No. 22-529

In the Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, and ILANA HARWAYNE-GIDANSKY, 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

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QUESTION PRESENTED

A New York state statute requires mortgage lenders to pay a minimum interest rate on funds held in mortgage-escrow accounts. *See* N.Y. G.O.L. § 5-601.

The question presented is whether "the Laws of the United States," U.S. Const. art. VI, cl. 2, preempt application of New York's statute to national banks as a matter of law.

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Introduction 1

Opinions below 2

Jurisdictional statement 2

Statutory provisions involved 2

Statement 3

I. Statutory and regulatory background 3

A. National Bank Act preemption 3

B. Mortgage-escrow accounts 20

II. Factual and procedural background 23

Summary of argument 26

Argument 28

I. The Second Circuit's "control" test contradicts section 25b's plain text, structure, and history, as well as 100 years of this Court's precedents. 31

A. Section 25's text, structure, and history foreclose the Second Circuit's test. 31

B. Section 25b's preemption standard is confirmed by *Barnett Bank* and 100 years of this Court's precedents. 39

II. Section 25b requires a factual showing that New York's law would have a significant impact on the exercise of an express statutory power—a showing that Bank of America has not made. 43

Conclusion 46

Appendix – Statutory Provisions.................... App. 1

TABLE OF AUTHORITIES

Cases

Anderson National Bank v. Luckett,
321 U.S. 233 (1944) 12, 13, 41, 42, 46

Atherton v. F.D.I.C.,
519 U.S. 213 (1997) 3, 10, 12

Barnett Bank v. Nelson,
517 U.S. 25 (1996) 13, 29, 30, 35, 40, 41, 45

Bartenwerfer v. Buckley,
598 U.S. 69 (2023) 32

Biestek v. Berryhill,
139 S. Ct. 1148 (2019) 38

Chamber of Commerce v. Whiting,
563 U.S. 582 (2011) 28, 29

Cochise Consultancy, Inc. v. United States ex rel. Hunt,
139 S. Ct. 1507 (2019) 38

Corley v. United States,
556 U.S. 303 (2009) 36

Cuomo v. Clearing House Association,
557 U.S. 519 (2009) 8, 12, 15, 33, 34, 42

Davis v. Elmira Savings Bank,
161 U.S. 275 (1896) 8, 9, 25

DeBoer v. Mellon Mortgage Co.,
64 F.3d 1171 (8th Cir. 1995) 21

Digital Realty Trust, Inc. v. Somers,
583 U.S. 149 (2018) 32

Easton v. Iowa,
188 U.S. 220 (1903) 9, 35

Farmers' & Mechanics' National Bank v. Dearing,
91 U.S. 29 (1875) 9

Franklin National Bank v. People,
347 U.S. 373 (1954) 36, 40

First Agricultural National Bank v. State Tax Commission,
392 U.S. 339 (1968) 11, 12

First National Bank v. California,
262 U.S. 366 (1923) 13

First National Bank v. Kentucky,
76 U.S. (9 Wall.) 353 (1869)..................................10, 33

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263 U.S. 640 (1924) 12

Flagg v. Yonkers Savings & Loan Association,
396 F.3d 178 (2d Cir. 2005).......................................14

Gamble v. United States,
139 S. Ct. 1960 (2019) 32

Guthrie v. Harkness,
199 U.S. 148 (1905) 10

Kansas v. Garcia,
140 S. Ct. 791 (2020) 29

Lewis v. Fidelity & Deposit Co.,
292 U.S. 559 (1933) 42

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 5, 25

Merck Sharp & Dohme Corp. v. Albrecht,
139 S. Ct. 1668 (2019) 38

Oklahoma v. Castro-Huerta,
142 S. Ct. 2486 (2022) 29

Osborn v. Bank of the United States,
22 U.S. (9 Wheat.) 738 (1824) 5

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 18

Tiffany v. National Bank,
85 U.S. 409 (1873) 6

United States v. Davis,
139 S. Ct. 2319 (2019) 38

Virginia Uranium, Inc. v. Warren,
139 S. Ct. 1894 (2019) 28, 29

Waite v. Dowley,
94 U.S. 527 (1876) 10

Watters v. Wachovia Bank, N.A.,
550 U.S. 1 (2007) 6, 7, 11, 35

Wyeth v. Levine,
555 U.S. 555 (2009) 29, 31, 39, 45

Yates v. United States,
574 U.S. 528 (2015) 36

Statutes

12 U.S.C. § 24 ....7, 43, 44

12 U.S.C. § 25b.................................2, 17, 18, 26, 27, 29, 30,
32, 33, 34, 35, 37, 38, 39, 45

12 U.S.C. § 36 ....34, 43

12 U.S.C. § 371 ....12, 43, 44

12 U.S.C. § 2609 21

15 U.S.C. § 1602 44

15 U.S.C. § 1639d..23, 44

15 U.S.C. § 6701 ....36, 40, 43

28 U.S.C. § 1254 2

Cal. Civ. Code § 2954.8...21

Conn. Gen. Stat. § 49-2a..21

Federal Reserve Act, 38 Stat. 251 11

N.Y. G.O.L. § 5-601... i, 21

Or. Rev. Stat. § 86.245 22

U.S. Const. art. VI, cl. 2 .... i, 28

Vt. Stat. Ann. tit. 8, § 10404 22

Regulations

12 C.F.R. § 560.2 (2004) 14

Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) 14, 15, 17, 22, 23, 34, 35

Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 30,557 (May 26, 2011) 19

Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,459 (July 21, 2011) 19, 20, 23

Other authorities

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Arthur E. Wilmarth, Jr.,
The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services, 36 J. Corp. L. 893 (2011) 7, 15, 16

Arthur E. Wilmarth, Jr.,
The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection, 23 Ann. Rev. Banking & Fin. L. 225 (2004)................8, 11

Bruce E. Foote,
Cong. Rsch. Serv., 98-979E, *Mortgage Escrow Accounts: An Analysis of the Issues* (1998)....................20, 21

Caleb E. Nelson,
Preemption, 86 Va. L. Rev. 225 (2000) 6

Catherine M. Sharkey,
Inside Agency Preemption, 110 Mich. L. Rev. 521 (2012)....................22

Daniel J. Elazar,
Banking and Federalism in the Early American Republic, 28 Huntington Library Q. 301 (1965) 3, 4, 8

Edward L. Symons, Jr.,
The 'Business of Banking' in Historical Perspective, 51 Geo. Wash. L. Rev. 676 (1983)....................3

Financial Crisis Inquiry Commission,
The Financial Crisis Inquiry Report (2011) 16

GAO,
Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing (1973) 22

George E. Barnett,
State Banking in the United States Since the Passage of the National Bank Act (1902) 7

H.R. Rep. No. 111-94 (2009) 23

H.R. Rep. No. 111-517 (2010) 18

Henry N. Butler & Jonathan R. Macey,
The Myth of Competition in the Dual Banking System, 73 Cornell L. Rev. 677 (1988) 6

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Rebellious Homeowners: Mortgagors Challenge Demand That Taxes Be Paid Into No-Interest Escrow Accounts, Wall St. J., Oct. 26, 1971 21

Kenneth E. Scott,
The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1 (1977) 4, 6, 7, 8

Letter from George W. Madison, General Counsel, Department of the Treasury, to John Walsh, Acting Comptroller of the Currency (June 27, 2011)..........19

Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. Chi. L. Rev 1361 (2021)..........6

Milton Friedman & Anna J. Schwartz, *A Monetary History of the United States, 1867-1960* (1963)..........12

Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 Conn. L. Rev. 1327 (2009)..........16

Roderick M. Hills, Jr., *Exorcising* McCulloch*: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. Pa. L. Rev. 1235 (2013)..........5, 8, 10, 11, 15, 17

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INTRODUCTION

In the decision below, the Second Circuit held that the National Bank Act preempts a 50-year-old New York law as applied to national banks like Bank of America. The law requires all banks to pay at least 2% interest on mortgage-escrow accounts. Relying on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and other nineteenth-century cases, the Second Circuit held that preemption does not turn on "how much a state law impacts a national bank, but [on] whether it purports to 'control' the exercise of its powers." Pet. App. 17a. Because New York's law "would exert control over" the implied power to use escrow accounts, the court found it preempted. Pet. App. 23a.

Preemption, however, is a question for Congress. And here, Congress passed a statute in 2010 clarifying the preemption standards for national banks. That statute expressly provides that a "State consumer financial law" is preempted "only if," as relevant here, it "prevents or significantly interferes with the exercise by the national bank of its powers," 12 U.S.C. § 25b(b)(1)—a specific legal standard taken from a specific case. *See Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

The Second Circuit's "control" test defies this statute. As defined in section 25b, "State consumer financial laws" *necessarily* exert control over national banks. So if control were the test, *every* "State consumer financial law" would be preempted, undoing the statute. The Second Circuit's test also eliminates "significantly" from the text and contradicts subsection 25b(b)'s separate requirement that a "preemption determination" must assess the state law's "impact" on national banks. Because Bank of America has not shown that New York's law would have a significant impact on national banks, this Court should reverse.

OPINIONS BELOW

The Second Circuit's opinion is reported at 49 F.4th 121 (Pet. App. 1a). The district court's order is reported at 408 F. Supp. 3d 171 (Pet. App. 70a). Its order certifying an interlocutory appeal is unreported (Pet. App. 51a).

JURISDICTIONAL STATEMENT

The Second Circuit entered judgment on September 15, 2022. The petition for certiorari was filed on December 5, 2022. This Court granted certiorari on October 13, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

(a) Definitions

(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.

* * *

(b) Preemption standard

(1) In general

State consumer financial laws are preempted, only if—

* * *

(B) in accordance with the legal standard for preemption … 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[.]

* * *

The full text of these provisions, and other relevant provisions, is reproduced in an appendix to this brief.

STATEMENT

I. Statutory and regulatory background

A. National Bank Act preemption

During "most of the first century of our Nation's history, … state-chartered banks were the norm and federally chartered banks an exception." *Atherton v. F.D.I.C.*, 519 U.S. 213, 221 (1997). In the early republic, most "American banks were either state-owned joint-stock companies in which the state was a major shareholder or were controlled by the state through special charter provisions." Elazar, *Banking and Federalism in the Early American Republic*, 28 Huntington Library Q. 301, 303-04 (1965). "Generally, these banks were considered governmental or quasi-governmental entities, because their most important function was the issuance of notes, which served as money." Symons, *The 'Business of Banking' in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 686 (1983).[1]

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[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

1. Congress creates the First and Second Banks of the United States.

In 1790, Alexander Hamilton submitted a report to Congress advocating the creation of a national central bank. *See* Hamilton, *Report on the Subject of a National Bank* (1790). The bank, Hamilton wrote, "ought not to be regarded simply as a commercial bank." Hamilton, *Letter from the Secretary of the Treasury*, 29 Annals of Cong. 505, 508 (1816). It would not be "an institution created for the purposes of commerce and profit alone, but much more for the purposes of national policy, as an auxiliary in the exercise of some of the highest powers of the Government." *Id.* Hamilton dismissed concerns that the central bank's directors and shareholders would serve their own interests over the interests of the public. "Public utility," Hamilton wrote, "is more truly the object of public banks, than private profit." Hamilton, *Report on the Subject of a National Bank*, at 87.

Congress created the Bank of the United States in 1791 and, in 1816, the Second Bank of the United States. *See* Elazar, *Banking and Federalism in the Early American Republic*, 28 Huntington Libr. Q. at 311, 313. "Although the Second Bank of the United States was not a central bank in the modern sense, there was a major public element in its operations." Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 15 (1977). The federal government did not directly manage the Bank, but it was the Bank's largest shareholder, appointed a fifth of its directors, and garnered a portion of the Bank's profits. *See id.* at 15 n.62. As the federal government's "exclusive fiscal agent," the Bank secured the government's money, collected tax revenues, loaned money to the government, and paid its

debts. *See* Hills, *Exorcising* McCulloch*: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. Pa. L. Rev. 1235, 1249 (2013).

2. This Court in *McCulloch v. Maryland* holds the Second Bank of the United States immune from state taxes.

Some states, envious of the Second Bank's exclusive access to the government's deposits, attempted to tax the Bank. In *McCulloch v. Maryland*, this Court held that Maryland lacked the power to impose such a tax. 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall wrote that the Second Bank was an "essential instrument" of the federal government "in the prosecution of its fiscal operations." *Id.* at 422. Because "the power to tax involves the power to destroy," he reasoned, the states cannot have "power, by taxation or otherwise, to … control … the powers vested in the general government." *Id.* at 431, 436. States could no more tax the Bank of the United States than they could "tax the mail" or "tax the mint." *Id.* at 432.

In reaffirming *McCulloch*'s holding, the Court in *Osborn v. Bank of the United States* rejected Ohio's argument that, because most of the Bank's stock was privately owned, its "public business" was "in reality" just a "means of promoting" the Bank's "private gain." 22 U.S. (9 Wheat.) 738, 788 (1824) (quoting argument). The Court agreed that the Second Bank "would certainly be subject to the taxing power of the State" if it were a "mere private corporation, … having private trade and private profit for its great end and principal object." *Id.* at 859-60. But the Bank was not engaged in "the mere business of banking." *Id.* Rather, it was "a public corporation, created for public and national purposes." *Id.*

As commentators have recognized, *McCulloch* and *Osborn* essentially created a field-preemption regime for the Bank, in which Congress was seen as acting "to occupy [the] particular field" of banking law. Nelson, *Preemption*, 86 Va. L. Rev. 225, 271 & n.153 (2000); *see also* Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1258.

3. The National Bank Act establishes the dual system of private banks subject to federal and state law.

"The demise of the Second Bank of the United States in 1836 at the hands of President Andrew Jackson left the country with a heterogeneous, unequal, and unsafe money supply." Menand & Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. Chi. L. Rev 1361, 1384 (2021). In 1864, Congress responded with the National Bank Act (NBA), thereby "establishing the system of national banking still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10 (2007).

The NBA created a new federal agency called the Currency Bureau—later, the Office of the Comptroller of the Currency (OCC)—with authority to charter and supervise a new system of "national banks." Scott, *The Dual Banking System*, 30 Stan. L. Rev. at 3. Congress hoped that these banks would "provide the nation with a stable system of currency to replace the existing system of notes issued by state banks," and, by requiring national banks to back the notes with federal bonds, "a ready market for the new bonds the federal government was issuing to finance the Civil War." Butler & Macey, *The Myth of Competition in the Dual Banking System*, 73 Cornell L. Rev. 677, 681 (1988); *see Tiffany v. Nat'l Bank*, 85 U.S. 409, 413 (1873) (noting that national banks "were established for the purpose, in part, of providing a

currency for the whole country, and in part to create a market for the loans of the General government").

The NBA gave the new national banks the exclusive power—and in some cases, the duty—"to issue a national currency in the form of national bank notes." Wilmarth, *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893, 945 (2011). It also granted the banks a list of other enumerated powers, including the power to accept deposits and make non-real-estate loans, along with "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24; *see Watters*, 550 U.S. at 23 (Stevens, J., dissenting). "To maintain a meaningful role for state legislation and for state corporations," however, Congress "expressly prohibited" national banks "from making mortgage loans." *Id.* Thus, for decades, the "characteristic difference" between state and national banks was that "state banks [could] loan on real estate security, while national banks [were] prohibited from doing so." Barnett, *State Banking in the United States Since the Passage of the National Bank Act* 50 (1902).

"Originally, it was anticipated that existing banks would surrender their state charters and re-incorporate under the terms of the new law." *Watters*, 550 U.S. at 23 (Stevens, J., dissenting). "Instead, after an initial post-[NBA] decline, state-chartered institutions thrived." *Id.* The result was the "competitive mix of state and national banks" now "known as the dual banking system." *Id.*

In the dual-banking system, banks may choose whether to charter as a state bank or a national one. *See* Scott, *The Dual Banking System*, 30 Stan. L. Rev. at 8. Those that choose to become national banks are subject to primary regulation by the OCC and the powers and

limitations of the NBA. *See id.* The NBA says "nothing explicit, however, about most operations of national banks, thus leaving regulation of those activities largely to other bodies of law." *Id.* at 16. It thus established a "mixed state/federal regime[] in which the Federal Government exercise[d] general oversight while leaving state substantive law in place." *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 530 (2009).

Despite being chartered by the federal government, national banks were not "public institutions comparable to the Second Bank of the United States." Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 242 (2004). The government did not appoint directors or own stock in the banks. *See* Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1272-73. Rather than a central bank, the NBA "contemplated and achieved a system of thousands of privately owned banks." Scott, *The Dual Banking System*, 30 Stan. L. Rev. at 15. These banks were "private, competitive, and often speculative businesses, rather than agents of government." Elazar, *Banking and Federalism in the Early American Republic*, 28 Huntington Library Q. at 318.

4. Initially, this Court continues to apply ***McCulloch*'s field-preemption regime.**

Nevertheless, this Court for a time continued to apply *McCulloch*'s field-preemption regime to preempt state laws that targeted banking, such as laws charging interest, accepting deposits, and maintaining accounts. *See Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). Because "[n]ational banks are instrumentalities of the federal government, created for a public purpose," the

Court wrote in *Davis*, "[i]t follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void." *Id.*

In *Farmers' & Mechanics' National Bank v. Dearing*, for example, the Court held that states could not set their own penalties for exceeding the NBA's interest-rate limit. 91 U.S. 29, 32-33 (1875). Relying on the "reasoning of Secretary Hamilton and of this Court in *McCulloch* … and in *Osborn*," the Court explained that these banks were "instruments designed to be used to aid the government in the administration of an important branch of the public service." *Id.* at 33-34. States thus could "exercise no control" over them, "nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Id.*

In perhaps its most explicit embrace of *McCulloch*'s field-preemption reasoning, the Court wrote in *Easton v. Iowa* that the NBA created "a symmetrical and complete scheme for the banks" in which the federal government "has the sole power to regulate and control the exercise of their operations." 188 U.S. 220, 231, 238 (1903). The Act did not "leave the field open" for any "direct legislation" by states over the banking activities of national banks. *Id.* at 231-32. If states could so regulate, the Court believed, "confusion would … result from control possessed and exercised by two independent authorities." *Id.*

Even so, the Court clarified that the NBA did not preempt "general and undiscriminating state laws on the contracts of national banks so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation." *Davis*, 161 U.S. at 290. Nor did it preempt general state laws regarding, for example, the "transfer of property" or the "right to collect [] debts"

or "be sued for debts." *First Nat'l Bank v. Kentucky,* 76 U.S. (9 Wall.) 353, 362 (1869). The Court upheld the application of such general state laws even when they overlapped with specific NBA provisions. *See Guthrie v. Harkness*, 199 U.S. 148, 155 (1905) (upholding the right of shareholders to inspect a bank's shareholder list).

Thus, even during this field-preemption era, national banks were "governed in their daily course of business far more by the laws of the State than of the nation." *Kentucky*, 76 U.S. (9 Wall.) at 362; *see also Atherton*, 519 U.S. at 222 ("In 1870 and thereafter this Court held that federally chartered banks are subject to state law."). Banks remained "subject to State legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation." *Waite v. Dowley*, 94 U.S. 527, 533 (1876); *accord Kentucky*, 76 U.S. (9 Wall.) at 362.

5. The Federal Reserve Act ends the public function of national banks.

"By the early [1900s], the notion that privately owned banks were the equivalent of disinterested federal officials had become completely indefensible." Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1262. As this Court explained in *Atherton*, the idea that federally chartered banks required the protection of federal law "might have seemed a strong one during most of the first century of our Nation's history, for then … federal banks often encountered hostility and deleterious state laws." 519 U.S. at 221. But by the twentieth century, the concern that states were hostile to federal banks "was obsolete." Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1274.

At the same time, repeated economic crisis and bank failures had "exposed the fragility of a financial system essentially rooted in the self-governance of decentralized bankers." *Id.* at 1263. The Panic of 1907 and the Great Depression prompted Congress to overhaul the nation's banking system. *See id.* "Most significantly, in 1913 Congress established the Federal Reserve System to oversee federal monetary policy through its influence over the availability of credit." *Watters*, 550 U.S. at 26 (Stevens, J., dissenting); *see* Federal Reserve Act (FRA) §§ 2, 9, 38 Stat. 251, 259. Under the FRA, the Federal Reserve System (Fed) "perform[s] all central banking functions for the nation"—functions once assigned to the Bank of the United States. Wilmarth, *The OCC's Preemption Rules*, 23 Ann. Rev. Banking & Fin. L. at 241.

Another core "objective of the FRA was to provide the [Fed] with sole control over the nation's money supply." *Id.* The Act phased out national bank notes, instead authorizing a new national currency in the form of Federal Reserve notes. *See id.* By doing so, it "terminat[ed] the roles that national banks had previously played in funding government operations and issuing a national currency under the original National Bank Act." *Id.* As Justice Thurgood Marshall observed in 1968, national banks now "perform[] no significant federal governmental function that is not performed equally by state-chartered banks." *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 354 (1968) (Marshall, J., dissenting). A national bank is therefore no longer a "federal instrumentality," but "a privately owned corporation existing for the private profit of its shareholders." *Id.*

The FRA also gave national banks, for the first time, the authority to make real-estate loans. *See* 12 U.S.C.

§ 371(a). In addition to terminating the only public duty of national banks, the Act thus ended their most significant remaining limitation, "greatly reduc[ing] the importance of the distinction between national and nonnational banks." Friedman & Schwartz, *A Monetary History of the United States, 1867-1960*, at 196 (1963).

6. In a series of cases culminating in *Barnett Bank*, this Court holds that ordinary preemption applies.

In light of Congress's banking reforms, this Court, beginning in 1924, "subsequently found numerous state laws applicable to federally chartered banks" when those laws did not discriminate against national banks or conflict with the NBA's express terms. *Atherton*, 519 U.S. at 223. The Court in these cases engaged in detailed, fact-intensive inquiries over the practical effect of the law on national banks. *See, e.g.*, *First Nat'l Bank v. Missouri*, 263 U.S. 640 (1924) (upholding application of a Missouri law barring banks from opening branch offices in the state). By 2009, this Court was able to write that states had "enforced their banking-related laws against national banks for at least 85 years." *Cuomo*, 557 U.S. at 534.

The Court in *Anderson National Bank v. Luckett,* for example, upheld application of a Kentucky law requiring national banks to transfer dormant accounts to the state. 321 U.S. 233 (1944). Although the law directly targeted bank deposits, it did "not discriminate against national banks" or conflict with "any word in the national banking laws." *Id.* at 247. The "mere fact that the depositor's account is in a national bank," the Court explained, "does not render it immune to attachment by the creditors of the depositor, as authorized by state law." *Id.* at 248. The Court distinguished *First National Bank v. California*,

262 U.S. 366 (1923), which held a similar law preempted, on the ground that that law was "so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks." *Anderson*, 321 U.S. at 250. Unlike that law, Kentucky's law did not "impose an undue burden on the performance of the banks' functions" because it would not "deter [depositors] from placing their funds in national banks." *Id.* at 248, 252. Stated another way, the law neither prevented nor significantly impaired national banks from exercising their powers. So it was not preempted.

Barnett Bank v. Nelson, 517 U.S. 25 (1996), applied this principle. 517 U.S. 25. There, the Court held that an NBA provision expressly permitting national banks to sell insurance in small towns preempted a Florida law prohibiting the practice. *See id.* at 27-28. In doing so, however, the Court emphasized its holding in *Anderson* that states have authority "to regulate national banks"—even as to a "bank's exercise of its powers"—unless they "prevent or significantly interfere with" those powers. *Id.* at 33. The Florida law rose to this level of interference, the Court explained, because "the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids." *Id.* at 31.

7. The OCC resurrects field preemption.

Over time, as "the devastating results of predatory mortgage lending" grew evident, thirty states and the District of Columbia adopted laws to prohibit banks from inducing borrowers to borrow more than they could repay. S. Rep. No. 111-176, at 16-17 (2010). But "rather than supporting these antipredatory lending laws, federal regulators preempted them." *Id.* In 2004, the OCC enacted sweeping preemption rules purporting to bar

state efforts against subprime lending. *See Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904 (Jan. 13, 2004).

The OCC's rules summarily declared that fourteen broad categories of state law did "not apply to national banks' lending and deposit taking activities." *Id.* In reaching that result, the OCC declined to follow *Barnett Bank*'s "prevent or significantly interfere with" standard, contending that no "one phrase constitutes the exclusive standard for preemption." *Id.* at 1910. Instead, the OCC broadly declared preempted any "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers"—a standard the agency characterized as a "distillation of the various preemption constructs articulated by the Supreme Court." *Id.* at 1910-11.

Although the OCC denied having adopted a field-preemption regime, it acknowledged that its rules were "substantially identical" to 1996 field-preemption rules adopted under the Home Owners' Loan Act (HOLA). *Id.* at 1911 n.56 (citing 12 C.F.R. § 560.2(b) (2004)). But it did not acknowledge a key difference: HOLA governs the charters of federal savings associations, while the NBA governs the charters of national banks. And in 2004, HOLA was thought to preempt its field—while the NBA was not. *Compare, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 182 (2d Cir. 2005) (field preemption under HOLA), *with Cuomo*, 557 U.S. at 534 (no field preemption under the NBA since at least 1924).

Commentators have thus recognized that, "despite the OCC's disclaimers," the agency's "rationale for its 2004 rules … institutes a regime of field preemption." Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1278

(noting that the OCC essentially revived *McCulloch*'s "federal instrumentality" theory). Even the agency recognized that it was "largely immaterial" whether its rules were considered "field" or "conflict" preemption because, either way, the rules would foreclose application of whole categories of state law. 69 Fed. Reg. at 1911. The OCC thus created "a regime of field preemption in everything but name." Wilmarth, *The Dodd-Frank Act's Expansion of State Authority*, 36 J. Corp. L. at 937.

Under the OCC's framework, the NBA would preempt state attempts to regulate the manner or content of national banks' real-estate lending. The agency's rules allowed only "general" state laws to apply, and only to the extent that such laws have a mere "incidental" effect on the real-estate lending activities of national banks. 69 Fed. Reg. at 1912. The OCC explained that state laws will be deemed "incidental" if they "form the legal infrastructure that makes it practicable to exercise a permissible Federal power." *Id.* But as this Court later held in *Cuomo*, the OCC's "legal infrastructure" rule "can be found nowhere within the text of the statute" and "attempt[ed] to do what Congress declined to do: exempt national banks from all state banking laws." 557 U.S. at 532-33.

8. The 2008 financial crisis ensues.

Within just a few years of the OCC's deregulatory efforts, the housing market collapsed, and the country plunged into "the most calamitous worldwide recession since the Great Depression." S. Rep. No. 111-176, at 2. Taking advantage of the OCC's efforts to nullify huge swaths of state law by bureaucratic fiat, large national banks had "expanded aggressively into subprime" loans. Wilmarth, *The Dodd-Frank Act's Expansion of State Authority*, 36 J. Corp. L. at 917; *see* McCoy, Pavlov &

Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 Conn. L. Rev. 1327, 1353 (2009). The consequences to the nation were severe: "defaults and foreclosures on millions of nonprime loans" and federal "bailouts of several of the largest national banks." Wilmarth, *The Dodd-Frank Act's Expansion of State Authority*, 36 J. Corp. L. at 898.

In the aftermath of the crisis, Congress found that the OCC's categorical preemption of state consumer-finance laws "helped bring the financial system down." S. Rep. No. 111-176, at 166. The Financial Crisis Inquiry Commission, which Congress created to investigate the crisis, found that the OCC's preemption efforts "prevent[ed] adequate protection for borrowers and weaken[ed] constraints on this segment of the mortgage market." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 126 (2011). By "exempt[ing] all national banks from State lending laws, including the anti-predatory lending laws," the OCC "actively created an environment where abusive mortgage lending could flourish without State controls," planting the seeds "for long-term trouble in the national banking system." S. Rep. No. 111-176, at 16-17.

9. In 2010, Congress enacts several provisions to repudiate the OCC.

Congress rebuked the OCC in the Dodd-Frank Act of 2010. After much debate, Congress settled on an unusual, carefully reticulated set of interlocking provisions designed to "clarify the preemption standard relating to State consumer financial laws as applied to national banks." S. Rep. No. 111-176, at 175. Those provisions, set forth in section 25b, made clear that the NBA "does not occupy the field in any area of State law." 12 U.S.C. § 25b(b)(4). Congress thus "repudiate[d] the sort of

categorical field preemption that, under *McCulloch* and its post-Civil War progeny" (and, later, the OCC's rule), "precluded states from enforcing banking-specific rules against nationally chartered banks." Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1287.

Congress then clarified the proper standard for preempting "State consumer financial laws." A "State consumer financial law" is necessarily banking-specific: Congress defined it as a law that does not discriminate against national banks and that "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction." 12 U.S.C. § 25b(a)(2). With this definition, Congress overruled the OCC's previous classification of laws as "incidental"—and therefore not preempted—if they "*do not* attempt to regulate the manner or content of national banks' real estate lending, but … instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power." 69 Fed. Reg. at 1912. Instead, section 25b provides that the NBA preempts "State consumer financial laws" in two key circumstances, both of which focus on the laws' effects. First, such a law is preempted if its application "would have a discriminatory effect on national banks." *See* 12 U.S.C. § 25b(b)(1)(A). Second, such a law is preempted if, "in accordance with … *Barnett Bank*," the law "prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 25b(b)(1)(B).

As the statute's text and historical context show, these provisions were meant to "undo[] broader standards adopted by … the OCC in 2004." S. Rep. No. 111-176, at 175. Congress expected that the "standard for preempting State consumer financial laws" would "return to what it had been for decades, that recognized by the Supreme

Court in *Barnett Bank*." *Id.*; *see* H.R. Rep. No. 111-517, at 875 (2010) (Dodd-Frank "revises the standard the OCC will use to preempt state consumer protection laws").

Finally, Congress granted the OCC tightly limited authority to make a "preemption determination." 12 U.S.C. § 25b(b)(3). Section 25b provides that the agency may apply *Barnett Bank* to preempt state laws only on a "case-by-case basis," after assessing "the impact of a particular State consumer financial law on any national bank." *Id.* § 25b(b)(1)(B). The agency must back up its determination with "substantial evidence, made on the record of the proceeding," that "supports the specific finding regarding the preemption of such [state law] in accordance with" *Barnett Bank*. *Id.* § 25b(c). Even then, a reviewing court will give the OCC's determination only *Skidmore* deference, based on the "thoroughness evident" in its "reasoning," and whether it is "persuasive" to the court. *Id.* § 25b(b)(5)(A); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In addition, the agency must consult with the Consumer Financial Protection Bureau before expanding its determination to "substantially equivalent" laws in other states, and publish and periodically review any preemption determinations. 12 U.S.C. § 25b(b)(3), (d).

10. Ignoring Dodd-Frank, the OCC resurrects field preemption.

Rather than comply with the new statute, the OCC acted as if nothing had happened. It quickly proposed new preemption rules that largely left intact its 2004 rules. The OCC did propose removing the phrase "obstruct, impair, or condition" from the preemption rules, explaining that this "terminology had resulted in misunderstanding and confusion." *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,459,

43,552 (July 21, 2011). Nevertheless, the OCC claimed that its test was "an amalgam of prior precedents" consistent with *Barnett Bank*. *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 30,557, 30,563 (May 26, 2011). The agency concluded that "eliminating this language [would] not impact the continued applicability of precedents based on those rules." 76 Fed. Reg. at 43,553. Its 2004 preemption rules would thus stay in effect. *See id.*

The General Counsel of the Department of the Treasury, of which OCC is a part, took the unusual step of submitting comments on the proposed rule, questioning its lawfulness. He criticized the agency for proposing "a preemption standard that is broader than the language of … Dodd-Frank." Letter from George W. Madison, Gen. Couns., Dep't of the Treasury, to John Walsh, Acting Comptroller of the Currency 1 (June 27, 2011). The rule, he wrote, "seems to take the position that the Dodd-Frank standard has no effect." *Id.* at 2.

Nevertheless, the OCC adopted the proposed rule. It made no effort to comply with Dodd-Frank's limits on its authority to make preemption determinations. The OCC did not review state laws on a "case-by-case" basis. *See* 76 Fed. Reg. at 43,557. It did not consult with the CFPB before adopting categorical preemptions of multiple state laws. *Id.* And it did not identify evidence supporting its determinations, instead relying on its general "conclusion that the listed types and terms of state laws would be preempted by application of the conflict preemption standard of the *Barnett* decision." *Id.* at 43,556. The OCC argued that these "procedural requirements" did not apply "retroactively" to its new rules—which it adopted one day before Dodd-Frank's effective date. *Id.* at 43,553.

B. Mortgage-escrow accounts

1. Mortgage-escrow accounts rise in popularity, leading to abuse.

Escrow accounts emerged in the 1930s, on the eve of the postwar housing boom. Mortgage lenders began requiring that borrowers deposit funds into these accounts on a monthly basis so that lenders could access the funds to cover annual property taxes and insurance payments. *See* Foote, Cong. Rsch. Serv., 98-979E, *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). In time, the vast majority of mortgages required such accounts, in part because the Federal Housing Administration mandated the practice under its home loan insurance program. *See id.* at 2. The rising popularity of escrow accounts made sense: A tax lien or, without insurance, a natural disaster could prevent a lender from recovering a mortgage's full value in the event of a default.

But as the escrow device grew more common, it also became subject to abuse. Many banks required borrowers to make payments well in advance and often in excess of future tax and insurance charges. *Id.* at 3. When banks refused to pay interest on these deposits, they profited. Because they could "invest the money accumulated in impound accounts in profitable, short-term investments," the "loss of interest income to the consuming public on tax prepayments alone could," by 1971, "be as high as $100 million annually." Carberry, *Rebellious Homeowners: Mortgagors Challenge Demand That Taxes Be Paid Into No-Interest Escrow Accounts*, Wall St. J., Oct. 26, 1971, at 40. In other words, payments once intended to avert foreclosure effectively became a large "interest-free loan from the customer" to the customer's own bank. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1173 (8th Cir. 1995).

2. Congress and several states regulate mortgage-escrow accounts.

In the 1970s, Congress and state legislatures introduced guardrails on escrow accounts to curb these abuses. In the Real Estate Settlement Procedures Act of 1974, Congress limited the maximum balance that national banks can hold in escrow and the circumstances under which they can require it. *See* 12 U.S.C. § 2609. Around the same time, several states adopted laws requiring lenders to pay a minimum amount of interest on escrow-account balances. *See* Foote, *Mortgage Escrow Accounts*, at 3-4. In total, fourteen states have enacted such laws. Among them are New York and California, each of which requires banks to pay at least 2% interest on escrow accounts. *See* N.Y. G.O.L. § 5-601; Cal. Civ. Code § 2954.8(a).[2]

These state laws are nondiscriminatory—they apply equally to state and national banks. *See, e.g.*, Conn. Gen. Stat. § 49-2a (applicable to any "state bank and trust company, national banking association, state or federally-chartered savings and loan association, savings bank, insurance company and other mortgagee or mortgage servicer"). They implement modest interest rates that reflect, for example, the "prevailing market rate of interest for regular savings accounts offered by local financial institutions." Vt. Stat. Ann. tit. 8, § 10404(b); *see also* GAO, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 21 (1973) (explaining that the California legislature enacted its escrow-interest law only after "study[ing] the amount

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[2] The other states are Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Oregon, Rhode Island, Utah, Vermont, and Wisconsin. *See* Pet. App. 22a n.7.

of money held by lending institutions for the payment of taxes, the amount of interest paid on such funds, and the cost of administering such funds"). And they are designed to balance the interests of borrowers and lenders: In exchange for receiving the "security protection provision" of an escrow account, a lender must pay interest. Or. Rev. Stat. § 86.245(2).

3. The OCC attempts to preempt escrow-interest laws and is rebuffed by Congress.

For decades, federal and state escrow laws operated side by side. But in 2004, despite having never regulated mortgage-escrow accounts before, the OCC included state laws "concerning … escrow accounts" among the broad categories of state law that it deemed preempted. 69 Fed. Reg. at 1917. The OCC provided no rationale for including escrow-account laws and made "no factual findings … explaining why preemption was necessary in th[is] specific case or what conflicts between state authorities and federal banks justified preemption." Sharkey, *Inside Agency Preemption*, 110 Mich. L. Rev. 521, 581 (2012). Outside the text of the rule itself, the OCC made no mention of escrow accounts in its thirteen-page statement accompanying the rule. *See* 69 Fed. Reg. 1904; *see also* Pet. App. 104a. The OCC wrote only that the list of areas covered (which included escrow accounts) "reflects our experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." 69 Fed. Reg. at 1911. It neglected to describe what that "experience" was.

Following the housing market's collapse, Congress in Dodd-Frank mandated compliance with state-escrow interest laws for certain subprime mortgage transactions.

In an effort to curtail "a number of abusive and deceptive practices related to escrow accounts, mortgage servicing, and appraisal practices," H.R. Rep. No. 111-94, at 49 (2009), Dodd-Frank amended the Truth in Lending Act by enacting a new provision on mortgage-escrow accounts. *See* 15 U.S.C. § 1639d. Subsection 1639d(g)(3) requires all "creditor[s]" to pay interest on balances in covered escrow accounts if required by any "applicable State or Federal law," and to do so "in the manner as prescribed by that applicable … law." Covered escrow accounts arise in two circumstances—where required by state or federal law, and in connection with certain home mortgages, including those insured by state or federal agencies and some higher-priced mortgages. *Id.* § 1639d(b).

Notwithstanding Dodd-Frank's massive overhaul, the OCC's 2011 rules again sought to preempt all state laws "concerning … [e]scrow accounts." The OCC did not explain why, other than to note that it had "re-reviewed those rules … to confirm that the specific types of laws cited in the rules are consistent with [*Barnett Bank*'s] standard for conflict preemption." 76 Fed. Reg. at 43,557.

II. Factual and procedural background

Plaintiffs Alex Cantero, Saul R. Hymes, and Ilana Harwayne-Gidansky are New York residents who financed the purchase of their homes with mortgage loans from Bank of America, a bank established under the NBA. Pet. App. 52a-53a. Their loan agreements required them to deposit funds in escrow accounts held by the bank to cover property taxes and insurance payments. *Id.* Although each agreement provided that it would be governed by New York law, Bank of America refused to comply with New York's law requiring that it pay at least 2% interest on mortgage-escrow accounts. Pet. App. 10a.

1. The plaintiffs sued for breach of contract and other claims in two related cases in the Eastern District of New York. Pet. App. 52a-53a. Bank of America moved to dismiss both cases, arguing that the NBA preempts application of state escrow-interest laws. *Id.* The district court denied the motions in a single decision. Applying *Barnett Bank* and other NBA preemption cases, the court concluded that New York's law neither prevents nor significantly interferes with any banking power. Pet. App. 54a. It "does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use." *See* Pet. App. 111a.

Instead, the court wrote, the law requires only that the bank "pay interest on the comparatively small sums deposited in mortgage escrow accounts" to ensure that the bank is not obtaining an interest-free loan. *Id.* To be sure, compliance will "cost the Bank money." Pet. App. 112a. But although that requirement imposes a modest burden on national banks, the "degree of interference is minimal." Pet. App. 111a. The court noted that many of Bank of America's competitors, as well as Bank of America itself in California, already comply with state law in administering mortgage-escrow accounts without apparent issues. *Id.* Thus, New York's escrow-interest law was not preempted.

2. After granting leave to appeal, the Second Circuit reversed, holding that the NBA preempts New York's 2% escrow-interest requirement as applied to national banks—the first time any court has held that an escrow-interest law is preempted by the Act. "By requiring a bank to pay its customers," the court held, New York's law would impermissibly "exert control over banks' exercise

of [its] power" to create and fund escrow accounts. Pet. App. 23a.

In explaining this result, the court began with *McCulloch*'s holding that the Second Bank of the United States—which the court described as "a federally chartered, majority privately owned bank"—was immune from state taxes. Pet. App. 5a. Relying on *McCulloch*, *Dearing*, *Easton*, and other nineteenth-century cases, the court held that "national banks are instrumentalities of the Federal government, created for a public purpose." Pet. App. 6a (quoting *Davis*, 161 U.S. at 283). It did so using the language of field preemption, writing that the NBA acts as "a complete system for the establishment and government of national banks." *Id.* (quoting 1883 case).

In "an unbroken line of case law since *McCulloch*," the court wrote, this "Court has made clear that the question is not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its powers." Pet. App. 17a. *McCulloch*, it explained, declined to ask "*what degree* of taxation is the legitimate use." Pet. App. 4a. Instead, it held that any state exertion of the "power to control" could, "if taken to its extreme, threaten to 'destroy' the grant made by the federal government." Pet. App. 18a, 24a (quoting *McCulloch*, 17 U.S. at 431).

It thus made no difference that the minimum interest rate was "not very high." Pet. App. 33a. "To determine whether the NBA conflicts with a state law," the court would "not endeavor to assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power." Pet. App. 18a. Even if the "practical effect may be minimal," the NBA "displaces all state laws that purport to 'control' banks' exercise of [their] powers." Pet. App. 19a, 33a.

SUMMARY OF ARGUMENT

Determining whether a federal statute displaces state law is a question of statutory interpretation. And like any other question of statutory interpretation, this Court answers it by looking to the statute's text and context.

The key statute is section 25b, which provides that a "State consumer financial law" is preempted "only if," as relevant here, it "prevents or significantly interferes with" a national banking power. 12 U.S.C. § 25b(b)(1)(B).

I.A. The Second Circuit held that New York's escrow-interest law is preempted under this statute because it "would exert control" over an asserted incidental banking power (using mortgage-escrow accounts). Pet. App. 5a. But section 25b's text and context squarely reject this test.

First, the Second Circuit's test is incompatible with section 25b's definition of "State consumer financial law." A law may qualify for that definition only if it "directly and specifically regulates"—meaning, controls—activity that national banks "may be authorized … to engage in." 12 U.S.C. § 25b(a)(2). Under the Second Circuit's test, then, the very thing that makes a state consumer financial law a "State consumer financial law" is also what makes it preempted. That cannot be right, for it would nullify the statute and create a regime of field preemption.

Second, the Second Circuit's test erases the word "significantly" from the statute. It preempts any state law that in any way hinders a banking power (enumerated or incidental) by regulating that power—even if the law's practical impact on national banks is *in*significant. Congress, however, selected the "prevents or significantly interferes with" standard for a reason: to undo the OCC's attempt to evade it. That choice has to mean something.

Third, the Second Circuit's test contradicts section 25b's requirement that a "preemption determination" assess the "impact of a particular State consumer financial law." *Id.* § 25b(b)(1)(B), (3)(A). The Second Circuit held the opposite—that courts should *not* look to the "impact" or "degree of interference" of the law. Pet. App. 16a-18a.

B. The Second Circuit believed that it could avoid a careful examination of the text based on its view that the statute "did nothing more than codify" the standard for preemption "going back to *McCulloch*." Pet. App. 26a. But neither the statute nor the cases support that approach.

1. As the statute's text makes clear, it did not codify the standard from *McCulloch*. It codified the standard from *Barnett Bank*—"prevents or significantly interferes with." That standard was drawn from a passage in *Barnett Bank* in which the Court was attempting to distinguish between state laws that create a clear practical obstacle to exercising a specific statutory power and laws that do not rise to that level of interference. And the lead case that *Barnett Bank* cited as support for its rule confirms that the inquiry is focused on the law's impact on national banks—not whether it seeks to exert control over them.

2. The Second Circuit also misread this Court's cases. Pet. App. 39a. It stated that there has been an "unbroken line" of authority for its rule—and then proceeded to rely primarily on cases from before 1924, when this Court was still interpreting the NBA to effectively occupy the field. But for the past 100 years, states have enforced their banking-related laws against national banks when doing so would not prevent or significantly impair their powers.

II. Under the correct reading of section 25b, reversal is warranted. It requires a factual showing of the degree of interference, which Bank of America has not made.

ARGUMENT

"The Supremacy Clause supplies a rule of priority." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality op.). But it has important limits. It doesn't authorize courts to cast aside validly enacted state laws based on "some brooding federal interest" or the "policy preference[s]" of judges or bureaucrats. *Id.* Nor does it authorize "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011). Instead, like the Constitution as a whole, the Supremacy Clause reflects a balance of state and federal interests, one that preserves each state's "residuary and inviolable sovereignty." *The Federalist* No. 39, at 197 (James Madison) (Ian Shapiro ed., 2009). Under the Clause's plain text, only "the Laws of the United States which shall be made in Pursuance" of the Constitution—that is, via the arduous processes of bicameralism and presentment—are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. And they displace only "State [laws] to the Contrary." *Id.*

Determining whether a state law is "Contrary" to a federal statute is thus a question of "congressional intent." *Barnett Bank*, 517 U.S. at 30. "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Id.*; *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("The purpose of Congress is the ultimate touchstone in every pre-emption case."); *Whiting*, 563 U.S. at 607 ("It is Congress … that pre-exempts state law.").

In answering that question, this Court has often "used different labels to describe the different ways in which federal statutes may displace state law—speaking, for example, of express, field, and conflict preemption." *Va.*

Uranium, 139 S. Ct. at 1901 (plurality op.). These labels can signify vastly different preemption regimes. But "all preemption arguments," no matter the label given to them, "must be grounded in the text and structure of the statute at issue," *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020), for the simple reason that this is how "Congress expresses its intentions"—"through statutory text passed by both Houses and signed by the President," *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). So this Court's task in a preemption case is no different than in any other statutory dispute: to ascertain the statute's meaning by "looking to [its] text and context," "guided by the traditional tools of statutory interpretation." *Va. Uranium*, 139 S. Ct. at 1901 (plurality op.).

The key statute in this case is section 25b, which "clarified" the "preemption standards for national banks." 12 U.S.C. § 25b (heading). Subsection 25b(b)(1) provides that "State consumer financial laws are preempted[] only if," as relevant here, they "prevent[] or significantly interfere[] with the exercise by the national bank of its powers." The Second Circuit construed this provision to preempt every state law that would in any way "hinder" the exercise of any banking power (even an incidental power) by exerting "control" over the power. Pet. App. 17a-18a, 23a. Relying principally on this Court's 1819 decision in *McCulloch*, the Second Circuit held that section 25b does not permit an inquiry into the "impact" of a particular state law on national banks or its "degree of interference" with their powers. Pet. App. 16a, 23a.

That construction is flatly inconsistent with the text, structure, and history of section 25b. It reads the word "significantly" out of the statute, and it reads the statute out of the U.S. Code. It requires preemption of *every*

"State consumer financial law"—laws that, by definition, "directly and specifically regulate" (*i.e.*, control) activity that national banks are "authorized … to engage in." 12 U.S.C. § 25b(a)(2). It is tantamount to field preemption, which the statute expressly rejects. *Id.* § 25b(b)(4). It also ignores the statute's requirement that any "preemption determination" must be made based on "the impact of a particular State consumer financial law on any national bank," and identify "substantial evidence" supporting that "finding." *Id.* § 25b(b)(1)(B), (b)(3), (c). And by adopting the very standard that the OCC did in its 2004 rule, the Second Circuit resurrected the same preemption regime that caused Congress to pass the statute in the first place.

Properly understood, section 25b's "significantly interferes with" standard requires a factual showing that compliance with the state law would have a significant and demonstrable "impact," *id.* § 25b(b)(1)(B), (3)(A), on the national bank's ability to exercise "a power that Congress explicitly granted," *Barnett Bank*, 517 U.S. at 33. The OCC has not made any such showing here. So it falls to Bank of America, as the party asserting preemption as a defense, to carry the burden of making this showing.

Bank of America has not attempted to make any such showing, and this case is at the motion-to-dismiss stage. Hence, Bank of America has "failed to demonstrate," "on the record before" the Court, that it is entitled to prevail on its "demanding defense" of preemption. *Wyeth*, 555 U.S. at 573. This Court should accordingly reverse the Second Circuit's judgment and allow the case to proceed.

I. The Second Circuit's "control" test contradicts section 25b's plain text, structure, and history, as well as 100 years of this Court's precedents.

The Second Circuit's interpretation of section 25b is indefensible. Instead of beginning with the statute's text, the court began with *McCulloch*. Pet. App. 4a-5a, 17a-20a. It took the view that, under *McCulloch* and "an unbroken line of case law since," the preemption question is whether a state law "purports to 'control' the exercise of [a national bank's] powers"—"not how much [it] impacts a national bank," or its "degree of interference." Pet. App. 16a-17a. The court read section 25b as doing "nothing more than codify[ing]" this control test. Pet. App. 26a. Applying that test, the court held that New York's law is preempted because it "would target, curtail, and hinder"—and thus "exert control over"—"a power granted to national banks by the federal government." Pet. App. 23a. As the court saw it, "the issue is not whether this particular rate of 2% is so high that it undermines the use of [mortgage-escrow] accounts, or even if it substantially impacts national banks' competitiveness." Pet. App. 23a-24a. The issue, rather, is whether the law, "if taken to a greater degree," "could infringe on national banks' power." Pet. App. 23a.

Every aspect of that analysis is wrong.

A. Section 25's text, structure, and history foreclose the Second Circuit's test.

The court's first mistake was to give greater weight to what *McCulloch* said about the Second Bank of the United States than to what section 25b says about preemption. As a constitutional precedent, there are few "decisions as foundational to our legal system as *McCulloch*." *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019). But this is a case about a statute. And the statute is from 2010—not

1810. The starting point should have been the text of that statute. *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023).

1. The Second Circuit's test cannot be reconciled with section 25b's definition of "State consumer financial law."

Does the text of section 25b codify a "control" test? It emphatically does not. Its preemption provision applies only to "State consumer financial laws," 12 U.S.C. § 25b(b)(1)(B)—a term for which the statute serves as its own dictionary. *See Digit. Realty Tr., Inc. v. Somers*, 583 U.S. 149, 160 (2018) ("When a statute includes an explicit definition, we must follow that definition."). The statute defines "the term 'State consumer financial law'" to mean "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 transactions (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). Such a law is preempted "only if," as relevant here, the law "prevents or significantly interferes with" the exercise of a national bank's powers. *Id.* § 25b(b)(1)(B).

The Second Circuit did not mention this definition, and it is incompatible with a "control" test. The only way that a state law may qualify for the definition—and hence be subject to the statute—is if it "directly and specifically regulates" activity that national banks "may be authorized … to engage in." *Id.* § 25b(a)(2). And "regulate" is just another word for "control." *See The American Heritage Dictionary of the English Language* 1471 (4th ed. 2006) ("Regulate" means "to control or direct according to rule, principle, or law."); *Cuomo*, 557 U.S. at 539 ("When terms used in a statute are undefined, we give them their

ordinary meaning."). To say that a state law "controls" the exercise of a national bank's authority, then, is to say that the law satisfies one of the necessary conditions for being a "State consumer financial law"—not that the law is preempted. If a law were preempted simply by virtue of being a "State consumer financial law," the entire statute would be pointless. Even worse, it would mean that federal law would effectively "occupy the field" of consumer financial law for national banks, in direct contravention of subsection 25(b)(4). So whatever else section 25b might leave open to debate, its text makes clear that "exerts control" cannot be the standard for preemption.[3]

2. The Second Circuit read the word "significantly" out of the statute.

The preemption standard is instead what the statute says it is: "prevents or significantly interferes with." The Second Circuit interpreted this language to mean the same thing as "interferes with to any degree." It reasoned

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[3] The Second Circuit claimed that its test "does not mean that all 'State consumer financial laws' are preempted or that Congress has 'occupied the field,'" because "states are generally free to impose restrictions on the transactions engaged in by national banks, in common with those of other corporations doing business within the state." Pet. App. 28a n.10 (citing *Kentucky*, 76 U.S. (9 Wall.) at 362). Generally applicable background state laws, however, are not "State consumer financial laws." In suggesting that only general laws are saved from preemption, the Second Circuit drew the same distinction that the OCC did in 2004, when the OCC took the view that state laws forming "legal infrastructure" are not preempted, while laws that "regulate the manner or content of national banks' real estate lending" or "the business of banking" are. 69 Fed. Reg. at 1911-13. As this Court explained in *Cuomo*, that distinction—which echoed this Court's early NBA cases—lacked any textual support even in 2004. 557 U.S. at 533; *see also* 12 U.S.C. § 36(f)(1)(A) (1994 law refuting this distinction). But Section 25b now entirely repudiates it.

that New York's law is preempted because the law "would target, curtail, and hinder a power granted to national banks by the federal government." Pet. App. 23a. But again, *all* State consumer financial laws, by definition, "target" and "curtail" activity that national banks "may be authorized … to engage in," because they "directly and specifically regulate[]" that activity. 12 U.S.C. § 25b(a)(2). As for "hinder," it is simply a synonym for "interfere with." *See American Heritage Dictionary of the English Language* 913 ("Interfere" means "to be or create a hinderance or obstacle."). So what is missing from the Second Circuit's standard is the textual requirement that the interference be *significant*—a word that commonly means "having or likely to have a major effect" or "fairly large in amount or quantity." *Id.* at 1619.

The word "significantly" may be the most important word in all of the statute. Subsection 25b(b)(1)(B) codifies a particular formulation of the legal standard ("prevents or significantly interferes with") from a particular case (*Barnett Bank*). That is important because this Court has used a variety of formulations to articulate the preemption standard since 1864—beginning with field-preemption-like language, and then shifting, about 100 years ago, to a practical inquiry focused on conflict preemption. *Compare Easton*, 188 U.S. at 231-32, 238 (states may not "interfere" with national banks' powers because Congress "has the sole power to regulate and control the exercise of their operations" and did not "leave the field open" for "direct legislation" by states), *with Barnett Bank*, 517 U.S. at 33 (states may "regulate national banks" so long as they do not "prevent or significantly interfere with" the "exercise of a power that Congress explicitly granted"). The Court's "many formulations," some of which were quoted in *Barnett Bank* itself, allowed the OCC to claim in its 2004

rulemaking that no "one phrase constitutes the exclusive standard for [NBA] preemption," and to take the position that the correct standard was *not* "prevents or significantly interferes with," but instead "obstruct, impair, or condition." 69 Fed. Reg. at 1911.

So it is telling that subsection 25b(b)(1)(B) does not say that the standard is "obstruct, impair, or condition." It does not say, for instance, that in accordance with *Easton v. Iowa*, the question is whether a state law "interferes with the exercise by the national bank of its powers." *See also* 12 U.S.C. § 25b(b)(4) (rejecting field preemption). Nor does it say that the question is whether state laws "curtail or hinder a national bank's efficient exercise of its powers," as stated in *Watters*, 550 U.S. at 13; *see also* 12 U.S.C. § 25b(e) (abrogating *Watters*). It says that the standard is "prevents or *significantly* interferes with." Congress's decision to add that extra language can only be described as, well, significant. *See Corley v. United States,* 556 U.S. 303, 314 (2009) (surplusage canon); *see also* 15 U.S.C. § 6701(d)(2)(A) (1999 law codifying same *Barnett Bank* standard for insurance sales by national banks).

Interference alone, therefore, isn't enough. To count, the interference must be "significant"—meaning that it would hinder a statutory power to a "fairly large" degree or have "a major effect." *American Heritage Dictionary* 1619. Not only is that the word's plain meaning, but it is confirmed by the word's placement next to "prevents." Because "a word is known by the company it keeps," *Yates v. United States*, 574 U.S. 528, 543 (2015), "significantly interferes with" is best understood to mean something close to "prevent"—one step, or one notch, down from "prevent." It captures state laws that, although they do not prevent the exercise of an expressly authorized power,

come close to doing so by making it practically infeasible. *See, e.g.*, *Franklin Nat'l Bank v. People*, 347 U.S. 373, 374-78 (1954) (holding that a federal law that expressly authorizes national banks "to receive savings deposits" was significantly impaired by, and thus preempted, a state law prohibiting national banks—but not state savings banks—from using the word "savings, or its variants," anywhere in "their advertising or business" operations).

The Second Circuit all but conceded that New York's law does not rise to this level of interference. As the court interpreted section 25b, preemption does not turn on whether the state law at issue "significantly interferes with" a national banking power. It turns on whether a *hypothetical* state law, *if* the interference were "taken to a greater degree," "*could* infringe on" that power. Pet. App. 23a (emphasis added). But section 25b looks to the actual effects of the actual state law—not the hypothetical effects of a hypothetical law. Otherwise, the statute would have said that it preempts any State consumer financial law that, "if taken to its extreme," "could" prevent or significantly interfere with the exercise of a national bank's power, including an incidental power not spelled out by statute. Pet. App. 18a, 23a. It says nothing of the sort. Under the text of the statute as written, what must "significantly interfere with" such a power is "the State consumer financial law" sought to be "preempted," not a law that doesn't exist. 12 U.S.C. § 25b(b)(1)(B).

3. Section 25b requires that a "preemption determination" examine the "impact of a particular State consumer financial law."

The Second Circuit's defiance of the statute doesn't stop there. It held that a preemption determination under subsection 25b(b)(1)(B) does not look to the "impact" of

the particular state law on national banks or its "degree of interference" with their powers. Pet. App. 16a, 18a; *see also* Pet. App. 17a ("The question is not how much a state law impacts a national bank."). But that is *exactly* what the statute requires. It provides that the OCC, when it makes a "preemption determination," must examine 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." 12 U.S.C. § 25b(b)(1)(B), (3)(A). A court may then give effect to that OCC preemption determination only if "substantial evidence, made on the record of the proceeding, supports the specific finding [of] preemption … in accordance with … *Barnett Bank*." *Id.* § 25b(c). "'Substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency factfinding." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

The same standard necessarily applies when courts make the same determination. The statute provides that a "preemption determination under this subparagraph may be made by a court, or by a regulation or order of the [OCC] on a case-by-case basis." 12 U.S.C. § 25b(b)(1)(B). "In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019); *see United States v. Davis*, 139 S. Ct. 2319, 2328 (2019) (noting that, when a term "appears just once" in a sentence, it rarely "bears a split personality"). That is undoubtedly the case here. Although the OCC has its own procedural requirements that it must satisfy when making a preemption determination, the *substance* of the determination is the same regardless of who is making it.

Congress thus intended a preemption regime in which (1) factfinding would be necessary to show substantial interference, and (2) such factfinding could (and perhaps often would) be made by the OCC in the first instance. When the OCC has made the necessary findings and its reasoning is persuasive, a court may defer to the OCC's preemption determination. 12 U.S.C. § 25b(b)(5)(A); *see Wyeth*, 555 U.S. at 576-77. But when the OCC has not made the necessary findings, the court must make the preemption determination—and its accompanying factual findings—itself. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1680 (2019) (holding that courts, when facing another fact-intensive preemption question, must "resolve subsidiary factual disputes that are part and parcel of the broader legal question" of preemption).[4]

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[4] The Second Circuit did not rely on the OCC's 2004 and 2011 preemption rules, and they supply no ground for preemption. At the Court's invitation in this case, the Solicitor General "considered the question presented" and concluded that the OCC's "broad[] view of NBA preemption" contravenes "the text, structure, and history of the statute." U.S. Cert. Br. 9 n.2. It is thus now clear that the OCC's views do not represent the views of the United States. In any event, the OCC lacked statutory authority to issue the rules. As the Solicitor General recognized, the OCC did not comply with the procedures required for it to have authority to make a "preemption determination" carrying the force of law. 12 U.S.C. § 25b(b), (c). Outside those procedures, the OCC has no delegated authority to directly preempt state law—and it never has. This Court therefore should not "defer[] to [the] agency's *conclusion* that state law is pre-empted." *Wyeth*, 555 U.S. at 576. Even if the OCC's rules were valid, Congress has made clear that they would receive only *Skidmore* deference based on "the thoroughness evident" in the decision and "the validity of the reasoning." 12 U.S.C. § 25b(b)(5)(A). As the district court noted, the OCC's rulemaking did "not offer a specific rationale for preempting state laws limiting escrow accounts" or "even mention escrow interest laws." Pet. App. 104a. So there is no reasoning to which this Court could possibly defer.

B. Section 25b's preemption standard is confirmed by *Barnett Bank* and 100 years of this Court's precedents.

The reason why the Second Circuit felt free to ignore so much of section 25b's text—including its "significantly interferes with" standard—is that the court dismissed the statute as simply codifying "the longstanding preemption test articulated in cases going back to *McCulloch*." Pet. App. 26a. That misreads both the statute and the cases.

1. For starters, section 25b does not codify "cases going back to *McCulloch*." As already noted, it codified a particular preemption standard from a particular case. (And not for the first time. *See* 15 U.S.C. § 6701(d)(2)(A).)

Nor does the fuller context in which *Barnett Bank* articulated the standard support the Second Circuit's view. The Court in *Barnett Bank* held that "a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." 517 U.S. at 27. Applying "ordinary pre-emption principles," the Court unanimously concluded that the two statutes were in "irreconcilable conflict." *Id.* at 27, 31.

In reaching that conclusion, the Court explained that the case was "quite similar" to 1954's *Franklin National Bank v. People*, 347 U.S. 373. *Barnett Bank*, 517 U.S. at 33. Both cases involved a specific federal statute granting an express power to national banks. *Franklin* "held that a federal statute permitting, but not requiring, national banks to receive savings deposits, pre-empts a state statute prohibiting certain state and national banks from using the word 'savings'" or its equivalent, *id*, because that was the "particular label" "Congress ha[d] given" to "this type of account," *Franklin*, 347 U.S. at 378. The Court in *Barnett Bank* read *Franklin* to "take the view that

normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted"—in *Franklin*, the power to receive savings deposits; in *Barnett*, the power "to sell insurance in small towns." 517 U.S. at 27, 33. The state law in *Franklin* "impaired significantly" the exercise of that specific power, while the state law in *Barnett Bank* "prevented" its exercise. Both were preempted.

At the same time, the Court in *Barnett Bank* took pains to cabin its reasoning to state laws presenting conflicts like those in *Franklin* and *Barnett Bank*. Right after saying that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted," the Court was quick to add: "To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* at 33.

The lead case that the Court cited for that proposition was *Anderson,* the 1944 decision that upheld a state law requiring banks to pay funds in dormant accounts to the state. 321 U.S. at 236. Even though the law effectively forced banks to pay deposits earlier than they otherwise would have, depriving them of an interest-free loan in the interim, the Court rejected the argument that requiring "such withdrawal of accounts from a national bank infringes the national banking laws." *Id.* at 239.

Central to *Anderson*'s holding was the law's practical effect on national banks. In distinguishing an earlier 1923 case that also involved an escheat law (*California*), the Court emphasized that *California* "turned … on the effect of the state statute in altering the contracts of deposit in a manner considered so unusual and so harsh in its

application to depositors as to deter them from placing or keeping their funds in national banks." *Id.* at 250. Because that "unusual" state statute was "in effect confiscation of depositors' accounts," it "operat[ed] as an effective deterrent to depositors' placing their funds in national banks doing business within the state." *Id.* at 251. Ergo, it was preempted. But the law in *Anderson* had no such effect. *See id.* at 252 ("It cannot be said that it would have that effect."). The Court was unable to conclude that the law, "which in many circumstances may operate for the benefit and security of depositors, will deter them from placing their funds in national banks in that state." *Id.* Absent such an "effect," the law was not preempted. *Id.*

Anderson thus sheds additional light on what *Barnett Bank* meant by the phrase "significantly interferes with." If *Franklin* shows that a state law significantly interferes with a particular express power if it makes exercising that power practically infeasible, *Anderson* shows that a law also significantly interferes with a power if it deters people from using national banks altogether. But in both circumstances, the law's practical effect is what matters. Congress then codified this same standard in section 25b.

2. As these cases indicate, the Second Circuit was also mistaken in its description of this Court's precedents. The court asserted that there has been "an unbroken line of case law since *McCulloch*" supporting a test that ignores "the degree of [the] state law's impact on national banks" and focuses exclusively on whether the law seeks to exert control over a national banking power. Pet. App. 17a-18a. But as this Court observed in 2009, states "have enforced their banking-related laws against national banks for at least 85 years"—since 1924. *Cuomo*, 557 U.S. at 534 (citing *Anderson* as an example). So it is not surprising that the

Second Circuit relied primarily on cases decided *before* 1924 in claiming that a state law's "degree of interference" is irrelevant to the preemption question. *See* Pet. App. 18a-21a (relying primarily on *McCulloch* and *California*). As *Anderson* and *Barnett Bank* show, that is not correct. *See also Lewis v. Fid. & Deposit Co.*, 292 U.S. 559, 567-68 (1933) (looking to a state law's practical "operation and effect" and finding no evidence supporting preemption).

The Second Circuit also tried to make something of *Barnett Bank*'s statement that it was applying "ordinary" principles of preemption. Pet. App. 26a. But ordinary preemption principles require identifying the particular federal statute that does the preempting. The Second Circuit mentioned only two candidates. The first is the statute granting national banks the power to "make, arrange, purchase or sell [real-estate] loans." 12 U.S.C. § 371(a). The second is the statute granting national banks the power to exercise, "subject to law, all such incidental powers as shall be necessary to carry on the business of banking," *Id.* § 24 (Seventh). Neither says anything about mortgage-escrow accounts. In contrast to the specific statutory grants of power at issue in *Barnett Bank* and *Franklin*, neither of these statutes remotely suggests that a state escrow-interest law like New York's, which has existed for 50 years, irreconcilably conflicts with them.[5]

[5] For these reasons, the Second Circuit also erred in holding that New York's law is preempted as to mortgages executed before section 25b took effect (like Cantero's). Indeed, long before section 25b took effect, Congress made clear that nondiscriminatory state "consumer protection" laws generally aren't preempted, 12 U.S.C. § 36(f)(1)(A), and codified *Barnett Bank*'s "prevents or significantly interferes with" standard for insurance sales, 15 U.S.C. § 6701(d)(2)(A). After the OCC departed from these standards in 2004, in rulemaking that lacked authority and is owed no deference, Congress responded by

In fact, for many escrow accounts, national-bank compliance with state escrow-interest laws is not only consistent with federal law—it *is* federal law. Section 1639d requires use of escrow accounts for many subprime mortgages and provides that, "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." 15 U.S.C. § 1639d(a), (b), (g)(3). This provision uses the mandatory "shall" and applies to "each creditor," with no exception for national banks. *Id.* § 1602(g). That means that, as a matter of federal law, when applicable state law requires a national bank to pay interest on a covered escrow account, it must do so in accordance with that law.

Although this provision does not directly apply to the mortgages here, it is nevertheless revealing. It would be odd to conclude that, in the absence of any indication from Congress, the same state laws that *are* federal law for many mortgage-escrow accounts, irreconcilably *conflict* with federal law for other accounts.

II. Section 25b requires a factual showing that New York's law would have a significant impact on the exercise of an express statutory power—a showing that Bank of America has not made.

Under a proper understanding of section 25b, Bank of America has not established that it is entitled to prevail on its preemption defense as a matter of law.

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clarifying that the standard is the same standard reflected in those earlier (albeit more narrowly applicable) laws, and the same standard applied in *Barnett Bank*. So there is no basis for holding that the actual preemption standard that governed before section 25b, as opposed to the OCC's lawless standard, dictates a different result.

Like the Second Circuit, Bank of America below identified only two sources of statutory authority: its enumerated power to make real-estate loans, 12 U.S.C. § 371, and its general incidental powers, *id.* § 24 (Seventh). According to Bank of America, the power to use mortgage-escrow accounts when not required by law is necessary to banking, and thus an incidental power. Even assuming that were true, there is no serious argument that New York's law "prevents" the exercise of that asserted incidental power. So Bank of America must show that the law "substantially interferes with" its claimed power.[6]

As already explained, this requires a factual showing of the degree of interference with the asserted power. The OCC has not issued any "regulation or order" that makes any factfinding "concerning the impact of [the law] on any national bank." 12 U.S.C. § 25b(b)(1)(B), (3)(A), (c). It thus falls to Bank of America to make such a factual showing if it wishes to evade compliance with the law. *Cf. Wyeth*, 555 U.S. at 573 (noting that "impossibility pre-emption is a demanding defense" and holding that the defendant "failed to demonstrate" preemption "on the record before us"). Were it otherwise, and Bank of America were not required to make such a showing, it would leave the bank somehow *better off* than if the OCC had made the kind of

[6] Bank of America argued below that the relevant "power" is the incidental power "to establish the terms and conditions" of escrow accounts, including the power "to decide whether to pay" interest on them—a power that New York's law "prohibits." CA2 Appellant's Br. 22, 34. But the "powers" mentioned in section 25b cannot simply be redefined as whatever a national bank would have authority to do in the absence of contrary state law, for that would preempt *every* "State consumer financial law." The relevant power, rather, is "a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33.

preemption determination contemplated by the statute, in which case the court would have to review the soundness of the OCC's findings under *Skidmore*.

Bank of America has not even attempted to make such a showing here. It has not attempted to show, for example, that compliance with New York's law would operate to deter customers in the state from using national banks. *See, e.g.*, *Anderson*, 321 U.S. at 250. Nor has Bank of America attempted to show that compliance with the law would make it practically infeasible for it to use mortgage-escrow accounts or make mortgage loans. And no court below made any factfinding of the sort that would be necessary to find that a "State consumer financial law" substantially interferes with the exercise of an incidental power. Accordingly, reversal is warranted.

CONCLUSION

The Second Circuit's judgment should be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

U.S. Const., art. VI, cl. 2 (Supremacy Clause) .... App. 1

12 U.S.C. § 24 .... App. 1

12 U.S.C. § 25b .... App. 3

12 U.S.C. § 371 .... App. 10

12 C.F.R. § 34.4 .... App. 10

15 U.S.C. § 1639d .... App. 12

N.Y. G.O.L. § 5-601 .... App. 15

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion of the United States Court of Appeals for the Second Circuit (Sept. 15, 2022) ..... Pet. App. 1a

Order of the United States District Court for the Eastern District of New York on Certification of Issue for Interlocutory Appeal (Oct. 7, 2020) .... Pet. App. 51a

Order of the United States District Court for the Eastern District of New York on Motion to Dismiss (Oct. 3, 2019) .... Pet. App. 70a

1. The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

2. 12 U.S.C. § 24 provides, in relevant part:

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). …

* * *

3. 12 U.S.C. § 25b provides:

(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., 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

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

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.

* * *

4. 12 U.S.C. § 371 provides, in relevant part:

(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.

* * *

5. 12 C.F.R. § 34.4 provides:

(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

[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.

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]

(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.

* * *

6. 15 U.S.C. § 1639d provides, in relevant part:

(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

[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).

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.

* * *

(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.

* * *

7. N.Y. G.O.L. § 5-601 provides:

Any mortgage investing institution which maintains an escrow account pursuant to any agreement executed in connection with a mortgage on any one to six family residence occupied by the owner or on any property owned by a cooperative apartment corporation, … , 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. …