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.,
RESPONDENT.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The petition (at i) presents the following question:

Does the National Bank Act preempt the application of state escrow-interest laws to national banks?

CORPORATE DISCLOSURE STATEMENT

Bank of America, N.A. is wholly owned by BAC North America Holding Company ("BACNAH"). BACNAH is a direct, wholly owned subsidiary of NB Holdings Corporation ("NB Holdings"). NB Holdings is a direct, wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange and has no parent corporation. Based on the U.S. Securities and Exchange Commission Rules regarding beneficial ownership, Berkshire Hathaway Inc., 3555 Farnam Street, Omaha, Nebraska 68131, beneficially owns greater than 10% of Bank of America Corporation's outstanding common stock.

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STATEMENT

This Court has long "recognized the special nature of federally chartered banks," commonly called national banks. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003). Unlike state-chartered banks, national banks' core banking powers—including the power to lend—come from federal law, namely the National Bank Act (NBA). And, unlike state-chartered banks, national banks are subject to plenary federal control and supervision to ensure that national banks play their part in national economic policy.

This Court repeatedly has held that "grants of both enumerated and incidental 'powers' to national banks

[are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996). "[T]he 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 v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875)). The court below thus properly held that preemption is based on the nature, not the magnitude, of the intrusion into national-bank powers. The 2010 Dodd-Frank Act codifies these principles by invoking "the legal standard for preemption" in this Court's *Barnett Bank* decision alongside a phrase from the opinion ("prevents or significantly interferes with the exercise by the national bank of its powers"). 12 U.S.C. § 25b(b)(1)(B).

Under this longstanding framework, New York's interest-on-escrow law is preempted. Respondent Bank of America is a national bank. Federal law expressly authorizes national banks to offer mortgages. That grant undisputedly includes the incidental power to offer escrow accounts to cover property taxes and insurance premiums. Congress, the Office of the Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau (CFPB) exhaustively regulate national banks' federally conferred powers over mortgages, including escrow accounts. And Congress and federal regulators have repeatedly declined to require national banks to pay interest on escrow accounts. OCC has opined that state laws regulating escrow accounts "meaningfully interfere with fundamental and substantial elements of the business of national banks." 76 Fed. Reg. 43549, 43557 (July 21, 2011).

New York's law would require national banks to pay 2% interest or *any* higher rate of New York's choosing on escrow accounts. That law defies Congress' decision to leave it to national banks to set the terms of escrow accounts, including whether to pay interest. Further, New York's law frustrates national banks' federally conferred mortgage-lending powers in practice. New York's law empowers state officials to impose any interest rate to infinity, backed by punitive fines, leaving the terms and conditions of escrow accounts at New York's mercy. Eleven other States impose competing requirements, threatening a patchwork, "death-by-a-thousand-cuts regime of mortgage-escrow regulation." Pet.App.22a.

Petitioners' and the Solicitor General's approach would replace stability and precedent with mayhem. Under their view, Congress in Dodd-Frank codified *Barnett Bank*, yet replaced this Court's preemption test with its antithesis—a requirement that national banks make factual showings that state laws all but foreclose national banks from exercising federally conferred powers. That approach would require litigating laws State-by-State, and perhaps bank-by-bank. One national bank might satisfactorily show drastic enough consequences to trigger preemption; others might not, spawning incessant, unpredictable litigation in every State over every banking law.

That new test would give States unheard-of powers to try to dictate the terms and conditions of national banks' exercise of core national powers. States could pervasively try to regulate mortgage length, minimum account balances, when funds become available, and so on, unless and until that regulation nearly extinguishes the federal power altogether. When state regulation would cross the line is anyone's guess. For an industry built around mitigating financial risk, that novel preemption approach would invite the destabilizing consequences that Congress in the 1860s enacted the NBA to prevent.

A. National Banks' National Function and Insulation from State Control

1. Since 1863, the United States has employed a dual system of national and state-chartered banks. National banks originated in 1791; the federal government charters and extensively regulates them to sustain the national economy. *See* OCC, *Annual Report* 4, 21 (2022). By contrast, individual States charter and supervise state banks. National banks languished after the Second Bank of the United States expired in 1836, and state-chartered banks expanded. Throughout the mid-19th century, state banks operated "in a jungle of *laisse[z] faire*" and committed "profuse" "blunders" "incongruous with the nature of the economy." Bray Hammond, *Banks and Politics in America* 675-76 (1957).

Congress thus enacted the NBA in a pair of 1863 and 1864 statutes to "secure the financial stability of the Republic" and create a new "banking system" with which States could not "interfere." Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Charles Sumner). Respondent Bank of America's predecessors obtained one of the first federal charters in 1865.

The NBA "establish[ed] the system of national banking still in place today." *Watters*, 550 U.S. at 10. National banks still act as "depositaries of public money" and "financial agents of the Government." 12 U.S.C. § 90. At the Secretary of the Treasury's command, national banks must "give satisfactory security" to guarantee "faithful performance" of their federal duties. *Id.* During emergencies, the President may order Treasury to impose any restriction on national banks and other federally regulated entities "to relieve interstate commerce." *Id.* § 95(a).

National banks' banking business is bound up with their role providing credit for the national economy. Many of national banks' public functions, especially providing "federal credit, depend upon their success in attracting private deposits." *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954). Congress thus gave national banks broad "power[s] … to carry on the business of banking," including to "make contracts," "receiv[e] deposits," and "loan[] money on personal security" or "interests in real estate." 12 U.S.C. §§ 24 Third, Seventh, 371(a). Congress also vested national banks with "all such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24 Seventh.

Further, national banks assist federal monetary policy. They must purchase stock in their regional Federal Reserve Bank, *id.* § 222—the "bank[s] for banks" that underpin the American monetary system. *See* Fed. Rsrv. Sys., *The Fed Explained* 11 (11th ed. 2021). At any time, the Federal Reserve can order national banks to pay for outstanding stock in gold. 12 U.S.C. § 282. Large national banks can trade with the Federal Reserve Bank of New York to "make markets" "in its implementation of monetary policy." *See* Fed. Rsrv. Bank of N.Y., *Primary Dealers*, http://tinyurl.com/4w33ez7x.

Thus, while national banks no longer issue currency—a power Congress transferred to the Federal Reserve in 1913, Federal Reserve Act, ch. 6, 38 Stat. 251 (1913)—national banks remain integral tools of national economic policy. This Court has described national banks as "instrumentalit[ies] of the federal government" because of their enduring "public purpose." *Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978) (citation omitted).

2. National banks are also "subject to the paramount authority of the United States." *Id.* (citation omitted). While various federal agencies regulate the financial industry, since 1863, Congress has charged OCC with pervasively regulating all aspects of national banks to advance public purposes.

To receive a federal charter, OCC must determine that the bank would support "a safe and sound banking system." 12 C.F.R. § 5.20(f)(i). OCC exercises "visitorial powers," *i.e.*, "sovereign oversight and supervision," over national banks. *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 529 (2009). OCC may "examine into [a national bank's] manner of conducting business, and enforce an observance of its laws and regulations." *Watters*, 550 U.S. at 14 (citation omitted). OCC may examine national banks at any time, for any reason. *Cuomo*, 557 U.S. at 531. OCC "prescribes standards under which national banks may purchase, sell, deal in, underwrite, and hold securities." 12 C.F.R. § 1.1(b). OCC imposes minimum capital requirements on national banks. *See id.* pt. 3. And OCC exhaustively prescribes how national banks can exercise their express power to offer mortgages. *Infra* pp. 10-11.

Given national banks' federal functions under federal supervision, this Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. To distinguish between permissible and impermissible state regulation, this Court asks whether state law would "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33. States may not "curtail or hinder a national bank's efficient exercise of any … power, incidental or enumerated under the NBA," whether by attaching state-law conditions to the exercise of national banks' federally conferred powers or enacting laws whose effect is to stymie national-bank powers. *Watters*, 550 U.S. at 13.

B. The 2010 Dodd-Frank Act

The 2010 Dodd-Frank Act responded to the 2008 recession. With respect to national-bank preemption of state consumer financial laws, Dodd-Frank "clarified" the NBA's standard. 12 U.S.C. § 25b (title).

Dodd-Frank's express-preemption provision identifies three types of preempted state consumer financial laws, *i.e.*, laws "that directly and specifically regulate[] 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." *Id.* § 25b(a)(2), (b):

- As relevant here, state consumer financial laws are preempted when, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank* …, the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 25b(b)(1)(B).
- Such laws are preempted when they "would have a discriminatory effect on national banks." *Id.* § 25b(b)(1)(A).
- They may also be "preempted by a provision of Federal law other than title 62 of the Revised Statutes" (which includes most of the NBA). *Id.* § 25b(b)(1)(C).

Dodd-Frank also amended the NBA to not preempt state laws as applied to national-bank subsidiaries, overruling the result in *Watters*. *Id.* § 25b(b)(2); *see* 550 U.S. at 21. And Dodd-Frank specified detailed procedures for

OCC preemption determinations, including on-the-record findings and consultation with the CFPB. 12 U.S.C. § 25b(b)(3)(B), (c); *infra* pp. 44-45.

C. Mortgage Escrow Accounts

1. Federal law has long empowered national banks to offer mortgages. In 1863, Congress authorized national banks to "loan[] money on real … security." Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 668; *contra* Pet. Br. 7, 11. Although Congress revoked that power in 1864, Congress in 1913 authorized national banks to offer loans secured by farmland. Act of June 3, 1864, ch. 106, § 8, 13 Stat. 99, 101; Federal Reserve Act § 24, 38 Stat. at 273. In 1982, Congress granted national banks full authority to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate," *i.e.*, mortgages. 12 U.S.C. § 371(a).

National banks account for 9 of the top 20 U.S. mortgage lenders. Alex Graf & Gaby Villaluz, *Banks Gain Major Ground in Mortgage Market Share, but Nonbanks Still Lead*, S&P Glob. Mkt. Intell. (July 13, 2023), http://tinyurl.com/mkw2vx4c. In 2022, Bank of America funded $44.7 billion in first mortgages, and has committed $15 billion to helping 60,000 low- and middle-income families purchase homes through 2025. *See* Bank of America, *Bank of America Triples Affordable Homeownership Commitment to $15 Billion* (Feb. 3, 2021), http://tinyurl.com/ejy8abab.

2. National banks exercise the "incidental" power to offer escrow accounts when they originate and service mortgages. 12 U.S.C. § 24 Seventh. Mortgage markets "typically require[] the establishment of escrow accounts," which are "a logical outgrowth of the lending function." OCC Conditional Approval #276, at 12 (May 8,

1998); U.S. Br. 2. Borrowers prepay expenses like property taxes and insurance premiums into escrow, and lenders and servicers ensure these bills are timely paid.

The vast majority of mortgages have an escrow account. FHFA & CFPB, *A Profile of 2016 Mortgage Borrowers* 27 (2018). After the Great Depression triggered cascading foreclosures, federal agencies that purchase or insure mortgages began requiring escrow accounts. GAO, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Several federal programs require escrow accounts, including loans insured or guaranteed by the Federal Housing Administration (FHA) and Department of Agriculture, and many mortgages purchased by Fannie Mae or Freddie Mac.[1] These programs do not require interest or reimburse banks that pay interest.[2]

Escrow accounts protect lenders by protecting their collateral (the borrower's home) against tax foreclosure and property damage. Because tax liens are superior to mortgage liens, borrowers' failure to pay property taxes means governments collect before lenders. Bruce E. Foote, Cong. Rsch. Serv., *Mortgage Escrow Accounts* 1-2 (1998). Likewise, if homeowners fail to pay insurance premiums and fire destroys the house, lenders may be left holding worthless collateral. *Id.*

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[1] *See* 24 C.F.R. § 200.84(b)(3) (FHA-insured loans); 7 C.F.R. § 3555.252(b) (USDA Guaranteed Rural Housing Program); USDA, *HB-1-3550 Direct Single Family Housing Loans and Grants* 351 (2022), https://tinyurl.com/bdz7dzwx; Fannie Mae, *Selling Guide* 224 (2023), http://tinyurl.com/4364w8hk; Freddie Mac, *Servicer Guide* § 4201.23 (2023), https://tinyurl.com/3um2y9s6.

[2] *See* Fannie Mae, *Servicing Guide* 168 (2023), http://tinyurl.com/ye23hrz4; Freddie Mac, *Servicer Guide*, *supra*, § 8201.1(a)(i).

As the CFPB has observed, escrow accounts "provide meaningful consumer protections" and guard against "a higher probability of foreclosure." 78 Fed. Reg. 4726, 4735, 4747 (Jan. 22, 2013). Escrow accounts "make[] it easier to budget … by paying small amounts with each mortgage payment" and prevent borrowers from "scrambl[ing] to pay a large property tax bill or insurance premium." CFPB, *What Is an Escrow or Impound Account?* (Sept. 4, 2020), https://tinyurl.com/3zf5e4dz.

Bank of America does not charge borrowers for escrow services and holds escrowed funds in non-interest-bearing accounts. Orriss Decl. ¶ 2, *Lusnak v. Bank of Am.*, No. 14-1855 (C.D. Cal. Sept. 27, 2019), ECF No. 87-6; *contra* Pet. Br. 20. For FHA-insured mortgages, federal guidance prevents national banks from investing escrowed funds and limits their use to "the purpose for which they were collected." *See* HUD, *Handbook 4000.1*, at 931 (Jan. 18, 2023), http://tinyurl.com/bddmmz9h. Bank of America applies those guidelines to all escrow accounts. Indeed, escrow accounts cost banks money; banks bear administrative expenses (like account statements and record-keeping) and costs from updating estimated taxes and insurance premiums. *See* Orris Decl. ¶¶ 2-3.

3. Mortgages issued by national banks face exhaustive federal oversight. OCC sets stringent, elaborate lending requirements. 12 C.F.R. § 34.62(b)(1)(i) & app. National banks must consider "the borrower's ability to repay," not just the home's value, *id.* § 34.3(b), and follow OCC appraisal guidelines, *id.* pt. 34 subpt. C.

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601 *et seq.*, as implemented by the CFPB's "Regulation X," 12 C.F.R. § 1024.17, extensively regulates mortgage-escrow accounts. Lenders may collect only funds "sufficient to pay such taxes, insurance premiums and other charges" plus a small cushion for unexpected changes. 12 U.S.C. § 2609(a)(1). Lenders must ensure that bills are "timely" paid, *id.* § 2605(g), and refund surplus deposits over $50, 12 C.F.R. § 1024.17(f)(2). The CFPB and OCC ensure national banks' compliance with RESPA. 12 U.S.C. § 5515(e).

Congress has thrice considered but declined to require interest on mortgage escrow accounts. *See* GAO Study, *supra*; H.R. 3542, 102d Cong. (1991); H.R. 27, 103d Cong. (1993). Instead, Dodd-Frank amended the Truth in Lending Act (TILA) to require lenders to establish escrow accounts for certain mortgages with above-average interest rates. 15 U.S.C. § 1639d(b). For these accounts only, lenders "shall pay interest to the consumer" "[i]f prescribed by applicable State or Federal law." *Id.* § 1639d(g)(3). This provision does not apply to petitioners' mortgages. Pet.App.29a.

4. New York and other States have nonetheless attempted to regulate national banks' escrow accounts. As of 2018, 14 States mandated that all lenders—including national banks—pay state-dictated interest rates on escrowed funds; Iowa and Wisconsin later repealed their laws.[3] New York's General Obligations Law § 5-601 mandates interest on any "escrow account … in connection with a mortgage" on one-to-six family homes and co-ops in New York. Lenders must pay the "higher" of 2% or any "rate prescribed by the superintendent of financial services." *Id.* The Superintendent may, every three months,

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[3] Cal. Civ. Code § 2954.8(a); Cal. Fin. Code § 50202; Pet.App.22a n.7 (collecting citations); *see* 2017 Wis. Act 340; 2022 Iowa S.F. 586.

set *any* rate. *See* N.Y. Banking Law § 14-b. Penalties for noncompliance reach $250,000 daily. *Id.* § 44(4).

But OCC has long considered state restrictions on national banks' mortgage powers preempted. In 1983, OCC opined that the NBA preempts "certain state laws which apply to real estate lending," including laws regulating mortgages' size, repayment schedule, and term. 48 Fed. Reg. 40698, 40700-01 (Sept. 9, 1983). Varying state mortgage regulations, OCC explained, would constrain "national banks' ability to respond to market conditions." *Id.* at 40699.

In 2004, OCC addressed "[e]scrow accounts" directly, issuing a notice-and-comment rule preempting "state law limitations" on real-estate lending, including escrow accounts. 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004). OCC determined that such state laws "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers." *Id.* "[D]iverse and potentially conflicting state and local laws," like those governing real-estate lending, impede national banks' ability "to operate under the powers of their Federal charter." *Id.* at 1908.

After Dodd-Frank, OCC issued a 2011 regulation confirming that state laws identified in the 2004 rule, including escrow-account restrictions, remained preempted. 76 Fed. Reg. at 43557. OCC opined that Dodd-Frank did not adopt a "new, stand-alone 'prevents or significantly interferes' preemption standard," but incorporated *Barnett Bank*. *Id.* at 43555. OCC acknowledged that its 2004 "obstruct, impair, or condition" formulation "created confusion and misunderstanding" and clarified its rule did not preempt the field. *Id.* at 44556. OCC explained that preemption stems from "the extent and nature of an impediment posed by state law to the exercise of a power granted national banks under Federal law." *Id.* OCC also concluded that Dodd-Frank's procedural requirements for OCC preemption determinations did not retroactively repeal the 2004 rule. *Id.*

D. Proceedings Below

1. Petitioners purchased homes in New York with mortgages issued by Bank of America. Pet.App.9a-10a. Cantero entered his mortgage in August 2010, before Dodd-Frank's effective date. Pet.App.9a-10a. Hymes and Harwayne-Gidansky entered their mortgage in May 2016, after Dodd-Frank's effective date. Pet.App.10a. Petitioners' mortgages attached a "NOTICE CONCERNING YOUR ESCROW ACCOUNT" explaining that, because Bank of America is a national bank, "no interest will accrue on your escrow account even if your state has a law concerning the payment of interest on escrow accounts." *Hymes* C.A.J.A.51; *accord Cantero* C.A.J.A.40.

In 2018, petitioners brought separate putative class actions against Bank of America in the Eastern District of New York. Pet.App.52a. Petitioners alleged breach-of-contract, unjust-enrichment, and statutory consumer-protection claims, all arising from Bank of America's nonpayment of interest on escrow accounts. Pet.App.84a.

2. Bank of America moved to dismiss, arguing that the NBA preempted New York's interest-on-escrow law. Pet.App.85a. The district court rejected preemption and let petitioners' breach-of-contract claims proceed, but dismissed petitioners' other claims under New York law. Pet.App.118a-123a. As to preemption, the court reasoned that New York's law did not "prevent or significantly interfere with" national banks' power to offer escrow ac-

counts because New York mandated payment of "comparatively small sums" with a low "cost of compliance." Pet.App.111a-113a.

Bank of America moved for interlocutory review. OCC filed an amicus brief explaining that the court's order "upset[] settled legal principles" and "could undermine key aspects of the national banking system." D. Ct. OCC Br. 1, 5. The court certified an interlocutory appeal. Pet.App.69a.

3. The Second Circuit reversed. Pet.App.1a-34a. The court explained that while this "Court has used various formulations to describe when states impermissibly regulate national banks," Pet.App.16a, the common thread from *McCulloch* (1819) to *Watters* (2007) is that federal law preempts any state law that "would exert control over a banking power." Pet.App.17a-20a. Otherwise, national banks could face a "death-by-a-thousand-cuts regime" of state regulation. Pet.App.22a. However, Congress did not "occup[y] the field," so States "are generally free to impose" their laws on national banks—including generally applicable restrictions with "severe" dollars-and-cents burdens. Pet.App.22a, 28a n.10.

The court held that New York's law was preempted as to Cantero, whose mortgage did not implicate Dodd-Frank. "[N]o party dispute[d]" national banks' "'power to provide escrow services' in connection with home mortgage loans." Pet.App.6a-7a. New York's law "exert[ed] control over" that power and was thus preempted. Pet.App.23a. "[S]tate authority to set minimum interest rates could infringe on national banks' power to use mortgage escrow accounts altogether," as OCC's amicus brief before the court confirmed. Pet.App.23a-24a.

The Second Circuit likewise found New York's law expressly preempted as to Hymes and Harwayne-Gidansky's mortgage, which post-dated Dodd-Frank. Pet.App.25a. Because Dodd-Frank "codif[ied] the ordinary rules of preemption," New York's law was preempted under the same analysis for Cantero. Pet.App.26a. The court noted that Congress' decision in TILA to subject particular mortgages (but not petitioners') to interest-on-escrow laws suggested Congress intended to exclude other escrow accounts from those laws. Pet.App.29a-30a.[4]

Judge Pérez concurred "in full," emphasizing that New York's law "directly condition[ed]" banks' federal power to offer escrow accounts "on the payment of interest," but that States have ample room to regulate national banks. Pet.App.35a, 39a. She also expressed the view that national banks must follow state interest-on-escrow laws for mortgages subject to TILA, but not for other mortgages like petitioners'. Pet.App.40a.

SUMMARY OF ARGUMENT

I. The NBA preempts New York's interest-on-escrow law, both before and after Dodd-Frank.

A. The parties agree that this Court's bank-preemption precedents, including *Barnett Bank*, govern Cantero's mortgage. Under those precedents, the NBA

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[4] The court (Pet.App.26a n.9) also noted that Bank of America forfeited the argument that 12 U.S.C. § 25b(b)(1)(C) separately preempts state interest-on-escrow laws. Section 25b(b)(1)(C) preempts any state law "preempted by a provision of Federal law other than title 62 of the Revised Statutes." Title 62 includes most of the NBA, but omits the real-estate lending provision, 12 U.S.C. § 371. Therefore, even if section 25b(b)(1)(B) codifies a narrower preemption standard than *Barnett Bank*, *Barnett Bank* would still apply to real-estate lending.

preempts state laws that control or otherwise unduly burden national banks' exercise of federally granted powers.

This Court has consistently deemed preempted a range of state laws that add state-law conditions to national banks' exercise of their powers. To start, States cannot control national-bank powers. Some preempted state laws prohibit national banks from exercising federally authorized powers, as in *Barnett Bank*. This Court has also preempted state laws that simply restrict national banks' exercise of federal powers, *e.g.*, by limiting the words banks use to advertise. Additionally, this Court independently has preempted state laws that hinder bank operations even if they do not directly control national-bank powers. That longstanding preemption approach leaves considerable room for States to regulate national banks, both with generally applicable rules and bank-specific laws, like bans on racially discriminatory lending.

B. New York's interest-on-escrow law is preempted because it impermissibly controls a core national-bank power. National banks undisputedly have the incidental power to offer mortgage escrow accounts as part of their explicit federal power to extend mortgages. Congress, OCC, and the CFPB have pervasively regulated national banks' real-estate-lending power, including escrow accounts, without mandating interest. But New York subjects national banks' power to offer escrow accounts to the condition that national banks pay whatever interest New York prescribes, depriving national banks of the authority to set the terms of escrow accounts themselves.

Even were New York not seeking to control a core national-bank power, New York's law hinders the operation of national-bank powers. New York's Superintendent of Financial Services may impose *any* interest rate she wishes, backed by coercive penalties. National banks would have no choice but to comply and make up the difference elsewhere. Eleven other States impose their own competing requirements with different interest rates, computation methods, and property coverage; more could follow. As OCC's preemption rules—which the Solicitor General discards in a footnote—confirm, such duplicative, burdensome state regulation undermines national-bank real-estate lending.

C. Dodd-Frank expressly codified *Barnett Bank* by name. And lower courts circa 2010 uniformly understood *Barnett Bank* to encapsulate longstanding caselaw preempting state laws that control national-bank powers. Because those precedents preempt New York's law as to Cantero, Dodd-Frank expressly preempts New York's law as to Hymes and Harwayne-Gidansky.

II. Petitioners and the government propose a fact-intensive inquiry into whether a state law would effectively vitiate a national-bank power. That test appears nowhere in Dodd-Frank's text or this Court's caselaw, and would produce intolerable instability as to what state laws are actually preempted, when, and as to which banks.

A. Dodd-Frank preempts state laws if, "in accordance with the legal standard for preemption in" *Barnett Bank*, the state law "prevents or significantly interferes with the exercise" of national-bank powers. 12 U.S.C. § 25b(b)(1)(B). Yet petitioners and the government initially rely on dictionaries, not *Barnett Bank*, to define "prevents or significantly interferes" as quantitatively large effects. But "significantly" also means "important," and state laws that control a national-bank power qualify because they usurp federal primacy.

Regardless, Dodd-Frank did not fashion a new preemption test by citing *Barnett Bank* and quoting its "prevents or significantly interferes" formulation. By copying this Court's language, Congress tracked this Court's meaning. While petitioners and the government try to square their reading with *Barnett Bank* writ large, that opinion uses "prevents or significantly interferes" interchangeably with other formulations synthesized from previous precedents. Until this case, the Office of the Solicitor General repeatedly interpreted *Barnett Bank* to bar *any* intrusion on national banks' federal powers that Congress had not allowed.

Petitioners incorrectly claim that the decision below would preempt all "[s]tate consumer financial laws," as Dodd-Frank defines that term. "State consumer financial laws" include those that regulate "the manner, content, or terms and conditions of any financial transaction" in which national banks may engage. *Id.* § 25b(a)(2). Many state laws—like state laws banning racially discriminatory lending, or the statute of frauds—fit that definition but are not preempted.

B. Dodd-Frank does not require a factual showing of a law's impact. Petitioners and the government invoke the fact-finding requirements that apply when *OCC* issues a rule preempting state law. Those requirements do not extend to *courts*, which simply apply *Barnett Bank* to determine whether the NBA preempts state law.

C. Petitioners and the government claim that Dodd-Frank's legislative history shows that Congress intended to undo OCC's 2004 preemption regulation. Whatever Congress thought of how OCC articulated the standard, legislative history confirms that Congress did not intend any change from this Court's longstanding caselaw.

D. Preemption is ordinarily a legal test. Transforming bank preemption into a fact-specific inquiry would leave banks and regulators guessing what state laws are preempted. States could impose myriad regulations that strike at the heart of bank powers from mortgage terms to loan fees, so long as those regulations do not practically stop banks from offering a product or service. Banks and courts would have no guidance on how much regulation is too much, leaving preemption determinations to shift with market conditions and judges' economic assessments.

ARGUMENT

I. The National Bank Act Preempts New York's Law

Under this Court's national-bank preemption precedents, the NBA preempts state laws that control the exercise of federally conferred banking powers. Here, federal law empowers national banks to offer mortgage escrow accounts subject to federal regulation. New York's law controls that power by forcing national banks to pay interest that federal law does not require. New York's law is therefore preempted as to Cantero, whose claims pre-date Dodd-Frank's effective date.[5] New York's law is likewise expressly preempted as to Hymes and Harwayne-Gidansky, whose mortgage is subject to Dodd-Frank, which codifies *Barnett Bank* and this Court's longstanding bank-preemption framework.

[5] The government (at 25-26 n.7) suggests that Dodd-Frank applies to Cantero's claims seeking interest after Dodd-Frank's effective date. But New York breach-of-contract claims "generally accrue[] upon the breach." *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, 140 N.E.3d 511, 520 (N.Y. 2019). For claim accrual, New York courts treat the initial wrong payment, not subsequent payments, as the breach. *E.g.*, *Ilan Props., Inc. v. Benishai*, 166 N.Y.S.3d 532, 533 (App. Div. 2022). The law at the time of Cantero's mortgage—which Cantero alleges Bank of America immediately breached—therefore governs. Regardless, as the government (at 25 n.7) acknowledges, Cantero waived any contrary argument. Pet.App.10a.

A. The NBA Preempts State Laws Controlling or Otherwise Impairing Federal Banking Powers

1. State laws that control or otherwise hinder national banks' exercise of their federally conferred powers are preempted unless Congress expressly authorizes them. That rule reflects national banks' unique federal status. Federal law defines national banks' powers. 12 U.S.C. § 24. Federal regulators exercise near-plenary supervision over national banks, to advance federal purposes like supplying credit for the national economy. *Supra* pp. 5-7. Given national banks' federal functions, this Court and the United States have described national banks as federal "instrumentalit[ies]" well into the modern day. *Marquette*, 439 U.S. at 308 (citation omitted); U.S. Br. 13, *Cuomo*, 557 U.S. 519 (No. 08-453).

Barnett Bank held that States only retain "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. States cannot "unlawfully encroach on the rights and privileges of national banks" (or "interfere with, or impair [national banks'] efficiency in performing [authorized] functions"). *Id.* at 33-34 (cleaned up).

First and foremost, state laws restricting the exercise of national banks' federally granted powers are preempted when "the federal power-granting statute … contain[s] 'no indication that Congress … intended'" such restrictions. *Id.* at 34 (quoting *Franklin*, 347 U.S. at 378). That cardinal rule, *Barnett Bank* observed, reflects the "history" of bank preemption, which establishes that "grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."

Id. at 32 (quoting *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368-69 (1923)). Further, state laws "prevent or significantly interfere with the national bank's exercise of its powers"—even if those laws do not directly regulate national banks' powers—if the law's effect is to "destro[y] or hampe[r]" those powers. *Id.* at 33.

Watters—this Court's lone case explicating *Barnett Bank*—reiterated: "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." 550 U.S. at 11 (quoting *Dearing*, 91 U.S. at 34); *accord Cuomo*, 557 U.S. at 553 (Thomas, J., dissenting in part) (quoting same passage). "Beyond genuine dispute," *Watters* concluded, "state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA." 550 U.S. at 13 (citing *Barnett Bank*, 517 U.S. at 33-34).

Likewise, until this case, the United States repeatedly told this Court that *Barnett Bank* reflects "the settled principle that the grants of both enumerated and incidental powers to national banks ordinarily preempt any state law limitations." U.S. Br. 8, *Watters*, 550 U.S. 1 (No. 05-1342); *accord Cuomo* U.S. Br. 19. The United States represented that *Barnett Bank* "held that, where national banks are granted an express or incidental power by the National Bank Act, state law limitations on that power do not apply in the absence of congressional specification to that effect." *Watters* U.S. Br. 9. And the United States characterized *Barnett Bank* as asking whether state laws "frustrate achievement of the [NBA's] purposes." *Id.* at 27. As the United States summarized this Court's caselaw: "From its enactment, the National Bank Act has embodied the principle that 'the States can exercise no control over' national banks … 'except in so far as Congress may see proper to permit.'" *Id.* at 9 (quoting *Dearing*, 91 U.S. at 34); *Cuomo* U.S. Br. 17.

2. Under those principles, the NBA preempts state laws that control the exercise of federally granted banking powers by attaching state-law conditions.

Most obviously, States cannot impose directly conflicting duties. For example, New York could not require insolvent banks to preference certain creditors at a time when federal law dictated equal treatment. *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 284 (1896). Nor can States prohibit the exercise of federally authorized powers. In *Barnett Bank*, federal law let national banks sell insurance, but Florida barred banks from selling insurance. 517 U.S. at 29. Florida's law was preempted because Congress "did not intend to subject national banks' power to local restrictions." *Id.* at 34.

Even state laws that merely bar national banks from exercising a *subset* of a federally conferred power are invalid. For instance, the NBA empowers national banks to offer mortgages and grants incidental powers necessary to effectuate that power. Thus, state laws banning certain debt-acceleration provisions in mortgage contracts are preempted, even though such clauses are a sliver of national banks' mortgage powers. *Id.* at 33 (citing *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154-59 (1982)). Similarly, this Court deemed an Iowa law banning insolvent banks from accepting deposits preempted, even though that law only affected national banks' federally conferred power to accept deposits in rare circumstances (insolvency). *Id.* at 32 (citing *Easton v. Iowa*, 188 U.S. 220, 229-30 (1903)).

State laws that encroach on national banks' federal powers are preempted too. Most relevant is *Franklin*, a case *Barnett Bank*, 517 U.S. at 33, deemed "quite similar." *Franklin* held that a New York law prohibiting banks from using the word "savings" in advertisements was preempted because the NBA "authorizes national banks to receive deposits without qualification or limitation." 347 U.S. at 376. *Franklin* reasoned that restrictions on advertising would impair national banks' ability to attract deposits and were thus preempted, even though the NBA says nothing about advertising. *Id.* at 377-78. As this Court summed up: States may not "subject" national banks' powers "to local restrictions." *Id.* at 378.

Or take *McCulloch v. Maryland*, which held that States cannot tax national-bank operations. Taxes may not stop banks from doing anything, but "the power to tax involves the power to destroy," so "states have no power … to retard, impede, burden, or in any manner control" national banks. 17 U.S. 316, 431, 436 (1819).

Similarly, *Dearing* held that States could not hamper national banks' loan-making powers by supplementing federal-law remedies for usurious loans. 91 U.S. at 33. The NBA permits States to cap interest rates on loans, but prescribes the remedy as voiding the interest. Allowing States to impose the further remedy of voiding the entire usurious contract would not necessarily affect national banks' lending given the existing penalties for usury. Yet this Court deemed preempted a New York law voiding the entire contract as a "usurpation of power." *Id.* at 34.

More recently, *Watters* held preempted state laws imposing licensing, reporting, and visitorial regimes on national-bank subsidiaries' mortgage businesses. Such state regulatory regimes do not necessarily restrict any of national banks' substantive powers. But conducting mortgage-lending activities through subsidiaries is one of national banks' incidental powers under the NBA. 550 U.S. at 7. Superimposing additional state regulatory oversight would thus impermissibly "interfere with the 'business of banking.'" *Id.* at 21.[6] In short, "[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." Pet.App.17a.

Additionally, beyond state laws that seek to directly control national-bank powers, the NBA preempts state laws that nonetheless "impose an undue burden on the performance of the banks' functions." *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944). The NBA "shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. This Court thus deemed preempted a California law that let the State seize all bank accounts inactive for 20 years. *California*, 262 U.S. at 369-70. That law did not attach any conditions on how national banks exercised their federal power to accept deposits; the law was directed at ownership of the underlying account. *Id.* at 369. But preemption applied because depositors "might well hesitate to subject their funds to possible confiscation." *Id.* at 370. Plus, other States might impose "varying limitations," undermining national banks' ability to provide uniform bank-account services "irrespective of domicile." *Id.*

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[6] As petitioners (at 35) note, Dodd-Frank abrogated *Watters*' holding by providing that state consumer financial laws "shall apply to a subsidiary … of a national bank." 12 U.S.C. § 25b(b)(2), (e). Dodd-Frank did not disturb *Watters*' legal reasoning, which invokes the "prevent or significantly interfere" formulation upon which petitioners rely. 550 U.S. at 12.

3. Petitioners (at 33) and the government (at 23-24) object that the above principles effectively occupy the field and displace most state laws. *Accord* CSBS Br. 4-10; Pub. Citizen Br. 18-21; N.Y. Br. 3-12; CAC Br. 5-9. But this Court's preemption framework "leaves ample room for state regulation of national banks" of all sorts. Pet.App.35a (Pérez, J., concurring); *accord Atherton v. FDIC*, 519 U.S. 213, 223 (1997) (canvassing examples).

For starters, national banks "are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA," of which there are plenty. *Watters*, 550 U.S. at 11; *see* 12 C.F.R. § 34.4(b) (cataloging non-preempted state laws). National banks follow state contract-formation rules. *McClellan v. Chipman*, 164 U.S. 347, 358 (1896). National banks cannot accept property transfers from insolvent businesses. *Id.* State law governs national banks' "right to collect their debts, and their liability to be sued for debts." *First Nat'l Bank v. Kentucky*, 76 U.S. 353, 362 (1870). National banks face state-law tort claims. *Atherton*, 519 U.S. at 223 (citing *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103 (1939)). All those laws are permissible, absent an unusual regime whereby these indirect limitations rise to the level of frustrating national banks' exercise of their powers. *Watters*, 550 U.S. at 11; *accord California*, 262 U.S. at 368-69.

State banking laws are also not categorically preempted. This Court deemed non-preempted a Missouri law precluding banks from opening branches, even though the state law directly regulated banks. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656-57 (1924). That law did not "interfere with the purposes" of national banks, "tend to impair or destroy their efficiency," or "conflict with the paramount law of the United States" because, at the time, the NBA did not grant national banks the power to open branches. *Id.* at 656, 659.

The NBA similarly does not preempt laws letting States claim abandoned bank accounts. *Anderson*, 321 U.S. at 247-48. Those laws do not "infringe or interfere with any authorized function of the bank" because banks always have to pay deposits on demand. *Id.* at 249. Preemption thus does not apply unless those laws, like the law in *California*, would "deter [customers] from placing or keeping their funds in national banks." *Id.* at 250.

And in *Cuomo*, this Court held that States can enforce non-preempted state laws against national banks. 557 U.S. at 536. All accepted, and this Court assumed, that New York's fair-lending statute at issue was not preempted. *See Cuomo* U.S. Br. 20. As OCC has long maintained, state fair-lending laws, which bar discrimination on the basis of protected classes like race and sex, are not preempted. OCC Interpretive Ltr. #998, at 1 (Mar. 9, 2004).

4. Petitioners (at 12-13, 34, 41-42) and the government (at 28) depict the control test as a discarded 19th century relic. But *Barnett Bank* emphasized the "history" of national-bank powers "ordinarily pre-empting[] contrary state law," citing cases back to 1876 and calling national banks "normally 'independent, so far as powers conferred are concerned, of state legislation.'" 517 U.S. at 32 (quoting *Easton*, 188 U.S. at 229-30; citing *Waite v. Dowley*, 94 U.S. 527, 533 (1876)). Were the control test abandoned around 1924, as petitioners (at 41) claim, *Watters* in 2007 would not have cited *McCulloch* as the foundational case holding "federal law supreme over state law with respect to national banking." 550 U.S. at 10.

The government's condemnation (at 28-30) of the Second Circuit for "misunderst[anding] *Barnett Bank*" to impose a "rigid 'control' test" is particularly puzzling. Before this case, the United States' position across administrations was that, "[f]rom its enactment, the National Bank Act has embodied the principle that 'the 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* U.S. Br. 9 (quoting *Dearing*, 91 U.S. at 34) (emphasis added); *accord Cuomo* U.S. Br. 7.

Petitioners (at 10-13, 41-42) and the government (at 26-28) dismiss early cases as resting on an outdated conception of national banks' powers that purportedly ceased when the 1913 Federal Reserve Act transferred currency issuing to the Federal Reserve. That thesis ignores the federal functions and forms of federal control that still give national banks a unique role in national economic policy. *Supra* pp. 5-7. Also unmentioned: the United States' previous, unflinching view that, "[a]s instrumentalities of the federal government, federally chartered and created for a public purpose, national banks have always been subject to the paramount authority of the United States." *Cuomo* U.S. Br. 13; *accord Marquette*, 439 U.S. at 308.

B. New York's Law Is Preempted

The Second Circuit correctly held that New York's interest-on-escrow law is preempted. Pet.App.23a. "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." Pet.App.23a.

1. New York's law impermissibly conditions the exercise of national-bank powers on compliance with state law. Federal law expressly empowers national banks to engage

in real-estate lending, *i.e.*, to offer mortgages. 12 U.S.C. § 371(a). The NBA also gives national banks all "incidental powers … necessary to carry on the business of banking." *Id.* § 24 Seventh. Those incidental powers undisputedly include offering mortgage escrow accounts.[7]

Congress has not "conditioned the grant of" national banks' mortgage-escrow authority upon compliance with state-law conditions—namely, mandatory payment of interest. *See Barnett Bank*, 517 U.S. at 34. Congress made national bank's real-estate powers "subject to" just two limitations: (1) federal banking agencies' "uniform regulations prescribing standards" for mortgages, and (2) any "restrictions and requirements" OCC may prescribe. 12 U.S.C. §§ 371(a), 1828(o). By "specifically refer[ring] to 'rules and regulations' that will govern" real-estate powers and "citing as their source not state" but federal law, Congress signaled a "broad" power not "limited" by state law. *See Barnett Bank*, 517 U.S. at 32.

Congress has considered and chosen how to protect consumers in the escrow-account area, deciding against mandating interest and instead imposing "apt provisions, sanctioned by severe penalties." *See Easton*, 188 U.S. at 230. Many federal programs require escrow accounts. *Supra* p. 9. Just as States were enacting 1970s-era laws requiring interest, Congress in 1974 made a different choice in RESPA, specifically declining to require interest and instead capping the amount of money banks can collect. 12 U.S.C. § 2609(a)(1); *see* GAO Study, *supra*. If banks fail to timely pay expenses or refund leftover funds, federal law imposes statutory damages and attorneys' fees. 12 U.S.C. § 2605(f)-(g).

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[7] U.S. Br. 2; Pet.App.108a; OCC Conditional Approval #276, *supra*, at 12; OCC Interpretive Ltr. #1041, at 3 (Sept. 28, 2005).

The CFPB's Regulation X exhaustively regulates escrow accounts and requires lenders to provide detailed statements documenting payment flows, balances, and any surplus or deficit. 12 C.F.R. § 1024.17(i)(1). OCC and the CFPB monitor national banks' compliance. *See* 12 U.S.C. § 5515(e). Noncompliance carries significant penalties—up to $100 per statement, *id.* § 2609(d)—with potential exposure well into the millions across all of a bank's escrow accounts. Again, none of these regulations requires interest on escrow accounts.

When Congress wanted to give States a role over core banking functions like setting interest rates, Congress said so. Congress directly addressed interest-on-escrow laws in Dodd-Frank's amendments to TILA, 15 U.S.C. § 1639d. For certain mortgages—but not petitioners'—TILA mandates escrow accounts and directs lenders to pay interest "if prescribed by applicable State or Federal law." *Id.* § 1639d(a), (g)(3). More generally, Congress lets States cap the interest rate that national banks *charge* customers, within federally set bounds. 12 U.S.C. § 85.

Whether or not state interest-on-escrow laws are "applicable" to national banks, *see* Pet.App.29a n.11 (reserving this question), TILA shows that Congress knows how to condition national banks' power to offer escrow accounts on paying interest. Pet.App.29a-32a. Congress' decision to do so for only high-interest-rate mortgages strongly indicates that Congress made a different choice as to other mortgages. *Cf. Bittner v. United States*, 598 U.S. 85, 94 (2023); *contra* Pet. Br. 43.

2. Additionally, New York's law significantly intrudes on national banks' federally conferred power to offer mortgage escrow accounts by subjecting that power to total state discretion over the interest rate. Banks must pay

either 2% interest or "a rate prescribed by the superintendent of financial services … whichever is higher." N.Y. Gen. Oblig. Law § 5-601. That gives the Superintendent, an unelected official, "the sole discretion, in [her] judgment, to determine the appropriate rate of interest." *Saslow v. Cephas*, 603 N.Y.S.2d 460, 462 (App. Div. 1993). The Superintendent may consider any "economic and cost factors" she deems "pertinent." N.Y. Banking Law § 14-b(2). And she is free to change the rate every three months on a week's notice, *id.* § 14-b(1), (3), creating tremendous uncertainty for banks.

New York's law imposes significant penalties on national banks for non-compliance. Violations can result in $5,000-per-day fines. *Id.* § 44(2)(b). For "knowing[] and willful[]" violations, daily fines jump to the lesser of $250,000 or 1% of the bank's total assets. *Id.* § 44(4)(b). For small banks with less than $25 million in assets, New York asserts the power to seize the entire bank if the bank willfully refuses to pay interest for 100 days. Other States go further: California subjects bank officials to imprisonment for willfully refusing to pay interest. Cal. Fin. Code §§ 50202(d), 50500.

Because federal programs routinely *require* escrow accounts, *supra* p. 9, banks cannot simply stop using escrow accounts, belying the government's suggestion that preemption should depend on whether banks would be deterred from using escrow accounts. U.S. Br. 33. Instead, the threat of hefty fines could pressure national banks to alter the range of services they offer customers. Mortgages are contracts with numerous trade-offs like the rate, term, and payment schedule. *See Cantero* C.A.J.A.33-39; *Hymes* C.A.J.A.40-50 (petitioners' mortgages). Imposing costs in one area invariably requires changing services to recoup costs elsewhere. *See* GAO Study, *supra*, at 25.

State interest-on-escrow laws also risk the "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking" that "the NBA was designed to prevent." *See Watters*, 550 U.S. at 13-14. That "death-by-a-thousand-cuts regime of mortgage-escrow regulation," Pet.App.22a, frustrates "the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank*, 517 U.S. at 31 (citation omitted).

This Court has held laws preempted where the mere possibility that States may impose "varying limitations" threatened national uniformity. *California*, 262 U.S. at 370. Here, varying limitations already exist: 12 States require different interest rates, computed differently, on different property. Some state "interest-on-escrow" laws mandate a flat rate; others track various indexes; others allow lenders to set their own rates; and still others leave it to regulators' discretion.[8] States also vary in property coverage—some extend to *any* mortgaged property, others only to one-to-four family homes, and some cover apartments.[9]

While most States limit their statutes to in-State property, Maryland and New Hampshire cover any "residential real property" or "real estate," Md. Code Com. Law § 12-109; N.H. Rev. Stat. § 383-B:3-303(a)(7)(E),

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[8] *E.g.*, Md. Code Com. Law § 12-109(b)(1) (one-year Treasury rate); Conn. Gen. Stat. § 49-2a (state index); 19 R.I. Gen. Laws § 19-9-2(a) (local market rate); Mass. Gen. Laws ch. 183, § 61 (lender's discretion); Utah Code § 7-17-3(1) (three rate options); N.Y. Gen. Oblig. Law § 5-601 (flat rate or regulators' discretion).

[9] *E.g.*, N.H. Rev. Stat. § 383-B:3-303(a)(7)(E) (any property); Minn. Stat. § 47.20, subdiv. 9(a) (one-to-four family homes); N.Y. Gen. Oblig. Law § 5-601 (co-op apartments).

leaving ambiguity whether these laws cover any transaction involving in-State banks and consumers. National banks administering an escrow account for a Marylander's Vermont vacation home might face competing rates or computational methods. That risk of conflicting requirements threatens national banks' "uniform and universal operation through the entire territorial limits of the country." *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891).

The 38 States that do not currently demand interest could enact such laws tomorrow, spawning "limitations and restrictions as various and as numerous as the States." *See Watters*, 550 U.S. at 14 (quoting *Easton*, 188 U.S. at 229). While national banks face state regulation in other areas, U.S. Br. 32, the NBA does not permit "unduly burdensome and duplicative state regulation" of national-bank powers. *See Watters*, 550 U.S. at 11.

3. In 2004, OCC—the agency charged with issuing "restrictions and requirements" governing national banks' real-estate lending, 12 U.S.C. § 371(a)—issued a notice-and-comment rule determining that "state law limitations" on "[e]scrow accounts," like New York's, are preempted. 12 C.F.R. § 34.4(a)(6) (2004). OCC has long issued preemption regulations in its role supervising national banks. *See Cuomo*, 557 U.S. at 538-39 (Thomas, J., dissenting in part). And this Court has cited the 2004 rule as proof that States' inability to "significantly burden a national bank's own exercise of its real estate lending power" is "[b]eyond genuine dispute." *Watters*, 550 U.S. at 13.

The impetus for the 2004 rule, OCC explained, was that "diverse and potentially conflicting state and local laws" impede national banks' ability "to operate under the powers of their Federal charter." 69 Fed. Reg. at 1908. In OCC's "experience supervising national banks," state efforts to regulate real-estate lending have "curtailed" "national banks' ability to conduct operations." *Id.* "[C]ostly and burdensome" state regulation, including escrow laws, "interferes with [banks'] ability to plan their business and manage their risk" and "deters [banks] from making certain products available in certain jurisdictions." *Id.*

In 2011, OCC explained why its 2004 rule remains valid after Dodd-Frank. 76 Fed. Reg. at 43557. Ordinarily, an on-point federal regulation dictating preemption would at least merit consideration. Here, the government (at 6 n.3) suggests that OCC's regulation is not "applicable" because it did not follow Dodd-Frank's procedural requirements. The government ignores OCC's 2011 explanation that Dodd-Frank's procedures did not affect rules issued before Dodd-Frank's effective date. *Id.* The government's attempted overruling by amicus footnote—rather than notice-and-comment—of a binding, 20-year-old regulation that applies well beyond mortgage escrow accounts appears unprecedented. Meanwhile, in November 2023, after the government filed its invitation brief, OCC reminded all national-bank CEOs that OCC regulations "provide examples of the types of state laws that do not apply to national banks," citing the 2011 regulation (12 C.F.R. § 34.4). *Infra* App.45a-46a & n.2.

4. Petitioners (at 42, 44) respond that the "incidental" nature of the mortgage-escrow power diminishes its preemptive significance. But state laws that "significantly impair the exercise of authority, enumerated *or incidental* under the NBA, … must give way." *Watters*, 550 U.S. at 12 (emphasis added); *accord Barnett Bank*, 517 U.S. at 32.

Petitioners (at 1, 42) emphasize that New York's law is 50-years old, implying that preemption would unsettle the status quo. But *Barnett Bank* attached no significance to the fact that Florida's preempted law was decades old. 517 U.S. at 28. States cannot encroach national-bank powers by adverse possession. Petitioners also never claim that *national* (versus state) banks have followed that law. Indeed, New York in 2018 issued a regulation setting a lower rate for state banks on the assumption that national banks follow federal OCC regulations and do not pay interest on escrow accounts. N.Y. St. Dep't Fin. Servs., *DFS Issues Order Regarding Interest on Escrow Account* (Jan. 29, 2018), http://tinyurl.com/4wfm4ch7. The Second Circuit below accordingly observed (Pet.App.24a-25a) that, were New York's law not preempted, Dodd-Frank would preempt that regulation because it would treat state-chartered banks more favorably than national banks. 12 U.S.C. § 25b(b)(1)(A).

Petitioners' amici likewise note that some national banks pay interest, including Bank of America in California. *Flagstar* Pls. Br. 3-4. But the Ninth Circuit requires the payment of such interest, *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018), and willful violations can trigger imprisonment, *supra* p. 30. Other national banks may choose to pay interest to their borrowers. Bank of America prefers to offer its borrowers a different suite of services (such as preferred rewards programs, industry-leading online and digital applications, increased fee waivers, more convenient banking given its full product offerings and many branch locations, and enhanced loss mitigation to avoid foreclosure). Escrow regulations like New York's disrupt that choice, "affect[ing] the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets." 76 Fed. Reg. at 43557.

C. Dodd-Frank Expressly Preempts New York's Law

As petitioners (at 42-43 n.5) and the government (at 17-20) agree, Dodd-Frank's express-preemption provision codifies *Barnett Bank*. Because New York's law is preempted as to Cantero under ordinary preemption rules, the same result holds for Hymes and Harwayne-Gidansky under Dodd-Frank. Pet.App.25a.

Dodd-Frank "clarified" that the NBA preempts state consumer financial laws if, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States 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 title, (b)(1)(B).

By its terms, that language directs courts to "the legal standard for preemption in the decision of … *Barnett Bank*." *Id.* § 25b(b)(1)(B). "When the words of the Court are used in a later statute governing the same subject matter," this Court ordinarily "give[s] the words the same meaning" reflected in this Court's decisions. *Williams v. Taylor*, 529 U.S. 420, 434 (2000). Thus, when construing a statute codifying *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court gave "the language found in [the statute] the meaning ascribed it in *Barefoot*." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Likewise, when this Court considered Congress' direction in the Justice Against Sponsors of Terrorism Act to apply the "legal framework" of *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), 130 Stat. 852, § 2(a)(5), this Court anchored its analysis of the statutory text in "*Halberstam*'s 'legal framework,' viewed in context of the common-law tradition from which it arose." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 485 (2023).

By incorporating "the legal standard for preemption" in *Barnett Bank*, 12 U.S.C. § 25b(b)(1)(B), Congress presumptively ratified the consensus circa 2010 as to what *Barnett Bank* meant. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010). As of 2010, *no* circuits thought *Barnett Bank* required proof that state laws would effectively foreclose national banks from exercising their powers. Even petitioners' principal law-review authority calls the control test the "[c]onventional wisdom." Roderick M. Hills, Jr., *Exorcising* McCulloch, 161 U. Pa. L Rev. 1235, 1235 (2013).

Pre-Dodd-Frank, the Ninth Circuit, invoking "the holding[] of *Barnett Bank*," held that "no amount of discovery would change the central holding that Congress intended for the NBA to preempt state restrictions on national banks." *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037-38 & n.4 (9th Cir. 2008). The Eighth Circuit interpreted *Barnett Bank* as holding that national-bank powers are unencumbered by state law unless accompanied by a statement that the "power is subject to state law." *Bank One v. Guttau*, 190 F.3d 844, 848, 850 (8th Cir. 1999) (citation omitted). So did the First Circuit. *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 533 (1st Cir. 2007). These courts deemed preempted California's disclosure requirements for convenience checks, Iowa's restrictions on national banks' ATM advertising, and New Hampshire's restrictions on bank-issued gift cards' expiration dates or administrative fees even though none prohibited or made practically infeasible national banks' exercise of powers. The state laws simply sought to control federally conferred powers; that ended the inquiry.

II. Dodd-Frank Does Not Require Proof of Practical Infeasibility

Petitioners and the government counter that only state laws with "a significant and demonstrable 'impact'" on explicit national-bank powers are preempted, and then only if challengers present factual proof that national banks are prohibited or cannot practicably exercise their powers. Pet. Br. 30 (citation omitted); *see* U.S. Br. 10. They derive that novel test from Dodd-Frank, yet insist that Dodd-Frank simply "codified th[e] same standard" that this Court applied for "100 years" in *Barnett Bank* and elsewhere. Pet. Br. 39, 41; *see* U.S. Br. 24. That interpretation bears no resemblance to *Barnett Bank*, this Court's broader bank-preemption jurisprudence, or the United States' previous understanding of *Barnett Bank*, and would expose national banks to intolerable intrusions on federally conferred powers.

A. "Significant Interference" Does Not Require Near-Total Impairment of National Banks' Powers

Section 25b(b)(1)(B) preempts state laws as to national banks if, "in accordance with the legal standard for preemption in" *Barnett Bank*, the "law prevents or significantly interferes with the exercise by the national bank of its powers." Petitioners and the government maintain that section 25b preempts only state laws that demonstrably prohibit, "major[ly] [a]ffect," or "mak[e] it practically infeasible" for national banks to exercise federally conferred powers. Pet. Br. 35-36; *see* U.S. Br. 13-14. The Second Circuit rightly rejected that implausible reading. Pet.App.27a-28a.

1. **Dictionary Definitions.** Petitioners (at 35-36) and the government (at 13) argue that the ordinary meaning of "prevents" and "significantly interferes with" should

govern preemption determinations, and that pairing the terms together suggests "significantly interferes with" means something close to total prohibition. But section 25b(b)(1)(B) is an obvious term-of-art reference to the *Barnett Bank* decision. Hence, all agree "Section 25b(b)(1)(B) codified a preexisting preemption standard" from *Barnett Bank*. U.S. Br. 18, 24; *see* Pet. Br. 27.

Regardless, the ordinary meaning of "significantly" includes "important" or "noteworthy," not just quantitatively large, as the court below observed. Pet.App.27a-28a; *accord Webster's Dictionary* 320 (2009); *Oxford English Dictionary* (3d ed. 2011). Thus, "significant" interference includes interference "important in relation to the banking power at issue." Pet.App.27a.

Trespassing, for example, can "significantly interfere" with property rights whether hunters briefly cut across the woods or the neighbor's malodorous poultry barn straddles the property line near your hot tub. The right to exclude is a core, inviolable property right, however frequent or quantitatively large the intrusion. Similarly, state laws that control the exercise of a national-bank power "significantly interfere[]" with that power by threatening federal control and adding conditions Congress did not see fit to impose.

2. **"Significantly Interferes" in Isolation.** Petitioners (at 34-35, 39) in places argue section 25b(b)(1)(B) codifies just "a particular formulation" from *Barnett Bank*, showing that Congress rejected other, more-preemptive formulations that this Court has used, such as "curtail or hinder." Pet. Br. 35 (quoting *Watters*, 550 U.S. at 13); *cf. Barnett Bank*, 517 U.S. at 34 ("interfere with, or impair national banks' efficiency" (cleaned up)). Meanwhile, the government (at 24-25) fixates on "significantly interferes" in isolation, but elsewhere (at 18) acknowledges that

Dodd-Frank draws from "a line of precedents spanning decades."

The selective-codification hypothesis is untenable. When a statute enshrines this Court's precedent, this Court ordinarily concludes that Congress endorsed the whole case, not just an excerpt. *See Williams*, 529 U.S. at 434; Pet.App.27a. Here, that intuition makes particular sense because Congress referred to "the legal standard for preemption" in *Barnett Bank* before quoting the "prevents or significantly interferes" formulation. 12 U.S.C. § 25b(b)(1)(B). The natural inference is that Congress wanted courts to apply the whole legal framework from *Barnett Bank*, not to assign talismanic significance to one isolated phrase.

Barnett Bank itself refutes the notion that "prevents or significantly interferes" differed from earlier formulations. As the government (at 17-18) acknowledges, "[t]he *Barnett Bank* Court … framed its decision not as breaking new ground, but instead as the logical application of NBA-preemption principles developed in a line of precedents spanning decades." And *Barnett Bank* used the phrase "prevents or significantly interferes" interchangeably with formulations that petitioners (at 35) apparently consider more preemptive, like "unlawfully encroach on the rights and privileges of national banks," or "destroy or hamper," or "interfere with, or impair national banks' efficiency." 517 U.S. at 33-34 (cleaned up).

Additional evidence that Congress incorporated *Barnett Bank* in toto comes from Congress' model for section 25b(b)(1)(B), the Gramm-Leach-Bliley Act. As petitioners (at 35) acknowledge, Dodd-Frank lifted from 15 U.S.C. § 6701(d)(2)(A), which provides: "In accordance with the legal standards for preemption set forth in … *Barnett*

Bank …, no State may … prevent or significantly interfere with" depository institutions' insurance sales. When Congress passed Dodd-Frank, courts had interpreted that statutory language to codify "the *Barnett Bank* opinion," not the "prevent or significantly interfere" language alone. *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 408-09 (6th Cir. 2001); *see Mass. Bankers Ass'n, Inc. v. Bowler*, 392 F. Supp. 2d 24, 27 (D. Mass. 2005).

Petitioners' view would create glaring anomalies. Under that view, section 25b(b)(1)(B) uses *Barnett Bank*'s "significant[] interfer[ence]" language in isolation. But section 25b(c) authorizes courts to uphold OCC's preemption determinations if they are "in accordance with the legal standard of" *Barnett Bank*, full stop. Congress did not inexplicably force courts and OCC to apply a snippet of *Barnett Bank* to whether state laws are preempted, then remove the blindfold and let courts apply the whole opinion when evaluating OCC preemption rules. Similarly, the abbreviated version of *Barnett Bank* would govern preemption determinations as to state consumer financial laws, yet the full-on framework would apply whenever courts consider other state laws.

3. ***Barnett Bank*'s Meaning.** Petitioners (at 40) argue that *Barnett Bank* "cabin[s] its reasoning to state laws presenting conflicts" where national-bank powers are prohibited or practically foreclosed. Similarly, the government (at 30) urges a "more limited understanding of *Barnett Bank*," necessitating a "practical inquiry into the degree to which a state law interfere[s] with national banks' exercise of their powers."

That contention wrongly elevates the fact that *Barnett Bank* involved a state-law prohibition on a national-bank power over *Barnett Bank*'s broad reasoning. State interest-on-escrow laws function as prohibitions too; they prohibit national banks from offering escrow accounts absent compliance with state law.

Regardless, preemption does not require a prohibition. *Barnett Bank* asked whether the NBA "grant[s] a power to national banks" (yes: they can sell insurance); whether the NBA "contains" any "'indication' that Congress intended to subject that power to local restriction" (no); and whether state law restricts the insurance-sales power (yes, through outright prohibition). 517 U.S. at 32-35 (citation omitted). *Barnett Bank* did not say that state prohibitions on national banks' powers are necessarily "substantial" or quantifiably grave. The Court reasoned that because *all* state conditions on the exercise of national banks' powers are verboten, *a fortiori* prohibitions on those powers are preempted. Indeed, *Barnett Bank* described *Franklin*—a case involving advertising restrictions that in no way stopped national banks from offering services—as "quite similar." *Id.* at 33. Again, across administrations, the United States previously interpreted *Barnett Bank* as sweepingly holding that *any* limitations on national-bank powers are preempted. *Supra* pp. 21-22, 27. The government nowhere acknowledges these representations, much less explains how the Office of the Solicitor General misunderstood *Barnett Bank*'s holding so many times.

Meanwhile, petitioners' and the government's cited cases do not embrace a practical degree-of-interference inquiry. Start with *Franklin* (discussed at Pet. Br. 39-40; U.S. Br. 31-32), which involved a state-law prohibition on using the word "savings" in bank advertisements. 347 U.S. at 377-79. Even though "savings" commonly described the accounts at issue, *id.* at 378, the state law hardly prevented or rendered impracticable banks' power to receive or advertise savings deposits. The state court even found that every other national bank in New York complied by using synonyms for "savings." *See People v. Franklin Nat'l Bank of Franklin Square*, 113 N.E.2d 796, 799 (N.Y. 1953), *rev'd*, *Franklin*, 347 U.S. 373. This Court still deemed the state ban on the word "savings" preempted because it "subject[ed]" national-bank powers "to local restrictions." 347 U.S. at 378; *accord Watters* U.S. Br. 28.

Anderson, 321 U.S. 233—involving a non-preempted Kentucky law requiring banks to turn over abandoned deposits to the state—does not turn on state laws' practical effects either. *Contra* U.S. Br. 30. *Anderson* asked whether there was an "unlawful encroachment on the rights and privileges of national banks." 321 U.S. at 252. As discussed, generally applicable laws governing ownership of property and escheatment are not ordinarily preempted.

Similarly, the Missouri law in *St. Louis* (cited at U.S. Br. 18) precluding national banks from operating branches was non-preempted because national banks lacked branch-opening powers at the time; state law did not control national-bank powers. 263 U.S. at 660.

Recent bank-preemption cases also eschew the practical-effects test. True, *Watters* described "the burdens and undue duplication state controls could produce." 550 U.S. at 14 (cited at U.S. Br. 19-20). But the mere existence of overlapping state regulation in an area where national banks exercise federally authorized powers suffices to show preemption. *Any* "[s]tate laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery" would be preempted simply for "interfer[ing] with the banks' federally authorized business." *Id.* at 13. Meanwhile, *Cuomo* (cited at U.S.

Br. 20) merely rejected the categorical argument that States could not enforce even *non*-preempted state laws against national banks. 557 U.S. at 529, 532-33. No one claims national banks are categorically immune from state laws or enforcement.

4. **State Consumer Financial Laws.** Petitioners (at 32-33) and the government (at 23) argue that a control test preempts all "[s]tate consumer financial laws" within Dodd-Frank's definition of that phrase, *i.e.*, state laws that "directly and specifically regulate[] the manner, content, or terms and conditions of any financial transaction" in which national banks "may be authorized" to engage "with respect to a consumer." 12 U.S.C. § 25b(a)(2). In their view, because *all* such state laws control national banks' powers, a control test leaves no state consumer law unpreempted.

But as discussed, *supra* pp. 25-26, the control test leaves myriad state consumer financial laws non-preempted, including state fair-lending laws. Those laws directly and specifically regulate the manner and terms of financial transactions between lenders and consumers by preventing national banks from making financial transactions on the basis of a protected characteristic like race or sex. Generally applicable state contract laws—like bans on contracting by minors or requirements that certain contracts be committed to writing—likewise meet Dodd-Frank's definition of "[s]tate consumer financial laws." *Contra* U.S. Br. 23. Those laws may not be limited to financial transactions, but they "directly and specifically regulate[] the manner" of a transaction by requiring that it be entered into with an adult or in writing.

B. Dodd-Frank Does Not Require Factual Proof

Petitioners and the government argue Dodd-Frank also requires "factual showing[s]" about the degree of a state law's impact. Pet. Br. 27; *see* U.S. Br. 21-22. But they cite no bank preemption case from this Court ever demanding such proof, and preemption is generally a legal question. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019). Dodd-Frank did not convert bank preemption alone into a judicial factfinding expedition.

1. Petitioners (at 36-38) and the government (at 15) observe that Dodd-Frank requires *OCC*'s preemption determinations to reflect factfinding about state laws' practical "impact." 12 U.S.C. 25b(b)(3)(A). The government argues that "nothing … suggests that Congress intended *courts* to take a different approach." U.S. Br. 15.

But statutory text is not nothing. That Congress expressly subjected OCC to requirements while omitting courts is compelling evidence that Congress viewed OCC and courts differently. *See Gallardo ex rel. Vassallo v. Marstiller*, 596 U.S. 420, 433 (2022). Whereas "any preemption determination … may be made by a court," a "preemption determination" by the OCC must be made "by regulation or order … on a case-by-case basis." 12 U.S.C. § 25b(b)(1)(B). Ergo, only OCC must satisfy "case-by-case" requirements like describing "the impact of a particular [s]tate … law." *Id.* § 25b(b)(3)(A). Dodd-Frank's definition of a "case-by-case" determination as one "*made by the Comptroller*" confirms as much. *Id.* (emphasis added). Likewise, Dodd-Frank prescribes that "[n]o regulation or order *of the Comptroller*" purporting to preempt state law gets preemptive force "unless substantial evidence, made on the record of the proceeding, supports" OCC's preemption finding. *Id.* § 25b(c) (emphasis added).

Moreover, courts cannot execute many OCC-specific requirements. OCC must "consult" with the CFPB and "take [CFPB's] views … into account" when preempting substantively equivalent state laws. *Id.* § 25b(b)(3)(B). And OCC must determine the impact of the state law "on any national bank that is subject to that law, or the law of *any other State with substantively equivalent terms*." *Id.* § 25b(b)(3)(A) (emphasis added). But the judicial role does not ordinarily extend to consulting agencies or conducting roving investigations into what "substantively equivalent" but unchallenged state laws exist.

2. Congress' differential treatment reflects inherent differences between agencies' and courts' preemption decisions. OCC issues rules that *themselves* are federal law with preemptive force. *See de la Cuesta*, 458 U.S. at 153-54; 12 U.S.C. § 25b(b)(3)(B) (referring to state law "the Comptroller is preempting"). Pre-Dodd-Frank, OCC and the United States viewed the only substantive constraints on OCC's preemptive power as that (1) OCC regulations had to "intend[] to preempt the state laws in question," and (2) the regulations had to be "within the scope of [OCC's] delegated authority." *Watters* U.S. Br. 10 (citation omitted). The statute governing OCC rules that preempt state "consumer protection" and "fair lending" laws, 12 U.S.C. § 43, merely required OCC to engage in notice and comment. Dodd-Frank sections 25b(b)(1)(B) and (c) thus significantly curtailed which OCC rules carry preemptive force.

Congress had no need to attach comparable guardrails to courts' preemption determinations. Before and after Dodd-Frank, courts apply *Barnett Bank* to determine preemption. As to courts, Dodd-Frank merely barred *Chevron* deference to OCC's preemption determinations and required that "substantial evidence" support OCC's determinations. 12 U.S.C. § 25b(b)(5)(A), (c).

C. Legislative History Does Not Support Petitioners

Petitioners (at 16-19) and the government (at 15-17) invoke committee reports, law-review articles, a letter from the Department of Treasury, and other external sources to paint Dodd-Frank's preemption provisions as repudiating OCC's 2004 preemption rule.

"But legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018); Pet.App.31a. Legislators' putative desire to claw back OCC's 2004 rule proves nothing about what Dodd-Frank does. Anyway, OCC itself acknowledged in 2011 that its 2004 formulation—"obstruct, impair, or condition"—proved confusing and unnecessary. 76 Fed. Reg. at 43556. OCC's 2011 rule thus clarified that OCC follows *Barnett Bank*, under which state interest-on-escrow laws are preempted. *Id.* at 43556-57.

Petitioners' (at 19) and the government's (at 6) invocation of a Department of Treasury letter criticizing OCC is incomplete. Shortly before OCC proposed its 2011 rule, Senators Carper and Warner, the authors of Dodd-Frank's preemption provision, wrote OCC to state that section 25b adopted *Barnett Bank* in full, "not simply the short-hand phrase 'prevent or significantly interfere.'" *Infra* App.32a. On June 27, 2011, the Department of Treasury wrote OCC objecting to OCC's proposed rule and expressing the view that Dodd Frank did not "encompass[] the entirety of the *Barnett* opinion." *Infra* App.36a. On July 8, 2011, Senators Carper and Warner responded to Treasury, repeating that Dodd-Frank did not narrow the standard for preemption or overrule OCC's previous preemption rules. *Infra* App.40a-44a.[10]

D. Requiring Factfinding Would Upend National-Bank Preemption and Risk Destabilizing Uncertainty

Repudiating over a century of bank-preemption precedent to embrace petitioners' factfinding approach would allow States to declare open season on national banks' federally conferred powers. Under that approach, *all* state laws would apparently apply to national banks unless and until national banks obtained final judgments of preemption State-by-State, law-by-law, and maybe bank-by-bank, creating alarming unpredictability.

1. Start with mortgages. Under the other side's view, States could regulate national banks' ability to offer mortgages so long as mortgages remain somewhat available. States could ban mortgages under 30 years or with variable rates on the theory that the 30-year-fixed-rate is best. Thirty-year mortgages are by far the most popular today, so banks would continue offering the lion's share of mortgages. But banning all other offerings would majorly restrict banks' ability to offer customers a range of products.

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[10] The government (at 17 n.5) claims that Dodd-Frank's savings clause would be superfluous had Congress not overruled OCC's 2004 regulation. That clause precludes construing the Act "to alter or affect the applicability of" any OCC preemption regulation "to any contract entered into on or before July 21, 2010." 12 U.S.C. § 5553. The government reasons that Dodd-Frank must have changed the law from previous OCC regulations to give that language effect. But Dodd-Frank *did* change some aspects of preemption law, *e.g.*, by overruling *Watters*' holding. *Id.* § 25b(b)(2). The clause thus preserves OCC regulations mirroring that holding for pre-Dodd-Frank contracts. 12 C.F.R. § 7.4006 (2010). In any event, Congress routinely uses savings clauses to clarify that no change in the law is intended. *E.g.*, *Cooper Indus., Inc. v. Aviall Servs.*, 543 U.S. 157, 166-67 (2004).

States could similarly dictate licensing requirements, mortgage insurance, loan-to-value ratios, interest rates, due-on-sale clauses, credit terms, mortgage size, and credit-report use—all limitations OCC regulations preempt. 12 C.F.R. § 34.4(a). For instance, for certain mortgage products, New York purports to prescribe which words banks can use in advertisements and lets the Superintendent fix loan-to-value ratios. N.Y. Real Prop. Law §§ 280-a(2)(c), 280-b(2).

Indeed petitioners (at 13-14) imply that States can make different choices than Congress regarding subprime lending by national banks. Dodd-Frank's amendments to TILA pervasively set the terms, structures, fees, and disclosure requirements for such loans. *See* 15 U.S.C. § 1639. The CFPB's Regulation Z imposes further requirements. 12 C.F.R. §§ 1026.32, 1026.35. It is unfathomable that Dodd-Frank simultaneously empowered 50 States to adjust every one of these intricate laws, leaving it to courts to pinpoint when regulation went from being just "modest," Pet. Br. 21, 24, to having a "'fairly large' degree" of impact, Pet. Br. 35.

Similar problems would plague escrow accounts. States could mandate 20% or even 50% interest—as New York regulators could already do at their discretion. Even then, asking "whether the law is sufficiently burdensome to 'deter' national banks from using mortgage escrow accounts," U.S. Br. 33, would be unilluminating. Federal law often compels national banks to provide escrow accounts, so national banks would have no choice but to continue offering them. *Supra* p. 9. Banks would be stuck passing costs on to consumers in other ways by raising rates, hiking fees, or reducing customer service.

States could pervasively regulate other core banking powers. States could require banks to keep 50% of customer deposits in cash at each branch to facilitate speedy withdrawals. States could ban banks from cashing any check over $1,000. States could issue a mandatory rate schedule for certificates of deposit. States could compel banks to have at least one ATM for every 10,000 residents. None of those laws may "come close to" preventing national banks from accepting deposits, cashing checks, selling CDs, or opening ATMs. *See* Pet. Br. 36. But in a world where States would constrain national-bank powers unless that regulation nearly snuffs the power out, national banks would be creatures of state, not federal, control.

2. The other side's approach would inject unworkable uncertainty into the financial system. State laws would control national banks' core powers through years of fact development, discovery requests, and warring experts. Judges would become bank-economists-in-chief, forced to predict relative real-world consequences in a complex financial setting. Banks, regulators, and customers would not know in advance which state laws might prove too cumbersome to survive. While preemption determinations sometimes involve subsidiary factual questions, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 877-81 (2000) (cited at U.S. Br. 33), the other side's approach would make fact-finding the whole ballgame in every case.

Notably, the other side never explains how courts should apply their approach. Sometimes, they analyze "a particular state law" and its "likely practical effect on national banks[]," *e.g.*, U.S. Br. 12, suggesting an aggregate-degree-of-harm approach. Elsewhere, petitioners suggest a bank-by-bank approach, demanding that Bank of America show that complying with New York's law "would make it practically infeasible for *it* to use mortgage-escrow accounts or make mortgage loans." Pet. Br. 45 (emphasis added). Under that inquiry, the same state law might be preempted as to some national banks but not others, depending on how well a bank could absorb or work around the state law's burdens. *See Parks v. MBNA Am. Bank, N.A.*, 278 P.3d 1193, 1204 (Cal. 2012).

Nor do petitioners or the government say what happens when circumstances change (or if New York raises its rate). Smaller national banks may grow; larger ones may contract, changing those banks' ability to weather state-law burdens over time. Market conditions change constantly; state laws might bite less in boom times but threaten banks' businesses in downturns. Two-percent interest might seem "modest" today, Pet. Br. 24, but was 33-times the national average for savings accounts just two years ago. FDIC, *National Rates and Rate Caps*, http://tinyurl.com/2z99994w. A good-for-today-only preemption determination that could be reopened when interest rates rise or housing markets slide would eviscerate preemption as this Court has known it.

CONCLUSION

The court of appeals' judgment should be affirmed.

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APPENDIX

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12 U.S.C. § 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession from February 25, 1927, or from the date of its organization if organized after February 25, 1927, until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or a special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, bylaws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, 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; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

* * *

Eighth. To contribute to community funds, or to charitable, philanthropic, or benevolent instrumentalities conducive to public welfare, such sums as its board of directors may deem expedient and in the interests of the association, if it is located in a State the laws of which do not expressly prohibit State banking institutions from contributing to such funds or instrumentalities.

Ninth. To issue and sell securities which are guaranteed pursuant to section 1721(g) of this title.

Tenth. To invest in tangible personal property, including, without limitation, vehicles, manufactured homes, machinery, equipment, or furniture, for lease financing transactions on a net lease basis, but such investment may not exceed 10 percent of the assets of the association.

Eleventh. To make investments directly or indirectly, each of which is designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs). An association shall not make any such investment if the investment would expose the association to unlimited liability. The Comptroller of the Currency shall limit an association's investments in any 1 project and an association's aggregate investments under this paragraph. An association's aggregate investments under this paragraph shall not exceed an amount equal to the sum of 5 percent of the association's capital stock actually paid in and unimpaired and 5 percent of the association's unimpaired surplus fund, unless the Comptroller determines by order that the higher amount will pose no significant risk to the affected deposit insurance fund, and the association is adequately capitalized. In no case shall an association's aggregate investments under this paragraph exceed an amount equal to the sum of 15 percent of the association's capital stock actually paid in and unimpaired and 15 percent of the association's unimpaired surplus fund. The foregoing standards and limitations apply to investments under this paragraph made by a national bank directly and by its subsidiaries.

12 U.S.C. § 25b. State law preemption standards for national banks and subsidiaries clarified

(a) Definitions

For purposes of this section, the following definitions shall apply:

(1) National bank

The term “national bank” includes—

(A) any bank organized under the laws of the United States; and

(B) any Federal branch established in accordance with the International Banking Act of 1978 [12 U.S.C. 3101 et seq.].

(2) State consumer financial laws

The term “State consumer financial law” means a State law that does not directly or indirectly discriminate against national banks and 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.

(3) Other definitions

The terms “affiliate”, “subsidiary”, “includes”, and “including” have the same meanings as in section 1813 of this title.

(b) Preemption standard

(1) In general

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 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.

(2) Savings clause

Title 62 of the Revised Statutes and section 371 of this title do 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).

(3) Case-by-case basis

(A) Definition

As used in this section the term "case-by-case basis" refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.

(B) Consultation

When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) Rule of construction

Title 62 of the Revised Statutes does not occupy the field in any area of State law.

(5) Standards of review

(A) Preemption

A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, 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.

(B) Savings clause

Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

(6) Comptroller determination not delegable

Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

(c) Substantial evidence

No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of 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).

(d) Periodic review of preemption determinations

(1) In general

The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 43 of this title.

(2) Reports to Congress

At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

(e) Application of State consumer financial law to subsidiaries and affiliates

Notwithstanding any provision of title 62 of the Revised Statutes or section 371 of this title, a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

(f) Preservation of powers related to charging interest

No provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of "interest" under such provision.

(g) Transparency of OCC preemption determinations

The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and practices covered by each determination and the requirements and constraints determined to be preempted.

(h) Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks

(1) Definitions

For purposes of this subsection, the terms "depository institution", "subsidiary", and "affiliate" have the same meanings as in section 1813 of this title.

(2) Rule of construction

No provision of title 62 of the Revised Statutes or section 371 of this title shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).

(i) Visitorial powers

(1)[1] In general

In accordance with the decision of the Supreme Court of the United States in Cuomo v. Clearing House Assn.,

[1] So in original. No par. (2) has been enacted.

L. L. C. (129 S.Ct. 2710 (2009)), no provision of title 62 of the Revised Statutes which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.

(j) Enforcement actions

The ability of the Comptroller of the Currency to bring an enforcement action under title 62 of the Revised Statutes or section 45 of title 15 does not preclude any private party from enforcing rights granted under Federal or State law in the courts.

12 U.S.C. § 371. Real estate loans

(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

* * *

12 U.S.C. § 2605. Servicing of mortgage loans and administration of escrow accounts

* * *

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. Any balance in any such account that is within the servicer's control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.

* * *

12 U.S.C. § 2609. Limitation on requirement of advance deposits in escrow accounts

(a) In general

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower—

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums and other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with

the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided, however*, That in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

(b) Notification of shortage in escrow account

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.

(c) Escrow account statements

(1) Initial statement

(A) In general

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established a statement clearly itemizing the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

(C) Initial statement at closing

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Bureau shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

(2) Annual statement

(A) In general

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period, the first such period beginning on the first January 1st that occurs after November 28, 1990, and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

(d) Penalties

(1) In general

In the case of each failure to submit a statement to a borrower as required under subsection (c), the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed on such lender or escrow servicer for all such failures during any 12-month period referred to in subsection (b)[1] may not exceed $100,000.

(2) Intentional violations

If any failure to which paragraph (1) applies is due to intentional disregard of the requirement to submit the statement, then, with respect to such failure—

(A) the penalty imposed under paragraph (1) shall be $100; and

(B) in the case of any penalty determined under

[1] So in original. Probably should be subsection "(c)".

subparagraph (A), the $100,000 limitation under paragraph (1) shall not apply.

15 U.S.C. § 1639d. Escrow or impound accounts relating to certain consumer credit transactions

(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 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.

(c) Exemptions

(1) In general

The Bureau may, by regulation, exempt from the requirements of subsection (a) a creditor that—

(A) operates in rural or underserved areas;

(B) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Bureau;

(C) retains its mortgage loan originations in portfolio; and

(D) meets any asset size threshold and any other criteria the Bureau may establish, consistent with the purposes of this part.

(2) Treatment of loans held by smaller institutions

The Bureau shall, by regulation, exempt from the requirements of subsection (a) any loan made by an insured depository institution or an insured credit union secured by a first lien on the principal dwelling of a consumer if—

(A) the insured depository institution or insured credit union has assets of $10,000,000,000 or less;

(B) during the preceding calendar year, the insured depository institution or insured credit union and its affiliates originated 1,000 or fewer loans secured by a first lien on a principal dwelling; and

(C) the transaction satisfies the criteria in sections 1026.35(b)(2)(iii)(A), 1026.35(b)(2)(iii)(D), and 1026.35(b)(2)(v) of title 12, Code of Federal Regulations, or any successor regulation.

(d) Duration of mandatory escrow or impound account

An escrow or impound account established pursuant to subsection (b) shall remain in existence for a minimum period of 5 years, beginning with the date of the consummation of the loan, unless and until—

(1) such borrower has sufficient equity in the dwelling securing the consumer credit transaction so as to no longer be required to maintain private mortgage insurance;

(2) such borrower is delinquent;

(3) such borrower otherwise has not complied with the legal obligation, as established by rule; or

(4) the underlying mortgage establishing the account is terminated.

(e) Limited exemptions for loans secured by shares in **a cooperative or in which an association must maintain a master insurance policy**

Escrow accounts need not be established for loans secured by shares in a cooperative. Insurance premiums need not be included in escrow accounts for loans secured by dwellings or units, where the borrower must join an association as a condition of ownership, and that association has an obligation to the dwelling or unit owners to maintain a master policy insuring the dwellings or units.

(f) Clarification on escrow accounts for loans not meeting statutory test

For mortgages not covered by the requirements of subsection (b), no provision of this section shall be construed as precluding the establishment of an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property—

(1) on terms mutually agreeable to the parties to the loan;

(2) at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower; or

(3) pursuant to the requirements for the escrowing of flood insurance payments for regulated lending institutions in section 102(d) of the Flood Disaster Protection Act of 1973 [42 U.S.C. 4012a(d)].

(g) Administration of mandatory escrow or impound accounts

(1) In general

Except as may otherwise be provided for in this subchapter or in regulations prescribed by the Bureau, escrow or impound accounts established pursuant to subsection (b) shall be established in a federally insured depository institution or credit union.

(2) Administration

Except as provided in this section or regulations prescribed under this section, an escrow or impound account subject to this section shall be administered in accordance with—

(A) the Real Estate Settlement Procedures Act of 1974 [12 U.S.C. 2601 et seq.] and regulations prescribed under such Act;

(B) the Flood Disaster Protection Act of 1973 and regulations prescribed under such Act; and

(C) the law of the State, if applicable, where the real property securing the consumer credit transaction is located.

(3) Applicability of payment of interest

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.

(4) Penalty coordination with RESPA

Any action or omission on the part of any person which constitutes a violation of the Real Estate Settlement Procedures Act of 1974 or any regulation prescribed under such Act for which the person has paid any fine, civil money penalty, or other damages shall not give rise to any additional fine, civil money penalty, or other damages under this section, unless the action or omission also constitutes a direct violation of this section.

(h) Disclosures relating to mandatory escrow or impound account

In the case of any impound, trust, or escrow account that is required under subsection (b), the creditor shall disclose by written notice to the consumer at least 3 business days before the consummation of the consumer credit transaction giving rise to such account or in accordance with timeframes established in prescribed regulations the following information:

(1) The fact that an escrow or impound account will be established at consummation of the transaction.

(2) The amount required at closing to initially fund the escrow or impound account.

(3) The amount, in the initial year after the consummation of the transaction, of the estimated taxes and hazard insurance, including flood insurance, if applicable, and any other required periodic payments or premiums that reflects, as appropriate, either the taxable assessed value of the real property securing the transaction, including the value of any improvements on the property or to be constructed on the property (whether or not such construction will be financed from the proceeds of the transaction) or the replacement costs of the property.

(4) The estimated monthly amount payable to be escrowed for taxes, hazard insurance (including flood insurance, if applicable) and any other required periodic payments or premiums.

(5) The fact that, if the consumer chooses to terminate the account in the future, the consumer will become responsible for the payment of all taxes, hazard insurance, and flood insurance, if applicable, as well as any other required periodic payments or premiums on the property unless a new escrow or impound account is established.

(6) Such other information as the Bureau determines necessary for the protection of the consumer.

(i) Definitions

For purposes of this section, the following definitions shall apply:

(1) Flood insurance

The term "flood insurance" means flood insurance coverage provided under the national flood insurance program pursuant to the National Flood Insurance Act of 1968 [42 U.S.C. 4001 et seq.].

(2) Hazard insurance

The term "hazard insurance" shall have the same meaning as provided for "hazard insurance", "casualty insurance", "homeowner's insurance", or other similar term under the law of the State where the real property securing the consumer credit transaction is located.

(3) Insured credit union

The term "insured credit union" has the meaning given the term in section 1752 of title 12.

(4) Insured depository institution

The term "insured depository institution" has the meaning given the term in section 1813 of title 12.

(j) Disclosure notice required for consumers who waive escrow services

(1) In general

If—

(A) an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to real property securing a consumer credit transaction is not established in connection with the transaction; or

(B) a consumer chooses, and provides written notice to the creditor or servicer of such choice, at any time after such an account is established in connection with any such transaction and in accordance with any statute, regulation, or contractual agreement, to close such account,

the creditor or servicer shall provide a timely and clearly written disclosure to the consumer that advises the consumer of the responsibilities of the consumer and implications for the consumer in the absence of any such account.

(2) Disclosure requirements

Any disclosure provided to a consumer under paragraph (1) shall include the following:

(A) Information concerning any applicable fees or costs associated with either the non-establishment of any such account at the time of the transaction, or any subsequent closure of any such account.

(B) A clear and prominent statement that the consumer is responsible for personally and directly paying the non-escrowed items, in addition to paying the mortgage loan payment, in the absence of any such account, and the fact that the costs for taxes, insurance, and related fees can be substantial.

(C) A clear explanation of the consequences of any failure to pay non-escrowed items, including the possible requirement for the forced placement of insurance by the creditor or servicer and the potentially higher cost (including any potential commission payments to the servicer) or reduced coverage for the consumer in the event of any such creditor-placed insurance.

(D) Such other information as the Bureau determines necessary for the protection of the consumer.

12 C.F.R. § 34.4. Applicability of state law.

(a) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or

purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1]

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(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 the decision of the Supreme Court in *Barnett Bank of Marion County, N.A.* v. *Nelson, Florida Insurance Commissioner, et al.,* 517 U.S. 25 (1996):

(1) Contracts;

(2) Torts;

(3) Criminal law;[2]

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[1] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f-7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

[2] But see the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903), where the Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

(9) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A.* v. *Nelson, Florida Insurance Commissioner, et al.,* 517 U.S. 25 (1996), or that is made applicable by Federal law.

N.Y. Gen. Oblig. Law § 5-601. Interest on deposits in escrow with mortgage investing institutions

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 or on any property owned by a cooperative apartment corporation, as defined in subdivision twelve of section three hundred sixty of the tax law, (as such subdivision was in effect on December thirtieth, nineteen hundred sixty), 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. The superintendent of financial services shall prescribe by regulation the method or basis of computing any minimum rate of interest required by this section and any such minimum rate shall be a net rate over and above any service charge that may be imposed by any mortgage lending institution for maintaining an escrow account. No mortgage investing institution shall impose a service charge in connection with the maintenance of an escrow account unless provision therefor was expressly made in a loan contract executed prior to the effective date of this section.

United States Senate

WASHINGTON, DC 20510

April 4, 2011

Acting Comptroller John Walsh
Office of the Comptroller of the Currency
Administrator of National Banks
250 E Street SW
Washington, DC 20219

Dear Acting Comptroller Walsh:

Recent press stories have highlighted questions about the meaning of the preemption provisions that were added to the National Bank Act by Subtitle D of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act. We have a particular interest in this matter because we authored the amendment adopted by the full Senate that contains the preemption provisions in question.[1] The Senate-passed version, with only slight modifications, was adopted by the Conference Committee and enacted into law. Since your Office is the sole agency charged with interpreting and administering the National Bank Act, your views on the meaning of these provisions will provide authoritative guidance to all interested parties. Therefore, we are writing this letter to assure that your interpretation of the preemption provisions is consistent with the intent of our amendment.

The House-passed version of this legislation did not clearly incorporate the preemption principles enunciated

[1] The amendment was adopted by a vote of 80-18.

by the Supreme Court in the *Barnett Bank v. Nelson* case. This would have created an uncertain legal environment in which it would not be clear what laws applied to national banks. In order to address this problem and to assure legal certainty for all parties, we insisted that a direct reference to the *Barnett Bank* case be included in the bill to ensure that the preemption principles in the *Barnett Bank* case were preserved. This point was clarified further during the Senate floor debate on the Conference report. During that debate, we noted that the Conference report maintained the *Barnett Bank* standard as the basic legal standard for preemption.[2] Senator Dodd, the Chairman of the Senate Banking, Housing and Urban Affairs Committee, agreed with our view, and confirmed that the legislation codifies the preemption standard of the *Barnett Bank* case.[3] As you know that standard is not simply the short-hand phrase "prevent or significantly interfere", but rather the traditional conflict preemption standard as explained by the Court in its holding in the *Barnett Bank* case.

Additionally, our amendment stated that the Comptroller is to act on a case-by-case basis in making preemption determinations. Consistent with our desire to provide legal certainty to all parties, this provision is not intended to retroactively repeal the OCC's 2004 preemption rulemaking, and nothing in our amendment reflects such a retroactive intent. Indeed, any form of retroactive legislative repeal of that rule would disrupt settled expectations and create considerable uncertainty as to the legal status of prior preemption determinations,

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[2] Congressional Record, page S5902, July 15, 2010.

[3] Id.

including case law. Instead, the case-by-case provision is to be applied to any new OCC preemption determinations made after the effective date of the amendment. Throwing the 2004 regulation and other prior administrative and judicial determinations into doubt would not bring certainty to the marketplace, but instead would be disruptive and create untold potential liability by effectively retroactively changing the law for regulated institutions.

Other features of the preemption provisions address the application of preemption to subsidiaries, affiliates and agents of national banks, the application of preemption to federal savings associations, and the authority of state attorneys general to enforce applicable federal and state laws.

In view of the questions that are being raised and to provide more certainty to interested parties, we request that you please clarify how you interpret the preemption provisions in the Dodd-Frank Act.

Sincerely,

Thomas R. Carper	*Mark R. Warner*
Thomas R. Carper	Mark Warner
United States Senator	United States Senator

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

June 27, 2011

By E-Mail and Messenger

The Honorable John Walsh
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

Re: Docket ID OCC-2011-0006
Agency: OCC

Dear Acting Comptroller Walsh:

On behalf of the Treasury Department, I am writing to comment on the Office of the Comptroller of the Currency's (OCC) proposed rule relating to the federal preemption of state consumer financial law.

The OCC's proposed rule raises three principal concerns for Treasury: (1) it is not centered on the key language of the Dodd-Frank Act's preemption standard, and instead seeks to broaden the standard; (2) even though the proposed rule deletes the OCC's current "obstruct, impair, or condition" standard, the rule asserts that preemption determinations based on that eliminated standard would continue to be valid; and (3) the rule could be read to preempt *categories* of state laws in the future, even though Dodd-Frank requires that preemption determinations be made on a "case-by-case" basis, and after consultation with the Consumer Financial Protection Bureau (CFPB) where appropriate.

1. The OCC's proposed rule is not centered on the key language of Dodd-Frank's preemption standard and seeks to broaden the standard.

Although Congress adopted a specific preemption standard in Dodd-Frank, the OCC's rule articulates a preemption standard that is broader than the language of the Dodd-Frank standard.

One of the most strenuously debated provisions of Dodd-Frank was the scope and extent of the preemption standard for national banks. In the end, Congress chose to enact a specific preemption standard. In particular, Dodd-Frank states that a state consumer financial law may be preempted "only if ... in accordance with the legal standard for preemption in the decision of the Supreme Court ... in *Barnett Bank of Marion County, N.A.* v. *Nelson* ... , the State consumer financial law *prevents or significantly interferes* with the exercise by the national bank of its powers."[1]

The OCC rule, however, essentially reads the "prevents or significantly interferes" language out of the statute. Specifically, the rule takes the position that Congress sought to codify the *Barnett* opinion, but not any particular formulation in the opinion.[2] This avoidance of

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a) (emphasis added).

[2] Although the preamble of the rule discusses this specific standard, it argues that Congress intended to codify the entirety of the *Barnett* opinion, and not any particular standard. And, significantly, the text

the specific standard is inconsistent with the plain language of the statute and its legislative history.[3]

We believe that, as provided by the plain language of the statute, Congress 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. While it is proper to look to the *Barnett* opinion to interpret the "prevents or significantly interferes" standard, we believe that Congress intended "prevents or significantly interferes" (as used in *Barnett)* to be the relevant test, not some broader test encompassing the entirety of the *Barnett* opinion.

2. The proposed rule validates all prior preemption determinations, including those based on its deleted "obstruct, impair, or condition" standard.

The OCC rule asserts that all prior preemption determinations continue to be valid, including those that were based on the OCC's previous "obstruct, impair, or condition" standard. In our view, this position is not in

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of the rule does not cite the "prevent or significantly interferes" language at all. Rather, the proposed rule articulates the relevant test as "consistent with the decision of the Supreme Court in *Barnett.*"

[3] The House-passed version of the bill contained a specific preemption standard ("prevents, significantly interferes with, or materially impairs"). While the Senate-passed version of the bill only contained a reference to the *Barnett* opinion, without any formulation, the Conference Committee specifically added the "prevents or significantly interferes" standard---further supporting that Congress specifically sought to codify the "prevents or significantly interferes" standard of *Barnett*.

accordance with Dodd-Frank.

The proposed rule acknowledges that the "obstruct, impair, or condition" standard was not drawn directly from the *Barnett* opinion, and it proposes the deletion of that standard. Nonetheless, the rule maintains that this deleted standard was "an amalgam of prior precedents relied upon in [*Barnett*]" and, therefore, argues that determinations based on it are consistent with the new Dodd-Frank standard. According to the preamble of the rule: "To the extent any existing precedent cited those terms in our regulations, that precedent remains valid, since the regulations were premised on principles drawn from the *Barnett* case."

In our view, this position is contrary to Dodd-Frank. As discussed above, Congress chose a specific preemption standard—"prevents or significantly interferes"—from the *Barnett* opinion. To the extent that a prior preemption determination was based on the "obstruct, impair, or condition" standard—and is not congruent with the "prevents or significantly interferes" standard—such prior determination does not satisfy the preemption standard enacted in Dodd-Frank.

The rule seems to take the position that the Dodd-Frank standard has no effect: the proposed rule expressly argues that the new Dodd-Frank standard would not change the outcome of any previous determination, and the same logic would apply to any future determination. The notion that the new standard does not have any effect runs afoul of basic canons of statutory construction; it is also contrary to the legislative history, which states that Congress sought to "*revis[e]* the standard the OCC will use to preempt state consumer protection laws."[4]

3. The OCC's proposed rule may not comport with the "case-by-case" requirement.

Dodd-Frank requires that each preemption determination be made on a "case-by-case" basis and after consultation with the CFPB where appropriate. Despite this case-by-case requirement, the OCC's proposal could be read to preempt broad *categories* of state consumer financial laws going forward.

The OCC's intent on this issue is unclear: the proposed rule addresses the case-by-case requirement in the preamble (i.e., acknowledging the requirement), but not in the text of the proposed rule; as a result, it is unclear how the OCC intends to apply the case-by-case requirement going forward. Nonetheless, the language of the proposed rule could be read to preempt categories of state laws in the future. To the extent that the OCC seeks to preempt categories of state consumer financial laws going forward, rather than through a case-by-case approach (and after consulting with the CFPB in appropriate instances), that would not comply with Dodd-Frank. Thus, we recommend that you clarify the rule to state that any future determination will be made only on a case-by-case basis, and after consultation with the CFPB to the extent required by Dodd-Frank.

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On behalf of the Treasury Department, thank you for

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[4] H.R. Rep. No. 111-517, at 875 (Conf. Rep.) (emphasis added).

your careful consideration of these comments.

Very truly yours,

George W. Madison

July 8, 2011

The Honorable Timothy Geithner
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Geithner:

We were both surprised and disappointed by the comment letter George W. Madison, the General Counsel of the Department of the Treasury, sent to the OCC on June 27 relating to the OCC's proposed rule on federal preemption. As you know, we were the sponsors of the Senate amendment on this subject and were involved in the negotiations on preemption during the conference committee. While we understand that the position of the Administration was to eliminate federal preemption for national banks, the fact is that Congress did not accept that position. Our amendment maintaining the Barnett standard passed the Senate by an overwhelming vote of 80 to 18. Both the language of the final law and its legislative history clearly demonstrate that the Barnett standard is maintained, and the Treasury position in this comment process was, in fact, rejected by Congress.

The letter fails to discuss any persuasive legislative history in support of its position that a new preemption standard was intended,[1] and at the same time ignores the

[1] The Treasury letter attempts to use a phrase in the Conference report to support its case, but that phrase is taken out of context and the very next sentence, which Treasury ignores, explicitly states that the report "codifies" the Barnett standard. The Treasury cites the

clear legislative history indicating that the statute is intended to codify the Barnett case. In fact the literal language of the statute on its face clearly shows the Barnett standard was maintained. The statute states "in accordance with the legal standard for preemption in the decision of the Supreme Court … in Barnett Bank of Marion County N.A. v. Nelson. . . ." It does not say in accordance with "part of" the legal standard; it says "the" legal standard.

It is true that the statute goes on to say "the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers" but that language is stating the touchstone of the Barnett case. It is not a limiting phrase and cannot reasonably be read to be one. It would not have been practical to incorporate all the factors the court considered in the lengthy Barnett decision in a statute.

As noted, Mr. Madison can cite no persuasive legislative history supporting his position; however, there is very strong legislative history supporting the position that the Barnett standard was maintained. First, the House-Senate Conference Committee Report specifically states that the Conference Report language "codifies" the

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phrase that says the Conference report "revises" the standard the OCC will use, but that is because the Senate committee report took the position that the OCC had gone beyond the Barnett standard in its regulation, and therefore use of the Barnett standard would constitute a revision. Therefore a return to the true Barnett standard was seen as a revision. In fact the OCC has proposed to remove the language that concerned the Senate from the regulation to alleviate any concern it had gone beyond Barnett.

Barnett standard.[2] Second, in the Senate floor debate on the Conference Report, it was specifically noted that the Conference Report maintained the Barnett standard as the basic legal standard for preemption. Importantly, Senator Dodd, the Chairman of the Senate Banking, Housing and Urban Affairs Committee, agreed and explicitly confirmed that the legislation codifies the preemption standard of the Barnett Bank case, saying "There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case.[3]" Senator Johnson also agreed with this analysis and added that such codification would provide "certainty" to consumers and providers of financial services. As discussed further below, the Treasury's position would completely undermine such certainty and therefore is contrary to Senator Johnson's statement.

Indeed, the codification of Barnett in the Dodd-Frank Act is explicitly stated elsewhere in the Act itself. Section 1044 says that a court can only uphold an OCC determination to preempt a state law if it is "in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank. . . ." Thus courts are explicitly ordered to judge the OCC's determination based on the legal standard of Barnett, not some part of it. It would obviously be an absurdity for a court to be instructed by Congress to use a broader standard of review than the OCC itself could use.

We would furthermore point out that the language in the

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[2] See Conference Committee Report No. 111-517 at 875 (2010).

[3] See 156 Cong. Rec. S5870-02, 2010 WL 2788025 (July 15, 2010) (colloquy between Senator Carper and Chairman Dodd.

Dodd-Frank Act closely tracks preemption language in the Gramm-Leach-Bliley Act that also included "prevent or significant interfere." Both the clear legislative history[4] and court cases interpreting that language confirm that this Gramm-Leach-Bliley language was a codification of the Barnett standard.[5]

Finally, a court – the 11th Circuit Court of Appeals – has already ruled that under the Dodd-Frank Act the proper standard for preemption is the full conflict preemption standard of the Barnett decision. (Baptista v. JPMorgan Chase, N.A.).

Treasury's second argument in its comment letter - that prior OCC preemption determinations must be revisited - flows directly, as the letter itself states, from its argument that the Barnett standard no longer applies. Since that argument is incorrect, the Treasury analysis that prior determinations must be revisited is also incorrect.

The position taken in the Treasury letter is also extremely troublesome from a public policy point of view. As Senator Johnson stated on the Senate floor, Congress wished to provide "certainty" on the issue of the preemption standard. If the Treasury position were to be adopted, there would be great uncertainty as to what the new standard would mean. There can be no doubt this would lead to years of litigation before the new standard was finalized in a way that enabled national banks (and

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[4] See, e.g. Senate Banking Committee Report No.106-44 at 13 (1999).

[5] See, Association of Banks in Insurance v. Duryee, 270 F.3d 397 (6th Cir. 2001); Bowler v. Hawke, 320 F.3d 59 (1st CIr. 2003); Mass Bankers Assn. v. Bowler, 392 F. Supp. 2d 24 (D. Ma. 2005).

state banks chartered by states with wild card statutes) to plan and deliver products and services without significant legal risk. Products and services offered nationally could literally be subject to hundreds of differing state and local laws. This uncertainty would clearly increase the cost and decrease the availability of bank services, including lending, at a time of economic difficulty when we can least afford it.

Of course, the final language of the Dodd-Frank Act does include important changes relating to preemption, including requiring the OCC to act on a case-by-case basis on determinations made after the effective date, conforming OTS and OCC preemption standards, addressing the authority of attorneys general to enforce applicable laws, and addressing the application of preemption to subsidiaries and affiliates.

It is our hope that you will reconsider this letter and withdraw it.

Sincerely,

Thomas R. Carper United States Senator	Mark Warner United States Senator

cc: John Walsh, Acting Comptroller, OCC

Office of the
Comptroller of the Currency

400 7th Street, SW
Washington, DC 20219

November 9, 2023

To: Chief Executive Officers of All National Banks and Federal Savings Associations

Subject: Uniform federal banking standards

National banks and federal savings associations (FSAs) are subject to a robust federal framework of regulation and supervision, which is designed to ensure that these institutions operate in a safe and sound manner, treat customers fairly, provide fair access to financial services, and comply with applicable law. The OCC is aware that some states have passed laws or taken other actions that purport to apply to national banks and FSAs. The OCC is carefully monitoring the proliferation of competing and potentially inconsistent requirements. We are concerned about their impact on the ability of national banks and FSAs to provide banking services consistent with safety, soundness, and the fair treatment of customers.

As provided for in the Supremacy Clause of the U.S. Constitution, federal law preempts state laws that conflict with the exercise by national banks and FSAs of their federally authorized powers.[1] OCC regulations provide

[1] *See Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996). *See also Easton v. Iowa*, 188 U.S. 220, 229 (1903) (stating that federal banking law "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred

examples of the types of state laws that do not apply to national banks and FSAs.[2] In addition, the OCC has exclusive visitorial authority with respect to national banks and FSAs.[3]

The OCC is committed to preserving the legal framework for preemption established by Congress, including in the Dodd-Frank Wall Street Reform and Consumer Protection Act. National banks and FSAs should be aware that each state action presents unique considerations, and the OCC encourages banks with questions to consult with legal counsel.

Please contact your supervisory office for additional information or if you have any questions.

Sincerely,

Benjamin W. McDonough
Senior Deputy Comptroller and Chief Counsel

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are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States").

[2] *See* 12 CFR 7.4007, 7.4008, 7.4010, 34.4, and 34.6. These OCC regulations also address the types of state laws that generally do apply to national banks and FSAs such as those addressing contracts, torts, criminal law, and zoning.

[3] *See, e.g.*, 12 USC 484, 1463(a)(1), and 1464(a)(1); 12 CFR 7.4000. For example, to the extent that state laws purport to impose requirements such as attestation or reporting on national banks or FSAs, these laws may be inconsistent with the OCC's exclusive visitorial authority under federal law.