No. 22-529

In the Supreme Court of the United States

ALEX CANTERO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

BANK OF AMERICA, N.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHARLES L. MCCLOUD
Assistant to the Solicitor General
GERARD SINZDAK
URJA MITTAL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 25b(b)(1)(B) of Title 12 of the United States Code provides that "State consumer financial laws are preempted" as applied to national banks "only if," *inter alia*, such a law "prevents or significantly interferes with the exercise by the national bank of its powers," "in accordance with" this Court's decision in *Barnett Bank of Marion County, N. A.* v. *Nelson*, 517 U.S. 25 (1996). 12 U.S.C. 25b(b)(1)(B). The state law at issue in this case requires banks to pay at least 2% interest annually on escrow accounts associated with certain residential mortgages. See N.Y. Gen. Oblig. Law § 5-601 (McKinney 2022). The question presented is as follows:

Whether a state-law requirement that national banks pay 2% annual interest on residential-mortgage escrow accounts "significantly interferes with the exercise" of national banks' powers and therefore is preempted under 12 U.S.C. 25b(b)(1)(B).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR

INTEREST OF THE UNITED STATES

This case presents the question whether the National Bank Act (NBA), 12 U.S.C. 1 *et seq.*, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376, preempts a state law that requires banks to pay interest on mortgage escrow account balances. The United States, through the Office of the Comptroller of the Currency (OCC), is the primary regulator of banks chartered under the NBA. The Consumer Financial Protection Bureau also has enforcement responsibilities under the Dodd-Frank Act. The United States accordingly has a substantial interest in the proper interpretation of the Dodd-Frank Act's preemption standard. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

A. Legal Background

1. Enacted in 1864, the NBA "establish[ed] the system of national banks still in place today." *Watters* v. *Wachovia Bank*, *N. A.*, 550 U.S. 1, 10 (2007). The NBA grants national banks certain enumerated powers, 12 U.S.C. 24, as well as "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 (Seventh). One of the enumerated powers is the authority 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). A related power is the authority to provide escrow services for mortgage loans. See OCC Interpretive Ltr. No. 1041 (Sept. 28, 2005).

The NBA created a "mixed state/federal regime[] in which the Federal Government exercises general oversight while leaving state substantive law in place." *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 534 (2009). Under this system, the OCC, a bureau within the Department of the Treasury, is "charged by Congress with superintendence of national banks." *Nationsbank of North Carolina*, v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995). But States may "enforce[] their banking-related laws against national banks," so long as those laws are not preempted by the NBA or other federal laws. *Cuomo*, 557 U.S. at 534.

In *Barnett Bank* v. *Nelson*, 517 U.S. 25 (1996), this Court explained that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. The Court also recognized, however, that States

have "power to regulate national banks, where * * * doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Ibid.*

2. a. In the wake of the 2008 financial crisis, Congress enacted the Dodd-Frank Act to "promote the financial stability of the United States by improving accountability and transparency in the financial system," Pmbl., 124 Stat. 1376. The Dodd-Frank Act responded to numerous perceived shortcomings in financial regulation, including the "failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending." S. Rep. No. 176, 111th Cong., 2d Sess. 15 (2010) (Senate Report).

To address that problem, among others, Congress clarified the standard for NBA preemption of "State consumer financial laws," Dodd-Frank Act § 1044(a), 124 Stat. 2015. As relevant here, Section 25b of Title 12 defines "State consumer financial law" to mean a state law "that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. 25b(a)(2). Section 25b then specifies that "State consumer financial laws are preempted, only if":

> (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 [this Court] in [*Barnett Bank*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers * * * or

(C) the State consumer financial law is preempted by [other applicable federal law].

12 U.S.C. 25b(b)(1). Section 25b(b)'s preemption provisions became effective on July 21, 2011.[1]

Section 25b also addresses the OCC's role in making preemption determinations about state consumer financial laws. The Dodd-Frank Act authorizes the OCC to make "preemption determination[s]" only "on a case-by-case basis" after considering "the impact of a particular State consumer financial law on any national bank." 12 U.S.C. 25b(b)(1)(B) and (3)(A). Section 25b further provides that no OCC "regulation or order * * * prescribed under [Section 25b(b)(1)(B)], shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, [a] provision of [a] State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision." 12 U.S.C. 25b(c).

b. In 2011, the OCC issued a Notice of Proposed Rulemaking (NPRM) proposing certain regulatory changes to implement the Dodd-Frank Act. See 76 Fed. Reg. 30,557 (May 26, 2011).

Before the Dodd-Frank Act was enacted, the OCC had concluded that national banks are not subject to state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers." 12 C.F.R. 34.4(a) (2005); see 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004). Applying

[1] See Dodd-Frank Act § 1048, 124 Stat. 2018 (effective on "designated transfer date"); § 1062, 124 Stat. 2039–2040 (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).

that standard, the OCC had concluded that the NBA categorically preempted various types of state laws, including state laws addressing "[e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. 34.4(a)(6) (2005); 12 C.F.R. 7.4008 (2005). The 2011 NPRM proposed to remove the phrase "obstruct, impair, or condition" from the OCC's preemption rules. 76 Fed. Reg. at 30,563. The NPRM further proposed, however, to leave intact the OCC's pre-existing rules concerning the types of state laws that the NBA preempts.

In explaining that proposal, the OCC noted that, although the phrase "obstruct, impair, or condition" was intended to be consistent with this Court's decision in *Barnett Bank*, that terminology "ha[d] created ambiguities and misunderstandings regarding the preemption standard." 76 Fed. Reg. at 30,563. The OCC further acknowledged that Section 25b(b)'s preemption standard "could have been intended to clarify the standard relative to how current OCC regulations have distilled principles from the *Barnett* case." *Ibid.* The OCC suggested, however, that by referencing *Barnett Bank* in Section 25b(b), Congress had intended to codify "the whole of the * * * decision," rather than any particular test or formulation for preemption. *Id.* at 30,562; see *ibid.* (stating that *Barnett Bank*'s reference to state laws that "prevent or significantly interfere" with a national banking power had been "exemplary"). The OCC further concluded that its preexisting approach to preemption had been consistent with *Barnett Bank* as a whole, and that the agency therefore was not proposing changes to the listed types of state laws that it had previously deemed categorically preempted. *Id.* at 30,563.

"On behalf of the Treasury Department," the General Counsel of the Department submitted a public comment on the OCC's rulemaking proposal. Letter from George W. Madison to John Walsh 1 (June 27, 2011).[2] The General Counsel's letter observed that Congress, in enacting the Dodd-Frank Act, had "intended that a state consumer financial law may be preempted only if the law 'prevents or significantly interferes' with the exercise of a national bank's powers, as those terms are used in the *Barnett* opinion." *Id.* at 2. The General Counsel expressed concern that the OCC's revised preemption standard "essentially reads the 'prevents or significantly interferes' language out of" Section 25b(b). *Ibid.* The General Counsel also asserted that, in the Treasury Department's view, the 2011 NPRM's assertion that "all prior preemption determinations continue[d] to be valid" was "not in accordance with Dodd-Frank." *Ibid.*

On July 21, 2011, the same day that Section 25b's preemption provisions took effect, see p. 4 & n.1, *supra*, the OCC adopted its Dodd-Frank Act implementing regulations in substantially the same form in which they had been proposed. See 76 Fed. Reg. 43,549.[3] Under the revised regulations, national banks may make real estate loans "without regard to state law limitations

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[2] https://perma.cc/D9MX-8HH8.

[3] The OCC did not promulgate the regulations pursuant to Section 25b's standards and procedures for OCC preemption determinations "concerning the impact of a particular State consumer financial law." 12 U.S.C. 25b(b)(3)(A); see 12 U.S.C. 25b(b)(1)(B), (c), and (d). Accordingly, the OCC's regulation is not a "preemption determination" applicable to the New York law at issue here. 12 U.S.C. 25b(b)(1)(B).

concerning * * * [e]scrow accounts." 12 C.F.R. 34.4(a)(6).[4]

B. The Present Controversy

1. To ensure timely payment of property taxes and insurance premiums, many mortgage lenders require borrowers to regularly deposit money into escrow accounts. "These accounts often carry a significant positive balance." *Lusnak* v. *Bank of America, N.A.*, 883 F.3d 1185, 1188 (9th Cir.), cert. denied, 139 S. Ct. 567 (2018). To prevent lenders from effectively "receiv[ing] an interest-free loan from the customer," *DeBoer* v. *Mellon Mortg. Co.*, 64 F.3d 1171, 1173 (8th Cir. 1995), cert. denied, 517 U.S. 1156 (1996), 13 States have required lenders to pay a minimum interest rate on mortgage escrow balances, *Lusnak*, 883 F.3d at 1195. New York is among those States; it requires lenders to pay at least 2% annual interest on such balances. See Pet. App. 9a.

Respondent Bank of America is a federally chartered national bank. In August 2010 and May 2016 respectively, petitioner Alex Cantero and petitioners Saul Hymes and Ilana Harwayne-Gidansky obtained mortgages from respondent on New York homes. Pet. App. 9a-10a. Petitioners' mortgages required them to de-

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[4] In the Second Circuit, the OCC filed an amicus brief in support of respondent that relied on OCC's current regulations to urge a different and broader view of NBA preemption than the one the government advocates here. See 21-400 OCC C.A. Amicus Br. 6-10. After the Court invited the Solicitor General to express the views of the United States in this case, the Solicitor General considered the question presented and concluded that the interpretation of Section 25b(b)(1)(B) set forth in this brief better reflects the text, structure, and history of the statute and this Court's cases applying the NBA.

posit money into escrow accounts. *Ibid.* Notwithstanding New York's interest-on-escrow law, respondent paid no interest to petitioners on their escrow-account balances. *Id.* at 10a-11a.

Petitioners filed two putative class actions against respondent in the United States District Court for the Eastern District of New York, asserting that respondent had breached its obligation to pay interest in accordance with New York law. Pet. App. 11a. Respondent moved to dismiss both suits on the ground that the NBA preempted the application of New York's interest-on-escrow law to national banks. *Ibid.*

2. The district court denied respondent's motions to dismiss in relevant part. Pet. App. 70a-123a. The court concluded that the NBA does not preempt New York's interest-on-escrow law because that law "does not 'significantly interfere' with national banks' power to administer mortgage escrow accounts." *Id.* at 111a. The court explained that, although New York's law "requires the Bank to pay interest on the comparatively small sums deposited in mortgage escrow accounts," it "does not bar the creation of [those] accounts, or subject them to state visitorial control, or otherwise limit the terms of their use." *Ibid.* The court observed that certain national banks "already compl[y] with" state interest-on-escrow laws, suggesting that such laws will not cause national banks to "lose significant business." *Id.* at 112a.

3. On interlocutory appeal, the Second Circuit reversed. Pet. App. 1a-50a.

At the outset, the court of appeals noted the parties' agreement that the Dodd-Frank Act's preemption provision, Section 25b, "took effect after Cantero's mortgage was executed, but before the *Hymes* Plaintiffs' was." Pet. App. 10a. The court therefore decided the

preemption question in Cantero's case without considering Section 25b. *Id.* at 14a. Instead, the court applied what it perceived to be "ordinary preemption rules," *ibid.* (capitalization and emphasis omitted), and found New York's interest-on-escrow law preempted because it "would exert control over banks' exercise of th[e] power" to "create and fund escrow accounts," *id.* at 23a.

Turning to the Hymes plaintiffs' suit, the Second Circuit recognized that Section 25b applied, but the court viewed that provision as merely "codif[ying]" the "preexisting legal standard." Pet. App. 26a; see *id.* at 27a (stating that parsing Section 25b's text would "make[] little sense when Congress has codified a preexisting, judicially articulated rule," and that the court instead could "simply apply the test [it] ha[d] always used"). The court held that Section 25b's "significantly interferes with" standard, 12 U.S.C. 25b(b)(1)(B), does not require an assessment of the "degree" to which a challenged state law impedes national banks' exercise of their powers. Pet. App. 27a (citation omitted). The court disclaimed any holding "that all 'State consumer financial laws' are preempted," explaining that "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." *Id.* at 28a n.10 (citation omitted).

SUMMARY OF ARGUMENT

I. To determine whether a particular "State consumer financial law * * * significantly interferes with the exercise" of national banks' powers, 12 U.S.C. 25b(b)(1)(B), a court must make a practical, case-by-case assessment of the degree to which the state law will impede the exercise of those powers.

A. The term "significantly interferes with" is naturally understood to refer to interference that is fairly large in degree or extent. Contextual clues support that understanding here. Congress drew Section 25b's "significantly interferes with" standard from a portion of the *Barnett Bank* opinion in which the Court explained that the permissibility of state regulation depends on the extent to which the regulation interferes with or impedes the exercise of a national bank's powers. Section 25b's rules governing the manner in which the OCC should make preemption determinations reinforce the understanding that preemption of a "State consumer financial law" depends on a fact-intensive inquiry that focuses on the anticipated practical impacts of specific state laws on national banks' exercise of their powers.

B. The Dodd-Frank Act's legislative history supports the conclusion that Section 25b's preemption standard requires a practical assessment of a state law's effects. Congress rejected more limited and more sweeping preemption standards in favor of the practical, degree-of-interference test articulated in *Barnett Bank*.

C. Requiring courts to apply a practical, case-by-case preemption analysis under Section 25b is consistent with this Court's decisions clarifying the NBA's preemptive scope. Well before Congress enacted the Dodd-Frank Act, this Court had repeatedly considered the practical effects of particular state laws on national banks' operations when deciding whether those laws were preempted. The same emphasis on practical effects has remained a feature of the Court's decisions after *Barnett Bank*.

II. Because the Second Circuit did not perform the necessary practical analysis in this case, its judgment should be vacated.

A. The Second Circuit concluded that a state law is preempted if it attempts to "control" a national bank's exercise of a banking power granted under the NBA. That approach runs counter to the ordinary meaning of the term "significantly interferes with"; it is inconsistent with Congress's evident expectation that preemption determinations will rest on practical, degree-of-interference assessments; and it does not account for this Court's many decisions holding that the NBA did not preempt various state laws regulating national banks' banking activities. The court's analysis was particularly flawed because, despite the court's disclaimer, its analysis logically implies that substantially all "State consumer financial laws" will be preempted, in contravention of Section 25b's text, structure, and history.

B. This Court's precedents do not support the Second Circuit's approach. The Court in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), held that a State could not tax the Second Bank of the United States. Subsequent decisions have clarified, however, that *McCulloch* does not stand for the proposition that States may never regulate federally chartered banks in the exercise of their banking powers. The Second Circuit's reliance on *McCulloch* also overlooked important differences between the Second Bank and modern national banks, which are privately owned and perform no significant federal functions that are not also performed by state banks.

Barnett Bank and the other decisions of this Court cited by the Second Circuit likewise do not hold that a

mere attempt to control a power of a national bank is sufficient for preemption. To the contrary, those decisions underscore that preemption determinations under the NBA turn on the practical impacts of the challenged state laws—an analysis the Second Circuit expressly disavowed in this case.

C. The Second Circuit's other rationales also lack merit. Although consistency in the regulation of national banks is one goal of the NBA, Congress has not pursued that goal to the exclusion of all others. Instead, Congress (both before and after its enactment of the Dodd-Frank Act) has preserved the applicability of state substantive law to national banks in appropriate circumstances. And contrary to the Second Circuit's assertions, courts are well equipped to undertake the kind of fact-intensive inquiry that Section 25b(b)(1)(B)'s preemption standard requires.

ARGUMENT

Under the Dodd-Frank Act, a "State consumer financial law" is preempted only if, as relevant here, it "prevents or significantly interferes with the exercise" of national banks' powers. 12 U.S.C. 25b(b)(1)(B). Section 25b(b)(1)(B)'s text, context, and history show that, to determine whether a particular state law is preempted under this standard, a court must assess the law's likely practical effect on national banks' exercise of their powers. This Court's pre-Dodd-Frank Act decisions interpreting the NBA confirm the need for a practical, case-by-case inquiry.

The Second Circuit concluded that assessing the practical effect of New York's interest-on-escrow law was unnecessary because that law attempts to "control" the exercise of national banks' federal powers. This ex-

pansive preemption standard is inconsistent with Section 25b's text and finds no support in the Court's NBA precedents. The judgment of the court of appeals should be vacated.

I. SECTION 25B(B)(1)(B)'S "SIGNIFICANTLY INTERFERES WITH" STANDARD REQUIRES A PRACTICAL, CASE-BY-CASE INQUIRY

A. The Text Of Section 25b Requires Courts To Assess The Degree To Which A Particular State Law Impedes The Exercise Of A National Bank's Powers

Section 25b prescribes a specific standard for determining when "State consumer financial laws are preempted" as applied to national banks. 12 U.S.C. 25b(b)(1); see 12 U.S.C. 25b(b) ("Preemption standard") (emphasis omitted). As relevant here, a "State consumer financial law" is preempted when it "prevents or significantly interferes with the exercise by the national bank of its powers," "in accordance with the legal standard for preemption in [*Barnett Bank* v. *Nelson*, 517 U.S. 25 (1996)]." 12 U.S.C. 25b(b)(1)(B). This standard requires a practical assessment of the degree to which a particular "State consumer financial law" impedes the exercise of national banks' powers.

1. "Significant" commonly means "[h]aving or likely to have a major effect" or "[f]airly large in amount or quantity." *The American Heritage Dictionary of the English Language* 1619 (4th ed. 2006) (*American Heritage*) (emphasis omitted). And "interfere" commonly means "[t]o be or create a hindrance or obstacle." *Id.* at 913 (emphasis omitted). Thus, as a matter of ordinary meaning, a state law "significantly interferes with" national banks' exercise of their powers when the law

hinders the exercise of those powers to a fairly large degree. Conversely, a state law does not "significantly interfere with" national banks' exercise of their powers when the law does not hinder the exercise of those powers or hinders their exercise to only a minimal degree.

As further confirmation that the provision focuses on practical effects, the phrase "significantly interferes with" is paired with "prevents * * * the exercise by the national bank of its powers." 12 U.S.C. 25b(b)(1)(B). The term "prevents" suggests the creation of an impediment that renders particular action infeasible. See *American Heritage* 1391 (defining "prevent" as "[t]o keep (someone) from doing something; impede"). Determining whether such an impediment exists requires consideration of the practical consequences of the state law in question.

2. Contextual clues also support a practical understanding of the phrase "significantly interferes with."

Section 25b refers to "the legal standard for preemption in [*Barnett Bank*]." 12 U.S.C. 25b(b)(1)(B). And Section 25b(b)(1)(B)'s substantive preemption standard is drawn from this Court's statement that the NBA does 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." *Barnett Bank*, 517 U.S. at 33. In the sentence immediately preceding that statement, the Court similarly noted that "normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted." *Ibid.* These statements confirm that (1) States have some authority to "regulate" national banks, and (2) in cases where a State has not "prevent[ed]" or "forbid[den]" a national

bank's exercise of a federal power, the extent of permissible regulation depends on the "significan[ce]"—that is, the magnitude—of the regulation's "interference" with, or "impair[ment]" of, the exercise of that power.

The Section 25b requirements that govern OCC preemption determinations reinforce this conclusion. Under the Dodd-Frank Act, the OCC must make such determinations on a "case-by-case-basis" by analyzing "the impact of a particular State consumer financial law on any national bank that is subject to that law." 12 U.S.C. 25b(b)(3)(A). Those determinations may be made only if "substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of [the state-law] provision in accordance with [*Barnett Bank*]." 12 U.S.C. 25b(c). "The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency *factfinding*." *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (emphasis added; citation omitted). Its use in this context indicates that Congress expected the OCC to make preemption determinations based on factual findings as to the "impact" of a "particular State consumer financial law" on national banks' exercise of their powers. 12 U.S.C. 25b(b)(3). And nothing in the statute suggests that Congress intended *courts* to take a different approach when resolving preemption questions in cases within their jurisdiction.

B. The History Of Section 25b Confirms That Courts Must Assess The Likely Practical Impacts Of Particular State Consumer Financial Laws In Order To Determine Whether Those Laws Are Preempted

In June 2009, the Treasury Department submitted a financial regulatory reform proposal to Congress. See

The Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation* (2009). The proposal would have eliminated NBA preemption of state consumer financial laws by making "federally chartered institutions * * * subject to nondiscriminatory state consumer protection * * * laws to the same extent as other financial institutions." *Id.* at 61. Congress did not adopt that proposal. Instead, in December 2009, the House of Representatives passed a bill authored by Representative Barney Frank (the co-author of the Dodd-Frank Act), under which a state consumer financial law would be preempted only if it "prevents, significantly interferes with, or materially impairs the ability of [an institution chartered as a national bank] to engage in the business of banking." H.R. 4173, 111th Cong., 1st Sess. § 4404, at 1013.

A modified version of the House bill passed the Senate in April 2010. S. 3217, 111th Cong., 2d Sess. Under the Senate bill, preemption determinations would be made "in accordance with the legal standard of [*Barnett Bank*]," and on a case-by-case basis. *Id.* § 1044, at 1315. The Senate Banking Committee noted that its bill sought "to clarify the preemption standard relating to State consumer financial laws as applied to national banks." Senate Report 175. In particular, the Committee sought to "return" the preemption standard to "what it had been for decades"—the *Barnett Bank* standard—and thereby "undo[] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." *Ibid.* A House-Senate conference committee ultimately adopted a modified version of the Senate bill, adding the "prevents or significantly interferes with" language from the House bill to the Senate's

citation of *Barnett Bank*. H.R. Rep. No. 517, 111th Cong., 2d Sess. 651 (2010).

As the preceding history shows, the preemption standard set forth in the Dodd-Frank Act reflected a careful legislative compromise. Congress rejected the Treasury Department's proposal, under which nondiscriminatory state consumer financial laws would have escaped preemption altogether. At the same time, the Senate Report disapproved the OCC's preemption standards as unduly broad, and the Committee expressed its intent to replace the OCC's approach with a narrower standard drawn from *Barnett Bank*.[5]

C. An Inquiry Into The Likely Practical Impacts Of Particular State Laws On National Banks' Operations Is Consistent With *Barnett Bank* And With The Traditional Balance Between State And Federal Regulation Of National Banks

In addition to incorporating the "prevents or significantly interferes with" standard, Section 25b refers to "the legal standard for preemption in the decision of" this Court in *Barnett Bank*. 12 U.S.C. 25b(b)(1)(B). The *Barnett Bank* Court, in turn, framed its decision not as

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[5] Congress's intent to depart from past agency practice with respect to preemption of state consumer financial laws is also evident from the Dodd-Frank Act's savings provision, codified at 12 U.S.C. 5553. Section 5553 states that the Dodd-Frank Act's preemption provisions "shall not be construed to alter or affect the applicability of" OCC's regulations "regarding the applicability of State law under Federal banking law to any contract entered into on or before July 21, 2010, by national banks" or other institutions supervised by the OCC or the Office of Thrift Supervision. *Ibid.* That savings provision's coverage of national banks' pre-Dodd-Frank Act contracts would have been unnecessary if Congress had intended the OCC's prior regulatory approach toward national banks to continue in effect going forward.

breaking new ground, but instead as the logical application of NBA-preemption principles developed in a line of precedents spanning decades. See 517 U.S. at 32-34. Those precedents therefore bear on the proper interpretation of Section 25b(b)(1)(B)'s text, and they reinforce the conclusion that consideration of likely practical impacts on national banks' exercise of their powers is integral to the preemption inquiry.

1. Even before Congress enacted the Dodd-Frank Act, States "ha[d] enforced their banking-related laws against national banks for at least 85 years." *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 534 (2009). When determining how to maintain the "balance between the States and the Federal Government" in the regulation of national banks, *id.* at 553 (Thomas, J., concurring in part and dissenting in part) (citation omitted), this Court has long looked to the practical effect that particular state laws would have on national banks' exercise of their federal powers.

First National Bank in St. Louis v. *Missouri*, 263 U.S. 640, 652 (1924), is an early example of that approach. There, the Court considered a Missouri statute that prohibited state and national banks from opening branches within the State. The petitioner national bank argued that the law was preempted because, under the NBA, any "state statute attempting to limit or define the powers of a national bank is invalid." *Id.* at 642. The Court rejected that argument, holding that the Missouri law was not preempted because the NBA did not expressly or implicitly give national banks the power to operate branches. The Court went on to note that the Missouri law did not "frustrate the purpose for which the [national] bank was created or interfere with the discharge of its duties to the [federal] government or

impair its efficiency as a federal agency." *Id.* at 659; see *id.* at 657-659. The Court further explained (*id.* at 656) that its conclusion followed from the "rule" it had established in *McClellan* v. *Chipman*, 164 U.S. 347 (1896), which found no preemption of a state law that did not "impair[] the efficiency of national banks," even though the law imposed certain restrictions on national banks' power to make real-estate transactions, *id.* at 358.

The Court took a similar approach in *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944). That case presented the question whether the NBA preempted a state law requiring banks to "turn over to the state[] deposits which have remained inactive and unclaimed for specified periods." *Id.* at 236. The Court found no preemption, explaining that the state law did not "impose an undue burden on the performance of the banks' functions" because it did not "deter [depositors] from placing their funds in national banks" or effect an "unusual alteration of depositors' accounts." *Id.* at 248, 251-252. The Court explained that "[i]t has never been suggested that non-discriminatory laws of th[e] type" adopted by Kentucky "are so burdensome as to be inapplicable to the accounts of depositors in national banks." *Id.* at 248.

2. The same practical focus has remained a feature of the Court's post-*Barnett Bank* decisions.

In *Watters* v. *Wachovia Bank, N. A.*, 550 U.S. 1 (2007), the Court reiterated the "prevent or significantly interfere with" standard articulated in *Barnett Bank*. *Id.* at 12 ("States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's * * * exercise of its powers."). The Court went on to hold that the Michigan law at issue, which authorized a

state regulator to exercise visitorial authority over a national bank's subsidiary, was preempted by the NBA. The Court's analysis emphasized "the burdens and undue duplication state controls could produce," *id.* at 14, and the need for "[s]ecurity against significant interference by state regulators," *id.* at 18.[6]

Most recently, in *Cuomo*, the Court held invalid an OCC rule preempting enforcement of state fair-lending laws. The Court described as "[b]izarre" the "consequences" of the rule's "almost categorical prohibition" on state-law enforcement, which the Court concluded would improperly "exempt national banks from all state banking laws, or at least state enforcement of those laws." *Cuomo*, 557 U.S. at 529, 532-533. The Court explained that permitting the kind of "incursion that the Comptroller's regulation makes upon traditional state powers" would be contrary to *St. Louis*, *Anderson National Bank*, and other decisions that "honor[ed] * * * Congress's decision not to pre-empt substantive state law" in the NBA. *Id.* at 530, 534.

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[6] The specific disputed issue in *Watters* was whether certain state-law requirements, which the State conceded could not be applied to national banks themselves, were preempted as applied to national-bank "operating subsidiaries" that were "separately chartered under some State's law." 550 U.S. at 15. The Court found those requirements preempted, concluding that the NBA "protect[s] from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary." *Id.* at 21. The Dodd-Frank Act subsequently abrogated that holding. See 12 U.S.C. 25b(b)(2) (providing that the NBA "do[es] not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank)").

II. THE JUDGMENT OF THE SECOND CIRCUIT SHOULD BE VACATED

All parties to this case correctly agree that New York's interest-on-escrow law is a "State consumer financial law" as the Dodd-Frank Act defines that term. 12 U.S.C. 25b(a)(2); see Pet. App. 11a. The law "directly and specifically regulates the manner, content, [and] terms and conditions of a[] financial transaction"—*i.e.*, the use of a mortgage escrow account—between a national bank and a "consumer." 12 U.S.C. 25b(a)(2). The disputed question is whether the New York law "significantly interferes with," 12 U.S.C. 25b(b)(1)(B), national banks' exercise of their powers.

As explained above, answering that question requires a practical assessment of the degree to which New York's interest-on-escrow law will impair national banks' ability to make mortgage loans and to administer associated escrow accounts. The Second Circuit did not undertake that fact-intensive inquiry. Instead, it held that state laws are preempted whenever they attempt to exert "control" over a national bank's exercise of a power granted under the NBA, regardless of the degree to which a particular law impedes the exercise of a banking power. Pet. App. 17a. That approach was erroneous. The judgment below therefore should be vacated, and the case should be remanded so that the court of appeals can analyze respondent's preemption claim under the appropriate standard.

A. The Second Circuit's "Control" Test Is Inconsistent With Section 25b's Text, History, And Purpose

The Second Circuit concluded that, in determining the NBA's preemptive scope, the relevant "question is not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its

powers." Pet. App. 17a (citation omitted). Under that approach, "[i]t is the nature of an invasion into a national bank's operations—not the magnitude of its effects—that determines whether a state law purports to exercise control over a federally granted banking power and is thus preempted." *Ibid.* Applying that standard, the court concluded that New York's interest-on-escrow law is preempted because "[t]he banking power at issue here is the power to create and fund escrow accounts," and "[b]y requiring a bank to pay its customers in order to exercise a banking power granted by the federal government, the [New York] law would exert control over banks' exercise of that power." *Id.* at 23a. That approach is inconsistent with Section 25b's text, history, and purpose.

1. The Second Circuit's approach runs counter to the ordinary meaning of the phrase "significantly interferes with," which suggests a focus on the degree to which a particular state law impedes national banks' exercise of their powers. See pp. 13-14, *supra*. The Second Circuit explicitly declined to assess the New York interest-on-escrow law's "degree of interference" with national banks' exercise of their powers. Pet. App. 16a (citation omitted). It refused to ask, for instance, "whether this particular rate of 2% is so high that it undermines the use of [mortgage escrow] accounts." *Id.* at 23a. The court thus would have found the New York law preempted whether the interest rate it imposed was 10% or 0.1%.

2. The Second Circuit's standard is also inconsistent with Congress's expectation, reflected in both the text and history of Section 25b, that preemption determinations will be made only after fact-based, degree-of-

interference assessments of particular state laws. Indeed, the Second Circuit's approach would effectively negate Congress's effort to limit the circumstances under which the application to national banks of "State consumer financial laws" will be preempted. As noted, the Second Circuit held that the NBA preempts any state law that "exert[s] control over a banking power." Pet. App. 18a. But under the Dodd-Frank Act, *every* "State consumer financial law" is by definition a law that "directly and specifically regulates the manner, content, or terms and conditions of" national banks' "financial transaction[s]" with "consumer[s]." 12 U.S.C. 25b(a)(2). Such laws will necessarily exert *some* degree of control over national banks' exercise of their enumerated or incidental powers. Section 25b(b)(1)'s carefully crafted preemption standards for "State consumer financial laws," 12 U.S.C. 25b(b)(1), would serve no useful purpose if the defining characteristics of those laws caused them to be preempted.

The Second Circuit disclaimed any holding that "all 'State consumer financial laws' are preempted." Pet. App. 28a n.10 (citation omitted). But the only examples the court gave of non-preempted state laws were "restrictions on the transactions engaged in by national banks, in common with those of other corporations doing business within the state." *Ibid.* Respondent has similarly suggested (Br. in Opp. 15) that national banks are not bound by state laws directed at banks as such, but instead must comply only with generally applicable state "contract, property, tort, and criminal law[s]." Such laws of general applicability, however, will very rarely if ever fall within Section 25b(a)(2)'s definition of "State consumer financial law." 12 U.S.C. 25b(a)(2).

The approach to preemption adopted by the court of appeals and advocated by respondent would give no meaningful effect to Congress's decision to craft a specific preemption provision for "State consumer financial laws."

3. The court of appeals suggested that, because the Dodd-Frank Act codified a preexisting preemption standard drawn from *Barnett Bank*, close analysis of Section 25b's text would "make[] little sense." Pet. App. 27a. The court stated that "Congress has codified a preexisting, judicially articulated rule * * * , so we can simply apply the test we have always used." *Ibid.* That is incorrect.

Although Section 25b(b)(1)(B) codified a preexisting preemption standard, Congress presumably intended that the codification would affect the manner in which subsequent preemption determinations would be made. In addition to citing *Barnett Bank*, Section 25b(b)(1)(B) specifies "prevents or significantly interferes with" as the applicable substantive standard. The Second Circuit noted the principle that "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." Pet. App. 27a (brackets and citation omitted). But the phrase "prevents or significantly interferes with," as it appears in Section 25b(b)(1)(B), *is* "the language of a statute." Other aspects of Section 25b—*e.g.*, the requirement that the OCC in making preemption determinations must assess the "impact" of particular state laws on a "case-by-case basis," 12 U.S.C. 25b(b)(3)(A); the requirement that any preemption determination must be supported by "substantial evidence," 12 U.S.C. 25b(c); and the definition of "State consumer financial law," 12 U.S.C. 25b(a)(2)—reinforce the conclusion that preemption under that

provision turns on the practical effects of particular state laws on national banks' exercise of their powers. See pp. 13-15, *supra*. The fact that Congress drew the "prevents or significantly interferes with" standard from a decision of this Court is no reason to ignore those contextual clues.

As explained above, a practical, degree-of-impact approach to NBA preemption is consistent with *Barnett Bank* and the decisions on which the *Barnett Bank* Court relied. See pp. 14-15, 17-19, *supra*. But to the extent the Court views its NBA-preemption precedents as ambiguous, various features of Section 25b shed light on Congress's intent with respect to preemption of "State consumer financial laws." The court of appeals gave no sound reason for disregarding those features of the statutory text.[7]

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[7] The court of appeals viewed Section 25b as irrelevant to petitioner Cantero's claim because Cantero's mortgage was executed before the Dodd-Frank Act's effective date. See Pet. App. 10a (noting the parties' agreement that the Dodd-Frank Act's "codification of preemption standards * * * took effect after Cantero's mortgage was executed"); *id.* at 14a, 25a (holding Cantero's claim preempted based on "ordinary" preemption rules, without regard to Section 25b) (citation omitted). Although Cantero does not challenge that holding in this Court, it is incorrect. The Dodd-Frank Act provides that Title X of the Act, in which Section 25b appears, "shall not be construed to alter or affect the applicability" of OCC preemption rules or determinations "to any contract entered into on or before *the date of enactment* of [the Dodd-Frank] Act," *i.e.*, July 21, 2010. Dodd-Frank Act § 1043, 124 Stat. 2014 (emphasis added); see 12 U.S.C. 5553; p. 4 n.1, *supra*. Cantero's mortgage was executed "on or about August 3, 2010," Pet. App. 9a—before the Dodd-Frank Act's *effective date* (July 21, 2011), but after the *date of enactment* (July 21, 2010). Thus, to the extent that Cantero seeks relief for respondent's failure to pay him interest after the Dodd-Frank Act

B. This Court's Precedents Do Not Support The Second Circuit's "Control" Test

The Second Circuit viewed its preemption analysis as flowing from *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Barnett Bank*, and other decisions of this Court. See Pet. App. 17a-18a. The decisions on which the court of appeals relied do not support its expansive conception of the NBA's preemptive scope. To the contrary, this Court has long recognized States' significant latitude to subject national banks both to "their general laws" *and* to "their banking-related laws." *Cuomo*, 557 U.S. at 534.

1. The Court in *McCulloch* held that the Constitution prohibited the State of Maryland from taxing the operations of the Second Bank of the United States. In the Court's view, "the power of taxing" the Bank could also "be exercised so as to destroy it." 17 U.S. (4 Wheat.) at 427. The Court's conclusion that Maryland could not tax the Bank thus rested on the principle that the Constitution "prohibit[s] States from interfering with or controlling the operations of the Federal Government." *United States* v. *Washington*, 596 U.S. 832, 838 (2022); see *McCulloch*, 17 U.S. (4 Wheat.) at 431-437.

That principle was implicated in *McCulloch* because the federally chartered Second Bank of the United States was "an instrument employed by the government of the Union to carry its powers into execution." 17 U.S. (4 Wheat.) at 436-437. The Second Circuit concluded that the same principle should apply to modern national banks like respondent because they, too, are federally

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took effect, Section 25b governs the question whether his state-law claim is preempted.

chartered institutions that have been described as "instrumentalities of the Federal government." Pet. App. 6a (quoting *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896)); see *id.* at 18a & n.6. As later decisions make clear, however, "[t]o point to a federal charter by itself shows no conflict [or] threat." *Atherton* v. *FDIC*, 519 U.S. 213, 223 (1997). Instead, "[i]t is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank* v. *Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870). Shortly after the NBA's enactment, the Court rejected the view that "banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation." *Id.* at 361; see *id.* at 362 (rejecting interpretation that would "convert" *McCulloch* "into an unauthorized and unjustifiable invasion of the rights of the States").

The Second Circuit also ignored the historical context in which *McCulloch* was decided. The Second Bank of the United States was considered an instrumentality of the federal government because it "acted as fiscal agent for the United States and as the depository for public monies, and its circulating notes were legal tender for all debts to the federal government." Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 15 n.62 (1977) (citing Act of Apr. 10, 1816, ch. 44, 3 Stat. 266); see *First Agric. Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 355 (1968) (Marshall, J., dissenting). In addition, the federal government owned 20% of the Bank's capital stock and the President appointed 20% of its board. See *ibid.*

Modern national banks are of a different character. They are not owned by the federal government and they "perform[] no significant federal governmental function that is not performed equally by state-chartered banks." *First Agric. Nat'l Bank*, 392 U.S. at 354 (Marshall, J., dissenting). They are organized to maximize profit for their private shareholders, not to carry out the operations of the federal government. The federal functions once performed by the Second Bank of the United States are instead undertaken by the Federal Reserve banks, which serve as "the monetary and fiscal agents of the United States." See *id.* at 356; 12 U.S.C. 341 *et seq*. And while national banks are subject to extensive federal regulation, that feature neither distinguishes them from countless private enterprises nor renders them "so closely connected to the Government that [they] cannot realistically be viewed as separate entities." *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316, 321 (2001) (citation omitted).

Given these historical developments, the Second Circuit erred in equating state regulation of modern national banks with state regulation of the Second Bank. Indeed, Congress has already acknowledged the difference between the two by providing that national banks are subject to state taxation to the same extent as state banks having their principal offices in the same State. See 12 U.S.C. 548; see also S. Rep. No. 530, 91st Cong., 1st Sess. 2 (1969) (stating that "there is no longer any justification for * * * continuing to grant national banks immunities from State taxation").

2. The Second Circuit also misunderstood *Barnett Bank*. The Court there considered a Florida law that prohibited insurance agents associated with any "finan-

cial institution," including national banks, from operating within the State. 517 U.S. at 29 (quoting Fla. Stat. § 626.988(2) (Supp. 1996)). The Court held that the state statute was preempted because it would "impair significantly, the exercise of a power that Congress explicitly granted" to national banks, *id.* at 33, namely the power to "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance" in small towns, *id.* at 28 (quoting Act of Sept. 7, 1916, ch. 461, 39 Stat. 753) (ellipses and emphasis omitted). The Court further held that the Florida law was not saved from preemption by the McCarran-Ferguson Act, 15 U.S.C. 1012, which provides that federal law will not preempt state statutes "regulating the business of insurance" unless the federal law "specifically relates to the business of insurance." See *Barnett Bank*, 517 U.S. at 27-28 (quoting 15 U.S.C. 1012(b)) (emphasis omitted).

In reaching that conclusion, the Court contrasted "the special McCarran-Ferguson anti-preemption rule" with "ordinary legal principles of pre-emption," *Barnett Bank*, 517 U.S. at 37. To the extent the Second Circuit understood the Court's reference to "ordinary legal principles of pre-emption" to suggest a test different from the "prevents or significantly interferes with" standard, it was mistaken. As the remainder of *Barnett Bank* underscores, the "prevents or significantly interferes with" standard *is* the "ordinary" rule that the Court has applied in resolving preemption disputes under the NBA.

The Court in *Barnett Bank* also observed that federal statutory "grants of both enumerated and incidental 'powers' to national banks" have historically been construed "as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary

state law." 517 U.S. at 32. The Court in that passage was responding, however, to the State's argument that the federal-law authorization for national banks to sell insurance in small towns was "limited to circumstances where state law is not to the contrary." *Ibid.* In holding that federal law ordinarily preempts "*contrary* state law," *ibid.* (emphasis added), the Court simply recognized that, when a state law forbids national banks from engaging in conduct that the NBA expressly authorizes, the practical inquiry is straightforward. Such a prohibition necessarily "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers." *Id.* at 33. Petitioners in this case, by contrast, do not suggest that New York could prohibit national banks from making mortgage loans or utilizing escrow accounts in connection with such loans.

That more limited understanding of *Barnett Bank* is confirmed by *Anderson National Bank*, the lead precedent that *Barnett Bank* cited to illustrate the "significantly interferes with" standard. See *Barnett Bank*, 517 U.S. at 33. As discussed above, p. 19, *supra*, the Court in *Anderson National Bank* undertook a practical inquiry into the degree to which a state law interfered with national banks' exercise of their powers—precisely the kind of inquiry that the Second Circuit's rigid "control" test precludes.

3. The other precedents invoked by the Second Circuit likewise do not support its expansive view of NBA preemption.

First National Bank of San Jose v. *California*, 262 U.S. 366 (1923), concerned a California law under which deposits would escheat to the State after an account had remained dormant for 20 years. *Id.* at 366-367. The Court found the law preempted because it "attempt[ed]

to qualify in an unusual way agreements between national banks and their customers" and was "incompatible with" Congress's decision to "specifically empower[]" national banks "freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities." *Id.* at 370. The Court observed that national banks' depositors "might well hesitate to subject their funds to possible confiscation" if laws like California's were enforced. *Ibid*. The decision in *First National Bank of San Jose* thus "turned * * * on the effect of the state statute in altering the contract of deposit in a manner considered so unusual and so harsh * * * as to deter [depositors] from placing or keeping their funds in national banks." *Anderson Nat'l Bank*, 321 U.S. at 250 (describing and distinguishing the Court's prior decision in *First National Bank of San Jose*). That reasoning is consistent with a mode of preemption analysis that takes into account the degree to which particular state laws would impede national banks' performance of their functions.

In *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954), the Court held that the NBA and the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, preempted a state statute that forbade national banks from using the word "saving" or "savings" in advertisements for their services. 347 U.S. at 374; see *id.* at 377-378. Federal law expressly authorized national banks to receive "savings deposits," *id.* at 375-376 (citations omitted), and the Court viewed the "incidental powers granted to national banks" as including the power to advertise their "authorized business," *id.* at 377. The Court explained that the word "savings" was one that "aptly describes, in a national sense, the type of business carried on by these national banks." *Id.* at 378.

In holding the challenged state law preempted, the Court in *Franklin National Bank* declined to adopt an interpretation of the NBA "that would permit a national bank to engage in a business but g[ive] no right to let the public know about it." 347 U.S. at 377-378. But the Court did not hold that the State was categorically barred from regulating national banks' advertising. Rather, the Court explained that national banks "do accept and pay interest on time deposits of people's savings, and they must be deemed to have the right to advertise that fact *by using the commonly understood description which Congress has specifically selected*." *Id.* at 378 (emphasis added). The Court thus emphasized the *degree* to which the challenged state law would impede national banks' exercise of their enumerated and incidental powers.

C. The Second Circuit's Other Rationales For Its "Control" Test Lack Merit

1. The Second Circuit suggested that a categorical preemption standard is necessary to avoid exposing national banks to a "death-by-a-thousand-cuts regime" of potentially varying state regulation. Pet. App. 22a; see *id.* at 21a-22a. "To invoke the concept of 'uniformity,' however, is not to prove its need." *Atherton*, 519 U.S. at 220. Parallel federal and state regulation of national banks is a longstanding feature of the NBA regime. See *Cuomo*, 557 U.S. at 534 (observing, in 2009, that "States * * * have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years"). And in Section 25b(b)(1), Congress expressly preserved the applicability to national banks of "State consumer financial laws" except in three specified circumstances. 12 U.S.C. 25b(b)(1). In assessing whether

a challenged state law "significantly interferes with" a national bank's exercise of its powers, a court might take into account the degree of interference that would result if other States enacted similar laws. That possibility, however, provides no basis for treating anticipated practical effects as irrelevant.

2. The Second Circuit also asserted that a practical degree-of-interference inquiry would "entangle" courts "in questions they are poorly suited to answer." Pet. App. 23a n.8. But in resolving disputes concerning the preemptive effects of a wide range of federal statutes, courts routinely conduct practical, effects-based inquiries. In *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), for example, the Court identified seven "significant considerations" reflected in the federal rule regarding the use of restraints in vehicles. *Id.* at 877-881. The Court went on to consider the various ways in which the state-law rule advocated by the petitioner "would have stood 'as an obstacle to the accomplishment and execution of the important means-related federal objectives.'" *Id.* at 881 (citation omitted); see, *e.g.*, *Arizona* v. *United States*, 567 U.S. 387, 410 (2012) (finding state law preempted where it "creates an obstacle to the full purposes and objectives of Congress").

There is no reason to suppose that such inquiries will prove less workable in the context of NBA preemption. For example, in assessing the degree of conflict posed by New York's interest-on-escrow law, a court could ask whether the law is sufficiently burdensome to "deter" national banks from using mortgage escrow accounts. *Anderson Nat'l Bank*, 321 U.S. at 252. And it could ask whether the law amounts to an "unusual alteration" of the relationship "'between national banks and their cus-

tomers.'" *Id.* at 250-251 (citation omitted). Other similar inquiries may also be relevant to determining the degree to which various state laws interfere with national banks' exercise of their powers.

Based on its more categorical view of the NBA's preemptive scope, the Second Circuit specifically declined to assess the degree to which New York's interest-on-escrow law would impede national banks' performance of their banking functions. See Pet. App. 33a. Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should vacate the judgment below and remand the case to allow the court of appeals to undertake the correct preemption inquiry in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHARLES L. MCCLOUD
Assistant to the Solicitor General
GERARD SINZDAK
URJA MITTAL
Attorneys

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