questions of law. (Def. Memo. of Law (Doc. No. 65-1 in *Hymes*; Doc. No. 51-5 in *Cantero*) at 5.) Defendant also argues that there is a "substantial ground for difference of opinion" not only with respect to the Court's ultimate conclusion that federal law does not preempt GOL § 5-601, but also on 1) the proper interpretation of *Barnett Bank*'s "significantly interferes" test, 2) the meaning of the term "applicable" in 15 U.S.C. § 1639d(g)(3), 3) the level of deference to be afforded to the OCC's regulations, and 4) the question of whether Dodd–Frank affects the preemption analysis. Finally, Defendant argues that an interlocutory appeal will not only "avoid protracted litigation" in this case, but "assist with the resolution of other pending cases." (Def. Memo. at 19, 20.) These arguments and Defendant's application for a stay are discussed in more detail below.

DISCUSSION

I. Interlocutory Appeal

"It is a basic tenet of federal law to delay appellate review until a final judgment has been entered." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). "[F]ederal practice strongly disfavors discretionary interlocutory appeals, [as they] prolong judicial proceedings, add delay and expense to litigants, burden appellate courts, and present issues for decisions on uncertain and incomplete records, tending to weaken the precedential value of judicial opinions." *Hengjin Sun v. China 1221, Inc.*, No. 12-CV-7135 (RJS), 2015 WL 5544257, at *3 (S.D.N.Y. Sept. 17, 2015) (quoting *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007)) (bracketed material added in China 1221.) "[I]interlocutory appeals typically create inefficiency for the Courts of Appeals," *Republic of Colombia v. Diageo N. Am. Inc.*, 619 F. Supp. 2d 7, 9 (E.D.N.Y. 2007), since "piecemeal appeals … require two (or more) three-judge panels to familiarize themselves with a given case." *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 631 (2d Cir. 1991). Accordingly, "only 'exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)).

Section 1292(b) provides "a rare exception to the final judgment rule that generally prohibits piecemeal appeals," *Koehler*, 101 F.3d at 865, permitting review of "[i]nterlocutory orders that are otherwise non-appealable" under certain circumstances. *Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 211 (2d Cir. 2018), *cert. denied sub nom. YPF S.A. v. Petersen Energia Inversora S.A.U.*, 139 S. Ct. 2741 (2019), *and cert. denied sub nom. Argentine Republic v. Petersen Energia Inversora S.A.U.*, 139 S. Ct. 2741 (2019). Under § 1292(b), a "district court may certify an order for such an appeal if the moving party shows that the order (1) 'involves a controlling question of law' about which (2) 'there is substantial ground for difference of opinion,' and (3) 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, No. 14-MD-2589 (JMF), 2019 WL 3202745, at *1 (S.D.N.Y. July 16, 2019) (quoting 28 U.S.C. § 1292(b)). "The party seeking certification 'bears the burden of demonstrating that all three prongs of [Section] 1292(b) are met.'" *Id.* (quoting *In re Motors Liquidation Co.*, No. 17-CV-8712 (AJN), 2018 WL 4284286, at *3 (S.D.N.Y. Sept. 7, 2018)) (brackets added in *In re Barclays*). However, while the absence of any of the foregoing three elements is sufficient to deny a motion to certify an interlocutory appeal, *see Prout v. Vladeck*, 319 F. Supp. 3d 741, 747 (S.D.N.Y. 2018), the presence of the foregoing elements does not mandate granting the motion. "[E]ven if the order qualifie[s] for certification under 28 U.S.C. § 1292(b), the certification decision is entirely a matter of discretion for the district court." *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 36 (2d Cir. 2014).

"Section 1292(b) was not intended ... to be a 'vehicle to provide early review of difficult rulings in hard cases.'" *SEC v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 226 (S.D.N.Y. 2000) (quoting *German ex rel. German v. Fed. Home Loan Mortg. Corp.*, 896 F.Supp. 1385, 1398 (S.D.N.Y. 1995)). Rather, Congress passed 28 U.S.C. § 1292(b) "primarily to ensure that the courts of appeals would be able to rule on ... ephemeral question[s] of law that m[ight] disappear in the light of a complete and final record," and "to assure the prompt resolution of knotty legal problems." *Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007) (internal quotation marks and citations omitted; ellipses and brackets in original). The Second Circuit has "repeatedly cautioned [that] … use of this certification procedure should be strictly limited because only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (per curiam) (alterations and internal quotation marks omitted). However, the Second Circuit has also stated that "[w]hen a ruling satisfies these criteria and 'involves a new legal question or is of special consequence,' then the district court 'should not hesitate to certify an interlocutory appeal.'" *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)).

A. Controlling question

"Courts in this Circuit typically evaluate whether a controlling question of law exists by considering whether either (1) 'reversal of the district court's opinion could result in dismissal of the action'; (2) 'reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action,' or (3) 'the certified issue has precedential value for a large number of cases.'" *Green v. Humana at Home, Inc.*, No. 16-CV-7586 (AJN), 2019 WL 3729390, at *3 (S.D.N.Y. Aug. 8, 2019) (quoting *In re A2P SMS Antitrust Litig.*, No. 12-CV-2656 (AJN), 2015 WL 876456, at *3–4 (S.D.N.Y. Mar. 2, 2015)). Courts also require that the issue to be certified for interlocutory appeal be a "'pure' question of law that the reviewing court could decide quickly and cleanly without having to study the record." *Capitol Records LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 551 (S.D.N.Y. 2013).

Defendant argues that "there is no dispute" that all of Plaintiffs' claims will be dismissed if federal law preempts GOL § 5-601, and that its preemption defense presents pure questions of law. (Def. Memo. at 5 (citing *Spong v. Fid. Nat. Prop. & Cas. Ins. Co.*, 787 F.3d 296, 304 (5th Cir. 2015) ("Whether federal law preempts [plaintiffs'] claims certainly falls within the ambit of 28 U.S.C. § 1292(b).") Plaintiffs do not contest that this element has been met. (*See* Hymes' Memo. in Opposition (Doc. No. 65-5 in *Hymes*) at 1 ("Defendant's motion fails to satisfy … two of the three requisite factors for interlocutory review.") (emphasis in original); Cantero Memo. in Opposition (Doc. No. 51-6 in *Cantero*) at 5.) The Court agrees with Defendant that the preemption issue is dispositive of the cases at bar and is a pure question of law. Accordingly, the Court finds that the "controlling question" prong has been established.

B. <u>Substantial Ground for Difference of Opinion</u>

"The second prong of the test, that there exists a substantial ground for difference of opinion, is met when '(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit.'" *Capitol Records*, 972 F. Supp. 2d at 551 (quoting *In re Enron Corp.*, No. 06-CV-7828 (SAS), 2007 WL 2780394, at *1 (S.D.N.Y. Sept. 24, 2007)). The Second Circuit has emphasized that "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *In re Flor*, 79 F.3d at 284. A district judge must "analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute." *Id.* (emphasis in original).

Defendant claims there is a substantial ground for difference of opinion not only with respect to the Court's ultimate conclusion that federal law does not preempt GOL § 5-601, but also on 1) the proper interpretation of *Barnett Bank*'s "significantly interferes" test, 2) the meaning of the term "applicable" in 15 U.S.C. § 1639d(g)(3), 3) the amount of deference to be afforded to the OCC's regulations, and 4) the question of whether Dodd–Frank affects the preemption analysis. After analyzing the strength of Defendant's arguments, the Court concludes that this prong has also been met.

First, as the Court noted in its Prior Order, the question of whether the NBA preempts GOL § 5-601 and similar state laws requiring national banks to pay interest on mortgage escrow accounts is a question of first impression in the Second Circuit. *See Hymes*, 408 F. Supp. 3d at 184. In addition, some of the determinations that are central to the preemption analysis are difficult because the precise contours of certain pivotal terms are not well defined. First, while the Supreme Court has made it clear that states have the "power to regulate national banks, where … doing so does not prevent or significantly interfere with the national bank's exercise of its powers," *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996), the Supreme Court "has never explained in detail what this standard entails." *Hymes*, 408 F. Supp. 3d at 194. The Court attempted to ascertain the contours of this standard by examining two older Supreme Court cases: *Franklin Nat. Bank of Franklin Square v. People*, 347 U.S. 373 (1954), and *Anderson Nat. Bank v. Luckett*, 321 U.S. 233 (1944). However, defining the precise contours of the *Barnett Bank* standard from such a limited sample of cases is inherently difficult, leaving substantial grounds for dispute.

Similarly, as the Court itself acknowledged in the Prior Order, there is ample room for dispute regarding the meaning of the term "applicable" as used in 15 U.S.C. § 1639d(g)(3). The Court pointed to various definitions of the term and noted: "The task here is to choose among these various meanings." *Hymes*, 408 F. Supp. 3d at 187. Although this Court interpreted the term as meaning "relevant" or "having relevance," rather than "able to be applied," *id.*, it conceded that the Ninth Circuit interpreted the term differently, opining "that [Congress] used the term 'applicable' to refer to state escrow interest laws where they exist." *Id.* n.9 (quoting *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1195 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018)). Given the conflicting authorities and the lack of a statutory definition, there is a substantial ground for difference of opinion as to the meaning of this term.

There is also substantial ground for dispute as to the deference to be afforded to 12 C.F.R. § 34.4(a) – the provision of the Office of the Comptroller of the Currency's 2011 regulations which provides that "[a] national bank may make real estate loans … without regard to state law limitations concerning … [e]scrow accounts, impound accounts, and similar accounts." In *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), the Second Circuit held that OCC regulations providing for the preemption of state laws purporting to regulate operating subsidies of national banks were entitled to Chevron deference. *Id.* at 315. Although this Court distinguished *Burke* and cast doubt on its continued validity, Defendant correctly notes that this Court's finding that *Burke* did not control the question of what deference to afford the OCC's regulations can be questioned on several grounds.

First, while this Court noted that Burke was not "fully apposite," *Hymes*, 408 F. Supp. 3d at 190, it was not entirely inapposite, either. Burke addressed the question of whether different OCC regulations – 12 C.F.R. §§ 5.34 and 7.4006 – preempted Connecticut state laws which subjected subsidiaries of national banks to state licensing and inspection. However, *Burke* analogized those regulations to ones at issue in this case, concluding that "the combined effect of 12 C.F.R. § 34.1(b) and § 34.4 is that state regulation of real estate lending by national bank operating subsidiaries may be preempted." *Burke*, 414 F.3d at 313. *Burke* was unquestionably more similar to this case than *Wyeth v. Levine*, 555 U.S. 555 (2009), which addressed the question of whether the federal Food and Drug Administration's drug labeling judgments "preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use." *Wyeth*, 555 U.S. at 563.

Second, Defendant fairly questions this Court's assertion that Wyeth made it clear "that agency conclusions about preemption should receive only *Skidmore* deference." *Hymes*, 408 F. Supp. 3d at 190 (citing *Wyeth*, 555 U.S. at 576). In *Wyeth*, the Supreme Court rejected a drug manufacturer's claims that failure-to-warn tort claims were preempted because they interfered with "Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives." 555 U.S. at 573. The Supreme Court declined to defer to the FDA's own assessment that "certain state-law actions, such as those involving failure-to-warn claims," were preempted because they "threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs." *Id.* at 575–76 (quoting 71 Fed. Reg. 3922, 3935 (2006)). *Wyeth* pointed to the fact that Congress had never enacted an express preemption provision during the Federal Food, Drug, and Cosmetic Act's 70-year history as "powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.* at 575. After noting that Congress had not authorized the FDA to preempt state law directly, the Court held:

> While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. … The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its

> thoroughness, consistency, and persuasiveness. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 234–235 … (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 … (1944).

Wyeth, 555 U.S. at 576–77 (internal quotation marks and citations omitted).

As Defendant notes, "*Burke* recognized that Congress gave the OCC authority to promulgate regulations that 'demarcate more clearly what state laws are and are not preempted with respect to real estate lending activity.'" (Defendant's Memo at 13 (quoting *Burke*, 414 F.3d at 320)). In light of this express Congressional delegation of authority to the OCC, Defendant has a substantial argument that the *Wyeth*'s holding that agency conclusions about preemption receive only Skidmore deference might be inapplicable to the cases at bar.

Third, this Court's conclusion that Dodd–Frank undermined Burke is also susceptible to a challenge for the same reason explained above. Dodd–Frank addressed the preemptive effect of the NBA in several ways, including clarifying that the OCC's preemption determinations are entitled only to *Skidmore* deference. *See* 12 U.S.C. § 25b(b)(5)(A). However, the Ninth Circuit has opined that this clarification was not "an actual change in the law," but "merely codified existing law as set forth by the Supreme Court" in *Wyeth*. *Lusnak*, 883 F.3d at 1192.

C. <u>Materially Advance the Ultimate Termination of the Litigation</u>

One of the central goals of 28 U.S.C. § 1292(b) was "saving trial court time by avoiding fruitless litigation."

Koehler, 101 F.3d at 866. Congress sought, among other things, "to assure the prompt resolution of knotty legal problems." *Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007). Thus, "the use of § 1292(b) is reserved for those cases where an intermediate appeal may avoid protracted litigation." *Koehler*, 101 F.3d at 865–66.

Certifying an interlocutory appeal in this case would vindicate the central purposes of § 1292(b). The preemption question that Defendant seeks to certify for interlocutory appeal is unquestionably the central question in this case. If the Second Circuit were to determine that the NBA preempted GOL § 5-601, Plaintiffs' remaining causes of action would be dismissed. Conversely, if the Second Circuit were to determine that GOL § 5-601 was not preempted, that ruling could be expected to promote settlement in this case. Either way, certifying an interlocutory appeal on the preemption issue would materially advance the ultimate disposition of this litigation.

D. <u>The Court's Exercise of its Discretion</u>

Although the Court concludes that Defendant has made out the three elements necessary for certification of an interlocutory appeal under 28 U.S.C. § 1292(b), the certification decision remains entirely a matter of discretion for the Court. *See In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d at 36; *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F.Supp.2d 139, 146 (E.D.N.Y. 1999) (district courts have "independent and 'unreviewable' authority to deny certification even where the three statutory criteria are met"). The Court can exercise "[s]uch unfettered discretion … for 'any reason, including docket congestion' and 'the system-wide costs and benefits of allowing the appeal.'" *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 524, 530 (S.D.N.Y. 2014) (quoting *Klinghoffer*, 921 F.2d at 24). The Court may grant certification "if the statutory criteria are met and the court believes that immediate appeal would best foster a simultaneously effective and efficient judiciary." *Buehlman v. Ide Pontiac, Inc.*, 268 F. Supp. 3d 437, 441 (W.D.N.Y. 2017) (quoting *Katsanis v. Blue Cross & Blue Shield Ass'n*, No. 07-CV-696C, 2010 WL 2160353, at *1 (W.D.N.Y. May 27, 2010)).

The Court finds that this case presents one of the rare instances in which there would be system-wide benefits to granting an interlocutory appeal. As Defendant correctly notes in its letter dated January 30, 2020 (Doc. No. 70 in *Hymes*; Doc. No. 53 in *Cantero*), there are at least three other cases pending before district courts in this Circuit which raise the same preemption question at issue here. One – *Cymbalista v. JPMorgan Chase Bank, N.A.*, No. 20-CV-456 (RPK) – is pending before another judge in the district; two others – *347 Townhouse, LLC v. Citibank, N.A.*, No. 19-CV-542 (LAP), and *Tepper v. Santander Bank, N.A.*, No. 20-CV-501 (KMK), are pending before district judges in the United States District Court for the Southern District of New York. All involve banks other than Defendant and are pending before jurists who, judging from their published opinions, have yet to grapple with this complex preemption question. Certifying an interlocutory appeal on this question would save those defendants and jurists the considerable time and effort of re-litigating the preemption issue and thereby "best foster a simultaneously effective and efficient judiciary." *See Buehlman*, 268 F. Supp. 3d at 441; *Katsanis*, 2010 WL 2160353, at *1.

II. Stay of Discovery

Although the Court, in its discretion, concludes that certification of an interlocutory appeal is appropriate, that conclusion does not mandate a stay of discovery. Section 1292(b) expressly provides that an "application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." In deciding whether to order a stay pending appeal, courts in this Circuit consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The degree to which a factor must be present varies with the strength of the other factors, meaning that 'more of one [factor] excuses less of the other.'" *Id.* (quoting *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006)).

Although Defendant may not have made a strong showing of likelihood of success on the merits, there is a substantial ground for difference of opinion with respect to certain aspects of the Prior Order. Since Defendant's appeal has the potential to resolve this case without the need for further discovery, the Court finds that it is in the public interest and the interests of all parties to stay discovery and all further proceedings before this Court until the Second Circuit has either denied Defendant's petition for permission to file an interlocutory appeal or resolved that appeal. Accordingly, the motions to appoint interim class counsel are deemed withdrawn. These motions may be re-filed, if necessary, after the Second Circuit rules.

CONCLUSION

For the reasons set forth above, defendant Bank of America's motions to amend the Prior Order to certify the preemption question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) are granted. The Prior Order is deemed amended to certify the following question for immediate review: "Whether the National Bank Act and implementing regulations preempt New York General Obligations Law § 5-601 and similar state statutes that purport to require national banks to pay interest on mortgage escrow accounts." The Bank's motions to stay further proceedings before this Court pending a decision from the Second Circuit on the Bank's petition(s) for permission to file an interlocutory appeal are granted. The motion to appoint interim class counsel (Docs. No. 56 & 57 in *Hymes* and Doc. No. 47 in *Cantero*) are deemed withdrawn but may be re-filed, if necessary, after the Second Circuit rules.

SO ORDERED.

Dated: Brooklyn, New York
September 29, 2020

Roslynn R. Mauskopf

ROSLYNN R. MAUSKOPF
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SAUL R. HYMES and ILLANA HARWAYNE-GIDANSKY, on behalf of themselves and all others similarly situated, *Plaintiffs*, - against - BANK OF AMERICA, N.A., and Does 1 through 10, inclusive, *Defendants*.	**MEMORANDUM AND ORDER** 18-CV-2352 (RRM) (ARL)
ALEX CANTERO, individually and on behalf of all others similarly situated, *Plaintiff*, - against – BANK OF AMERICA, N.A., *Defendant*.	18-CV-4157 (RRM) (ARL)

ROSLYNN R. MAUSKOPF, United States District Judge.

Plaintiffs Saul Hymes and Illana Harwayne-Gidansky (the "Hymes Plaintiffs"), and plaintiff Alex Cantero (collectively with the Hymes Plaintiffs, "Plaintiffs"), bring this pair of putative class actions against Bank of America, N.A. ("the Bank"), seeking to require the Bank to pay interest, as required by New York General Obligation Law ("GOL") § 5-601, on money Plaintiffs have deposited into mortgage escrow accounts. Before the Court are the Bank's nearly identical motions to dismiss the complaints in each action for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). In each motion, the Bank principally argues that the National Bank Act ("NBA") preempts GOL § 5-601 and that Plaintiff's claims for breach of contract, unjust enrichment, and violation of state consumer protection law must therefore be dismissed. The motions are consolidated for the purposes of this Memorandum and Order.

For the reasons set forth below, the Court concludes the NBA does not preempt GOL § 5-601. Accordingly, Plaintiffs' complaints state valid claims for breach of contract. Plaintiffs' claims for unjust enrichment and violation of New York General Business Law § 349 are dismissed.

BACKGROUND

I. The NBA and Dodd–Frank

"In 1864, Congress enacted the NBA, establishing the system of national banking still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10–11 (2007) (citations omitted). The NBA created the Office of the Comptroller of the Currency ("OCC") to oversee nationally chartered banks, and it vested those banks with certain enumerated powers. Since the early twentieth century, this has included the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 371(a); *accord* 12 C.F.R. § 34.3(a).[1] The NBA also vested national banks with "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; . . . [and] by loaning money on personal security." 12 U.S.C. § 24 (Seventh). Pursuant to these powers, throughout the past century, national banks have engaged in the business of making residential real estate loans secured by mortgages.

While Congress delegated regulation of national banks to the OCC, it did not "wholly withdraw" them "from the operation of State legislation." *First Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 361 (1869). "It is often said that we have a 'dual banking system' of federal and state regulation." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (citations omitted). In this system, and as will be discussed more fully below, national banks are subject to state law, provided the state law does not "prevent or significantly interfere with the national bank[s'] exercise of [their] powers." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996). When

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[1] The precursor to section 371, which authorized national banks to make limited-duration loans secured by farmland, was enacted in 1913. *See* Pub. L. No. 63-43, § 24, 38 Stat. 251, 273 (1913). The statute evolved over the ensuing years into its current, more comprehensive form.

state law does prevent or significantly interfere with banks' exercise of their powers, it is preempted by the NBA. *Id.*

II. Mortgage Escrow Accounts, RESPA, and GOL § 5-601

Since at least the middle of the twentieth century, mortgage lenders have required or negotiated with borrowers to establish mortgage escrow accounts. *See Gibson v. First Fed. Sav. & Loan Ass'n of Detroit*, 504 F.2d 826, 829 (1974) (describing regulation of mortgage escrow accounts); *cf.* Edwin S. Mills, *The Functioning and Regulation of Escrow Accounts*, 5 HOUS POL'Y DEBATE 203, 203 (1994) ("Escrow accounts are the stepchildren of the mortgage business."). A mortgage escrow account, sometimes called an impound account, is "a trust account set up in a borrower's name to ensure the timely payment of specified obligations affiliated with a property." H.R. Rep. No. 111-94, at 53 (2009). Borrowers pre-pay a set amount into their accounts on a regular, often monthly, basis. *Id.* Lenders "then use these collected sums to guarantee the timely payment of property tax bills and insurance premiums." *Id.* By guaranteeing timely payment, lenders protect themselves and the borrowers from tax liens and property damage risk. *Id.* In turn, having mitigated these risks, lenders are able to offer loans to borrowers at reduced interest rates. *See* Mills, *supra*, at 209. When the mortgage contract ends, any money remaining in escrow is returned to the borrower.

For some mortgages, such as those with a low risk of default, these benefits may not outweigh the countervailing costs. Mortgage escrow accounts cost money for lenders to create and operate – an expense which may be borne by the lender or passed to the borrower. *See, e.g., Escrow Requirements Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 4726, 4746–47 (Jan. 22, 2013). They also necessarily require that borrowers be parted from control of their capital, and thus from the ability to use it, including to generate income. *See id.* During the period between when monthly deposits are required and taxes and insurance premiums come due, money belonging to the borrower simply accumulates in escrow. The lender may use this money to generate interest and income for itself, but the borrower has no access to it. *See id.*; Mills, *supra*, at 211.

By the 1970s, some lenders had begun to exploit this last feature of mortgage escrow accounts by requiring borrowers to deposit vastly more money than their tax and insurance liabilities demanded. *See* S. Rep. No. 93-866, 1974 U.S.C.C.A.N. 6546, 6548. These lenders could then invest this money for their own benefit, effectively giving themselves an interest-free loan for however long the mortgage escrow account remained in place.

In 1974, Congress and the State of New York responded with consumer protection legislation aimed at curbing different aspects this practice. At the federal level, Congress enacted the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, which capped the amount lenders – including national banks – could require in escrow deposits for federally insured, guaranteed, or owned mortgages. *See* Mills, *supra*, at 211–12. And Congress delegated authority to implement RESPA to the Department of Housing and Urban Development ("HUD"). *See* Pub. L. No. 93-533, § 3(6), 88 Stat. 1724, 1725 (1974). Under RESPA, lenders can now demand only so much as necessary to guarantee the timely payment of taxes and insurance premiums, and no more. *See* 12 U.S.C. § 2609.

At the state level, New York enacted GOL § 5-601, which required "mortgage investing institutions," including national banks, to pay interest to borrowers on the money in mortgage escrow accounts, thereby passing along some (or all) of whatever interest or income they made. *See Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 181 (2d Cir. 2005) (first citing N.Y. Gen. Oblig. Law § 5-601, then citing N.Y. Banking Law § 14-b(5)); *see also* 1974 N.Y. Laws 802–05. Specifically, New York General Obligations Law § 5-601 provides,

> Any mortgage investing institution which maintains an escrow account pursuant to any agreement executed in connection with a mortgage on any one to six family residence occupied by the owner . . . and located in this state shall, for each quarterly period in which such escrow account is established, credit the same with dividends or interest at a rate of not less than two per centum per year based on the average of the sums so paid for the average length of time on deposit or a rate prescribed by the superintendent of financial services pursuant to section fourteen-b of the banking law and pursuant to the terms and conditions set forth in that section whichever is higher.

N.Y. Gen. Oblig. Law § 5-601. Over the next two decades, approximately a dozen states enacted similar laws. *See* 1973 Conn. Acts 1373–74 Reg. Sess; 1991 Me. Laws 187; Mills, *supra*, at 214.[2]

[2] As detailed in Cantero's amended complaint, thirteen states now have escrow interest laws. (Cantero Am. Compl. at ¶ 79); *see also infra* note 10.

III. OCC Involvement

At no point during this period did the OCC seek to impose escrow-account regulations on national banks over and above what HUD required. Through a series of informal agency actions, it merely asserted that the NBA authorized national banks to offer escrow services, subject to RESPA and HUD regulations. *See* OCC Corporate Decision No. 99-06, 1999 WL 74103, at *2 (Jan. 29, 1999) (concluding that, under 12 U.S.C. § 24 (Seventh), "national banks are authorized to provide real estate closing and escrow services to their loan or title policy customers as activities that are part of or incidental to the business of banking" (citations omitted)); OCC Conditional Approval No. 276, 1998 WL 363812, at *9 (characterizing mortgage escrow accounts as "an integral part of or a logical outgrowth of the lending function" and "part of and incidental to the Bank[s'] lending and servicing function").

In 2004, however, the OCC's approach changed. Responding to "increasing efforts by states and localities to apply state and local laws to bank activities," the agency published a final rule "clarifying the applicability of state law to national banks' operations," and identifying "types of state laws that are preempted, as well as the types of state laws that generally are not preempted, with respect to national banks' lending, deposit-taking, and other operations." *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1904, 1908 (Jan. 13, 2004). The rule amended the OCC's real estate lending preemption regulations, codified at 12 C.F.R. § 34.4, by more than doubling the list of categories of state law preempted by the NBA. Compare Real Estate Lending and Appraisals, 69 Fed. Reg. at 1917, *with* 12 C.F.R. § 34.4(a) (2003). Ostensibly applying the Supreme

Court's decision in *Barnett Bank*, the rule provided,

> (a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:
>
> > (6) Escrow accounts, impound accounts, and similar accounts; . . . .

Real Estate Lending and Appraisals, 69 Fed. Reg. at 1917.

The OCC did not offer any basis for the inclusion of escrow accounts, in particular, on the list. It did not state, for example, that it had consulted with HUD, or that it had determined state regulation regarding escrow accounts, in particular, had encroached too far on the federal domain.[3] Instead, it offered several general defenses of the revised list as a whole. It asserted that the list "reflects our experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." *Id.* at 1911. It emphasized in general terms the paramount importance of "enable[ing] national banks to operate to the full extent of their powers under Federal law . . . ." *Id.* at 1908. And it claimed that preemption of some state consumer protection laws was acceptable given the

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[3] The notice of proposed rulemaking included no more detail on these questions than did the final rule. *See Real Estate Lending and Appraisals*, 68 Fed. Reg. 46,119, 46,119–32 (Aug. 5, 2003).

"scant" evidence that national banks – as opposed to the "subprime mortgage and finance companies that dominate mortgage lending" – engaged in predatory lending practices. *Id.* at 1913–14 & n.73. For the next six years, this regulation remained unchanged.

IV. Dodd–Frank

Between 2007 and 2008, the national housing market collapsed, precipitating the worst financial crisis since the Great Depression. *See generally* FIN. CRISIS INQUIRY COMM'N, *supra*. In 2010, in an effort to prevent a future collapse, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank"), Pub. L. No. 111-203, 124 Stat. 1376–2223 (2010). *See* S. Rep. No. 111-76, at 2 (2010). Three parts of the Act are relevant to this case. First, Dodd–Frank concentrated rulemaking authority over consumer-protection laws in the newly created Bureau of Consumer Financial Protection ("CFPB"). Thus, the responsibility for promulgating regulations under RESPA – previously the work of HUD – was transferred to the CFPB. *See* Dodd–Frank tit. X, 124 Stat. at 1955–2113.

Second, in an effort to "stop[] or mitigat[e] a number of abusive and deceptive practices related to escrow accounts, mortgage servicing, and appraisal practices," H.R. Rep. No. 111-94, Dodd–Frank amended the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, by enacting 15 U.S.C. § 1639d. Section 1639d requires "creditors," including national banks, to maintain mortgage escrow accounts on behalf of borrowers with federally guaranteed or insured loans (and other loans not relevant here) for a period of at least five years. *See id.* §

1639d(a)–(b); H.R. Rep. No. 111-94, at 49.[4] For all

[4] In full, subsections (a) and (b) read:

(a) In general

Except as provided in subsection (b), (c), (d), or (e), a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, shall establish, before the consummation of such transaction, an escrow or impound account for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums with respect to the property or the loan terms, as provided in, and in accordance with, this section.

(b) When required

No impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property may be required as a condition of a real property sale contract or a loan secured by a first deed of trust or mortgage on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, except when--

(1) any such impound, trust, or other type of escrow or impound account for such purposes is required by Federal or State law;

(2) a loan is made, guaranteed, or insured by a State or Federal governmental lending or insuring agency;

(3) the transaction is secured by a first mortgage or lien on the consumer's principal dwelling having an original principal obligation amount that--

(A) does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 1454(a)(2) of title 12, and the annual percentage rate will exceed the average prime offer rate as defined accounts thus mandated, section 1639d regulates the payment of interest thereon, providing, "If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." I § 1639d(g)(3).

Section 1639d became effective on January 21, 2013. *See Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1197 (9th Cir. 2018). The next day, on January 22, 2013, the CFPB promulgated a final rule implementing its provisions. *See Escrow Requirements Under the Truth in Lending Act*, 78 Fed. Reg. at 4726. In the accompanying notice of rulemaking, the agency plainly acknowledged that 1639d(g)(3) makes state escrow interest laws like GOL § 5-601 applicable to lenders. *See id.* at 4744–47 ("Depending on the State, the creditor might not have to pay interest on the money in the escrow account."). It did not, however, consider or address 1639d(g)(3)'s applicability to national banks, in particular. Nor did it discuss what preemptive significance, if any, that provision might have.

Third, in Title X, Dodd–Frank cabined the OCC's authority to wield the NBA to preempt state consumer

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in section 1639c of this title by 1.5 or more percentage points; or

(B) exceeds the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 1454(a)(2) of title 12, and the annual percentage rate will exceed the average prime offer rate as defined in section 1639c of this title by 2.5 or more percentage points; or

(4) so required pursuant to regulation.

protection laws. As relevant, it accomplished this in several ways. First, it clarified the preemption standard to be applied to such laws, providing that they

> are preempted, only if— . . . in accordance with the legal standard for preemption in [*Barnett Bank*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers . . . .

12 U.S.C. § 25b(b)(1). Second, it imposed limitations on when and to what extent the OCC could make preemption determinations. It required future "determination[s] . . . concerning the impact of a particular State consumer financial law" to be made "case-by-case" and in "consult[ation] with the [CFPB]." *Id.* § 25b(b)(3). Third, it made clear that only *Skidmore* deference applies to the OCC's preemption determinations. Specifically, it mandated that courts reviewing those determinations not give them any heightened deference, but instead assess them "depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." *Id.* § 25b(b)(5)(A).

V. The OCC's Subsequent Regulations

In 2011, acknowledging that Dodd–Frank's preemption provisions "may have been intended to change the OCC's approach," the OCC revisited its 2004 preemption regulations. *See Dodd–Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,556 (July 21, 2011). Upon review, the agency rearranged some wording, but it declined to alter its extensive list of preempted state laws, asserting that its decision to include these items was fully consistent with the "preemption standard of the Barnett decision." *Id.* As revised, the regulation now provides,

> (a) A national bank may make real estate loans . . . without regard to state law limitations concerning:
> . . .
> (6) Escrow accounts, impound accounts, and similar accounts; . . . .
> (b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with [Barnett Bank]:
> . . .
> (9) Any other law . . . that is made applicable by Federal law.

12 C.F.R. § 34.4 (2019).

Because these changes did not alter the list, the OCC believed it was not bound by Dodd–Frank's case-by-case requirement to justify its decision with respect to each category of state law on the list. *Dodd–Frank Act Implementation*, 76 Fed. Reg. at 43,557. As such, it did not consult with CFPB regarding the continued validity of the escrow account preemption regulation. And although the OCC offered justifications for some other items on the list, it once again declined to specifically explain or defend the escrow account regulation. *Id.*

VI. Plaintiffs' Mortgages

Plaintiffs in these actions have two types of mortgage escrow accounts with Bank of America, neither of which is mandatory pursuant to section 1639d.[5] In 2010 – over two

[5] In their motion papers, both sets of plaintiffs concede this point.

years before section 1639d's effective date – Cantero purchased a home in Queens Village, New York. (Cantero Am. Compl. (18-CV-4157, Doc. No. 6) at ¶ 29.) In connection with the purchase, he entered into a mortgage agreement with the Bank which required him to make monthly payments into a mortgage escrow account maintained by the Bank. (*Id.* at ¶¶ 18, 30.) The agreement provided "that the instrument 'shall be governed by Federal law and the law of jurisdiction in which the Property is located.'" (*Id.* at ¶¶ 31–32.) Cantero's mortgage loan is insured by the FHA. (Dec. 21, 2018 Letter (18-CV-4157, Doc. No. 27) at 1.)

In 2016, the Hymes Plaintiffs purchased a single-family home in East Setauket, New York. (Hymes Compl. (18-CV-2352, Doc. No. 1) at ¶ 13.) Like Cantero, they entered into a mortgage agreement with the Bank which required them to open an escrow account. (*Id.* at ¶¶ 8, 13.) And like Cantero, their agreement provided that it would be "governed by federal law and the law of New York State." (*Id.* at ¶ 43.) In addition, the agreement stated that the Bank would "not be required to pay . . . any interest or earnings on the Escrow Funds unless . . . Applicable Law requires" otherwise, and it defined "Applicable Law" as "federal law and the law of New York State." (*Id.*) Although the Hymes Plaintiffs' mortgage post-dates section 1639d's effective date, it is not insured by a state or federal agency, and it does not otherwise fall into one of the categories of loans for which section 1639d mandates escrow accounts.[6]

(*See* Hymes Opp'n (18-CV-2352, Doc. No 22) at 30; Cantero Opp'n (18-CV-4157, Doc. No. 22) at 24–27.)

[6] Counsel for the Hymes Plaintiffs conceded this at a consolidated

Plaintiffs allege that, although they have continued to make monthly payments into their escrow accounts, the Bank has not paid them any interest as required by both GOL § 5-601 and, by extension, their mortgage agreements. (Hymes Compl. at ¶ 14; Cantero Am. Compl. at ¶ 19.) They further allege that, at the time they entered into their agreements, they reasonably believed they would be paid interest, and that the Bank has known all along of its legal obligations but nonetheless has elected to not pay. (Hymes Compl. at ¶¶ 19, 33–36; Cantero Am. Compl. at ¶¶ 27–28, 58–63.)

On behalf of themselves and a putative class of similarly situated individuals, Plaintiffs assert claims for breach of contract, unjust enrichment, violation of New York General Business Law ("GBL") § 349, and violation of GOL § 5-601. (Hymes Compl. at ¶¶ 33–52; Cantero Am. Compl. at 49–92.)[7] They seek compensatory and punitive

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oral argument on the pending motions. (*See* Oral Arg. Tr. (18-CV-4157, Doc. No. 28) at 32.)

[7] Plaintiffs structure their class claims differently but, for the purposes of these motions to dismiss, the differences are immaterial. The Hymes Plaintiffs seek to represent a "New York Class" and a "Multi-State Class," which includes New York. On behalf of the former, they assert claims under New York General Business Law § 349. (Hymes Compl. at ¶¶ 33–41.) On behalf of the latter – customers of the Bank with mortgaged properties in Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Oregon, Rhode Island, and Utah – they assert claims for breach of contract and unjust enrichment. (*Id.* at ¶¶ 42–52.) Cantero seeks to represent a single all-encompassing class, which includes customers of the Bank with properties in the same 11 states plus Vermont and Wisconsin. (Cantero Am. Compl. at ¶¶ 57, 79.) In addition, Cantero seeks to assert claims under the consumer protection and escrow laws of each state, which he alleges are "substantially and materially

damages and injunctive and declaratory relief. (Hymes Compl. at 16; Cantero Am. Compl. at 15–16.)

VII. The Instant Motions to Dismiss

The Bank moves to dismiss Plaintiffs' complaints for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The Bank argues, first, that all claims must fail because the NBA preempts GOL § 5-601, and therefore it is not obligated to pay interest on mortgage escrow accounts. (Hymes Mot. (18-CV-2352, Doc. No. 19-1) at 12–29; Cantero Mot. (18-CV-4157, Doc. No. 21-1) at 13–29.) Second, following from this conclusion, it argues that Plaintiffs' breach of contract claims fail because the New York choice-of-law provisions in their mortgage agreements obviously do not incorporate preempted laws like GOL § 5-601. (Hymes Mot. at 30–31; Cantero Mot. at 32–33.) Third, it argues Plaintiffs' unjust enrichment claims are barred because their mortgage agreements cover the subject matter at issue. (Hymes Mot. at 31; Cantero Mot. at 33.) And, fourth, it argues Plaintiffs' GBL § 349 claims fail because they have not alleged the Bank engaged in deceptive acts or practices. (Hymes Mot. at 31–32; Cantero Mot. at 33–34.) The Bank does not make an argument specific to to Plaintiffs' "violation of GOL § 5-601" claims aside from its broader preemption argument.

On December 12, 2018, the parties in both *Hymes* and *Cantero* appeared before then–District Judge Joseph F. Bianco to argue the merits of the Banks' twin motions. (Oral Arg. Tr. (18-CV-2352, Doc. No. 27).) In the months

similar" to GOL § 5-601 and GBL § 349. (*Id.*) Whether these class claims can go forward will be addressed upon a motion for class certification.

since, this action has been transferred to the undersigned, and the parties have submitted supplemental letter briefs addressing various pertinent issues. The Court has considered the arguments raised in these supplemental submissions.

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint need not contain "detailed factual allegations," but it must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). That is, a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). The determination of whether "a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

In deciding a motion to dismiss, a Court may "consider matters of which judicial notice may be taken under Fed .R. Evid. 201." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). This includes "law, legislative facts, or factual matters that are incontrovertible," so long as "there is no dispute as to the authenticity of such materials." *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982). Here, given that no facts are in dispute and the issue before the Court turns purely on a question of law, the Court takes judicial notice of relevant legal authorities, legislative histories, and secondary sources.

DISCUSSION

The Court concludes that the NBA does not preempt GOL § 5-601, and therefore that the Plaintiffs' complaints state claims for breach of contract. Because Plaintiffs' contracts govern this dispute, their unjust enrichment claims must be dismissed. Moreover, the Court concludes that the complaints fail to allege deception on the part of the Bank sufficient to state claims for violation of GBL § 349, and, accordingly, those claims also are dismissed.

I. NBA Preemption

"National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *McClellan v. Chipman*, 164 U.S. 347, 357 (1896). For the past 200 years, it has been settled that "federal law [is] supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). Thus, state laws that purport to "define the[] duties or control the conduct" of national banks are preempted under the Supremacy Clause. *See Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896). This does not mean, however, that "banks or other corporations or instrumentalities of the [federal] government are to be wholly withdrawn from the operation of State legislation." *First Nat'l Bank*, 76 U.S. (9 Wall.) at 361. To the contrary, as noted above, "it is often said that we have a 'dual banking system' of federal and state regulation." *Burke*, 414 F.3d at 314 (citations omitted). For nearly as long as there has been a National Bank Act, the Supreme Court has recognized a role for state regulation. *See McClellan*, 164 U.S. at 356; *First Nat'l Bank*, 76 U.S. at 361–62. For example, national banks have historically been – and still are – subject to state contract law, tort law, criminal law, and law governing the transfer of real property. *See Watters*, 550 U.S. at 11; *McClellan*, 164 U.S. at 356; 12 C.F.R. 34.4(b).

The question whether the NBA preempts a state law "is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Barnett Bank*, 517 U.S. at 30. Sometimes, the answer is more easily gleaned, as is the case when Congress has clearly stated its intent to preempt state law or, conversely, when it has explicitly made exercise of a banking power "subject to state law." *Id.* at 31, 34 (citing examples of the latter throughout the NBA, including 12 U.S.C. §§ 36(c), 92a(a)). Often, though, Congress will not have spoken explicitly regarding the applicability of a particular state law. In this circumstance, state laws will be preempted only where Congress's preemptive intent can be implied. That is, state laws are implicitly preempted when they conflict with federal law – when adherence with both statutes is a "physical impossibility," *id.* at 31, or when "state law stands as an obstacle to the accomplishment and execution of the full purposes," *Burke*, 414 F.3d at 313–14 (citing, *inter alia*, *Barnett Bank*, 517 U.S. at 31; *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159–60 (1984)).

In general, when conducting a preemption inquiry, Courts are guided by "the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In other words, Courts typically employ a presumption against preemption. "The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Burke*, 414 F.3d at 314 (quoting *Flagg*, 396 F.3d at 183) (citations omitted). Thus, in confronting NBA preemption claims, there is a history of courts "interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32 (citations omitted).

Taking stock of this history and of the general principles of preemption, the Supreme Court in *Barnett Bank* articulated the standard for implied preemption under the NBA as follows:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [our precedents] take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers.

Barnett Bank, 517 U.S. at 33 (citing *Anderson Nat'l Bank* *v. Luckett*, 321 U.S. 233, 247–252 (1944); *McClellan*, 164 U.S. at 358; *First Nat'l Bank*, 76 U.S. at 362); *accord Watters*, 550 U.S. at 12 (reiterating *Barnett Bank*'s "prevent or significantly interfere" language). As discussed above, Congress subsequently codified this standard in the NBA. *See* 12 U.S.C. § 25b(b). Therefore, as a matter of both statutory and constitutional law, the NBA implicitly preempts a state law only if it "prevents or significantly interferes with" the national banks' exercise of their powers.

In this case, the parties agree that Congress has not explicitly spoken to whether the NBA preempts state laws, like New York's GOL § 5-601, requiring national banks to pay interest on mortgage escrow accounts. The parties further agree that, therefore, the answer turns on divining congressional intent through regulations and statutory provisions and, ultimately, through application of *Barnett Bank*.

Between them, the parties point to three sources of authority bearing on congressional intent. The first is the NBA itself, which has, for decades, endowed national banks with the power to engage in real estate lending and activities incidental thereto, but which does not specifically address escrow lending activities. *See* 12 U.S.C. §§ 24 (Seventh), 371(a). The second is the OCC's preemption regulations, first promulgated in 2004, interpreting the NBA to permit lending "without regard to state law limitations concerning . . . [e]scrow accounts, impound accounts, and similar accounts," but saving state laws "made applicable by Federal law." 12 C.F.R. § 34.4(a), (b)(9). The third is the 2010 Dodd–Frank Act, in which Congress simultaneously cabined the authority of the OCC to make preemption determinations and provided, in law not subject to OCC oversight, that mortgage lenders must pay interest on certain categories of mortgage escrow accounts "[i]f prescribed by applicable State or Federal law." *See* 12 U.S.C. § 25b; 15 U.S.C. § 1639d(g)(3). This case turns on the meaning of these three authorities.

It should be noted that this appears to be a question of first impression everywhere other than in the Ninth Circuit. There, in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018), the Court of Appeals concluded that the NBA does not preempt California's analogue to GOL § 5-601. The Court reasoned that section 1639d(g)(3) "expresses Congress's view that" escrow interest laws "would not necessarily prevent or significantly interfere with a national bank's operations," and therefore that, under *Barnett Bank*, the NBA did not preempt the California law. *Id.* at 1194–95. With respect to the OCC's 2011 preemption regulations, the Ninth Circuit found them to be "entitled to little, if any, deference," given that the agency failed to meaningfully revise them after Dodd–Frank repudiated the agency's approach to preemption. *Id.* at 1193. This Court finds *Lusnak* persuasive and reaches the same result; however, this Memorandum and Order stands on its own.

Turning to the parties' arguments, the Bank contends that the NBA and the OCC's preemption regulations each independently preempt GOL § 5-601 under a straightforward of *Barnett Bank*. (Hymes Mot. at 14–23; Cantero Mot. at 14–24.) Dodd–Frank, it asserts, did not change things: The preemption regulations continue to be entitled to deference, and section 1639d(g)(3) simply does not require compliance with preempted state laws because a preempted law cannot be an "applicable" one within the meaning of that provision. (Hymes Mot. at 23–29; Cantero

Mot. at 24–29.) In support of its arguments, the Bank points to an OCC amicus brief which was originally filed in support of the Bank's unsuccessful motion for en banc review of the Lusnak decision. (*See* OCC Brief (18-CV-2352, Doc. No. 19-2).) As relevant, the OCC brief contends, based on its interpretation of case law, that the Bank's positions are correct and the OCC's preemption regulations "directly address[] the issue in this case." (*Id.* at 13–25.)

Plaintiffs respond to each of these arguments in turn. They contend that, although the NBA grants real estate lending powers, GOL § 5-601's modest directive to pay interest on mortgage escrow accounts does not "significantly interfere" with those powers. (Hymes Opp'n (18-CV-2352, Doc. No. 22) at 18–24; Cantero Opp'n (18-CV-4157, Doc. No. 22) at 9–20.) With respect to section 1639d(g)(3), Plaintiffs dispute the Bank's interpretation of "applicable" and argue that, by enacting this provision, Congress signaled its view that laws like GOL § 5-601 could coexist with existing federal banking regulations. (Hymes Opp'n at 24–25; Cantero Opp'n at 22–24.) It follows from this, Plaintiffs argue, that the preemption regulations' exception for state law made applicable by federal law encompasses GOL § 5-601. And they add that the OCC's relatively unexplained determination that the NBA preempts all "limitations on escrow accounts" is not entitled to significant deference. (Hymes Opp'n at 26–30; Cantero Opp'n at 20–22.)

Before applying *Barnett Bank*, it is necessary to resolve the parties' interpretive disagreements regarding the statutory scheme and the OCC's preemption regulations. The Court begins with the statutes.

A. NBA, RESPA, and Dodd–Frank

Although the NBA does not itself explicitly address national banks' power to administer mortgage escrow accounts, Congress has not left the subject untouched. Since 1974, RESPA has governed the amounts mortgage lenders, including national banks, may require be deposited in escrow. *See* 12 U.S.C. §§ 2601(a), 2609. And since 1974, Congress has devolved oversight of RESPA upon agencies other than the OCC – to HUD from 1974 to 2010, *see* 88 Stat. at 1274, and to the CFPB thereafter, *see* 124 Stat. at 1965.

The significance of this to the case at hand is twofold. First, it is clear evidence that Congress intended mortgage escrow accounts, even those administered by national banks, to be subject to some measure of consumer protection regulation. Although RESPA is not the same sort of regulation as GOL § 5-601, the two share a unity of purpose. Both are directed to limiting the extent to which borrowers may be separated from control over their money. RESPA limits the amount initially demanded; GOL § 5-601 requires that a modest interest be paid on the amount retained.

Second, RESPA – and all other mortgage-lending legislation dating back to the New Deal – shows that the regulation of the mortgage industry has long transcended the confines of the NBA. Historically, national banks have not been the largest participants in the national mortgage business. Federally chartered savings and loan associations, mortgage companies, statechartered banks, and other entities have all, at various times, claimed a significant share of the market. *See* Kenneth A. Snowden, RESARCH INST. FOR HOUS. AM., *Mortgage Banking in the United States*, 1870–1940, at 86 tbl.25 (2014) (listing types of mortgage lender by share of mortgage originations from 1936 to 1939); Peter S. Rose & Richard L. Haney, Jr., *The Players in the Primary Mortgage Market*, 1 J. HOUSING RES. 91, 93 tbl.2 (1990) (listing types of mortgage lender by share of single-family loan originations from 1970 to 1989). In 1974, it would have made no sense for Congress to assign federal regulation of mortgage escrow accounts to the agency charged with oversight of only a fraction of the mortgage market. Nor, for example, would this have made sense in 1968, when Congress enacted TILA to regulate all "creditors." *See* Pub. L. No. 90-321, §§ 103, 105, 82 Stat. 146, 147–48 (1968) (delegating rulemaking authority to the Federal Reserve Board).[8]

In Dodd–Frank, Congress continued this approach with a newfound urgency, enacting a battery of new consumer protection laws applicable to all mortgage lenders and consolidating the power to administer them in the CFPB. One such law was section 1639d, which makes mortgage escrow accounts mandatory for large swaths of loans for a minimum of five years, and which requires creditors to "pay interest to the consumer on the amount held in any impound, trust, or escrow account" "[i]f prescribed by applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). The meaning of this provision would appear to be straightforward. Recognizing that escrow accounts offer borrowers "protection against tax liens and the forced placement of insurance," but, at the same time, that such accounts have long been subject to "RESPA and, if

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[8] TILA struck a balance, delegating the authority to promulgate regulations to the Federal Reserve Board (and, after Dodd–Frank, the CFPB), but delegating enforcement to several different agencies based on their expertise and purview. *See* 15 U.S.C. § 1604(a); 82 Stat. at 148. Thus, it vested the OCC with the power to enforce TILA against, *inter alia*, national banks. *See* 12 U.S.C. § 1813(q); 15 U.S.C. § 1607(a)(1)(A).

applicable, State law," Congress sought to strike a balance: it would require establishment of such accounts, subject to various restrictions and requirements imposed by RESPA and state law. *See* H.R. Rep. No. 111-94, at 49, 53.

The Bank, however, vigorously disputes this interpretation as applied to national banks. It argues that "applicable" means, at least in part, "not preempted." Therefore, to the extent state laws like GOL § 5-601 are preempted by the NBA, they are not incorporated into section 1639d(g)(3) and, consequently, that provision has no bearing on this case. (Hymes Mot. at 25–26; Cantero Mot. at 26–27.) It could not be otherwise, says the Bank, because had Congress intended to "modify" its approach to NBA preemption, thereby permitting state escrow interest laws to govern national banks, it would have done so more explicitly. (Hymes Mot. at 25–26; Cantero Mot. at 26–27.)

The Court is not persuaded that Congress intended "applicable" to create a massive preemption-based exemption for national banks. For the reasons set forth below, the Court concludes that the better reading of section 1639d(g)(3) is that it has nothing to say about preemption one way or the other – that, when Congress wrote the statute and used "applicable" before "State or Federal law," it was not concerned with NBA preemption. Rather, it appears Congress meant "applicable" simply to mean "relevant."

To begin with the text, the Bank takes a too-narrow view of the statute's plain meaning. *See, e.g., Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019) ("We begin with the text."). Citing Webster's II New College Dictionary (1999), the Bank defines "applicable" as "able to be applied; appropriate." (Hymes Mot. at 25; Cantero Mot. at

26.) From here, it concludes that, since preempted laws of course are not "able to be applied," "applicable" must mean "not preempted." (Hymes Mot. at 25; Cantero Mot. at 26.) The year after Dodd–Frank's enactment, however, the Supreme Court defined "applicable" more broadly and flexibly to mean '"capable of being applied: having relevance' or 'fit, suitable, or right to be applied: appropriate.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105 (2002)). The task here is to choose among these various meanings.

"The general rule is that the 'meaning of a word, and, consequently, the intention of the legislature,' should be 'ascertained by reference to the context.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 231 (2008) (quoting *Neal v. Clark*, 95 U.S. 704, 709 (1878)). "[A] word is given more precise content by the neighboring words with which it is associated*." United States v. Williams*, 553 U.S. 285 (2008). Here, although the surrounding words in section 1639d(g)(3) do little to pinpoint a meaning, they at least suggest that Congress was not thinking in terms of preemption. The provision twice refers to "applicable State or *Federal* law," which can quite naturally be read such that "applicable" modifies "Federal law," and which at best is ambiguous as to which words "applicable" modifies. Had Congress been concerned with preemption – which, of course, does not limit federal laws – it is unlikely it would have taken this approach.[9]

[9] Focused on the Lusnak decision, the Bank points to other language in section 1639d. In *Lusnak*, the Ninth Circuit concluded "that [Congress] used the term 'applicable' to refer to state escrow interest laws where they exist" – i.e., to account for the fact that, at the time, only approximately a dozen states had

Turning to section 1639d as a whole, "applicable" appears ten times. In the majority of these instances, it is best read as meaning "relevant" or "having relevance," and not "able to be applied." For example, it mandates creating escrow accounts "for the payment of taxes and hazard insurance, and, if applicable" – i.e., if relevant – "flood insurance, mortgage insurance, ground rents, and any other required periodic payments." *See* 15 U.S.C. § 1639d(a); *see also id.* § 1639d(h)(3)–(5).[10] Elsewhere, the statute refers to "residence[s] of the applicable size" – *i.e.*, relevant or appropriate size. *Id.* § 1639d(b)(3)(A)–(B). It would make no sense in either of these contexts for "applicable" to mean "able to be applied." Nor would it make sense at all for "applicable" to have anything to do with preemption.[11]

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escrow interest laws. *Lusnak*, 883 F.3d at 1195. The Bank argues this must be wrong because "Congress accounted for the absence of escrow interest laws in some states not with the word 'applicable,' but with the phrase '[i]f prescribed by,'" which appears at the very beginning of section 1639d(g)(3). (Hymes Mot. at 25–26; Cantero Mot. at 26–27.) For "applicable" to mean what the *Lusnak* court says it does, contends the Bank, would render "[i]f prescribed by" surplusage. (Hymes Mot. at 25–26; Cantero Mot. at 26–27.) Because the Court does not interpret "applicable" the same way the Ninth Circuit did, it need not address this argument. It suffices that the Court's reading of "applicable" to mean "relevant" is perfectly compatible with the Bank's chosen reading of "[i]f prescribed by."

[10] This usage repeats later in the statute, where "if applicable" is appended to references to premiums on optional insurance policies. *See id.* § 1639d(h)(3)–(5).

[11] The other two usages in section 1639d are not to the contrary. One refers to "the law of the State, if applicable," which, just as the passage at issue, is susceptible to being interpreted as either "relevant" or "able to be applied." *See* 12 U.S.C. §

Usage of "applicable" throughout the Act further reinforces the Court's interpretation. "It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571, (2012) (internal quotation marks omitted) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)). Dodd–Frank repeatedly uses "applicable" to qualify references to state law, federal law, or both. In every instance, reading "applicable" to mean "relevant" makes sense; whereas reading it to mean "able to be applied" and "not preempted" does not. Indeed, the statute sometimes inverts the language in section 1639d(g)(3) and refers to "applicable Federal or State law." *See* 124 Stat. at 1451. More pertinently, sometimes it simply refers to "applicable Federal law." *See id.* § 210(a)(16)(D)(ii). It cannot be the case that Congress nonsensically meant to invoke federal law only to the extent it is not preempted.[12]

Next, the Court's interpretation is supported by "the broader structure of the Act." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). As the Bank correctly points out, Congress knew how to address preemption when it wanted to. (Hymes Mot. at 26; Cantero Mot. at 27.) Subtitle D of Title X is named "Preservation of State Law," and it establishes rules for when state laws are and

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1639d(g)(2)(C). The other refers to "applicable fees or costs" associated with not creating an escrow account or with closing an escrow account. *Id.* § 1639d(j)(2)(A). This, too, is susceptible of two interpretations.

[12] 2 Beyond these examples, "applicable" appears nearly 350 times throughout the Act. The Court does not attempt to catalogue all usages here. It suffices to say that, upon careful review of a significant number of them, it is rarely if ever the case that "applicable" could not naturally be read to mean "relevant."

are not preempted. (Incidentally, this subtitle never once uses the phrase "applicable State law.") For example, Subtitle D deprives state attorneys general of the power to enforce the Act against national banks in all but some limited circumstances. *See* 124 Stat. at 2012. Section 1639d, and the title in which it is located (Title XIV), does none of these things. Pursuant to its zero-sum approach, the Bank argues that because section 1639d(g)(3) lacks an "explicit statement" of intent to not preempt state laws, it must mean that the provision instead intended to preserve existing preemption rules. But, as the foregoing discussion shows, it is possible and in fact more likely that, in enacting section 1639d, Congress meant nothing with respect to preemption at all.

Although not necessary to the Court's conclusion, legislative history also supports reading section 1639d(g)(3) as the Court does – as not containing a relatively hidden exemption to a mortgage lending rule for the nation's largest mortgage lenders. As detailed earlier in this Order, Congress was acutely aware of the benefits of mortgage escrow accounts, particularly for subprime borrowers, and the risks of issuing home loans without them. *See* H.R. Rep. No. 111-94, at 49, 53–54; *see also Lusnak*, 883 F.3d at 11985. In seeking to increase the use of such accounts, the House Report noted that they must be administered "in accordance with [RESPA], . . . and, if applicable, the law of the State where the real property securing the transaction is located, including making interest payments on the escrow account if required under such laws." *Id.* at 91. Nothing in this passage – other than the Bank's ill-fitting reading of "applicable" – suggests Congress intended to exempt national banks, who as of 2010 controlled a majority of the mortgage lending market, from this directive.

Bank of America argues that, because "the worst subprime loans were originated by nonbank lenders," section 1639d "was aimed primarily at subjecting these nonbank entities' mortgage lending practices to minimum federal consumer protection standards." (Hymes at 26–27 (citations omitted).) As the Bank surely knows, however, by 2010, many of these nonbank lenders were no longer in business. Two years before, the Bank itself had purchased the largest such lender: Countrywide Financial Corporation. *See* FIN. CRISIS INQUIRY COMM'N, *supra*, at 22. It would have made little sense for Congress to regulate in 2010 as if it were still 2006.

Finally, although the CFPB has not definitively issued a regulation interpreting section 1639d(g)(3), it bears noting that its final rulemaking gives no hint that it believed national banks would be exempted from state escrow interest laws. In a detailed analysis of the rationale for the interest requirement, the notice of rulemaking does not make any distinction between national banks and other creditors. *See* Escrow Requirements Under the Truth in Lending Act, 78 Fed. Reg. at 4726–57. Although it frequently notes that many creditors will not be required to pay interest, the notice attributes this to the fact that some states do not have interest laws – not to the fact that some creditors will be exempt given principles of preemption. Thus, it acknowledges, "[d]epending on the State, the creditor might not be required to pay interest," and "[u]nder some State regulations, creditors are not required to pay interest." *Id.* at 4745, 4757; *accord Lusnak*, 883 F.3d at 1195 (quoting the same language).

In sum, the text and structure of section 1639d, and Dodd–Frank more broadly, compel the conclusion that by "applicable State or Federal law," Congress meant "relevant State or Federal law," and that Congress did not intend to create a preemption-based exception for national banks. Thus, although section 1639d(g)(3) does not govern the specific loans at issue in this case, it is nonetheless significant, for it evinces a clear congressional purpose to subject *all* mortgage lenders to state escrow interest laws. As this section began by explaining, this purpose is not surprising. Indeed, it is wholly consistent with the history of mortgage-lending regulation in this country, and with the limited history of mortgage escrow account regulation from RESPA's enactment to the present. Congress has determined, again and again, to subject lenders, including national banks, to reasonable consumer protection laws. Especially after the post-crisis consolidation of the mortgage-market in the hands of a few large national banks, it would be perverse to interpret Congress's latest regulatory effort as obliquely exempting those banks. This conclusion does not end the preemption inquiry. It merely informs it, giving insight into Congress's intent.

B. The OCC's Preemption Regulations

The preemption inquiry is also informed by the OCC's regulations. Where the agency has issued regulations preempting state law, "[t]he proper focus" is on the content of those regulations. *See Burke*, 414 F.3d at 314. The deference owed to the agency, however, differs based on the substance of the regulation. Regulations that reflect the agency's informed interpretation of its organic statute are entitled to *Chevron* deference. *See, e.g., id.* at 315–18 (applying *Chevron* to OCC regulations granting banks the power to conduct banking activities through subsidiaries, subject to the same level of state regulation as the parent bank); *accord Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Such regulations are binding on courts so long as they represent "a permissible construction of" an ambiguous statute. *Chevron*, 467 U.S. at 842. Regulations that reflect the "agency's conclusion that . . . state law is pre-empted" receive lesser, *Skidmore* deference. *See Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Such regulations guide the court's inquiry only to the extent of their "thoroughness, consistency, and persuasiveness." *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Here, the OCC's preemption regulations, codified at 12 C.F.R. § 34.4, plainly fall into the latter category. *See Lusnak*, 883 F.3d at 1192 ("The Supreme Court . . . has indicated that regulations of this kind should receive, at most, *Skidmore* deference . . . ."). The Bank resists this conclusion, pointing to *Wachovia Bank, N.A. v. Burke*, a 2005 case in which the Second Circuit gave section 34.4 *Chevron* deference. (Hymes Mot. at 23; Cantero Mot. at 23–24.)[13] But *Burke* is not fully apposite, and subsequent events have undermined aspects of its approach. First, *Burke* pre-dated the Supreme Court's 2009 decision in *Wyeth v. Levine*, in which the Court made clear that agency conclusions about preemption should receive only *Skidmore* deference. *See* 555 U.S. at 576. Second, *Burke* also pre-dated Dodd–Frank, in which Congress effectively applied *Wyeth* to the OCC, mandating that courts "assess the validity of [the agency's preemption] determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning

[13] The Bank may have intended to retreat from this position at oral argument when it argued that, under either *Skidmore* or *Chevron*, section 34.4 is entitled to deference. (*See* Oral Arg. Tr. at 46.) In an abundance of caution, however, the Court assumes it did not.

of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." 12 U.S.C. § 25b(b)(5)(A). Third, *Burke* involved section 34.4 and a collection of other regulations which, together, interpreted the NBA to empower national banks to carry on the full panoply of banking activities through their subsidiaries. *See Burke*, 414 F.3d at 311–13 (describing the framework created by 12 C.F.R. §§ 5.34, 7.4000, 34.1, 34.4 (2005)). There is no analogous regulatory scheme in this case. Accordingly, the Court will afford section 34.4 *Skidmore* deference – deferring to it only to the extent it is persuasive.

Section 34.4 has two subsections: 34.4(a), which contains the list of preempted state laws, and 34.4(b), which sets out a competing list of state laws that are not preempted to the "extent consistent" with *Barnett Bank*, including any law that is "made applicable by Federal law." 12 C.F.R. § 34.4. Subpart (b) is unambiguous, and it plainly applies here. Section 1639d(g)(3) is a "Federal law" and, as explained at length in the preceding section, it makes GOL § 5-601 "applicable" to national banks. Under subpart (b), then, whether GOL § 5-601 is preempted turns on a straightforward application of *Barnett Bank*.

The Bank and the OCC say that subpart (a) supplies just that application, but the Court is not convinced. As the Ninth Circuit explained at length in *Lusnak*, there no evidence that, when the agency first promulgated the regulations in 2004, it had engaged in a careful, considered analysis of whether the NBA preempts state laws limiting escrow accounts. *See Lusnak*, 883 F.3d at 1192–94 ("The OCC did not conduct its own review of specific potential conflicts on the ground."). Nor is there evidence that, at this time, the agency gave any thought whatsoever to the specific question raised in this case, which is whether the NBA preempts *escrow interest laws*. The agency's proposed and final rulemakings do not offer a specific rationale for preempting state laws limiting escrow accounts, and they do not even mention escrow interest laws. *See Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1911–14 (notice of final rule); *Real Estate Lending and Appraisals*, 68 Fed. Reg. at 46,119–32 (notice of proposed rule).[14]

The agency's 2011 regulations, which updated the 2004 regulations in the wake of Dodd–Frank, did nothing to remedy this oversight. Explaining that it had "re-reviewed" the list of preempted state laws "to confirm that the specific types of laws cited in the rules are consistent with the standard for conflict preemption," the OCC declined to amend the list. *Dodd–Frank Act Implementation*, 76 Fed. Reg. at 43,557. But, once again, the agency did not get more specific. It failed to explain why or to what extent the NBA preempted state laws limiting escrow accounts, and it did not mention escrow interest laws. It is therefore difficult to conclude that the OCC has ever considered the question before the Court. And to the extent it has, its regulations do nothing to persuade the Court that it answered the question thoughtfully or carefully. *See* 12 U.S.C. § 25b(b)(5)(A); *Wyet*h, 555 U.S. at 576.

Urging the opposite conclusion, the Bank points to two

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[14] This is not to question the persuasiveness of the 2004 regulations more generally, which the Second Circuit, applying a greater level of deference pre-*Wyeth* and Dodd–Frank, found to be reasonable. *See Burke*, 414 F.3d at 320–21. The point is that, with respect to mortgage escrow accounts generally and state escrow interest laws more specifically, the 2004 rulemakings did not say anything at all.

other categories on the list of preempted state laws, those limiting "[t]he terms of credit," and those limiting "the ability of a creditor to require or obtain . . . risk mitigants," and it argues both should be read to encompass escrow interest laws. (*See* Hymes Mot. at 21 (quoting 12 C.F.R. 34.4(a)(2), (4), (6)); Cantero Mot. at 22 (same).) But these categories suffer from exactly the same deficiencies the "escrow accounts" category does. They are strikingly broad, and nothing about them suggests that the OCC considered whether, under *Barnett Bank*, the NBA preempts state escrow interest laws.

To the extent the Bank is instead arguing that subsection (a) represents the OCC's considered view that all state laws that could even arguably affect terms of credit, risk mitigants, or escrow accounts are preempted, the Court disagrees. Such a blunderbuss approach to preemption would run headlong into Dodd–Frank. Through that Act, Congress limited the OCC's power to effect preemption by prescribing *Skidmore* deference for all preemption determinations and mandating that future determinations affecting state consumer protection laws be made on a case-by-case basis in consultation with the CFPB. *See* 12 U.S.C. § 25b(b)(1)(B), (b)(3), (b)(5)(A). Congress also consolidated the power to administer consumer protection laws in the CFPB, and it decided that, in some instances, state laws should govern. *See* 15 U.S.C. § 1639d(g)(3). The Court cannot subscribe to reading section 34.4 as thoroughly disregarding these developments.

Finally, the Court is not persuaded by, and has no obligation to defer to, the view expressed in the OCC's Ninth Circuit amicus brief that "12 C.F.R. § 34.4[] directly addresses the issue in this case." (OCC Brief at 17.) First, the Ninth Circuit implicitly declined to defer to the agency's interpretation when it rejected the Bank's petition for en banc review. Second, under *Auer v. Robbins*, 519 U.S. 452 (1997), agency interpretations of their own regulations "become[] of controlling weight unless . . . plainly erroneous or inconsistent with the regulation[s]." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *accord Auer*, 519 U.S. at 461. But as the Supreme Court has very recently explained, there are several important exceptions to *Auer*. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019). One of them applies when the agency's interpretation does not "in some way implicate its substantive expertise." *Id.* at 2417. Then, the agency's interpretation merits deference only to the extent it has the "power to persuade." *Id.* at 2414. Here, the OCC's interpretation does not in any way implicate the agency's substantive expertise. It is based almost exclusively on the agency's analysis, in the brief, of relevant case law. (OCC Brief at 13–25.) Analysis of case law, as a general rule, falls squarely within the expertise the federal courts, not agencies. *See, e.g., New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997) ("[A]n agency has no special competence or role in interpreting a judicial decision."); *cf. Kisor*, 139 S. Ct. at 2417 ("Some interpretive issues may fall more naturally into a judge's bailiwick."). And when it comes to the OCC in particular, Congress has made it abundantly clear that courts are not to give any heightened deference to the agency's views on NBA preemption. *See* 12 U.S.C. § 25b(b)(5)(A); *cf. Kisor*, 139 S. Ct. at 2414 ("[W]e presume that Congress intended courts to defer to agencies when they interpret their own ambiguous rules. But when the reasons for that presumption do not apply . . courts should not give deference . . . ."). Moreover, the one short sentence in the brief which speaks to the OCC's deliberative process in enacting section 34.4 – "[b]y the time of the promulgation of the 2004 regulations, the OCC's judgement had been informed by several years of litigation experience," (OCC Brief at 18) – does nothing but parrot the 2004 rulemaking, and it does not provide specific support for the OCC's interpretation of section 34.4. *See Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908 ("As we have learned from our experience supervising national banks, . . . by the extent of litigation in recent years . . . national banks' ability to conduct operations . . . has been curtailed . . . ."). Accordingly, the OCC's amicus brief is relevant here only to the extent it is persuasive, and for the reasons already explained in this section, the Court does not find its interpretation of section 34.4 persuasive.

The Court concludes that section 34.4 does not preempt GOL § 5-601, and, as a guide to congressional intent on the narrow question at hand, it has little to offer. In subpart (b), the regulation unambiguously exempts state laws "made applicable by Federal law," leaving the question of their preemption up to an individualized application of *Barnett Bank*. 12 C.F.R. § 34.4(b). In subpart (a), the regulation fails to supply that individualized application. There is little evidence to suggest the OCC's decision to retain "escrow accounts" on the list after Dodd–Frank was the product of reasoned judgment, and there is no evidence whatsoever to suggest the OCC considered escrow interest laws when drafting or revising that provision. Thus, the only clear directive from the OCC is to apply *Barnett Bank*. It is to this task that the Court now turns.

C. Application of Barnett Bank

Barnett Bank holds that state laws which "prevent or significantly interfere" with banking powers are preempted. In its most recent recitation of the standard, the Supreme Court described it thus:

> States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.

Watters, 550 U.S. at 12 (citing *Barnett Bank*, 517 U.S. at 32–34; *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 377–79 (1954)). The analysis proceeds in two steps. The Court must first determine what banking powers are at issue. Then, it must determine whether state law prevents or significantly interferes with the exercise of those powers. *See Barnett Bank*, 517 U.S. at 30.

Here, the Court agrees with the Bank that the specific banking power at issue is "the power to provide escrow services." (Hymes Mot. at 15; Cantero Mot. at 16.) Section 371 authorizes national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate," 12 U.S.C. § 371(a), and section 24 grants them "all such incidental powers as shall be necessary to carry on the business of banking," *id.* § 24 (Seventh). Although neither the NBA nor its formal implementing regulations get more specific, the OCC has, since at least the late 1990s, interpreted these statutory grants to authorize banks to "provide real estate closing and escrow services to their loan or title policy customers as activities that are part of or incidental to the business of banking." OCC Corporate Decision No. 99-06, 1999 WL

74103, at *2 (citing 12 U.S.C. § 24 (Seventh)). This makes sense as a matter of practice and policy. As the Bank points out, "[b]anks often are unwilling to make secured mortgage loans without these escrow accounts." (Hymes Mot. at 15 (citing Bruce E. Foote,CONG. RESEARCH SERV., 98-979, MORTGAGE ESCROW ACCOUNTS: AN ANALYSIS OF THE ISSUES 1 (1998)); Cantero Mot. at 16 (same).) And in the wake of the consolidation of the mortgage market in the hands of national banks and Dodd–Frank mandating the creation of escrow accounts for a significant share of that market, it is untenable to think national banks lack the power to maintain such accounts.

The question then becomes whether GOL § 5-601 "significantly interferes with" (no one argues it "prevents") banks' exercise of their power to administer mortgage escrow accounts. The Supreme Court has never explained in detail what this standard entails. At minimum, obviously, state laws that merely affect or minimally impact the exercise of banking powers are not preempted. As noted earlier, national banks are subject to an array of state laws – contract law, tort law, criminal law, law regarding the transfer of real property – which apparently fall into this category. *See* 12 C.F.R. § 34.4(a); *see also McClellan*, 164 U.S. at 358 (holding law governing real estate transfers not preempted). The interference must be "significant" in a way these laws are not. The standard's different linguistic formulations bear this out – *Barnett Bank* favorably cited cases framing the question as whether the state law "unlawfully encroaches" or "destroys or hampers" the exercise of banking power. *Barnett Bank*, 517 U.S. at 33–34 (citations omitted).

A closer examination of precedent further illuminates the standard's contours. For example, in *Anderson National Bank v. Luckett*, one of the principal cases on which *Barnett Bank* relied, the Supreme Court upheld a Kentucky escheat law requiring banks "to turn over to the state, deposits which have remained inactive and unclaimed for specified periods," and to "file reports of inactive accounts" with the state. 321 U.S. at 236, 252–53. The banking power with which it interfered was the authorization, in 12 U.S.C. § 24 (Seventh), to "receiv[e] deposits." But the Supreme Court concluded the interference was minimal, reasoning that the state law would not "deter [customers] from placing their funds in national banks." *Id.* at 252. The Court continued, "It cannot be said that it would have that effect, more than would the tax laws, the attachment laws, or the laws for the administration of estates of decedents . . . which a state may maintain and apply to depositors in national banks." *Id.*

In *Franklin National Bank of Franklin Square v. New York*, another case relied on by *Barnett Bank*, the Supreme Court again considered a state law that interfered with the power to "receive deposits," but it reached a different conclusion. 347 U.S. 373. The challenged New York statute prohibited national banks, other than savings banks, from using the words "'saving' or 'savings,' or their equivalent in relation to [their] banking or financial business," or "in any way solicit[ing] or receiv[ing] deposits as a savings bank." *Id.* at 374–75. In other words, whereas the NBA expressly authorized banks to receive deposits, state law prevented them from in any way communicating this fact to prospective customers. Finding the state statute to be preempted, the Court observed that it could not subscribe to "an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Id.* at 377–78.

Barnett Bank itself is of a piece with *Franklin National Bank*. In *Barnett Bank*, the federal provision at issue authorized national banks located in small towns to "act as the agent for any fire, life, or other insurance company authorized by the authorities of the State . . . by soliciting and selling insurance." *Barnett Bank*, 517 U.S. at 28 (quoting Act of Sept. 7, 1916, 39 Stat. 753) (alterations in original). A competing Florida statute directly prohibited the exercise of this power by barring insurance agents associated with "financial institutions" from operating within the state. *Id.* at 29. The Court had little trouble finding that this law significantly interfered with federal purposes.[15]

Applying these precedents, the Court concludes GOL § 5-601 does not "significantly interfere" with national banks' power to administer mortgage escrow accounts. Compared to the state laws in *Barnett Bank* and *Franklin National Bank*, GOL § 5-601's degree of interference is minimal. It requires the Bank to pay interest on the comparatively small sums deposited in mortgage escrow accounts. It does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use. As a court interpreting GOL § 5-601 shortly after its enactment put it, "All New York State has done is to act upon funds which are kept by [the Bank] for the ultimate benefit of the

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[15] The primary analytical question in *Barnett Bank* was not what constitutes "significant interference" – as noted, the case dedicates little attention to elaborating that phrase – but instead whether the federal statute, in using permissive language (as in, "you may sell insurance") rather than mandatory language ("you must sell insurance") imparted only a limited power that was subject to state regulation. *Barnett Bank*, 517 U.S. at 31–33. The Court concluded it did not. *Id.*

original homeowner-mortgagor." *Nat'l Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364, 1369 (S.D.N.Y. 1975).

Unlike in *Barnett Bank* and *Franklin National Bank*, the cost of compliance with the state law is not practical abrogation of the banking power at issue. As the Bank concedes, it could continue to make escrow accounts available and either "use other means" to mitigate credit risk or "do nothing and assume greater risk." (Hymes Mot. at 17; Cantero Mot. at 18.) National banks already do these things to accommodate other, not-preempted state laws. Foreclosure law, for example, which has "historically . . . been within a state's purview," *Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1212 n.59, has a direct impact on credit risk. *See generally* Cem Remiroglu et al., *State Foreclosure Laws and the Incidence of Mortgage Default*, 57 J.L. & ECON. 225 (2014) (measuring the relation between various state foreclosure schemes and rates of default). There is nothing to suggest that compliance with mortgage escrow interest laws would more significantly interfere with national banking powers than compliance with foreclosure laws already does. *See Luckett*, 321 U.S. at 252. Nor does it appear that, by passing the credit risk back to customers by raising fees or rates, the Bank would thereby lose significant business. Wells Fargo, one of its largest competitors and a fellow national bank, already complies with GOL § 5-601 and its analogues in other states.

Of course, compliance with GOL § 5-601 will cost the Bank money, as will compliance with its analogues in other states. But as the Supreme Court's precedents illustrate, "significant interference" is not a question of cost – it is not this Court's role to determine the bottom-line impact of escrow interest laws on the business operations of national banks, or to allocate the benefits of mortgage lending between borrower and lender. Such policy judgments are the domain of legislatures. The "significant interference" test is a question of law. It asks the Court, simply, to determine whether the power specifically authorized by Congress may be exercised relatively unimpaired and unhampered by the state law. *See Barnett Bank*, 517 U.S. at 33–34. In *Barnett Bank* and *Franklin National Bank*, application of the state law would have practically nullified a specific grant of power. Here, there is no evidence that application of GOL § 5-601 would cause anything approaching this level of interference.

Moreover, through Dodd–Frank, Congress has explicitly required creditors, including national banks, to pay interest in accordance with state laws to a broad swath of borrowers. *See* 15 U.S.C. § 1639d(g)(3). Given that the purpose of a preemption inquiry is to congressional intent, *see Barnett Bank* 517 U.S. at 30, the Court cannot disregard the latest word from Congress. As discussed earlier, this is not to say that, through section 1639d, Congress announced that the NBA would never preempt state escrow interest laws. *See supra*, section I.A. A state escrow interest law "setting punitively high rates" could very well significantly interfere with national banks' power to administer escrow accounts. *See Lusnak*, 883 F.3d at 1195 n.7. Rather, section 1639d evinces a policy judgment that there is little incompatibility between requiring mortgage lenders to maintain escrow accounts and requiring them to pay a reasonable rate of interest on sums thereby received. *Cf. id.* at 1194–95 (observing that section 1639d "expresses Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations"). It is this Court's job to give effect to that judgment.

The cases the Bank cites are all distinguishable on this ground; none featured a law like section 1639d(g)(3). Instead, exemplifying the typical NBA preemption case, they relied on comprehensive OCC rules, interpretive letters, and the like to discern congressional intent. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 723–24 (9th Cir. 2012) (relying on 12 C.F.R. § 7.4002 and subsequent OCC interpretive letters); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197–98 (11th Cir. 2011) (relying on 12 C.F.R. § 7.4002); *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 280–81, 283 (6th Cir. 2009) (relying on 12 C.F.R. § 7.4002); *Rose v. Chase Bank, USA, N.A.*, 513 F.3d 1032, 1035–36 (9th Cir. 2008) (relying on 12 C.F.R. § 7.4008); *SPGGC v. Ayotte*, 488 F.3d 525, 531–33 (1st Cir. 2007) (relying on 12 C.F.R. § 7.5002 and subsequent OCC bulletins); *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 490–93 (5th Cir. 2003) (relying on 12 C.F.R. § 7.4002); *Bank of America v. San Francisco*, 309 F.3d 551, 561–64 (9th Cir. 2002) (relying on 12 C.F.R. §§ 7.4002, 7.4003 and subsequent OCC interpretive letters). Or they relied on the plain language of the NBA itself. *See Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 352 (2d Cir. 2008) (relying on the express grant of power in 12 U.S.C. § 85).

Moreover, even setting aside section 1639d(g)(3), nearly all of these cases are distinguishable on the ground that they featured a conflict between national banks' power to set fees and state laws directly restricting or eliminating that power. *See Gutierrez*, 704 F.3d at 717 (overdraft fees); *Baptista*, 640 F.3d at 1194 (check-cashing fees); *Monroe Retail*, 589 F.3d at 283–84 (garnishment processing fees at one dollar); *James*, 321 F.3d at 488 (check-cashing fees); *San Francisco*, 309 F.3d at 556

(ATM fees).[16] As for the remaining two cases, both of which were decided before Dodd–Frank, they are simply not instructive as to what constitutes "significant interference." *See Rose*, 513 F.3d at 1036–38; *Ayotte*, 488 F.3d at 528–33. In *SPGGC v. Ayotte*, the First Circuit concluded that a New Hampshire law prohibiting selling gift cards under $100 if they were subject to fees and expiration dates "significantly interfered" with national banks' power to issue gift cards. 488 F.3d at 528–33. And *Rose v. Chase Bank, USA, N.A.*, the Ninth Circuit concluded that a California law requiring banks (and other covered entities) to print certain disclosures when

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[16] The Court is not convinced by the Bank's argument that, because fees and interest are two sides of the same coin, both "core pricing decisions essential to establishing the terms on which a bank makes a mortgage loan," these cases must control the outcome here. (Hymes Reply at 10; Cantero Reply (18-CV-4157, Doc. No. 23) at 8 n.2.) First, as just explained, the *Barnett Bank* test is not about significant interference with national banks' balance sheets – it is about significant interference with the exercise of banking powers granted by Congress. The banking power asserted in these cases was the power to set fees only – not the power to set interest rates. The NBA does, in fact, empower national banks to set interest rates, but it explicitly subjects the exercise of this power to state law. *See* 12 U.S.C. § 85. The Court will not second-guess Congress's obvious judgment to treat national banks' fee powers and interest-rate powers as distinct. Second, the Bank's argument proves too much. It is difficult to imagine what state laws would not, in some way, impact the Bank's "pricing decisions." Compliance with state regulations costs money. National banks are free to elect whether to absorb the cost or attempt to pass it along to consumers in the form of heightened fees. But just because a state regulation might impel a national bank to raise its fees does not thereby transmute that regulation into a limitation on the bank's fee-setting power. Were this the case, the fee power would effectively preempt the field of national banking regulation.

extending credit to their customers through checks "significantly interfered" with national banks' power to make non–real estate loans. 513 F.3d at 1036–38. Neither case explained why the challenged state laws occasioned *significant* interference or offered a view of what less-than-significant interference might look like. Indeed, neither case analyzed the meaning of "significant interference" at all. Although the Court does not question the results reached in either case, it finds neither one persuasive here.

Finally, the Court does not agree with the Bank that the Second Circuit's reasoning in *Flagg v. Yonkers Savings & Loan Association, N.A.* "applies equally" to this case. In *Flagg*, the Circuit held that the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1461 *et seq.*, preempts GOL § 5-601's application to federal savings associations. *Flagg*, 396 F.3d at 181. As the Bank acknowledges, because the case involved application of field preemption standards pursuant to HOLA rather than the conflict preemption standards under the NBA, *Flagg* does not govern the outcome of this case. (Hymes Mot. at 18–19; Cantero Mot. at 19.) But *Flagg* differed in another way, too: the preemption question had already been decided by the district court, and the only issue for the Circuit on appeal was whether the Office of Thrift Supervision ("OTS") had acted arbitrarily or unreasonably in promulgating its preemption regulations. *Flagg*, 396 F.3d at 182 ("On appeal the Flaggs do not contest the District Court's determination that the OTS has preempted state law . . . ."). Concluding it had not, the Circuit "recognize[d] the potential interest that the OTS has in providing for consistency across the field of mortgage accounts offered by federal savings associations" and observed that, in preempting GOL § 5-

601 and similar laws, OTS "provide[d] a consistent nationwide playing field while giving individual institutions a level of flexibility." *Id.* at 184. If the issue here were whether OCC's preemption regulations were arbitrary, this reasoning might indeed apply with equal force. But it is not. The question is whether, in view of a different statutory scheme that is less predisposed to preemption, and in view of section 1639d, Congress intended laws like GOL § 5-601 be preempted. For all the reasons explained above, the Court concludes that it did not.

In demarcating the permissible boundaries within which state law may operate in a way consonant with the federal design, the guiding principle is the intent of Congress. *See Barnett Bank*, 517 U.S. at 30. At bottom, this case is about how to reconcile two acts of Congress that, to some extent, speak past each other. Section 1639d(g)(3) represents Congress's judgment that mortgage lenders can comply with reasonable state escrow interest laws. The NBA, however, represents Congress's judgment that national banks' power to engage in mortgage lending and offer escrow services is a "grant[] of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Id.* at 32. If Congress had the NBA in mind when it enacted section 1639d, it is not obvious. Nevertheless, the two acts can be read harmoniously, and they must be so read if each is to be given full effect. As the Supreme Court has explained, "[i]n the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added). Here, in view of the purposes and objectives of Congress expressed in both the NBA and Dodd–Frank, the Court concludes that GOL § 5-601 is not – and has never been[17] – such obstacle. Bank of America's motions to dismiss on this ground are denied.

II. Plaintiffs' Claims

Plaintiffs assert claims against the Bank for breach of contract; unjust enrichment; and violation of New York's consumer protection statute, GBL § 349. The Bank moves to dismiss.[18] For the reasons explained next, the Bank's motions are denied with respect to the breach of contract

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[17] The test for NBA preemption has been the same since at least 1996, when the Supreme Court decided *Barnett Bank*. Although this Court's application of the test has been informed by Dodd–Frank, it has not depended on it. The Court's conclusion that the NBA does not preempt GOL § 5-601 therefore applies equally to the time periods before and after Dodd–Frank became effective. And, as relevant to this case, it means that GOL § 5-601 was not preempted at the time Cantero purchased his home in 2010. (*See* Cantero Mot. at 29–32.) This result is consistent with that reached in *Lusnak*. *See Lusnak*, 883 F.3d at 1197. It is also consistent with the Court's interpretation of section 1639d(g)(3) as a provision that was not intended to impact NBA preemption one way or another.

[18] Plaintiffs also purport to assert claims for "violation of" GOL § 5-601. (Hymes Compl. at ¶¶ 39–41; Cantero Am. Compl. at ¶¶ 73–82.) This does not, however, appear to be an independent cause of action. Plaintiffs point to no authority that GOL § 5-601 created a private right of action, and the Court is aware of none. In its motions to dismiss, although the Bank argues in general that all claims should be dismissed on the basis of its preemption defense, it does not specifically address the viability of the GOL § 5-601 claims. Nor, in their opposition briefing, do Plaintiffs explain the legal basis for these claims. As the parties have not addressed this issue, the Court will not reach it here.

claims, and they are granted with respect to the unjust enrichment and GBL § 349 claims.

A. Breach of Contract

Under New York law, there are four elements to a breach of contract claim: "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Katz v. Travelers*, 241 F. Supp. 3d 397, 405 (E.D.N.Y. 2017) (quoting *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996)). Here, the Bank's sole argument for dismissal of these claims is predicated on its incorrect view that GOL § 5-601 is preempted. It argues that the Plaintiffs cannot show breach because the relevant choice-of-law provisions in their mortgage agreements do not refer to preempted state law. (Hymes Mot. at 30–31; Cantero Mot. at 32–33.) Because GOL § 5-601 is not preempted, and the Bank has offered no other legal reason to doubt that it therefore governs the mortgage agreements at issue, the Bank's motions to dismiss these claims are denied.

B. Unjust Enrichment

"To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that 'equity and good conscience' require restitution." i, 202 F.3d 611, 616 (2d Cir. 2000) (citation omitted). Moreover, an unjust enrichment claim is quasi-contractual, meaning that it does not lie when a valid contract governs the subject matter of the dispute. *See Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d

573, 586–87 (2d Cir. 2006) ("It is an obligation the law creates in the absence of any agreement." (quoting *Goldman v. Metro. Life Ins. Co.*, 841 N.E.2d 742 (N.Y. 2005))); *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (citations omitted)).

Here, both the Hymes Plaintiffs and Cantero plead unjust enrichment in the alternative to their contract claims seeking recovery of escrow interest payments. (Hymes Compl. at ¶¶ 48–52; Cantero Am. Compl. at ¶¶ 83–85, 90–92.) Because their mortgage agreements expressly govern such payments, their unjust enrichment claims must be dismissed. *See, e.g., Cont'l Cas. Co. v. Contest Promotions NY, LLC*, No. 15-CV-501 (MKB), 2016 WL 1255726, at *4 (E.D.N.Y. Mar. 28, 2016) ("Because this dispute is governed by a valid contract, Plaintiff is not entitled to recover on an unjust enrichment theory.")

Cantero additionally alleges that the Bank was unjustly enriched when it "use[d] the amounts it was obligated to pay as interest to generate float income." (Cantero Am. Compl. at ¶ 86.) It argues this income is "distinct" from the interest and therefore a "plausible independent basis for this claim." (Cantero Opp'n at 29.) Far from being distinct, however, money a defendant makes through "having use of another person's money for a specified period," is recoverable as prejudgment interest. *Mohassel v. Fenwick*, 832 N.E.2d 1174, 1178 (N.Y. 2005) (citations omitted). "Under New York law, a plaintiff who prevails on a claim for breach of contract is entitled to prejudgment interest as a matter of right." *U.S. Naval Inst. v. Charter Commc'ns, Inc.*, 936 F.2d 692, 698

(2d Cir. 1991) (citing, *inter alia*, N.Y. C.P.L.R. §§ 5001, 5002). Because Cantero can recover all the money he seeks through his contract claim, he is not entitled to simultaneously pursue recovery of a portion of that money through an unjust enrichment claim. *See Cont'l Cas. Co.*, 2016 WL 1255726, at *4; *cf. In re Bayou Grp., LLC*, 439 B.R. 284, 337 (S.D.N.Y. 2010) (noting that New York's pre-judgment interest statutes "do[] not provide an independent cause of action").

C. General Business Law § 349

GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful." "To maintain a cause of action under § 349, a plaintiff must show: (1) that the defendant's conduct is 'consumer-oriented'; (2) that the defendant is engaged in a 'deceptive act or practice'; and (3) that the plaintiff was injured by this practice." *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 64 (2d Cir. 2010) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744–45 (N.Y. 1995)). A "deceptive act or practice" is one that is "deceptive or misleading in a material way." *Sanchez v. Ehrlich*, No. 16-CV-8677 (LAP), 2018 WL 2084147, at *10 (S.D.N.Y. Mar. 29, 2018) (quoting *Oswego Laborers' Local 214 Pension Fund*, 647 N.E.2d at 744). In other words, it must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* (citation omitted). An act "is not deceptive simply because it is mistaken." *Shapiro v. Berkshire Life Ins. Co.*, 212 F.3d 121, 127 (2d Cir. 2000).

Here, Plaintiffs fail to allege the existence of a deceptive act or practice. The Hymes Plaintiffs' complaint does not offer anything more than the most conclusory allegations to this effect. (Hymes Compl. at ¶ 34 ("Defendant committed and continues to commit deceptive and unlawful business acts and practices by failing to pay interest . . . .").) Cantero's amended complaint does more. It alleges that the Bank was "aware of the applicable law," promised to follow it, and then forewent paying interest. (Cantero Am. Compl. at ¶¶ 62–63.) But these allegations do not plausibly allege anything deceptive. They only beg the question: what "applicable law" did the Bank believe it was following? For Cantero's claim to survive, he would need to allege the Bank believed GOL § 5-601 to be applicable law, promised him he would be paid interest accordingly, and then failed to do so. This, he did not do. In fact, the only fair inference to be drawn from nearly everything else in his complaint is that the Bank did not believe it was required to follow GOL § 5-601. (*See* Cantero Am. Compl. at ¶ 28 ("Defendant systematically refuses to pay interest on funds held in escrow accounts . . . .").) Accordingly, his GBL § 349 claim, along with the Hymes Plaintiffs', must be dismissed. *See Shapiro*, 212 F.3d at 127.[19]

[19] In their oppositions to the Bank's motions, Plaintiffs cite to notices they received from the Bank informing them that, based on the Bank's view of the law, it would not pay interest on their escrow funds. (Hymes Opp'n at 32; Cantero Opp'n at 30.) Given that Plaintiffs did not plead details about or otherwise reference the notices in their complaints, the Court will not rely on them to decide the instant motion. *See, e.g., Palin v. N.Y. Times Co.*, 2019 WL 3558545, at *3 (2d Cir. Aug. 6, 2019) (slip op.) (Under Rule 12(b), "matters outside the pleadings" are not to be considered on motions to dismiss.). However, it bears noting that the notices only further support the Bank's position. Each one clearly and simply explained that, based on the Bank's view of the law, customers would not be paid interest on their escrow accounts.

CONCLUSION

Bank of America's motions to dismiss (18-CV-2352, Doc. No. 19; 18-CV-4157, Doc. No. 21) are granted in part and denied in part. The Court concludes that the National Bank Act does not preempt New York General Obligations Law § 5-601. Accordingly, Plaintiffs' complaints state valid claims for breach of contract. Plaintiffs' claims for unjust enrichment and violation of New York General Business Law § 349 are dismissed.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2019

Roslynn R. Mauskopf

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ROSLYNN R. MAUSKOPF
Chief United States District Judge

(Hymes Notice (Doc. No. 19-5) at 1; Cantero Notice (Doc. No. 21-4) at 1.) Thus, although the Bank may have erroneously withheld fees, there can be no contention that it attempted to deceive Plaintiffs along the way. *See Silvester v. Selene Fin., LP*, No. 7:18 CV-02425 (NSR), 2019 WL 1316475, at *10 (S.D.N.Y. Mar. 21, 2019) ("The loan agreement clearly provided for these additional charges and, therefore, Plaintiff has failed to allege how they were materially deceptive . . . .").