21-400

In the United States Court of Appeals for the Second Circuit

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

v.

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

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

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INTRODUCTION

For nearly half a century, New York has required mortgage lenders to pay a modest interest rate on the money advanced to them by borrowers for paying taxes and insurance premiums on mortgaged properties. State "escrow interest" laws of this kind, including New York's, have been upheld against preemption challenges ever since—from 1975 to today. This includes not only the decision below, but the Ninth Circuit's decision in *Lusnak v. Bank of America*, 883 F.3d 1185 (9th Cir. 2018).

Bank of America now asks this Court to break from this consensus and create a circuit split by declaring state escrow-interest laws preempted by the National Bank Act of 1864, on the theory that this is what Congress intended. Bank of America cites no statement from Congress to that effect—no statute expressly authorizing national banks to defy escrow-interest requirements, nor any source of law granting national banks absolute control over the interest paid on mortgage-escrow accounts.

Instead, Bank of America contends that Congress has impliedly preempted escrow-interest laws because they "prevent or significantly interfere with" national banking powers. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33 (1996). It reads this language (at 35) as eradicating all state consumer-financial regulation and leaving intact only "a state's generally applicable criminal, contract, or property laws."

But both the Supreme Court and Congress have rejected that reading. States "have enforced their banking-related laws against national banks for at least 85

years," *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 534 (2009), and there is no basis for treating New York's law differently. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And Congress has made clear—in the landmark Dodd-Frank Act passed after the financial calamity of 2008—that the *Barnett Bank* standard means what it says: It does not preempt *all* "State consumer financial laws," or even those that "interfere[] with" the exercise of national banking powers. 12 U.S.C. § 25b(b)(1)(B). The standard preempts such a law "only if" the "State consumer financial law *prevents* or *significantly* interferes with the exercise by the national bank of its powers." *Id.* (emphasis added).

New York's law does neither. As the district court correctly held, it does not prevent national banks from making real-estate loans or providing mortgage-escrow services. Nor does it significantly interfere with their ability to do so. All that it does is require a modest interest payment on the money that borrowers put into their escrow accounts—a requirement that is fully compatible with federal policy. Indeed, Congress inserted a provision in Dodd-Frank requiring creditors (including national banks) to pay interest on certain escrow accounts "[i]f prescribed by applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). Many of Bank of America's competitors, like Wells Fargo and others, do just that, and Bank of America itself now does so in California. There is no indication that the powers of these national banks have been seriously impaired, and Bank of America cites no evidence that they have been.

Rather than try to carry its burden of establishing "significant interference" under *Barnett Bank*, Bank of America relies on a blanket preemption rule by the Office of the Comptroller of the Currency. In 2004, the OCC sought to preempt vast categories of state law by regulatory fiat, including "state law limitations" on "escrow accounts." 12 C.F.R. § 34.4. But the OCC did not mention escrow-interest laws, let alone explain how they conflicted with federal law. And Congress responded by rebuking the OCC in Dodd-Frank—clarifying the proper preemption standard for the purpose of "undoing broader standards adopted" by "the OCC in 2004." S. Rep. No. 111-176, at 175 (2010). Congress provided that the *Barnett Bank* standard was to be applied by a court, and that the OCC could seek to preempt a state law under this standard only on a "case-by-case basis," if supported by "substantial evidence, made on the record of the proceeding." 12 U.S.C. §§ 25b(b)(1)(B), (b)(3), (c). Even then, a court will "assess the validity" of the OCC's action based on the "thoroughness evident" in its "reasoning," and whether it is "persuasive." *Id.* § 25b(b)(5)(A).

The OCC's decision to reaffirm its 2004 rule, on a wholesale basis, is irrelevant to this case. The agency made no effort to show that escrow-interest laws prevented or significantly interfered with a national banking authority, or to shed any light on that question. And outside the narrowly confined procedures set forth in Dodd-Frank, the OCC has no delegated authority to directly preempt state law, so courts will not "defer[] to [its] *conclusion* that state law is pre-empted," *Wyeth*, 555 U.S. at 576.

STATEMENT OF THE ISSUES

1. Has Bank of America shown that Congress has clearly intended to preempt New York's half-century-old escrow-interest law, as applied to national banks, under the preemption standard set forth in *Barnett Bank* and codified by Dodd-Frank?

2. Does the OCC's 2011 preemption regulation—which gives no explanation of how state escrow-interest laws "prevent or significantly interfere" with national banking powers, *Barnett Bank*, 517 U.S. at 33, and adopts wholesale a 2004 OCC rule that Congress specifically repudiated in Dodd-Act—require a different result?

STATEMENT OF THE CASE AND OF THE FACTS

I. Statutory and regulatory background

A. Mortgage-escrow accounts rise in popularity, sometimes to borrowers' detriment.

In the 1930s, on the eve of the postwar boom in American homeownership, mortgage lenders began requiring that borrowers deposit funds into escrow accounts, which banks could then use for taxes and insurance payments associated with the mortgaged property. *See* Bruce E. Foote, Cong. Rsch. Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). Over time, this practice grew until escrow accounts were used for the vast majority of mortgages, in part because of requirements imposed by the Federal Housing Administration. *Id.* at 2. And the rising popularity of these accounts made sense: a tax lien or property damage uncompensated by insurance could prevent a lender from recovering a mortgage's full value. *Id.* at 1–2.

But later in the 20th century, borrowers and policymakers raised concerns about banks' abuses of escrow accounts. Many borrowers were required to make payments well in advance, and often in excess of the amount necessary to cover future tax and insurance charges on their properties, thus allowing banks to profit off the borrowers' deposits. When lenders refused to pay interest on the escrow-account balance, borrowers found themselves effectively making an interest-free loan to their own banks. *See id.* at 3; *Boer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1173 (8th Cir. 1995) ("When the loan servicer maintains excess cushion in an escrow account, the servicer essentially receives an interest-free loan from the customer on the excess amount.").

B. Congress and many states enact limits on mortgage-escrow accounts.

In the 1970s, Congress and numerous state governments swung into action to put guardrails on escrow accounts. They took different approaches. In the Real Estate Settlement Procedures Act of 1974, Pub. L. 93–533, 88 Stat. 1724, Congress limited the amounts that banks could require mortgagors to put in escrow. 12 U.S.C. § 2609. Around the same time, many states enacted laws requiring lenders to pay a minimum amount of interest on escrow-account balances. *See* Foote, *Mortgage Escrow Accounts*, at 3–4. The law at issue in this case, N.Y. G.O.L. § 5-601, was enacted the same year as RESPA and requires that interest be paid at an annual rate of at least 2% (or a lower rate set forth by the New York Superintendent of Financial Services).

For thirty years, federal and state escrow laws worked in harmony. Each touched on different aspects of the practice, but they shared the same goal of limiting lenders' abuses of escrow requirements. JA 62 ("Although RESPA is not the same sort of regulation as GOL § 5-601, the two share a unity of purpose. Both are directed to limiting the extent to which borrowers may be separated from control over their money."). And neither RESPA's nor the states' restrictions distinguished between federally and state-chartered banks. *See* JA 46. That was not surprising; national banks had long been subject to a wide range of state regulations. As the Supreme Court put it just a few years after the National Bank Act was passed, national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *First Nat'l Bank v. Commonwealth of Ky.*, 76 U.S. (9 Wall.) 353, 362 (1869); *see also Cuomo*, 557 U.S. at 530 (observing that the NBA creates a "mixed state/federal regime[] in which the Federal Government exercises general oversight while leaving state substantive law in place"); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (noting that national banks are governed, for example, by state usury laws, contract law, and property law).

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

1. In 2004, the OCC purports to preempt broad categories of state law.

In 2004, the OCC, which oversees federally chartered banks, took a different view of the proper state/federal regulatory balance for national banks. Despite decades of coexistence between federal and state mortgage-escrow-account laws, the OCC decided to weigh in on their interaction. It issued a new regulation seeking to preempt fourteen broad categories of state law, including all state laws "concerning . . . escrow accounts, impound accounts, and similar accounts." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004) [codified at 12 C.F.R. § 34.4 (2011)].

Why the OCC included escrow accounts in its 2004 rule is something of a mystery. An earlier version of the rule preempted state law as to five relatively specific real-estate loan terms, but none addressed escrow accounts. 12 C.F.R. § 34.4 (2003). One commentator has remarked that the agency was "[p]rovoked, in part, by states' efforts to control so-called predatory lending" in the late 1990s and 2000s. Roderick M. Hills, Jr., *Exorcising* McCulloch*: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. Pa. L. Rev. 1235, 1275 (2013). Others have noted that the scope of the OCC's power—and the size of its budget—depended on the extent to which banks pursued national rather than state charters, so its

"preemption initiatives were intended to induce large, multistate banks to convert from state charters." Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893, 915–916 (2011); *see* Kathleen C. Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit Regulatory Failure, and Next Steps* 158–159 (2011)e ("By offering preemption, the OCC . . . hoped to attract state banks and nonbank lenders to the national bank fold.").

Whatever its motivation, the OCC did not provide any rationale for including states escrow-account laws in its preemption rule. Outside the text of the rule itself, the OCC's fourteen-page explanation accompanying the rule did not mention escrow accounts. 69 Fed. Reg. 1904; *see* JA71 ('[T]he agency's proposed and final rulemakings do not offer a specific rationale for preempting state laws limiting escrow accounts, and they do not even mention escrow interest laws."). 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 powers." *Id.* at 1911. But it made no mention of what that experience was.

Although the OCC recognized that it did not have the power to preempt the field of national bank lending, it noted that the list of laws preempted by the NBA matched "the types of laws specified in a comparable regulation" under the Home Owners' Loan Act, or HOLA. *Id.* at 1911 & n.56 (citing 12 C.F.R. § 560.2(b)). HOLA

governs the charters of federal savings and loan associations, just as the NBA governs the charters of national banks. But the two Acts have one key difference: HOLA, unlike the NBA, preempts its field. *See Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 181 (2d. Cir. 2005) (field preemption under HOLA); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924) (no field preemption under NBA). By relying on HOLA, then, the OCC defined the scope of NBA preemption based on the field-preemption regime of another law. The OCC gave no explanation for the propriety of doing so, noting only that "the effect of labeling"—whether "field" or "conflict" preemption—"is largely immaterial in the present circumstance." 69 Fed. Reg. 1911.

The OCC acknowledged that the Supreme Court had delineated the scope of NBA preemption in *Barnett Bank*. 69 Fed. Reg. 1910. There, the Court made clear that states could regulate national banks so long as they do not "prevent or significantly interfere with the national banks' exercise of its powers." *Barnett Bank*, 517 U.S. at 33. The OCC nevertheless purported to preempt any "state laws that obstruct, impair, or condition" national banking powers, 69 Fed. Reg. 1917, ignoring *Barnett Bank*'s requirement of significant interference. Moreover, the OCC's regulation purported to preserve "a national bank's ability to *fully* exercise its" real-estate-lending powers, 69 Fed. Reg. 1911 (emphasis added), despite *Barnett Bank*'s clear command "not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere" with their powers. *Id.* at 1910–11.

2. Dodd-Frank reins in NBA preemption.

Within just a few years of the OCC's deregulatory efforts, the housing market collapsed and the country was plunged into the worst financial crisis since the Great Depression. Following the 2008 financial crisis, numerous experts, policymakers, and advocates pointed to overly aggressive preemption of state consumer protection laws as partially responsible for the devastation of the nation's housing markets.[1] The Financial Crisis Inquiry Commission, which Congress created to investigate the causes of the crisis, concluded in part: "Not only did the federal banking supervisors fail to rein in risky mortgage-lending practices, but the Office of the Comptroller of the Currency and the Office of Thrift Supervision preempted the applicability of state laws and regulatory efforts to national banks and thrifts, thus preventing adequate protection for borrowers and weakening constraints on this segment of the mortgage market." *The Financial Crisis Inquiry Report*, at 126.

[1] *See, e.g.*, Engel & McCoy, *The Subprime Virus*, at 186 ("When regulators must compete to attract institutions and retain them, federal preemption becomes an invitation to participate in a race to the bottom"); Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* 111–13 (2011) (offering similar account); Lei Ding, et al., Ctr. for Cmty. Cap., *The Preemption Effect: The Impact of Federal Preemption of State Anti-Predatory Lending Laws on the Foreclosure Crisis* 19 (2010), *available at* https://perma.cc/K7BU-C86P ("The findings suggest that preemption resulted in deterioration in the quality of, and an increase in the default risk for, mortgages originated by OCC lenders in states with strong anti-predatory lending laws.... Without the OCC preemption, which sent signals to all preempted lenders, the performance of loans originated by national banks would have been better.").

To address these and other concerns, Congress enacted a sweeping set of new consumer protections in the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). These reforms amounted to a "sea change in the regulation of the nation's financial markets." *Loan Syndications & Trading Ass'n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016).

To correct the pre-crisis financial-regulatory failures, Dodd-Frank eliminated the Office of Thrift Supervision, 12 U.S.C. § 5413, and removed many consumer-protection powers from the OCC and other regulators, *id.* § 5581. It consolidated them in a new agency—the Consumer Financial Protection Bureau. *E.g., id.* § 5515; *id.* § 5581(b)(2)(b) ("All consumer financial protection functions of the Comptroller of the Currency are transferred to the Bureau."). Congress designed this overhaul to "create[] one federal regulator with consolidated consumer protection authority over the largest depository institutions, leaving regulatory arbitrage . . . in the past." S. Rep. No. 111–176, at 168. Consistent with this purpose, Congress "vest[ed] the Bureau with broad rulemaking, supervisory, investigatory, adjudicatory, and enforcement authority." *Consumer Fin. Prot. Bureau, v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683, 688 (D.C. Cir. 2017) (cleaned up).

Congress also specifically addressed NBA preemption in Dodd-Frank, making clear that "[t]he standard for preempting State consumer financial law would return to what it had been for decades, [the standard] recognized by the Supreme Court in

Barnett Bank v. Nelson, undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175 (2010) (citation omitted). In Congress's judgment, the OCC had been far too aggressive in preempting state law, causing great harm to consumers. As the Senate Report put it: "Rather than supporting [state] anti-predatory lending laws, federal regulators preempted them. . . . [T]he OCC and the OTS actively created an environment where abusive mortgage lending could flourish without State controls." *Id.* at 16–17. The conference report expressed the same view, noting that, in codifying *Barnett Bank*, Dodd-Frank "*revises* the standard OCC will use to preempt state consumer protection laws." H.R. Conf. Rep. No. 111-517, at 731 (2010) (emphasis added).

This provision of Dodd-Frank, codified at 12 U.S.C. § 25b, reined in the OCC in three ways that are relevant to this case: It clarified the proper scope of NBA preemption. It imposed a set of stringent procedural requirements on the OCC's ability to make preemption determinations. And it clarified the level of deference to be given to such OCC preemption determinations.

As to the scope of preemption: Section 25b(b) provides that "state consumer financial laws are preempted" only in specific circumstances, including the one articulated in *Barnett Bank*: where "state consumer law prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 25b(b)(1)(B).

Congress also explicitly disavowed field preemption, *id.* § 25b(b)(4), and made clear that "any preemption determination . . . may be made by a court," *id.* § 25b(b)(1)(B).

As to the procedural requirements: Section 25b(b) requires that, whenever the OCC makes a preemption determination under the *Barnett Bank* standard, it may do so only on a "case-by-case basis," *id.*—that is, with respect to "a particular State consumer financial law" or "substantively equivalent" one in another state, *id.* § 25b(b)(3). Such a determination must be supported by on-the-record "substantial evidence." *Id.* § 25b(c). Further, the OCC must consult with the CFPB whenever it makes a preemption determination that purports to apply to more than one state's law. *Id.* § 25b(b)(3)(B). Congress also created new transparency, reporting, and periodic-review requirements for OCC's preemption determinations. *Id.* § 25b(d), (g).

As to the level of deference given to OCC preemption determinations made under these procedures: Congress expressly ensured that courts would defer to such determinations only to the extent that the agency's "reasoning" and "thoroughness" is "persuasive," in keeping with the principles of *Skidmore* deference. *Id.* § 25b(b)(5)(A).

3. The OCC refuses to change its stance on preemption in 2011.

Notwithstanding Dodd-Frank's massive regulatory overhaul, the OCC issued preemption rules in 2011 that were indistinguishable from those that it issued in 2004. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549 (July 21, 2021) (codified as 12 C.F.R. § 34.4). Indeed, despite Congress's

view that the 2004 rule reflected an overly broad view of preemption, the 2011 version included a list of preempted areas nearly identical to the one from 2004, including a broad categorical preemption of all "state law limitations concerning . . . escrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(6) (2011).

Although the OCC did not change the substance of its previous preemption determinations, it did change its articulation of the relevant standard. As noted, the 2004 rule used sweeping language to describe the NBA as preempting any "state laws that obstruct, impair, or condition" national banks' exercise of their powers. 69 Fed. Reg. 1917. In 2011, the OCC removed this language, noting that it "had resulted in misunderstanding and confusion." 76 Fed. Reg. 43,552. Yet the OCC's new rule did not meaningfully incorporate Dodd-Frank's "prevent or significantly interfere with" standard. It just repeated, without revision, the 2004 version's preemption of all state escrow-account laws.

Moreover, like the 2004 preemption rule, the OCC's 2011 counterpart was silent as to *why* state regulation of escrow accounts—either in general or in requiring payment of interest—conflicted with the NBA. Rather, the OCC simply noted that the 2004 rules "were based on the OCC's experience" and that the agency had "re-reviewed those rules . . . to confirm that the specific types of laws cited in the rules are consistent with the standard for conflict preemption" in *Barnett Bank*. 76 Fed. Reg.

34,557. The OCC omitted any mention of what experiences it had in mind, or how they applied to escrow-interest laws. *See* OCC Amicus Br. 11–12 (omitting same).

The 2011 rule also gave no consideration to the views of the CFPB. Even after Congress created an agency with "exclusive authority" to supervise large corporate banks' compliance with consumer-protection laws, 12 U.S.C. § 5515(b)(1), and gave it a specific role in the NBA preemption process, *id.* § 25b(b)(3)(A), the CFPB had no voice at all in the OCC's 2011 determination that the NBA preempts escrow laws.

Nor did the 2011 rule evaluate state laws affecting national banks on a "case-by-case" basis or make any on-the-record showing of "substantial evidence" (or *any* evidence) in support of the OCC's categorical preemption determinations. Instead, the OCC interpreted Dodd-Frank's procedural requirements to cover only "*future* preemption determinations." 76 Fed. Reg. 43,557 (emphasis added). The OCC thus followed none of the rules that Congress imposed on the agency to restrict its prior preemption determinations, including with respect to state escrow-account laws.

The 2011 rule's disregard of Dodd-Frank did not go unnoticed. The General Counsel of the Treasury explained that the OCC's approach "seem[ed] to take the position that the Dodd-Frank standard has no effect," which "runs afoul of basic canons of statutory interpretation [and] is also contrary to the legislative history." Department of the Treasury, *Comment Letter on Proposed Rule Relating to Federal Preemption of State Consumer Financial Law* (June 27, 2011), https://perma.cc/D9MX-8HH8.

Academic commenters and consumer-advocacy groups have likewise criticized the rule as violating Dodd-Frank, both as to the substantive scope of NBA preemption and as to the procedural requirements for the OCC's preemption determinations.[2]

D. Dodd-Frank imposes interest requirements on some mortgage-escrow accounts.

Although the OCC's 2011 preemption rule did not specifically mention state laws requiring interest payments on mortgage-escrow accounts, Dodd-Frank itself did. Separate from its provisions on NBA preemption, Dodd-Frank requires that escrow accounts be used in connection with mortgages insured by state or federal agencies. 15 U.S.C. § 1639d(g)(1). For those mandatory accounts, creditors must pay interest to borrowers "if prescribed by applicable State or Federal law." *Id.* § 1639d(g)(3). Like RESPA's limitation on the funds in mortgage-escrow accounts, the section does not distinguish between federally or state-chartered banks.

[2] *E.g.*, Wilmarth, *The Dodd-Frank Act's Expansion of State Authority*, 36 J. Corp. L. at 938 (arguing that the OCC's preemption rule violated Dodd-Frank's "case-by-case" and "substantial evidence" requirements); Hills, *Exorcising* McCulloch, 161 U. Pa. L. Rev. at 1238–39 ("[H]ow could such unusually specific statutory admonitions not be an effort to trim back on the preemption status quo?"); Nat'l Consumer L. Ctr., *Statement of NCLC Managing Attorney Lauren Saunders On OCC Final Preemption Rules* (2011), *available at* https://www.nclc.org/images/pdf/preemption/occ-preemption-statement.pdf ("[T]he agency has failed to correct the fundamental flaws in the rule that violate several aspects of the Dodd-Frank Act.").

II. Factual and procedural background

Plaintiff Alex Cantero is a New York resident who took out a mortgaged loan with defendant Bank of America to finance his purchase of a house. JA 12, JA 15. He was required to put funds into an escrow account held by Bank of America. JA 16. Although the mortgage agreement provided that it would be "governed by Federal law and the law of the jurisdiction in which the Property is located," JA 15, Bank of America has refused to comply with a New York law requiring the payment of interest on escrow accounts like the one that Cantero had. N.Y. G.O.L. § 5-601.

To remedy this violation of state law, Cantero brought this action on behalf of himself and similarly situated borrowers. JA 16, 19–20. The complaint alleges violations of New York's escrow-interest statute, N.Y. G.O.L. § 5-601 (as well as other similar state statutes), breach of contract, violations of state consumer-protection law, and unjust enrichment. JA 19–24.

Bank of America moved to dismiss the complaint. Among other things, it argued that the NBA preempts application of New York's escrow-interest law and the similar laws of other states.

The district court rejected Bank of America's preemption defense. The court first reviewed the NBA's preemption scheme, which extends only to state laws that "prevent or significantly interfere" with the exercise of national banking authorities. JA 59. To determine whether Congress implicitly preempted mortgage-escrow-

interest laws, the court looked to Dodd-Frank, where Congress codified the *Barnett Bank* standard and required lenders to pay interest on certain escrow accounts "[i]f prescribed by applicable State or Federal law." JA 60 (citing 12 U.S.C. §25b; 15 U.S.C. § 1639d(g)(3)). The court concluded that "it would be perverse to interpret Congress's latest regulatory effort as obliquely" exempting national banks from state escrow-interest requirements. JA 62–69.

The court then rejected Bank of America's argument that the 2011 OCC rule resolved the preemption question. Applying *Skidmore* deference, it found no evidence "the agency gave any thought whatsoever to the specific question raised in this case." JA 71. Finally, applying *Barnett Bank* and other precedent outlining NBA preemption's scope, the court concluded that N.Y. G.O.L. § 5-601 did not, by requiring payment of interest on escrow accounts, "significantly interfere" with Bank of America's real-estate-lending authority or its ability to provide escrow-account services. JA 76–78. The court thus concluded that New York's escrow-interest law was not preempted by the NBA, and dismissed only Cantero's non-contract claims. JA44, JA57.

The district court later granted Bank of America's request to certify the order for an interlocutory appeal under 28 U.S.C. § 1292(b) and stayed further proceedings. JA 125–26. This Court then granted Bank of America's motion for leave to appeal on February 19, 2021, and consolidated the case with a related one for the purpose of the appeal. *See* JA 141–42; *Bank of America, N.A. v. Hymes*, No. 20-3582.

SUMMARY OF ARGUMENT

I.A. In every case in which state escrow-interest laws have been challenged on preemption grounds, they've been upheld. The Ninth Circuit upheld a law like New York's in 2018. Rejecting Bank of America's preemption argument, it explained that "no legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated that they do not." *Lusnak*, 883 F.3d at 1197. Multiple courts have reached the same conclusion, including the district court below. *See Clark v. Bank of Am., N.A.*, 2020 WL 902457, at *7–*8 (D. Md. Feb. 24, 2020). And the very first court to consider a preemption challenge to New York's law, in 1975, held that the law was not preempted because the burden that it imposes is "insignificant." *Fed. Nat'l Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364, 1369 (S.D.N.Y. 1975). No case holds otherwise.

B.1. This consensus is correct. The text, purpose, and history of section 25b(b) show that Congress did not intend to preempt state escrow-interest laws.

The text of section 25b(b)(1)(B) preempts a "State consumer financial law only if," as relevant here, it "prevents or significantly interferes with the exercise by the national bank of its powers." Under this language, "[m]inor interference" is "not enough." *Lusnak*, 883 F.3d at 1194. It "must be *significant*." JA 76. Applying the canon of *noscitur a sociis*, significant interference is best understood to capture those laws that, although they do not "prevent" a national banking power, come close to doing so.

This understanding is supported by other text. The statute makes clear that national banks mst generally comply with state consumer-financial laws. It defines "State consumer financial law" as any nondiscriminatory state law that "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). And it states that such laws are preempted "only if" they meet *Barnett Bank*'s standard. *Id.* § 25b(b)(1).

Section 25b(b)'s purpose and history confirm that the statute means what it says. Congress sought to ensure that the "standard for preempting State consumer financial law would return to what it had been for decades," thus "undoing broader standards adopted . . . by the OCC in 2004." S. Rep. No. 111-176, at 175 (2010). Congress understood that this standard leaves considerable room for state banking regulation. As *Barnett Bank* explained, it has long been clear that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation," and it is "only when the State law incapacitates [national] banks from discharging" their powers that it is invalid. *First Nat'l Bank*, 76 U.S. (9 Wall.) at 362; *see Cuomo*, 557 U.S. at 534 ("[States] have enforced their banking-related laws against national banks for at least 85 years."). *Barnett Bank* applied this principle to a state law that prohibited national banks from doing what a federal statute expressly authorized. 517 U.S. at 27–28. It was therefore preempted.

2. In contrast, New York's escrow-interest law does not prevent or significantly interfere with national banking powers. Bank of America argued below that "the specific banking power at issue is 'the power to provide escrow services,'" JA 75, but New York's law does not "prevent" the exercise of that power. Nor does it come anywhere close: The only thing that the law does is require payment of at least 2% interest on escrow-account balances. It does not dictate how such accounts may be structured, or anything else. And his Court has already rejected the argument that a "decrease" in profits, on its own, is enough to show significant interference. *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015). The law thus does not substantially interfere with the exercise of a national banking power.

3. Section 1639d(g)(3) confirms that Congress sees no conflict between national banking powers and escrow-interest requirements. That provision expressly requires national banks to pay interest on balances in mandatory escrow accounts if required by any "applicable State or Federal law," and to do so "in the manner as prescribed by that applicable . . . law." 15 U.S.C. § 1639d(g)(3). Regardless of whether this statute covers the plaintiff's particular escrow account, it further demonstrates that national banks may comply with state escrow-interest laws without significant interference.

C. None of Bank of America's arguments to the contrary are persuasive.

1. Although Bank of America at times suggests that the relevant power is the "power to decide whether, and how much, interest to pay on escrow accounts," Br.

18–19, 34, that is incorrect. The only statutory authority that Bank of America cites is its general real-estate-lending authority, and the only regulatory authority it cites is the authority to provide escrow services. There is no basis for articulating the power more narrowly than that for purposes of *Barnett Bank*'s preemption standard.

Nor is there any basis for Bank of America's argument (at 22, 30) that Congress intended to preempt state laws that "prevent a national bank from fully exercising" its "power to establish the terms and conditions of mortgage loans." That argument is incompatible with Dodd-Frank's text, purpose, and history.

2. Bank of America claims that Congress wanted national banks to be subject to only generally applicable state laws. But that is false. The standard is "prevents or significantly interferes," not "generally applicable." And Congress expressly limited section 25(b)(1) to "State consumer financial laws." Nothing that Congress said or did in that provision would make any sense if only generally applicable laws could be excluded from preemption. Nor does Bank of America offer any theory of how state escrow-interest law poses a greater infringement on national banking powers than "criminal, contract, or property laws," which can have "significant consequences for the risk, pricing, and structure of a loan transaction." Appellant's Br. 35.

3. None of the cases cited by Bank of America require a finding of preemption. The laws in *Barnett Bank* and *Franklin* are easily distinguishable. They involved efforts by states "to forbid, or to impair significantly, the exercise of a power that Congress

explicitly granted." *Barnett Bank*, 517 U.S. at 33. As for the lower-court cases, they did not address escrow-interest laws, and many were decided before Dodd-Frank.

II. The OCC's decision to reaffirm its 2004 rule has no effect on this case.

Bank of America contends that the rule is entitled to *Chevron* deference under *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005). But Congress has clarified that OCC preemption determinations do not receive *Chevron* deference, as even the OCC concedes. They receive, at most, *Skidmore* deference. 12 U.S.C. § 25b(b)(5)(A).

In this case, however, the OCC's preemption determination should not even receive *Skidmore* deference. That is because, outside the procedures set forth in Dodd-Frank, which the OCC refused to comply with, "Congress has not authorized [the OCC] to pre-empt state law directly." *Wyeth*, 555 U.S. at 576. Absent such authority, as the Supreme Court held in a case decided after this Court's decision in *Burke*, courts will not "defer[] to [the] agency's *conclusion* that state law is pre-empted." *Id.* At most, they will give "the agency's explanation of state law's impact on the federal scheme" "some weight" under *Skidmore*—but only if the agency's explanation is "thorough[]" and "persuasive[.]"*Id.* at 577. Here, the OCC provided no explanation of any kind (much less a thorough and persuasive explanation) for how state escrow-interest laws prevent or significantly interfere with a national banking authority, not anything at all about state-interest laws. So there is no reasoning to even analyze. And the OCC's amicus brief is equally unpersuasive and unentitled to deference.

ARGUMENT

I. Congress did not intend to preempt state escrow-interest laws.

The Supreme Court's "precedents establish that a high threshold must be met" to show that a federal law implicitly displaces an otherwise valid state law. *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up). A litigant seeking to nullify state law as impliedly preempted by federal law must show that this was the "clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565; *see Entergy Nuclear Vt. Yankee v. Shumlin*, 733 F.3d 393, 414 n.21 (2d Cir. 2013) (explaining that "the party asserting preemption . . . carries the burden of proof"); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990) (explaining that "compelling evidence of an intention to preempt is required" to displace a state "consumer protection law").

Bank of America cannot make this showing. Congress has expressly provided that "State consumer financial laws are preempted, only if," as relevant here, "the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). As courts have uniformly held, escrow-interest laws do not rise to this level of interference. Quite the opposite: federal law expressly contemplates—and allows—enforcement of state escrow-interest laws. 15 U.S.C. § 1639d. Bank of America's arguments to the contrary have been universally rejected by the courts, are incompatible with Dodd-Frank's text, purpose, and history, and have no limiting principle.

A. Courts have uniformly rejected Bank of America's attempts to preempt state escrow-interest laws.

Bank of America has pressed for preemption of state escrow-interest laws in several cases in recent years. It has yet to be successful.

The first was *Lusnak v. Bank of America*, involving California's escrow-interest law. Like New York, California requires a 2% annual interest rate for escrow-account balances. 883 F.3d at 1188. Like the plaintiff here, the plaintiff in *Lusnak* alleged that Bank of America had violated its contractual obligation to comply with state law by refusing to comply with California's escrow-interest law. *Id.* at 1190. Bank of America moved to dismiss the complaint on preemption grounds, just as it did here.

The Ninth Circuit held that dismissal was improper because Bank of America could not "affirmatively demonstrate that Congress intended to preclude states from enforcing their escrow interest laws." *Id.* at 1191. The court explained that "the operative question is whether [the state law] *prevents* Bank of America from exercising its national bank powers or *significantly interferes* with [its] ability to do so." *Id.* at a 1194. Bank of America could not show that the law did either. As the Ninth Circuit put it, "no legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated that they do not." *Id.* at 1197. The Supreme Court then swiftly denied a petition for certiorari, 139 S. Ct. 567 (2018), in which Bank of America argued that *Lusnak* conflicts with the same appellate decisions that it cites here.

After *Lusnak*, Bank of America made the same arguments for preemption in two other cases, including this one. Courts in both cases rejected the arguments. *See Clark*, 2020 WL 902457, at *7–*8. The district court in *Clark* held that Maryland's escrow-interest law is not preempted by federal law because it allows Bank of America "to require escrow accounts for its borrowers" and "merely provides that, if [the bank] chooses to maintain escrow accounts, then it must pay a small amount of interest to the borrowers on their funds." 2020 WL 902457, at *7. The district court below held similarly here.

These holdings are in keeping with earlier cases involving escrow-interest laws. In 1975, one year after New York's escrow-interest law was enacted, the law was challenged on preemption grounds. Relying on *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), a district court held that the law was not preempted. *Lefkowitz*, 390 F. Supp. at 1369. The court explained that any burden imposed by the law on national banks "seems insignificant." *Id.* The law "does not regulate how [a bank] must keep or invest the escrow funds in its possession" *Id.* "All that New York State has done is to act upon funds which are kept by [the bank] for the ultimate benefit of the original homeowner-mortgagor. The purpose of prepaying certain insurance and tax expenses is not to provide [the bank] with income but rather to protect the mortgagees' interest in the mortgaged property." *Id.* New York's escrow-interest law, the court explained, "in no way impairs this purpose." *Id.* For nearly 50 years, then,

the case law has held that state escrow-interest laws are not preempted by federal law.

B. State escrow-interest laws do not "prevent or significantly interfere with" national banking powers.

Bank of America asks this Court to upend this judicial consensus and authorize national banks to violate state escrow-interest laws with impunity. But courts have uniformly rejected this argument for good reason: The "purpose of Congress is the ultimate touchstone in every pre-emption case," *Wyeth*, 555 U.S. at 565, and there is no indication that Congress has intended to preempt escrow-interest laws.

1. In Dodd-Frank, Congress "clarified" the "preemption standards for national banks." 12 U.S.C. § 25b (quoting caption). It provided that the NBA "does not occupy the field in any area of State law," *id.* § 25b(b)(4), and that "[s]tate consumer financial laws are preempted, only" in certain circumstances, including when they conflict with federal law as prescribed in *Barnett Bank*. 12 U.S.C. § 25b(b)(1).

The text, purpose, and history of this statutory provision show that Congress did not intend (and has never intended) to preempt state escrow-interest laws.

a. Text. By its terms, section 25b(b)(1)(B) preempts a "State consumer financial law only if," as relevant here, it "prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* Under this language, a law is not preempted just because it "interferes with the exercise by the national bank of its powers." Were that the case, the word "significantly" would be meaningless, violating "one of the

most basic interpretive canons"—"that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up). Thus, as the Ninth Circuit noted, "[m]inor interference with federal objectives is not enough." *Lusnak*, 883 F.3d at 1194; *see also* JA 76 ("[S]tate laws that merely affect or minimally impact the exercise of banking powers are not preempted."). To be preempted, "[t]he interference must be *significant*." JA 76 (emphasis added).

Although the statute does not specify what constitutes significant interference, the use of the word "prevents" sheds light on its meaning. When interpreting a legal text, courts "rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015) (quotation marks omitted); *see Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 604 (2d Cir. 2021) (applying the *noscitur* canon to "cabin" the meaning of an "undefined and potentially ambiguous" word, "such that its scope aligns with that of its listed companions"); *T.W. v. N.Y. State Bd. of L. Examiners*, 996 F.3d 87, 98 (2d Cir. 2021) (relying on *noscitur* to avoid an interpretation that would "define the word much more broadly than its statutory neighbors"); *see also United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."); Antonin Scalia &

Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195–198 (2012) (discussing the *noscitur* canon).

Applying this canon here, the phrase "significantly interferes with" is best understood to mean something close to "prevent"—one step, or one notch, down from "prevent." It is designed to capture those state laws that, although they do not prevent the exercise of a national bank's power, come close to doing so. *See, e.g., Franklin Nat'l Bank of Franklin Square v. People*, 347 U.S. 373, 374–78 (1954) (holding that a federal statute expressly authorizing national banks "to receive savings deposits" was significantly impaired by, and thus preempted, a state law prohibiting national banks from *telling* anyone that they could receive "savings" deposits, because the power to sell a service isn't worth much without being able to let customers know about it). On this reading, a state consumer-financial law that neither prevents nor comes close to preventing a national bank's exercise of its powers is not preempted.

It is true that, even on this understanding, a law that "prevents" the exercise of national banking authority also "significantly interfere[s] with" it. But that is true on *any* interpretation of the phrase. It is impossible for a law to prevent the exercise of a power without significantly interfering with the exercise of that power. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). That does not mean, however, that "prevents" plays no role here. To the contrary, the role that it plays is a clarifying one, informing the meaning of the phrase "significantly interferes with." *See United*

States v. Atlantic Rsch. Corp., 551 U.S. 128, 137 (2007) (explaining that text "performs a significant function simply by clarifying" the meaning of neighboring text). Taken together, the full language shows that Congress wanted to displace only state laws that prevent, or come close to preventing, the exercise of national banking authority.

Other text supports this understanding. Section 25b(b) expressly provides that the NBA "does not occupy the field in any area of State law." 12 U.S.C. § 25b(b)(4). Further, the statute makes clear that national banks are subject not only to "a state's generally applicable criminal, contract, or property laws," as even Bank of America admits (at 35), but also to "State consumer financial laws." 12 U.S.C. § 25b(b)(1). Were it otherwise, and state consumer-financial laws were invariably preempted, it would have made no sense for Congress to specify that "State consumer financial laws are preempted, *only if*" they rise to a certain level of interference. *Id.* (emphasis added); *see also Cuomo*, 557 U.S. at 534 (observing in 2009 that states "have enforced their banking-related laws against national banks for at least 85 years").

Congress defined the term "State consumer financial law," moreover, to mean any nondiscriminatory state law that "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). Section 25b's text and structure thus leave no doubt that Congress intended that states be able to "directly and specifically regulate[] the

manner, content, or terms and conditions of any financial transaction . . . authorized for national banks to engage in," or "any account related thereto," and that such regulation would be preempted only if it rose to the level of preventing or nearly preventing the exercise of the national bank's authority.

b. Purpose and history. Section 25b(b)'s purpose and history confirm that Congress did not want to preempt all state laws regulating the "terms and conditions" of a "financial transaction . . . authorized for national banks to engage in," or "any account related thereto." *Id.* Congress added the provision so that the "standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson* . . ., undoing broader standards adopted . . . by the OCC in 2004." S. Rep. No. 111-176, at 175 (2010).

It is implausible that Congress would have written the statute that it did, for the reasons it did, had it believed that the OCC's list of preempted laws was correct. Courts must give "real and substantial effect" to Congress's actions—not "act[] as though" the legislation "had not taken place." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). In codifying *Barnett Bank* while rejecting the OCC's broad approach, Congress signaled that the OCC had sought to displace too many state laws, and that a narrower range of laws in fact "prevent or significantly interfere with" national bank powers than those the OCC tried to annul, including escrow-account laws.

Nor does *Barnett Bank* itself require preemption of such laws. In that case, the Supreme Court explicitly recognized that states have "the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. The Court cited several cases upholding state laws under this standard. *See id.* at 33–34 (citing *Anderson Nat'l Bank*, 321 U.S. at 247–52; *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); *First Nat'l Bank*, 76 U.S. (9 Wall.) at 362). These cases stand for the proposition that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation," and "[i]t is only when the State law incapacitates [national] banks from discharging" their powers that it is invalid. *First Nat'l Bank*, 76 U.S. (9 Wall.) at 362; *accord Cuomo*, 557 U.S. at 534 ("[States] have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years."). Thus, in *Anderson*, the Court upheld a state law requiring banks to pay deposit accounts to the state under certain specified circumstances. 321 U.S. at 236. Even though the law 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. Stated another way, the law neither prevented nor significantly impaired national banks from exercising their powers. So it was not preempted.

Barnett Bank is an application of this principle. It involved a federal law that expressly authorized national banks to sell insurance in small towns, and a state law that prohibited them from doing so. 517 U.S. at 27–28. Because the state law plainly prevented national banks from exercising a power that Congress had explicitly given to them, the Court explained that the law was preempted under this precedent.

2. In stark contrast to the state law in *Barnett Bank*, New York's escrow-interest law does not prevent or significantly interfere with national banking powers.

Bank of America argued below that "the specific banking power at issue is 'the power to provide escrow services,'" and the district court "agree[d]." JA 75. The court noted that federal law "endow[s] national banks with the power to engage in real estate lending and activities incidental thereto," but "does not specifically address escrow lending activities." JA 59–60; *see* 12 U.S.C. § 371(a) (authorizing national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate"); *id.* § 24 (granting national banks "all such incidental powers as shall be necessary to carry on the business of banking"). But five years before the OCC adopted its preemption rules, the OCC took the position that these statutory grants also implicitly authorize national banks to "provide real estate closing and escrow services." JA 75. Dodd-Frank then "mandate[ed] the creation of escrow accounts for a significant share of [the mortgage] market." JA 76. The court

therefore concluded that the national banks have the power to maintain escrow accounts. *Id.*

Even so, New York's law does not "prevent" national banks from exercising this power (and "no one argue[d]" that it did below). *Id.* Indeed, many of Bank of America's competitors, including Wells Fargo and JPMorgan Chase, comply with the law in administering mortgage-escrow accounts and providing escrow services. *See* JA 79 (Wells Fargo); Report & Recommendation in *Cymbalista et al. v. JPMorgan Chase Bank, N.A.*, No 20-cv-456, (E.D.N.Y. Jan. 27, 2020), ECF No. 51, at 4–5 (settlement agreement under which JPMorgan Chase agreed to pay interest on mortgage-escrow accounts where state law so requires). Bank of America itself now does so in California, as does Citibank. So the only question is whether New York's escrow-interest law "significantly interferes with" the exercise of this authority.

It does not, and Bank of America has not shown otherwise. Although New York's law imposes a modest burden on national banks, the "degree of interference is minimal," as the court below correctly concluded. JA 78. The law "does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use." *Id.* It simply "requires the Bank to pay interest on the comparatively small sums deposited in mortgage escrow accounts," so that the borrower is not providing an interest-free loan to the bank. *Id.* To be sure, that will "cost the Bank money." *Id.* But the same could be said of the law at issue in

Anderson, which also deprived national banks of interest-free loans on the balance in certain accounts, or of any other law (from foreclosure to contract law) that Bank of America concedes is not preempted. Just because a law might affect a bank's bottom line does not mean that the law significantly interferes with the bank's exercise of a national bank power. *See Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015) (rejecting NBA preemption of state laws that "might decrease the amount a national bank could charge for its consumer debt" because "such an effect would not 'significantly interfere' with the exercise of a national bank power"); *see also* JA 79 ("[S]ignificant interference' is not a question of cost.").

Nor does Bank of America make any effort to show that its ability to provide escrow accounts or make real-estate loans would be seriously impaired by complying with New York's half-century-old law. Bank of America does not even attempt to show that the modest amount of interest required by the law is "punitively high." JA 80. It likewise does not attempt to provide any account of how paying that modest amount of interest on a balance in an escrow account could cause a bank to assume "even greater" "lending risks" (as opposed to just lowering its profits). Appellant's Br. 34. The bank asserts that New York's law "make[s] escrow accounts a less attractive mechanism for mitigating lending risks"—without providing any evidence (or even claiming) that the bank would stop using escrow accounts or "refrain from making the loan at all" if it had to comply with the law. *Id*. And no wonder: National banks

are already paying interest on federally backed mortgages in those states with escrow-interest laws, Bank of America's competitors are doing so for other mortgages, and Bank of America itself is now doing the same in California. Bank of America is thus unable to point to any evidence substantiating its claim of significant interference or establishing that Congress has "intend[ed] to exercise its constitutionally delegated authority to set aside" state escrow-interest laws. *Barnett Bank*, 517 U.S. at 30.

3. If anything, Congress has done the opposite: In Dodd-Frank, Congress embraced escrow-interest requirements as fully compatible with federal law. Section 1639d(g)(3) states: "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(g)(3). This provision uses the mandatory "shall" and applies to "each creditor," with no exception for national banks. *See id.* § 1602(g). That means that, when applicable state law requires a national bank to pay interest on an escrow account, it must do so in accordance with that law.

Far from showing that Congress "clear[ly] and manifest[ly]" sees state escrow-interest requirements as inconsistent with federal law, *Wyeth*, 555 U.S. at 565, section 1639d(g)(3) confirms that Congress sees no conflict between such requirements and national banking powers. The word "applicable" can easily be read—indeed, is most naturally read—as referring to "any relevant or appropriate state laws that require

creditors to pay interest on escrow account funds." *Lusnak*, 883 F.3d at 1195; *see also id.* ("The inclusion of this term makes sense because not every state has escrow interest laws." By requiring that "creditors pay interest 'in the manner as prescribed by' the relevant state law, Congress demonstrated an awareness of, and intent to address, the differences among state escrow interest laws."). And the legislative history likewise indicates that every creditor must "mak[e] interest payments on the escrow account if required under [state] laws." *Id.* at 1196 (quoting H.R. Conf. Rep. No. 111-94, at 91).

Hence, as the district court below correctly recognized, "section 1639d evinces a policy judgment that there is little incompatibility between requiring mortgage lenders to maintain escrow accounts and requiring them to pay a reasonable rate on interest on sums thereby received." JA 80. Or put more tersely: In "Congress's view," large corporate banks "can comply with state escrow interest laws without any significant interference with their banking powers." *Id.*; *see also* JA 79 ("Congress has explicitly required creditors, including national banks, to pay interest in accordance with state laws to a broad swath of borrowers."); *Clark*, 2020 WL 902457 at *8 ("Dodd-Frank changed the landscape of banking regulation and, in doing so, indicated that state statutes requiring payment of interest on escrow accounts are a viable means of consumer protection within the dual regime of federal and state regulation.").

Particularly given Congress's simultaneous disapproval of broad OCC preemption, this provision cuts decisively against preempting state escrow-interest laws.[3]

C. The preemption arguments of Bank of America and its amici are inconsistent with Dodd-Frank and Supreme Court precedent and have no coherent limiting principle.

In arguing that New York's law "prevents or significantly interferes with" the exercise of its national banking powers, Bank of America makes several moves. *First*, it seeks to recast the relevant power in exceedingly specific and conclusory terms—as the power to not pay a required escrow-interest rate—so it can claim that New York's law prevents the exercise of that power. *Second*, the bank takes the position (at 35) that Dodd-Frank broadly preempts all state laws other than "generally applicable criminal, contract, or property laws," or those that can be said to form "the legal infrastructure that surrounds and supports national banks' ability to do business."

[3] Bank of America contends (at 57) that section 1639d is irrelevant here because the plaintiffs' mortgages in these two cases were not covered by it. (Cantero's escrow account was opened before the law took effect, while Hymes' account was not mandatory.) But as the Ninth Circuit in *Lusnak* explained, it does not matter whether the particular account was subject to section 1639d. Cantero is not arguing that Bank of America has violated section 1639d with respect to his account. He is arguing that the existence of section 1639d is *further evidence* that Congress sees no "irreconcilable conflict" between state escrow-interest requirements and federal banking laws because state escrow-interest laws do not "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 31, 33.

Third, the bank asserts that the case law compels the conclusion that escrow-interest statutes are preempted under *Barnett Bank*. The bank is wrong across the board.[4]

1. Bank of America begins by trying to define away the problem. After arguing in the district court that "the specific banking power at issue is 'the power to provide escrow services,'" the bank now suggests that the relevant power is far narrower. JA 75. It claims that it need not comply with New York's escrow-interest law because the law "significantly interferes with the Bank's power to decide whether, and how much, interest to pay on escrow accounts." Appellant's Br. 18–19, 34.

But that is wordplay. If Congress had actually passed a statute giving national banks the specific authority "to decide whether, and how much, interest to pay on escrow accounts"—instead of one expressly saying that they are subject to applicable state and federal escrow-interest requirements for certain accounts—this would be an easy case. But Congress didn't do that. So the only statutory authority that Bank of America can cite is the authority to "make, arrange, purchase, or sell" real-estate loans, and to exercise all incidental powers necessary to perform an express power, 12 U.S.C. §§ 371(a), § 24. Bank of America claims that these grants of statutory authority "include the power to establish the terms and conditions of mortgage loans, including interest rates and loan origination fees," and that "[o]ne 'term' of a

[4] Bank of America also asks this Court to defer to the OCC's unreasoned preemption conclusion that escrow-interest laws are categorically preempted. *See* Appellant's Br. 37–46. That argument is addressed in Part II.

mortgage loan is the price, or interest rate, charged to a borrower as 'compensati[on] . . . for an extension of credit.'" Br. 22 (citing 12 C.F.R. § 7.4001(a)).

Maybe so. But New York's escrow-interest law does not regulate the interest rate "charged to a borrower" for a mortgage loan. It requires that a modest amount of interest be *paid* to a borrower on the balance in an escrow account where that account is established to protect Bank of America's interest in the loan. Which is why Bank of America elsewhere states (at 22) that "the federal banking power at issue is [the] power to establish the terms and conditions of mortgage loans, including the terms and conditions on which to establish and service escrow accounts."

As discussed, however, New York's law does not prevent or significantly interfere with the exercise of that power. It allows Bank of America to provide mortgage loans and service escrow accounts and to include any terms that it wants to, except for one: the bank must pay a small amount in interest on escrow-account balances. Bank of America argues (at 18–19) that this nullifies its powers because the law "prevents Bank of America from offering escrow accounts unless it pays interest on the account." But that is more wordplay. Regulatory conditions (even minor ones) can always be recharacterized as prohibitions if the condition isn't met. And yet it is clear that many state regulations are permissible under Dodd-Frank and *Barnett Bank*.

So what Bank of America is really saying is that any state law is preempted if it "prevent[s] a national bank from *fully* exercising" its "power to establish the terms

and conditions of mortgage loans." Appellant's Br. 22, 30 (emphasis added); *see also* OCC Br. 4 (making same "fully exercise" argument). That argument is incompatible with Dodd-Frank. If national banks had absolute "power to establish the terms and conditions of mortgage loans," Congress would have preempted *all* state consumer-financial laws as applied to national banks. It did not do so. Instead, Congress defined the term "State consumer financial law" to cover any nondiscriminatory state law that "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). Congress then explicitly provided that such state laws would be preempted "only" under certain circumstances. *Id.* § 25b(b)(1)(B). This language—which Bank of America entirely ignores—would make no sense if its view of the law were correct.

2. Bank of America's concessions reveal the incoherence of its position. The bank admits (at 35) that it must comply with "a state's generally applicable criminal, contract, or property laws," and with state laws that form "the legal infrastructure that surrounds and supports national banks' ability to do business."

But the test isn't "generally applicable." If it were, the banking law in *Anderson* would have been preempted. *See also Cuomo*, 557 U.S. at 534 ("[States] have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years."). The test, rather,

is "prevents or significantly interferes." The bank does not explain why that test, in its view, excludes all generally applicable laws and other "legal infrastructure." And its industry amici offer a view that is flatly inconsistent with Bank of America's concession, urging the Court to hold New York's law preempted because it makes it "more costly" for national banks to do business. *See* Chamber of Commerce Br. 15. This Court has already rejected that argument, and rightly so. *See Madden*, 786 F.3d at 251 ("Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states . . . , such an effect would not 'significantly interfere' with the exercise of a national bank power.").

Bank of America's proposed "generally applicable" standard also contradicts other parts of Dodd-Frank's text. In section 25b(b), Congress was not concerned with generally applicable state laws; it was concerned only with the preemption standard for "State consumer financial laws." And Congress made clear that such laws are preempted only under certain conditions. Bank of America offers no account of how *any* consumer financial law, as defined by Congress, could be valid under its view of preemption. *See id.* § 25b(a)(2) (defining the term to include any law that "directly and specifically" regulates the "terms and conditions" of a "financial transaction" "authorized for national banks to engage in," or of "any account related thereto").

Nor does Bank of America make much of an attempt to distinguish its position from field preemption, or the OCC's defunct "incidental effects" test, under which

any state law that prevented national bank's from fully exercising their national bank powers was preempted. *See* 12 C.F.R. § 7.4008(e) (2004); *Meluzio v. Capital One Bank (USA), N.A.*, 469 B.R. 250, 255 (N.D. W. Va. 2012) ("The Dodd–Frank Act and its accompanying regulations thus clarify that NBA preemption no longer depends on whether a state law obstructs, impairs, or conditions a national bank's full exercise of its lending powers, or more than incidentally affects the exercise of such powers.").

3. Nor does the case law somehow compel the conclusion that Congress has preempted state escrow-interest laws. As already explained, the cases uniformly hold the opposite—a conclusion that is fully consistent with the Supreme Court's cases.

Bank of America relies heavily on a 1954 case, *Franklin*, 347 U.S. at 373. But that case does not require a different result. The Court there considered a "narrow question." *Id.* at 374. National banks were authorized by federal law "to receive savings deposits." *Id.* Yet a state law banned them from telling customers that they could receive "savings" deposits ("forbidd[ing] use of the word 'savings,' or its variants")—while allowing the states' "own chartered savings banks and savings and loan associations" to do so. *Id.* The Court held that Congress had not condoned such a discriminatory and unconstitutional law, for it would be nonsensical to "permit a national bank to engage in a business but [give] no right to let the public know about it." *Id.* at 377–78. By prohibiting national banks, but not state banks, from using the very language defining that business, the state law significantly interfered with the

federal statutory regime. The Court thus explained that "[t]here appears to be a clear conflict" between state and federal law. *Id.* at 378. In reaching that conclusion, the Court reaffirmed its precedents holding that "national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law." *Id.* at 378 n.7 (citing *Anderson* and *McClellan*).

So it is not surprising that the Supreme Court in *Barnett Bank*, when discussing *Franklin*, regarded the cases as being "quite similar." 517 U.S. at 33. In both cases, a federal statute "explicitly grant[ed] a national bank an authorization, permission, or power." *Id.* at 34. And in both cases, a state had dramatically restricted the exercise of that explicit federal statutory power—either by entirely preventing its exercise (as in *Barnett Bank*) or by significantly impairing its exercise (as in *Franklin*). New York's escrow-interest law, by contrast, does neither. It does not prevent or seriously curtail the exercise of any federal power (much less an express statutory power), so it does not create an "irreconcilable conflict" with federal law. *Id.* at 31. Accordingly, the law does not implicate the Court's statement in *Barnett Bank* that the NBA "ordinarily" preempts "contrary state law," nor its decision in *Franklin*, which "take[s] the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress *explicitly* granted." *Id.* at 33 (emphasis added).[5]

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[5] It is in the context of describing these two cases that the district court below used the phrase "practical abrogation"—as a way of distinguishing the states laws in

Bank of America also cites a handful of lower-court cases to claim that the *Barnett Bank* standard is "not very high." Appellant's Br. 29–33 (citing cases). But these cases don't require a different result either. For example, the state laws at issue in *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011), and *Wells Fargo Bank of Texas NA v. James*, 321 F.3d 488 (5th Cir. 2003), prohibited national banks from charging fees to customers that had been expressly authorized by federal law. Because the state laws "prohibit[ed] the exercise of a power which federal law expressly grant[ed] the national banks," the state laws were "in irreconcilable conflict with the federal regulatory scheme" under *Barnett Bank*. *Wells Fargo*, 321 F.3d at 495; *see Baptista*, 640 F.3d at 1198 ("We adopt the reasoning of the Fifth Circuit and hold that . . . there is a clear conflict here: the OCC specifically authorizes banks to charge fees to non-account-holders presenting checks for payment. The state's prohibition on charging fees to non-account-holders, which reduces the bank's fee options by 50%, is in substantial conflict with federal authorization to charge such fees."). No federal law, however, expressly grants national banks the right to obtain an interest-free loan from borrowers by refusing to pay interest on mortgage-escrow accounts. And section 1639, as already discussed, provides powerful evidence to the contrary.

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those cases from the state law at issue here. JA 78. New York's escrow-interest law does not "practically abrogate" the ability of national banks to make real-estate loans or provide escrow-account services. Bank of America does not contend otherwise.

Bank of America also relies on a pair of Ninth Circuit decisions issued before *Lusnak*. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 723 (9th Cir. 2012); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 (9th Cir. 2008); *see also Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376 (2012) (reaching same conclusion as *Rose*). But as *Lusnak* illustrates, these cases do not require finding escrow-interest laws preempted. In *Guitierrez*, for example, federal law authorized national banks to decide for themselves how to calculate fees, and a state law purported to strip them of that right. The Ninth Circuit thus held that there was an irreconcilable conflict. Again, this case is different. Contra Bank of America's suggestion (at 33), this case does not involve a substantive OCC regulation expressly granting national banks a right that state law prohibits.

Finally, Bank of America points to a pre-Dodd Frank decision in which a divided panel found OCC's preemption analysis as to a different state law to be "persuasive." *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 284 (6th Cir. 2009). That case-specific conclusion has no applicability here. Although the majority stated in passing that the *Barnett Bank* standard is "not very high," *id.* at 283, that was *before* Dodd-Frank clarified the standard as preserving many state consumer financial laws. The majority also had no occasion to consider whether state escrow-interest laws would be preempted under that standard, especially given section 1639d.

Thus, none of Bank of America's lower court decisions address the question in this case: whether Congress's actions reveal a clear intent to preempt state escrow-

interest laws or whether those law irreconcilably conflict with Congress's scheme. The cases that *do* address that question, however, all agree on the answer—no.[6]

II. The OCC's repeated inability to provide any reason for why escrow-interest laws "prevent or significantly interfere" with national banking authority confirms that they do not.

Because New York's law does not prevent or significantly impair a national banking power, it is not preempted under Dodd-Frank and *Barnett Bank*. The only remaining question is whether the OCC's preemption rule alters the outcome. And here, too, the answer is clear: It does not come remotely close to doing so.

Bank of America contends that the regulation is entitled to deference under *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), which it calls "controlling."

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[6] Unable to show *Barnett Bank* preemption, Bank of America now advances a distinct preemption theory for the first time on appeal. It argues (at 36) that "if the district court's decision is permitted to stand, the state law would discriminate against national banks" because of a 2018 rule by the New York Superintendent of Financial Services lowering the interest rate on escrow accounts to the lesser of 2% and the treasury rate for state-chartered banks. *See* N.Y. State Dep't of Fin. Servs., Order Issued Under Section 12-a of the New York Banking Law (Jan. 19, 2019). Because this argument was not pressed or passed upon below, it is forfeited. It is also wrong on its own terms. It would not apply to the version of the law in effect before 2018. And the 2018 rule is not discriminatory in any event. The rule simply allows state-chartered banks to pay the treasury rate based on a mistaken belief (perhaps attributable to the OCC's regulations) that national banks are not required to pay interest. Were this Court to hold otherwise—in keeping with the uniform holdings of courts since the Superintendent's order—there is no reason to think that state-chartered banks would suddenly be treated more favorably than federal banks. To the contrary, removing the sole rationale for the rule would result in state and federal banks paying the same amount interest on the same accounts—an entirely non-discriminatory outcome. *See* N.Y. G.O.L. § 5-601 (applying the escrow-interest requirement to "any mortgage investing institution," whether state or federally chartered).

Appellant's Br. 40–42. But this Court in *Burke* applied "the framework of *Chevron*" deference, the applicability of which "[n]either party ha[d] questioned." 414 F.3d 315 & n.6. As Congress has since clarified, however, OCC preemption determinations do not receive *Chevron* deference. They receive, at most, *Skidmore* deference. 12 U.S.C. § 25b(b)(5)(A). A reviewing court "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." *Id.* And that is true even when the OCC has followed all pertinent procedural requirements, including making an on-the-record determination supported by substantial evidence, and consulting with the CFPB, neither of which the OCC did in its 2011 rule. *Id.* § 25b(b), (c). The district court thus rightly declined to apply *Chevron* deference. JA 70.

The OCC itself concedes that *Chevron* deference is inapplicable. In its amicus brief, the agency says that "the District Court opined correctly that § 34.4 should be analyzed under the standard of deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)," and that Dodd-Frank's articulation of *Skidmore* as the proper level of deference "does not represent a change to existing law." OCC Br. 10 & n.5; *see also id.* at 18 ("[T]his Court should conclude that *Skidmore* deference is applicable to the OCC's preemption regulations."); *see also* Office of the Comptroller of the Currency,

OCC Chief Counsel's Interpretation: 12 U.S.C. § 25b, at 5–6 (Dec. 18, 2020) (stating that *Skidmore* deference applies to all OCC preemption determinations). There is no question, then, that *Chevron* deference is inapplicable. The OCC's regulations "should receive, at most, *Skidmore* deference." *Lusnak*, 883 F.3d at 1192; *see* JA 70 (same).

Here, though, the OCC's preemption determination is not even entitled to *Skidmore* deference. The OCC specifically refused to follow any of Dodd-Frank's procedures for making a preemption determination. Outside those procedures, the OCC has no delegated authority to directly preempt state law—and never has. To be sure, it has the authority to promulgate regulations, and those regulations, if valid, "can pre-empt conflicting state requirements." *See Wyeth*, 555 U.S. at 576. But "Congress has not authorized [the OCC] to pre-empt state law directly." *Id.* When that is the case, as the Supreme Court held a few years after this Court decided *Burke*, courts will not "defer[] to [the] agency's *conclusion* that state law is pre-empted," *Id.* They will instead consider "the agency's explanation of state law's impact on the federal scheme," and give it "some weight" only if the explanation is "thorough[]" and "persuasive[.]" *Id.* at 577.

Under this precedent, the Court should not defer to the OCC's determination that laws relating to escrow accounts are preempted. "As the Ninth Circuit explained at length in *Lusnak*, there is no evidence that, when the agency first promulgated the regulations in 2004, it had engaged in a careful, considered analysis of whether the

NBA preempts state laws limiting escrow accounts"—or that it "gave any thought whatsoever to the specific question raised in this case, which is whether the NBA preempts escrow interest laws." JA 71. The OCC's 2004 rulemaking, the court below noted, did "not offer a specific rationale for preempting state laws limiting escrow accounts," and did "not even mention escrow interest laws." *Id.*; *see* Catherine M. Sharkey, *Inside Agency Preemption*, 110 Mich. L. Rev. 521, 581 (2012) ("There were no factual findings . . . explaining why preemption was necessary in the specific case or what conflicts between state authorities and federal banks justified preemption").

When the OCC reissued its regulations after Dodd-Frank, it "did nothing to remedy this oversight." JA 72. The OCC said that it had "re-reviewed" its list of preempted state laws and could "confirm" that all of them were properly preempted. 76 Fed. Reg. 43,557. "But, once again, the agency did not get more specific. It failed to explain why or to what extent the NBA preempted state laws limiting escrow accounts, and it did not mention escrow interest laws." JA 72; *see* 76 Fed. Reg. 43,557. It did not analyze those laws under *Barnett Bank* or explain how any of them (let alone all) could prevent or significantly interfere with a national banking power. Nor did the OCC discuss the meaning of section 1639d(g) or its relevance to the issue.

In short, there is no "reasoning of the agency" for this Court to "assess," much less defer to, nor any "thoroughness evident in the [agency's] consideration" on the question here. 12 U.S.C. § 25b(b)(5)(A). The OCC said nothing in either regulation

that sheds any light on its reasoning. It just announced its conclusion and said that it was the product of the agency's expertise. But even under *Skidmore*, courts don't defer to an agency's unreasoned conclusion, or to its own say-so; they defer to an agency's *reasoning* (and only to the extent that it is persuasive). *See, e.g.*, *Wyeth*, 555 U.S. at 577 ("The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness."). And here—where Congress specifically intervened to rein in the agency, and the agency acted as if nothing had happened—the case for deferring to the agency's unreasoned recalcitrance is especially weak.[7]

So Bank of America asks this Court to defer to the agency's amicus brief. An amicus brief, of course, cannot receive more deference than the agency's notice-and-comment rulemaking. And as the Supreme Court recently reiterated, an agency's legal opinion—especially one offered in a brief submitted in the middle of a case—is not worthy of any real deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) ("A court should decline to defer to a merely convenient litigating position or post hoc rationalization advanced to defend past agency action against attack." (cleaned up)).

[7] The OCC could enact a regulation that specifically addresses state escrow-interest laws. But it would be required to show that "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 . . . in *Barnett Bank*," and to do so only "on a case-by-case basis." 12 U.S.C. § 25b(b)(1)(B), (b)(3)(a), (c).

Moreover, the reasoning set forth in the OCC's briefing is anything but persuasive. Even in its briefing, the agency makes no serious effort to explain how escrow-interest laws prevent or significantly interfere with national banking power. In its brief in *Lusnak*, for example, which Bank of America touts (at 38), the OCC simply described what these laws do and then said they were preempted. 2018 WL 3702582, at *15. That isn't persuasive reasoning; it is little more than a conclusion.

The OCC's amicus brief in this case is equally unpersuasive. It says (at 10–17) that the 2011 rule contains "careful, considered analysis" on the preemption question here because it concludes that "state law limitations" on "[e]scrow accounts" are preempted, and this wasn't "accidental." But again, that is a *conclusion*—not reasoning. And the OCC is unable to persuasively explain how New York's escrow-interest law "prevent[s] or significantly interfere[s] with" a national bank's "authority to provide, establish, and service escrow accounts." OCC Br. 5, 14. It dismisses section 1639(g) in a footnote (at 19 n.10), saying only that the provision "does not apply to the mortgages at issue[] in this case"—without any attempt to explain how escrow-interest requirements could be both compatible and incompatible with federal law at the same time. The OCC also neglects to mention Dodd-Frank's specific reference to "state consumer financial laws," even as the OCC takes the position that Congress intended that only generally applicable state laws may be enforced against national banks. *See* OCC Br. 19–20.

The OCC's continued inability to muster *any* persuasive reasoning in support of its categorical determination that escrow-interest laws are preempted is not just a mark against it for deference purposes. It is confirmation that state escrow-interest requirements (like New York's) do not conflict with federal law because they neither prevent nor significantly impair any power that Congress has granted national banks.

Finally, Bank of America asks this Court to do "the same" as it did in *Flagg v. Yonkers Savings & Loan Ass'n, FA*, 396 F.3d 178, 181 (2d Cir. 2005). Appellant's Br. 44–46. But as Bank of America admits, "*Flagg* involved preemption under the Home Owners' Loan Act, where field preemption applied." *Id.* at 45. This case, by contrast, involves conflict preemption, which specifically preserves a role for states to play, and therefore allows state variation absent significant interference with federal law. *Barnett Bank*, 517 U.S. at 31–34; *see* 12 U.S.C. § 25b(b)(4); *Cuomo*, 557 U.S. at 534; *Watters*, 550 U.S. at 11; *see also Aguayo v. U.S. Bank*, 653 F.3d 912, 922 (9th Cir. 2011) (declining to apply preemption analysis applicable to regulations of the Office of Thrift Supervision, which occupies the field, to regulations of the OCC, which does not).

So even if national banks might have to comply with slightly different state escrow-interest laws, that is a natural consequence of Congress's scheme. It isn't a reason to preempt state law. Had Congress wanted national banks to be free from all state consumer-financial laws, it would have said so. But instead, it indicated that state consumer-financial laws would broadly apply, providing that such laws would

be preempted only when they prevent or significantly interfere with national banking powers. This Court should give effect to Congress's judgment—not ignore it.

CONCLUSION

The district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 32.1(a)(4) because this brief contains 13,882 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

September 3, 2021

/s/ Jonathan E. Taylor
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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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