2022

The Second Circuit's Cantero Decision Is Wrong about Preemption under the National Bank Act

Arthur E. Wilmarth Jr.

Forthcoming in 41 *Banking & Financial Services Policy Report* No. 11 (Nov. 2022)

Draft of 11/12/2022

The Second Circuit's *Cantero* Decision Is Wrong about Preemption under the National Bank Act

Arthur E. Wilmarth, Jr.

On September 15, 2022, the Second Circuit Court of Appeals issued its decision in *Cantero v. Bank of America, N.A.*[1] *Cantero* held that the National Bank Act (NBA) preempted the application to national banks of a New York law requiring home mortgage lenders to pay a minimum rate of interest on mortgage escrow accounts. The Second Circuit declared that New York's "minimum-interest requirement would exert control over a banking power granted by the federal government, so it would impermissibly interfere with national banks' exercise of that power."[2]

The Second Circuit's decision is clearly erroneous and should be rejected by the Supreme Court. *Cantero* creates a direct conflict with the Ninth Circuit Court of Appeals' decision in *Lusnak v. Bank of America, N.A.*,[3] which upheld a similar California law mandating the payment of a minimum rate of interest on mortgage escrow accounts. *Lusnak* properly applied the governing preemption standard under the NBA—namely, whether a state consumer financial law "prevents or significantly interferes with the exercise by the national bank of its powers."[4] The Supreme Court established that standard in *Barnett Bank of Marion County, N.A. v. Nelson*,[5] and

[1] 49 F.4th 121 (2d Cir. 2022) [hereinafter *Cantero*].
[2] *Id.* at 125.
[3] 883 F.3d 1185 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018) [hereinafter *Lusnak*]. The Second Circuit noted that Bank of America, "which was also the defendant in *Lusnak*, does not try to distinguish that case and argues instead that it was wrongly decided." *Cantero*, 49 F.4th at 129.
[4] *Lusnak*, 883 F.3d at 1191, 1193 (quoting 12 U.S.C. § 25b(b)(1)(B)).
[5] 517 U.S. 25, 33 (1996) [hereinafter *Barnett Bank*].

Congress codified that standard in the Dodd-Frank Wall Street Reform and Consumer Protection Act.[6]

The Second Circuit's assertion that the NBA preempts any state law that "would exert control over a banking power granted by the federal government" is contrary to the "prevents or significantly interferes" preemption standard established by *Barnett Bank* and codified by Dodd-Frank. The Second Circuit effectively adopted a *per se* rule invalidating all state laws that place any limitation on the exercise of any "power" granted to national banks by federal law. The Second Circuit's approach would result in the preemption of all state laws regulating the exercise of national bank powers, including state regulations that have insignificant effects on the operations of national banks. The Second Circuit's *per se* rule contravenes the more narrowly-tailored preemption standard that Congress codified in the Dodd-Frank Act.

The Second Circuit's view of preemption under the NBA is also contradicted by four key Supreme Court decisions that provided the foundation for *Barnett Bank*'s preemption standard. In each of those decisions, the Supreme Court upheld a state law that imposed a reasonable, nondiscriminatory limitation on the exercise of a national bank power. The Supreme Court recognized the validity of those four decisions in *Barnett Bank* and in two subsequent cases – *Atherton v. FDIC*[7] and *Cuomo v. Clearing House Ass'n, L.L.C.*[8]

The Supreme Court will soon have an opportunity to review the direct conflict between *Cantero* and *Lusnak*. In *Kivett v. Flagstar Bank, FSB*,[9] the Ninth Circuit reaffirmed its decision in *Lusnak* and again held that the NBA did not preempt California's minimum-interest-on-

[6] Pub. L. No. 111-203, § 1044, 124 Stat. 1376, 2015 (2010) (codified at 12 U.S.C. § 25b(b)(1)(B)) [hereinafter Dodd-Frank].
[7] 519 U.S. 213 (1997).
[8] 557 U.S. 519 (2009).
[9] No. 21-15667, 2022 WL 1553266 (9th Cir., May 17, 2022) [hereinafter *Kivett*].

mortgage-escrow statute. On October 13, 2022, Flagstar Bank filed a petition for certiorari requesting that the Supreme Court overturn the Ninth Circuit's holdings in *Lusnak* and *Kivett* and adopt the Second Circuit's position in *Cantero*.[10]

The Supreme Court recently admonished federal courts that they "must follow" the clear mandate of a federal statute and cannot "override a lawful congressional command" by relying on inconsistent language "extracted" from prior Supreme Court opinions.[11] As shown below, the Second Circuit disregarded that admonition in *Cantero*. The Second Circuit ignored the plain meaning of the "prevents or significantly interferes" preemption standard codified in the Dodd-Frank Act. The Second Circuit based its *per se* preemption rule on statements drawn from Supreme Court opinions that were issued many years ago and dealt with federally-chartered institutions that were far different from present-day national banks. The views on preemption expressed in those decisions have been superseded by the "prevents or significantly interferes" preemption standard that the Supreme Court established in *Barnett Bank* and Congress codified in the Dodd-Frank Act. Accordingly, the Supreme Court should reject *Cantero* and endorse the Ninth Circuit's proper application of the NBA's governing preemption standard in *Lusnak*.

1. The Second Circuit's decision in *Cantero*

In *Cantero*, the Second Circuit held that the NBA preempted the application to national banks of New York General Obligations Law (NYGOL) § 5-601. Section 5-601 requires each "mortgage investing institution" that is "located" in New York to pay a minimum rate of interest

[10] Petition for Writ of Certiorari, *Flagstar Bank, FSB v. Kivett*, No. 22-349 (U.S. Supreme Court, filed Oct. 13, 2022), 2022 WL 8258634. A federal district court in Rhode Island recently held that the NBA preempted Rhode Island's minimum-interest-on-mortgage-escrow statute. The district court agreed with *Cantero* and concluded that the Rhode Island statute was preempted because it "places 'limits' on an incidental power [of national banks]; here, the power to establish escrow accounts. These limitations therefore 'significantly interfere' with a national banks' [sic] incidental powers to utilize mortgage escrow accounts." *Conti v. Citizens Bank, N.A.*, C.A. No. 1:21-CV-00296-MSM-PAS, at *4 (D.R.I., Sept. 28, 2022), 2022 WL 4535251. The district court's decision was appealed to the First Circuit Court of Appeals on October 14, 2022.

[11] *Brown v. Davenport*, 142 S. Ct. 1510, 1520, 1528 (2022).

on outstanding balances held in mortgage escrow accounts. Lenders establish mortgage escrow accounts to ensure the timely payment of property taxes and liability insurance premiums owed by borrowers. Section 5-601 requires lenders to pay a minimum interest rate on mortgage escrow accounts equal to either 2% or an alternative "rate prescribed by the [New York] superintendent of financial services."

Four residents of New York (the "*Cantero* Plaintiffs" and the "*Hymes* Plaintiffs") filed class-action lawsuits against Bank of America, N.A. (BofA) for failing to pay interest on their mortgage escrow accounts. The *Cantero* Plaintiffs entered into their mortgage prior to Dodd-Frank's effective date, while the *Hymes* Plaintiffs received their mortgage after that date.[12] A federal district court denied BofA's motion to dismiss both lawsuits on grounds of federal preemption under the NBA.[13]

The Second Circuit reversed the district court's decision, declaring that the NBA "displaces all state laws that purport to 'control' banks' exercise of [enumerated and incidental] powers."[14] The Second Circuit said that it did not matter whether NYGOL § 5-601 prescribed a minimum interest rate that was "not very high."[15] The Second Circuit determined that the same preemption standard applied both before and after Dodd-Frank's effective date. The Second Circuit held that (i) the pre-Dodd-Frank preemption standard was established by *Barnett Bank*, and (ii) Dodd-Frank "did not change the preexisting [*Barnett Bank*] standard, but rather explicitly codified it."[16] The Second Circuit also recognized that the preemption standard

[12] *Cantero*, 49 F.4th at 127-28.
[13] *Hymes v. Bank of America, N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019) [hereinafter *Hymes*], *rev'd sub nom. Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022).
[14] *Cantero*, 49 F.4th at 139. The Second Circuit agreed with the district court's conclusion that national banks "have the incidental 'power to provide escrow services' in connection with home mortgage loans." *Id.* at 126 (quoting *Hymes*, 408 F. Supp. 3d at 193).
[15] *Id.* at 139.
[16] *Id.* at 130-31, 135-36 (quote at 135).

established by *Barnett Bank* and codified by Dodd-Frank in 12 U.S.C. § 25b(b)(1)(B) is whether a state consumer financial law "prevents or significantly interferes with the exercise by the national bank of its powers."[17]

The district court in *Hymes* determined that the New York statute's "degree of interference" with BofA's exercise of its powers was "minimal."[18] The district court found that NYGOL § 5-601 required BofA to pay a "modest" rate of interest, which would "cost the Bank money," but the statute allowed BofA to "administer mortgage escrow accounts" in a manner that was "relatively unimpaired and unhampered by the state law."[19] At the same time, the district court cautioned that a state law requiring national banks to pay "punitively high rates" on escrow accounts "could very well significantly interfere with national banks' power to administer escrow accounts."[20]

The district court agreed with the Ninth Circuit's decision in *Lusnak*, which upheld a similar California statute.[21] The Ninth Circuit held that California's minimum-interest-on-mortgage-escrow statute "does not prevent or significantly interfere" with a federally-authorized power of national banks, and "[m]inor interference with federal objectives is not enough" to satisfy *Barnett Bank*'s preemption standard codified in 12 U.S.C. § 25b(b)(1)(B).[22] Like the district court in *Hymes*, the Ninth Circuit warned in *Lusnak* that "a state law setting punitively high rates" could "prevent or significantly interfere with a bank's ability to engage in the business of banking," thereby resulting in preemption by the NBA.[23]

---

[17] *Id.* at 135 (quoting 12 U.S.C. § 25b(b)(1)(B)); *see also id.* at 130-31 (quoting *Barnett Bank*, 517 U.S. at 33).
[18] *Hymes*, 408 F. Supp. 3d at 195.
[19] *Id.* at 185-86, 195-96.
[20] *Id.* at 196 (internal quotation marks and citation omitted).
[21] *Id.* at 185 ("This Court finds *Lusnak* persuasive and reaches the same result.").
[22] *Lusnak*, 883 F.3d at 1191-95 (quotes at 1194).
[23] *Id.* at 1195 n.7.

The Second Circuit "reject[ed]" the "approach" of the district court in *Hymes*.[24] Citing several Supreme Court decisions dating back to *McCulloch v. Maryland*,[25] the Second Circuit held that the correct standard for determining preemption under the NBA is "not how much a state law impacts a national bank, but whether it purports to 'control' the exercise of its powers."[26] The Second Circuit declared that "state laws exercising control over national banks—even if their own practical effect may be minimal—are invalid if, when aggregated with similar laws of other states, they would threaten to undermine a federal banking power."[27] The Second Circuit further explained:

> To determine whether the NBA conflicts with a state law, we ask whether enforcement of the law at issue would exert control over a banking power—and thus, if taken to its extreme, threaten to "destroy" the grant made by the federal government. . . . We do not endeavor to assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power.[28]

In addition to BofA's preemption claim under the NBA, BofA argued that NYGOL § 5-601 was also preempted by 12 C.F.R. § 34.4, a regulation adopted by the Office of the Comptroller of the Currency (OCC) in 2004 and modified by the OCC in 2011. The Second Circuit "d[id] not reach that question," holding that "'the NBA itself—independent of [the] OCC's regulation—preempts the application' of GOL § 5-601 to national banks."[29] However,

---

[24] *Cantero*, 49 F.4th at 131.
[25] 17 U.S. (4 Wheat.) 316 (1819) [hereinafter *McCulloch*].
[26] *Cantero*, 49 F.4th at 131 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 431).
[27] *Id.* at 132.
[28] *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 431).
[29] *Id.* at 139 n.13 (quoting *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 n.13 (2007)); *see also id.* at 128 n.5 (stating that "we do not reach" BofA's claims "related to the preemptive effect of OCC regulations").

the Second Circuit stated that its "conclusion" concerning the NBA's preemption of Section 5-601 was "consistent" with the OCC's 2004 and 2011 preemption rules.[30]

The Second Circuit also disagreed with the reliance of the district court and the Ninth Circuit on Section 1639d of the Truth in Lending Act.[31] As amended by Dodd-Frank, Section 1639d(g)(3) provides that mortgage lenders must pay interest on mortgage escrow accounts if (i) their borrowers are required to establish such accounts pursuant to Section 1639d(b) and (ii) interest payments are "prescribed by applicable State or Federal law."[32] The district court and the Ninth Circuit concluded that Section 1639d reflected "Congress' view that creditors, including large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers."[33] In contrast, the Second Circuit determined that Section 1639d had "no relevance to this case" because the *Cantero* Plaintiffs and the *Hymes* Plaintiffs were not required to establish mortgage escrow accounts, and Section 1639d therefore did not govern their claims against BofA.[34]

2. The Second Circuit's decision in *Cantero* is contrary to the governing preemption standard established by the Supreme Court in *Barnett Bank* and codified by Congress in the Dodd-Frank Act.

---

[30] *Id.* at 135.
[31] *See Hymes*, 408 F. Supp. 3d at 186-90, 196-98 (discussing 15 U.S.C. § 1639d); *Lusnak*, 883 F.3d at 1194-96 (same).
[32] 15 U.S.C. § 1639d(b) (specifying when borrowers may be required to establish mortgage escrow accounts); *id.* §1639d(g)(3) ("If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any . . . escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law.").
[33] *Lusnak*, 883 F.3d at 1196; *see also id.* at 1194-95 (stating that Section 1639d(g)(3) "expresses Congress's view that [state laws requiring payment of interest on mortgage escrow accounts] would not necessarily prevent or significantly interfere with a national bank's operations"); *Hymes*, 408 F. Supp. 3d at 198 (stating that "Section 1639d(g)(3) represents Congress's judgment that mortgage lenders can comply with reasonable state escrow interest laws.").
[34] *Cantero*, 49 F.4th at 137.

a. The Second Circuit did not follow the "prevent or significantly interfere" standard established by the Supreme Court in Barnett Bank

In *Barnett Bank*, the Supreme Court held that a federal statute (12 U.S.C. § 92) preempted a Florida law that prohibited national banks from acting as insurance agents in small towns if those banks were subsidiaries of bank holding companies.[35] Applying conflict preemption principles, the Court held that the dispositive question was "whether or not the Federal and State Statutes are in 'irreconcilable conflict.'"[36] The Court noted that "the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids," a situation that would "ordinarily" result in preemption unless "the Federal Statute grants banks a permission that is limited to circumstances where state law is not to the contrary."[37] The Court concluded that Section 92 preempted Florida's law because there was no indication that Congress "expressly conditioned the grant of [federal] 'power' upon a grant of state permission."[38]

The Supreme Court explained in *Barnett Bank* that the NBA's "history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state laws."[39] The Court held that Florida's law was preempted because Section 92 "does not condition federal permission [for the exercise of insurance agency powers] upon that of the State."[40]

---

[35] *Barnett Bank*, 517 U.S. at 27-29. Under 12 U.S.C. § 92, national banks that are "located and doing business" in towns of 5,000 or less may act as insurance agents for insurance companies that are licensed by the relevant state authorities. In December 1995 (shortly before *Barnett Bank* was decided), almost 77% of U.S. banks were subsidiaries of bank holding companies. *Bank Holding Companies* (Bd. of Governors of the Fed. Res. Sys.), https://www.fedpartnership.gov/bank-life-cycle/manage-transition/bank-holding-companies.
[36] *Barnett Bank*, 517 U.S. at 31.
[37] *Id.* at 31-32.
[38] *Id.* at 34.
[39] *Id.* at 32.
[40] *Id.* at 35.

Thus, the Supreme Court's finding of preemption in *Barnett Bank* was based on the Court's determination that Florida's statute was "contrary" to federal law because Florida attempted to "condition[] the grant of 'power' [by Section 92] upon a grant of state permission."[41] Florida's statute sought to prevent the exercise of a federally-granted power by national banks if they were subsidiaries of bank holding companies. Because "nearly all U.S. banking assets are controlled by bank holding companies,"[42] the "condition" imposed by Florida amounted to a near-total prohibition on the exercise of a federally-granted power by national banks.

The Supreme Court made clear in *Barnett Bank* that the NBA does *not* preempt state laws that regulate the exercise of powers by national banks in a more limited and reasonable manner. The Court explained:

> [N]ormally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive the 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.[43]

The Supreme Court established two crucial points in the foregoing passage. First, the Court affirmed that the states have *some* authority "to regulate national banks" in the "exercise" of their "powers." That statement directly contradicts the Second Circuit's view that the NBA preempts *every* state law that seeks to "exert control over a banking power" granted to national

[41] *Id.* at 32, 34.
[42] Dafna Avraham, Patricia Selvaggi & James Vickery, "A Structural View of U.S. Bank Holding Companies," *Economic Policy Review* (Fed. Res. Bank of NY), July 2012, at 65 (quote), 66 (Chart 1), https://www.newyorkfed.org/medialibrary/media/research/epr/12v18n2/1207avra.pdf.
[43] *Barnett Bank*, 517 U.S. at 33.

banks under federal law.[44] Second, the Supreme Court used the same standard twice – "to forbid, or to impair significantly" and "prevent or significantly interfere" – to describe the magnitude of state interference that results in preemption under the NBA. Accordingly, *Barnett Bank* makes clear that state laws regulating national banks are preempted only if they completely block or "significantly" infringe upon the exercise by national banks of one or more of their federally-granted powers.

In *Barnett Bank*,[45] the Supreme Court cited three of its previous decisions under the NBA as supporting precedents for its "prevent or significantly interfere" preemption standard—*National Bank v. Commonwealth*,[46] *McClellan v. Chipman*,[47] and *Anderson National Bank v. Luckett*.[48] One year after its decision in *Barnett Bank*, the Supreme Court again affirmed the applicability of state laws to national banks in *Atherton v. FDIC*.[49] Justice Breyer, who authored the Court's unanimous opinion in *Barnett Bank*, also wrote the majority opinion in *Atherton*. In *Atherton*, all members of the Court agreed with Justice Breyer's statements that (i) "in 1870 and thereafter this Court held that federally chartered banks are subject to state law," and (ii) "[t]he Court subsequently found numerous state laws applicable to federally chartered banks."[50] To support those statements, *Atherton* cited several Supreme Court precedents, including *Commonwealth* and *Anderson National Bank* as well as *First National Bank in St. Louis v. Missouri*.[51]

---

[44] *Cantero*, 49 F.4th at 125, 132.
[45] *Barnett Bank*, 517 U.S. at 33-34.
[46] 76 U.S. (9 Wall.) 353 (1870) [hereinafter *Commonwealth*].
[47] 164 U.S. 347 (1896) [hereinafter *McClellan*].
[48] 321 U.S. 233 (1944) [hereinafter *Anderson National Bank*].
[49] 519 U.S. 213 (1997) [hereinafter *Atherton*].
[50] *Id.* at 222, 223 (majority opinion). The three concurring Justices in *Atherton* agreed with Justice Breyer's statements about the applicability of state laws to federally-chartered banks. *See id.* at 231-32 (O'Connor, J., concurring in part and concurring in the judgment) ("I join all of the Court's opinion, except to the extent that it relies on the notably unhelpful legislative history of 12 U.S.C. § 1821(k).").
[51] 263 U.S. 640 (1924) [hereinafter *St. Louis*].

In 2007, the Supreme Court reiterated *Barnett Bank*'s "prevent or significantly interfere" preemption standard in *Watters v. Wachovia Bank, N.A.*,[52] where the Court said:

> States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.[53]

Cuomo v. Clearing House Ass'n, L.L.C.[54] is the Supreme Court's most recent decision addressing the topic of preemption under the NBA, but *Cantero* failed to mention that decision or consider its relevance. In *Cuomo*, the Court declared that "States . . . have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years, as evidenced by *St. Louis*, in which we upheld enforcement of a state anti-bank branching law," as well as *Anderson National Bank*.[55] *Cuomo* struck down an OCC rule that barred state officials from filing lawsuits to enforce valid state laws against national banks. The Court held that the OCC's rule improperly sought to "exempt national banks from all state banking laws, or at least state enforcement of those laws."[56]

The Court pointed out in *Cuomo* that the "almost categorical prohibition" on state law enforcement in the OCC's rule potentially applied to the exercise by national banks of their "power" to make contracts under the NBA.[57] As the Court explained, that outcome would be contrary to *St. Louis*, *Anderson National Bank*, and other judicial decisions that "honor[ed] . . .

---

[52] 550 U.S. 1 (2007) [hereinafter *Watters*].
[53] *Watters*, 550 U.S. at 12 (citing *Barnett Bank*, 517 U.S. at 32-34).
[54] 557 U.S. 519 (2009) [hereinafter *Cuomo*].
[55] *Id.* at 534 (citing and discussing *St. Louis* and *Anderson National Bank*].
[56] *Id.* at 524-35 (quote at 533) (invalidating a portion of 12 C.F.R. § 7.4000(a)).
[57] *Id.* at 532-33 (citing 12 U.S.C. § 24 (Third)).

Congress's decision not to pre-empt substantive state law."[58] Congress codified *Cuomo*'s holding in Section 1047(a) of Dodd-Frank, which provides that a state attorney general may "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."[59]

The Second Circuit's decision in *Cantero* directly conflicts with the "prevent or significantly interfere" preemption standard established by the Supreme Court in *Barnett Bank* as well as the Court's subsequent decisions in *Atherton* and *Cuomo*. The Second Circuit disregarded the plain meaning of *Barnett Bank*'s preemption standard, holding that the dispositive question for preemption is "not how much a state law impacts a national bank, but whether it purports to 'control' the exercise of its powers."[60] The Second Circuit also said:

> To determine whether the NBA conflicts with a state law, we ask whether enforcement of the law at issue would exert control over a banking power—and thus, if taken to the extreme, threaten to 'destroy' the grant made by the federal government. . . . *We do not endeavor to assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power.*[61]

The Second Circuit concluded that (i) preemption under the NBA is *always* justified if a state law is "usurping control over federally granted powers to a federally created entity," and (ii) it is therefore *not* necessary to show that the state's "regulation is intrusive in degree or that it practically abrogates the [national bank's] power."[62]

---

[58] *Id.* at 527-30, 534-35 (quote at 530).
[59] Dodd-Frank, § 1047(a), 124 Stat. 2018 (codified at 12 U.S.C. § 25b(i)(1)); *see* Arthur E. Wilmarth, Jr., "The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services," 36 *Journal of Corporation Law* 893, 941-42 (2011) (explaining that Section 1047(a) of Dodd-Frank "expressly endorses the Supreme Court's decision in *Cuomo*") [hereinafter Wilmarth, "Dodd-Frank"], available at https://ssrn.com/abstract=1891970; Senate Report No. 111-176, at 176-77 (2010) (same).
[60] *Cantero*, 49 F.4th at 131 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 431).
[61] *Id.* at 132 (emphasis added) (citing and quoting *McCulloch*, 17 U.S. (4 Wheat.) 431).
[62] *Id.* at 137.

By refusing to consider "whether the degree of the state law's impact on national banks would be sufficient to undermine [a national bank's] power," or whether the state law is "intrusive in degree or . . . practically abrogates" a national bank's power, the Second Circuit failed to follow the plain meaning of *Barnett Bank*'s "prevent or significantly interfere" preemption standard. The Second Circuit acknowledged that dictionary definitions of the term "significantly" include "[f]airly large in amount or quantity" or "important" or "meaningful."[63] In decisions interpreting federal securities statutes, the Supreme Court held that the terms "material" and "significant" are synonyms, and a "material" fact is one that a reasonable investor would be likely to view as "important."[64]

The Supreme Court also equated the terms "significant" and "important" in a 1989 decision interpreting the National Environmental Policy Act (NEPA). NEPA requires federal agencies to file environmental impact statements when they issue proposals that have "significant" environmental consequences. The Supreme Court explained that "NEPA ensures that *important* [environmental] effects will not be overlooked or underestimated only to be discovered later after resources have been committed or the die otherwise cast."[65]

---

[63] *Id.* at 136-37; *see also* the definitions of "significant"—which include "having or likely to have influence or effect: IMPORTANT" and "of a noticeably or measurably large amount"—in *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/significant (accessed Nov. 12, 2022).

[64] In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the Court adopted, under Section 10(b) of the Securities Exchange Act of 1934 (1934 Act), a "materiality" standard that requires a plaintiff shareholder to show "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having *significantly* altered the 'total mix' of information made available." *Id.* at 231–32 (1988) (emphasis added) (quoting *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976) (establishing the same standard for "materiality" under Section 14(a) of the 1934 Act)). *Basic* also held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it *important* in deciding how to vote." *Id.* at 231 (emphasis added) (quoting *TSC*, 426 U.S. at 449); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991) (holding that "liability under [Section] 14(a) [of the 1934 Act] must rest not only on deceptiveness but on materiality as well (*i.e.*, it has to be *significant* enough to be *important* to a reasonable investor deciding how to vote") (emphasis added).

[65] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (emphasis added); *see also id.* at 348 (quoting NEPA's requirement that federal agencies must prepare environmental impact statements with respect to "major" proposals "*significantly* affecting the quality of the human environment") (emphasis added).

The Second Circuit's decision in *Cantero* cannot be harmonized with the Supreme Court's interpretations of the terms "significant" and "significantly" or with standard dictionary definitions of those terms. The Second Circuit clearly erred when it refused to consider the magnitude and importance of the alleged "interference" created by NYGOL § 5-601 before it concluded that preemption was justified under *Barnett Bank*'s "prevent or significantly interfere" standard. The Second Circuit disregarded the fact-intensive analysis required by *Barnett Bank* and instead adopted a blunt *per se* rule that *always* results in preemption under the NBA whenever a state law seeks to exert *any* degree of "control" over the exercise of a national bank power.[66] The Second Circuit's *per se* rule is untenable and should be rejected by the Supreme Court because that rule conflicts with the plain meaning of *Barnett Bank*'s governing preemption standard.

b. The Second Circuit's* per se *preemption rule is contradicted by four Supreme Court precedents that provided the foundation for* Barnett Bank*'s preemption standard.

As shown above, the Supreme Court's decisions in *Barnett Bank*, *Atherton*, and *Cuomo* relied on four key precedents—*Commonwealth*, *McClellan*, *St. Louis*, and *Anderson National Bank*—in developing the modern law of preemption under the NBA.[67] Those four decisions upheld the application of state laws to the exercise of national bank powers because the state laws in question (i) did not discriminate against national banks, (ii) did not conflict with the express terms of the NBA or other federal statutes, and (iii) did not impose significant burdens on national banks or impair their ability to discharge their duties to the federal government. All

[66] *See Cantero*. 49 F.4th at 125 (stating that NYGOL § 5-601's "minimum-interest requirement would exert control over a banking power granted by the federal government, *so it would impermissibly interfere with national banks' exercise of that power*. We thus hold that the law is preempted by the [NBA].") (emphasis added); *see also supra* notes 14-15, 24-28 and accompanying text (discussing the Second Circuit's view of preemption under the NBA).
[67] *See supra* notes 45-51, 54-58 and accompanying text.

four decisions refute the Second Circuit's view that state laws are *always* preempted if they attempt to exert *any* degree of "control" over the exercise of national bank powers.

In *Commonwealth*—decided six years after the NBA's enactment—the Supreme Court upheld a Kentucky law that required national and state banks to pay, on behalf of their shareholders, the state's tax on bank shares. The Supreme Court noted that "[i]t has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders."[68] The Court also pointed out that Kentucky "could undoubtedly collect [its bank shares tax] by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control."[69] Accordingly, Kentucky's law created "no greater interference with the functions of the [national] bank than any other legal proceeding to which its business operations may subject it."[70]

A national bank challenged the Kentucky statute. The bank argued, based on *McCulloch*, that national banks, "being instrumentalities of the federal government, by which some of its most important operations are conducted, cannot be submitted to such State legislation."[71] As discussed below, prior to the creation of the Federal Reserve System in 1913, national banks performed important public functions for the federal government.[72] The Supreme Court determined in *Commonwealth* that the Kentucky statute "in no manner hinders [the national bank] from performing all the duties of financial agent of the [federal] government."[73]

Commonwealth also distinguished *McCulloch*, explaining that the "principle" established in *McCulloch*

[68] *Commonwealth,* 76 U.S. (9 Wall.) at 361.
[69] *Id.* at 362.
[70] *Id.* at 362-63.
[71] *Id.* at 361 (summarizing the national bank's argument).
[72] *See infra* notes 183-86 and accompanying text.
[73] *Commonwealth,* 76 U.S. (9 Wall.) at 363.

> has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the [federal] government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the [federal] government are to be wholly withdrawn from the operation of State legislation. . . . *[T]he agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve the government.*[74]

In *Atherton*, the Supreme Court reiterated the distinction it drew in *Commonwealth*, stating that *Commonwealth* "distinguished *McCulloch* by recalling that Maryland's taxes were 'used . . . to destroy'" the Second Bank of the United States.[75]

Commonwealth further explained that the "principle" of *McCulloch* was "founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers."[76] *Commonwealth* rejected any broader rule for national banks that would "convert" *McCulloch*'s principle "into an unauthorized and unjustifiable invasion of the rights of the States."[77] The Supreme Court therefore held in *Commonwealth* 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. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts,

[74] *Id.* at 361-62 (emphasis added).
[75] *Atherton*, 519 U.S. at 222.
[76] *Commonwealth*, 76 U.S. (9 Wall.) at 362.
[77] *Id*. *See also infra* notes 145-86 and accompanying text (explaining why *McCulloch*'s sweeping doctrine of preemption with respect to the Second Bank of the United States does not apply to present-day national banks).

> are all based on State law. *It is only when the State law incapacitates the banks from discharging their duties to the [federal] government that it becomes unconstitutional.*[78]

Commonwealth thus made clear that "federally chartered banks are subject to state law," as the Supreme Court affirmed in *Atherton*.[79] The original NBA (like the current statute) expressly empowered national banks to make contracts, to sue and be sued, and to acquire, own, and transfer real property.[80] The foregoing passage from *Commonwealth* (which *Atherton* quoted in full) clearly establishes—contrary to the Second Circuit's view—that the NBA allows states to regulate the exercise of "powers" granted to national banks by federal law.

In *McClellan*, the Supreme Court upheld the application to national banks of a Massachusetts statute that prohibited creditors from receiving preferential transfers of assets from insolvent debtors. A national bank challenged the Massachusetts law, contending that it would "tend to impair" the express powers of national banks to make contracts and to accept transfers of real property either as security for debts previously contracted or in satisfaction of those debts.[81] The Supreme Court observed that the national bank's argument "amounts to the assertion that national banks in virtue of the act of Congress are entirely removed, as to all of their contracts, from any and every control by the state law."[82] The Court rejected that argument and held that the powers of national banks to make contracts and accept transfers of real estate were subject to the limitations imposed by the Massachusetts statute.[83]

---

[78] *Commonwealth*, 76 U.S. (9 Wall.) at 362 (emphasis added); *see also Atherton*, 519 U.S. at 222-23 (quoting in full the same passage from *Commonwealth*).
[79] *Atherton*, 519 U.S. at 222.
[80] *See* Act of June 3, 1864, ch. 106, §§ 8 & 28, 13 Stat. 99, 101-02, 107-08 (codified as amended at 12 U.S.C. §§ 24 (Third) and (Fourth) & 12 U.S.C. § 29).
[81] *McClellan*, 164 U.S. at 350-56 (argument of counsel for plaintiffs in error) (citing Rev. Stat. §§ 5136 & 5137 (codified as amended at 12 U.S.C. §§ 24 (Third) & 29).
[82] *Id.* at 358-59.
[83] *Id*. at 358-61.

After reviewing its prior decisions in *Commonwealth* and *Davis v. Elmira Savings Bank*,[84] the Supreme Court explained in *McClellan* that those decisions established

> a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed on them by the law of the United States.[85]

Based on the foregoing "rule," *McClellan* rejected the national bank's claim that "in every case where a national bank is empowered to make a contract, such contract is not subject to the state law."[86] The Supreme Court determined that there was "no conflict between the special power conferred by Congress upon national banks to take real estate for certain purposes, and the general and undiscriminating law of the State of Massachusetts subjecting the taking of real estate to certain restrictions, in order to prevent preferences in case of insolvency."[87] The Court also concluded that "[n]o function of [national] banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the State are subjected."[88]

In *St. Louis*, the Supreme Court upheld the validity of a Missouri statute that prohibited state and national banks from opening branches in the state. A national bank challenged the statute, claiming that "[a] state statute attempting to limit or define the powers of a national bank

---

[84] 161 U.S. 275 (1896) [hereinafter *Davis*].
[85] *McClellan*, 164 U.S. at 356-57.
[86] *Id.* at 358.
[87] *Id.* at 361.
[88] *Id.* at 358.

is invalid."[89] The Supreme Court rejected that claim based on the "rule" it established in *McClellan*, holding that "national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."[90] The Court determined that Missouri's anti-branching statute did not conflict with the NBA (as the NBA did not authorize national banks to establish branches in 1924), and it also did not "frustrate the purpose for which the [national] bank was created or interfere with the discharge of its duties to the [federal] government or impair its efficiency as a federal agency."[91]

In *Anderson National Bank*, the Supreme Court upheld the validity of a Kentucky statute that required banks to transfer to state authorities deposit accounts that were inactive for ten years (for demand deposits) or twenty-five years (for other types of deposits). The Kentucky statute provided owners of transferred deposits with notice and an opportunity for hearing, and transferred deposits were not escheated (i.e., forfeited) to the state unless state authorities proved in judicial proceedings that those deposits had been abandoned. A national bank challenged the Kentucky statute, claiming that it violated the due process rights of the bank and its depositors and also "infringe[d] the national banking laws, particularly [Rev. Stat.] § 5136, 12 U.S.C. § 24, which authorize national banks to accept deposits and to do a banking business."[92]

The Supreme Court rejected the national bank's challenge, finding that the Kentucky statute "does not deprive [the bank] or its depositors of property without due process of law" and did not create any conflict with the NBA.[93] The Court found that Kentucky's statute "does not

[89] *St. Louis*, 263 U.S. at 642-43 (argument of counsel for the national bank).
[90] *Id.* at 656 (citing *Commonwealth* and *McClellan*).
[91] *Id.* at 657-59 (quote at 659).
[92] *Anderson National Bank*, 321 U.S. at 239-40 (summarizing arguments made by the national bank).
[93] *Id.* at 247-49 (quote at 247), 252-53.

discriminate against national banks," as it applied equally to national and state banks. The state law also did not conflict with either the express or implied terms of the NBA.[94]

Citing *St. Louis* and other decisions, *Anderson National Bank* declared, "This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the bank's functions."[95] Accordingly, "[t]he mere fact that the depositor's account is in a national bank does not render it immune to attachment by the creditors of the depositor, as authorized by state law." A bank deposit "is a part of the mass of property within the state whose transfer and devolution is subject to state control. . . . It has never been suggested that non-discriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks."[96]

The appellant national bank in *Anderson National Bank* invoked the Supreme Court's previous decision in *First National Bank of San Jose v. California.*[97] The appellant bank argued that "if the [Kentucky statute] is sustained, it will open the door to the exercise of unlimited state discretionary power over the deposits in national banks."[98] The appellant bank's argument closely resembled the Second Circuit's conclusion (based on *San Jose*) that "state laws exercising control over national banks—even if their own practical effect may be minimal—are invalid if, when aggregated with similar laws of other states, they would threaten to undermine a federal banking power."[99]

The Supreme Court rejected the appellant bank's parade-of-horribles argument in *Anderson National Bank*, stating that

---

[94] *Id.* at 247-49 (quote at 247).
[95] *Id.* at 248.
[96] *Id.* (citations omitted).
[97] 262 U.S. 366 (1923) [hereinafter *San Jose*].
[98] *Anderson National Bank*, 321 U.S. at 249 (summarizing the national bank's argument).
[99] *Cantero*, 49 F.4th at 132 (citing and discussing *San Jose*).

> [T]he state's power to [require transfers of dormant deposit accounts] cannot extend beyond its power under state law and the Federal Constitution to acquire control of deposit accounts from their owners. So long as it is thus limited, and the power is exercised only to demand payment of the accounts in the same way and to the same extent that the depositors could, we can perceive no danger of unlimited control by the state over the operations of national banking institutions.[100]

The Court also explained in *Anderson National Bank* that its previous decision in *San Jose* was based "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."[101] The California statute at issue in *San Jose* provided that all deposits that remained inactive for more than twenty years would be escheated to the state based on "mere dormancy," without notice or opportunity for hearing and without "proof that the forfeited accounts had been in fact abandoned."[102] The California statute's "unusual alteration of depositors' accounts" was tantamount to a threatened "'confiscation' of depositors' accounts," thereby creating "an effective deterrent to depositors' placing their funds in national banks doing business within the state."[103]

In contrast, the Kentucky law upheld in *Anderson National Bank* did not authorize "escheat or forfeiture for mere dormancy," as it required state officials to establish "proof of abandonment" in judicial proceedings after giving notice to affected banks and depositors. In

[100] *Anderson National Bank*, 321 U.S. at 249.
[101] *Id.* at 250.
[102] *Id.* at 250, 251.
[103] *Id.* at 251; *see also San Jose*, 262 U.S. at 370 (finding that California's statute sought "to qualify in an unusual way [deposit] agreements between national banks and their customers," and potential depositors therefore "might well hesitate to subject their funds to possible confiscation" by depositing them in national banks in California).

view of those procedural protections, the Supreme Court determined that Kentucky's statute would not "deter [depositors] from placing their funds in national banks" in Kentucky to any greater degree than "the tax laws, the attachment laws, or the laws for the administration of estates of decedents or of missing or unknown persons, which a state may maintain and apply to depositors in national banks."[104] The Court concluded that Kentucky's statute resulted in "no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks."[105]

Thus, *Commonwealth*, *McClellan*, *St. Louis*, and *Anderson National Bank* upheld state laws that imposed nondiscriminatory and reasonable regulations on the exercise of national bank powers, including the powers to make contracts, acquire real property, and accept deposits. All four decisions sustained the validity of state laws that did not prohibit or significantly burden the exercise of national bank powers. In each of those decisions, the Supreme Court performed a detailed, fact-intensive inquiry regarding the practical effects of the challenged state law, and *Anderson National Bank* rejected a parade-of-horribles argument similar to the preemption analysis adopted by the Second Circuit. Those four key precedents provided the foundation for modern preemption law under the NBA, including *Barnett Bank*'s "prevent or significantly interfere" preemption standard. The same precedents—together with *Barnett Bank*, *Atherton*, and *Cuomo*—refute the Second Circuit's assertion that its *per se* preemption rule is supported by "an unbroken line of [Supreme Court] case law since *McCulloch*."[106]

[104] *Anderson National Bank*, 321 U.S. at 251, 252.
[105] *Id.*
[106] *Cantero*, 49 F.4th at 131.

c. *The Second Circuit's* per se *preemption rule contravenes the "prevents or significantly interferes" preemption standard codified by Congress in the Dodd-Frank Act.*

In 2010, Congress passed the Dodd-Frank Act "in response to a 'financial crisis that nearly crippled the U.S. economy.'"[107] Congress determined that "a major cause of the most calamitous worldwide recession since the Great Depression was the simple failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending."[108] Congress concluded that "it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down."[109]

Congress also found that, after "federal regulators refused to act, the states stepped into the breach" by enacting laws designed to prevent "the devastating results of predatory mortgage lending." However, "rather than supporting [state] anti-predatory lending laws, federal regulators preempted them."[110] In particular, "[t]he OCC promulgated a rule in 2004 that . . . exempted all national banks from State lending laws, including the anti-predatory lending laws."[111] The OCC's 2004 rule asserted that state lending laws were preempted if they "obstruct, impair, or condition a national bank's ability to fully exercise" its federally-authorized lending

---

[107] *Lusnak*, 883 F.3d at 1189 (footnote omitted) (quoting Senate Report No. 111-176, at 2 (2010)).
[108] Senate Report No. 111-176, at 15 (2010) (quoting testimony by Travis Plunkett).
[109] *Id.* at 166; *see also id.* at 15-17 (describing "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable . . . mortgages") (quote at 15); Financial Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 75-80, 93-97, 101, 111-13, 126, 170-74, 187, 279, 302-08 (2011) (describing multiple failures by the OCC and other federal financial regulators to stop abusive, predatory, and reckless mortgage lending during the 1990s and 2000s) [hereinafter FCIC Report], available at https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf; Wilmarth, "Dodd-Frank," *supra* note 59, at 897-908 (same); Arthur E. Wilmarth, Jr., *Taming the Megabanks: Why We Need a New Glass-Steagall Act* 208-29, 242-45, 251-54 (2020) (same).
[110] Senate Report No. 111-176, at 16 (2010).
[111] *Id.*; *see* "Bank Activities and Operations; Real Estate Lending and Appraisals," 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004) (codified at 12 C.F.R. § 34.4) [hereinafter 2004 OCC Preemption Rule].

powers.[112] Congress determined that the OCC's preemption rule "actively created an environment where abusive mortgage lending could flourish without State controls."[113]

In Title X of Dodd-Frank, Congress "addressed the framework of NBA preemption determinations" and "aimed to undo broad preemption determinations, which it believed planted the seeds 'for long-term trouble in the national banking system.'"[114] Section 1044 of Dodd-Frank amended the NBA "to clarify the preemption standard relating to State consumer financial laws as applied to national banks."[115] Under Section 1044, "[t]he standard for preempting State consumer financial laws would return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996) (*Barnett*), undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004."[116]

Section 1044 of Dodd-Frank—codified at 12 U.S.C. § 25b(b)(1)—provides that "State consumer financial laws are preempted, only if" one of the following three circumstances is present: (A) "application of a State consumer financial law would have a discriminatory effect on

---

[112] 2004 OCC Preemption Rule, *supra* note 111, at 1912, 1917.

[113] Senate Report No. 111-176, at 17 (2010); *see also* FCIC Report, *supra* note 109, at 13, 96-97, 111-13, 126 (describing and criticizing the OCC's preemption of state anti-predatory lending laws); Wilmarth, "Dodd-Frank," *supra* note 59, at 909-19 (same); 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 *Annual Review of Banking & Financial Law* 225, 227-37, 298-99 (2004) (criticizing the OCC's 2004 preemption rules, including the OCC's preemption of state real estate lending laws under 12 C.F.R. § 34.4) [hereinafter Wilmarth, "OCC's 2004 Preemption Rules"), available at https://ssrn.com/abstract=577863.

[114] *Lusnak*, 883 F.3d at 1189 (quoting Senate Report No. 111-176, at 17 (2010) (quoting testimony of Martin Eakes)).

[115] Senate Report No. 111-176, at 175 (2010).

[116] *Id*.; *see also* House Conference Report No. 111-517, at 875 (2010) (explaining that Title X of Dodd-Frank "codifies the standard in the 1996 Supreme Court case *Barnett Bank of Marion County, N.A. v. Nelson* to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national banks' exercise of their powers"), reprinted in 2010 U.S. Code Cong. & Admin. News 722, 731. In *Lusnak*, the Ninth Circuit determined that the OCC's 2004 preemption rule "reads more broadly than *Barnett Bank*'s 'prevent or significantly interfere' standard in two respects. First, the OCC omitted the intensifier 'significantly' and used the terms 'impair' and 'condition' rather than 'interfere.' Second, it insisted that [national] banks be able to 'fully' exercise their NBA powers." *Lusnak*, 883 F.3d at 1192 n.4; *see also* Wilmarth, "OCC's 2004 Preemption Rules," *supra* note 113, at 247-48 (pointing out that the "obstruct, impair, or condition" preemption standard adopted by the OCC in 2004 "appears nowhere in *Barnett*" and would "obviously have a far greater impact in preempting state laws than the 'prevent or significantly interfere' rule that the Supreme Court actually adopted in *Barnett*").

national banks, in comparison with" that law's impact on state banks; or (B) "in accordance with the legal standard for preemption in the decision of the Supreme Court [in *Barnett Bank*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers;" or (C) "the State consumer financial law is preempted by a provision of Federal law other than [the NBA]."[117] Section 25b also imposes several substantive and procedural limitations on the OCC's authority to issue rules or orders determining that federal law preempts state consumer financial laws.[118]

In *Cantero,* the Second Circuit held that Section 25b(b)(1)(B) preempted the application of NYGOL § 5-601 to national banks. The Second Circuit did not rely on the preemption provisions contained in either Section 25b(b)(1)(A) or (C).[119] The Second Circuit recognized

---

[117] Dodd-Frank, § 1044, 124 Stat. 2015 (codified at 12 U.S.C. § 25b(b)(1)).

[118] *See Lusnak,* 883 F.3d at 1193-94 (explaining that, under 12 U.S.C. § 25b, "only *Skidmore* deference applies to preemption determinations made by the OCC," and Section 25b also requires that (i) "all of the OCC's future preemption determinations be made 'on a case-by-case basis, in accordance with applicable law,'" and (ii) "the OCC may not deem preempted a provision of a state consumer financial law 'unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with [*Barnett Bank*]'") (citing and quoting 12 U.S.C. §§ 25b(b)(5)(A), 25b(b)(1)(B) & 25b(c)); Wilmarth, "Dodd-Frank," *supra* note 59, at 931-34 (discussing the same limitations imposed by Section 25b on the OCC's authority to issue preemption determinations).

[119] *Cantero,* 49 F.4th at 135-37. "For the first time in its reply brief" on appeal, BoA argued that NYGOL § 5-601 was also preempted by 12 U.S.C. § 25b(b)(1)(C) because the federal statute granting mortgage lending powers to national banks (12 U.S.C. § 371) was enacted as part of the Federal Reserve Act (FRA) rather than the NBA. The Second Circuit held that BofA "forfeited" that argument by failing to raise it in a timely manner. *Id.* at 136 n.9. In addition, the Second Circuit specifically based its finding of preemption in *Cantero* on the "power" of national banks "to create and fund [mortgage] escrow accounts," which is an "incidental" power of national banks under the NBA, 12 U.S.C. § 24 (Seventh). *Cantero,* 49 F.4 at 126, 135 (quote). Accordingly, Section 25b(b)(1)(B) clearly governed BofA's preemption claim.

BofA's assertion that Section 25b(b)(1)(C) also applied to its preemption claim in *Cantero* is without merit because it conflicts with the plain meaning and manifest purpose of Section 25b(b)(1)(B). Section 25b(b)(1)(B) provides that *Barnett Bank*'s "prevents or significantly interferes" preemption standard applies to any state consumer financial law that affects "the exercise by the national bank of its powers." Section 25b(b)(1)(B) does not contain any language indicating that the "powers" referred to in that provision are confined to powers granted by the NBA. The plain meaning of Section 25b(b)(1)(B) signifies that *Barnett Bank*'s preemption standard governs *all* cases in which a state consumer financial law creates an alleged conflict with a federal statute granting a "power" to national banks. As discussed above, Congress was greatly concerned with the OCC's unwarranted preemption of state laws regulating mortgage lending when Congress codified *Barnett Bank*'s preemption standard in Section 25b(b)(1)(B). Congress must have expected that Section 25b(b)(1)(B) would apply to preemption claims related to the real estate lending activities of national banks authorized by 12 U.S.C. § 371. Otherwise, Congress would not have achieved its purpose of "undoing broader [preemption] standards adopted by rules, orders, and interpretations issued by the OCC in 2004," since the OCC's 2004 rules preempted state laws regulating real estate lending as well

that Section 25b(b)(1)(B) "expressly codifies" *Barnett Bank*'s "prevents or significantly interferes" preemption standard as the governing rule for determining whether the NBA preempts a nondiscriminatory state consumer financial law.[120] As the Ninth Circuit pointed out in *Lusnak*, Section 25b(b)(1)(B) provides that a state consumer financial law is preempted by the NBA "*only if* it 'prevents or significantly interferes with the exercise by the national bank of its powers.'"[121] Congress also emphasized that its codification of *Barnett Bank*'s "prevents or significantly interferes" preemption standard in Section 25b(b)(1)(B) was specifically intended to "undo[] broader standards adopted . . . by the OCC in 2004."[122]

In *Lusnak*, the Ninth Circuit criticized the OCC for refusing to adopt *Barnett Bank*'s "prevents or significantly interferes" preemption standard when the OCC issued its preemption

---

as other national bank activities. Senate Report No. 111-176, at 16-17, 175 (2010) (quote at 175); *see also supra* notes 108-17 and accompanying text.

Accordingly, *Barnett Bank*'s preemption standard codified in Section 25b(b)(1)(B) governs preemption claims based on alleged conflicts between state consumer financial laws and 12 U.S.C. § 371, a provision of the FRA that confers real estate lending powers on national banks. It is highly significant that *Barnett Bank* dealt with 12 U.S.C. § 92, a statute granting insurance agency powers to national banks that was enacted as an amendment to the FRA rather than the NBA. *See United States National Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455-63 (1993) (determining that Section 92 was enacted in 1916 as an amendment to Section 13 of the FRA). The Supreme Court did not distinguish between the NBA and the FRA when it adopted *Barnett Bank*'s preemption standard or when it decided *Franklin National Bank v. New York*, 347 U.S. 373 (1954). *Franklin* upheld a preemption claim based on provisions of the NBA and FRA that granted deposit-taking powers to national banks. *See Barnett Bank*, 517 U.S. at 32-35; *Franklin*, 347 U.S. at 375-79. In view of the plain meaning and purpose of Section 25b(b)(1)(B) and the Supreme Court's equivalent treatment of the NBA and the FRA in *Barnett Bank* and *Franklin*, the preemption standard codified in Section 25b(b)(1)(B) "should be applied in any case that involves an alleged conflict between a state consumer financial law and a federal law that grants any 'power' to a national bank, whether that federal law is codified in the NBA or another federal statute such as the [FRA]." Wilmarth, "Dodd-Frank," *supra* note 59, at 930. In contrast, the preemption standard in Section 25b(b)(1)(C) should be applied to a "[federal] law of general application—e.g., a federal criminal law, employment law or tax law—that does *not* grant a power to national banks" and is not codified in the NBA. *Id.*

[120] *Cantero*, 49 F.4th at 136 (stating that Section 25b(b)(1)(B) "expressly codifies 'the legal standard for preemption' in *Barnett Bank*"); *see also* House Conference Report No. 111-517, at 875 (2010) (explaining that Section 25b(b)(1)(B) "codifies the standard in [*Barnett Bank*] to allow for the preemption of State consumer financial laws that prevent or significant interfere with national banks' exercise of their powers"), reprinted in 2010 U.S. Code Cong. & Admin. News 722, 731.

[121] *Lusnak*, 883 F.3d at 1193 (emphasis in original).

[122] Senate Report No. 111-176, at 175 (2010); *see also supra* notes 110-18 and accompanying text (discussing Congress's reasons for codifying *Barnett Bank*'s preemption standard in Section 25b(b)(1)(B)).

rules in 2004 and modified those rules in 2011.[123] The OCC's refusal to include *Barnett Bank*'s "prevents or significantly interferes" standard in its 2011 preemption rules was particularly egregious in view of Congress's decision to codify that standard in Section 25b(b)(1)(B)) when it passed the Dodd-Frank Act in 2010.[124]

In striking contrast to the Ninth Circuit, the Second Circuit did not criticize the OCC and instead stated in *Cantero* that its "conclusion" about preemption was "consistent" with the OCC's 2004 and 2011 rules.[125] As shown above, the Second Circuit's view of preemption would preempt all state laws that "exert control over a banking power granted by the federal government," or that "target, curtail, and hinder" such a power.[126] The Second Circuit's *per se* preemption benchmark would have the same practical effect as the OCC's 2004 preemption rules, which sought to preempt all state laws that "obstruct, impair, or condition a national bank's ability to fully exercise" its federally-authorized powers.[127]

The Second Circuit's erroneous view of preemption—like the OCC's deeply flawed rules—directly conflicts with the "prevents or significant interferes" preemption standard

---

[123] *Lusnak*, 883 F.3d at 1192, 1192 n.4, 1193-94 (stating that the OCC's "preemption conclusions . . . are entitled to little, if any, deference" because the OCC's 2004 and 2011 rules "did not conform to *Barnett Bank*"); *see also* Wilmarth, "Dodd-Frank," *supra* note 59, at 936-37 (contending that the OCC's 2004 preemption rules were "plainly incompatible" with *Barnett Bank*'s "prevents or significantly interferes" standard, which Dodd-Frank codified in 12 U.S.C. § 25b(b)(1)(B)).

[124] *See* Arthur E. Wilmarth, Jr., "Policy Brief: The OCC's Repeated Failures to Comply with the Dodd-Frank Act and Other Legal Authorities Governing the Scope of Preemption for National Banks and Federal Savings Associations" (Geo. Wash. Univ. Law Sch. Legal Stud. Res. Paper No. 2021-51, Nov. 8, 2021), at 7, available at https://ssrn.com/abstract=3966510 (explaining that the OCC's 2011 preemption rules "do not include the 'prevent or significantly interfere' preemption standard established by *Barnett Bank*, despite Congress's express codification of that standard in Section 25b(b)(1)(B). In defiance of Congress's explicit mandate, the OCC asserted that 'the Dodd-Frank Act does not create a new stand-alone 'prevents or significantly interferes' preemption standard.'") (quoting "Office of Thrift Supervision Integration; Dodd-Frank Act Implementation," 76 Fed. Reg. 43549, 43555 (July 21, 2011)).

[125] *Cantero*, 49 F.4th at 135; *see also id.* (evidently agreeing with the OCC's view that *Barnett Bank* contains "different linguistic formations" about preemption).

[126] *Id.* at 125, 134; *see also supra* notes 14-15, 24-28, 60-66 and accompanying text (discussing the Second Circuit's sweeping view of preemption under the NBA).

[127] *See supra* notes 111-16 and accompanying text.

established by *Barnett Bank* and codified in Section 25b(b)(1)(B).[128] The unambiguous terms of Section 25b(b)(1)(B) permit "State consumer financial laws" to regulate the "exercise" of "powers" by national banks and provides that those state laws are preempted "only if" they violate *Barnett Bank*'s "prevents or significantly interferes" standard. Section 25b(a)(2) defines "State consumer financial law" to include any state law "that does not directly or indirectly discriminate against national banks and that directly and specifically relates to 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."[129]

The references in Section 25b(a)(2) to "financial transactions" that "may be authorized for national banks to engage in" clearly include deposits, loans, and other financial services that national banks provide to consumers under their federally-granted powers.[130] The Second Circuit's assertion that the NBA preempts all state laws that "exert control over a banking power granted by the federal government" contravenes the plain meaning of "State consumer financial law" as defined in Sections 25b(a)(2) as well as the "prevents or significantly interferes" preemption standard codified in Section 25b(b)(1)(B).

The Second Circuit's decision in *Cantero* also frustrates the manifest purpose of Congress when it codified *Barnett Bank*'s preemption standard in Section 25b(b)(1)(B). As shown above, Congress criticized and repudiated the OCC's expansive 2004 preemption rules—whose scope was similar to the Second Circuit's *per se* preemption benchmark—because (i) the OCC's rules had a "broader" preemptive impact on state consumer financial laws than *Barnett Bank*'s "prevent or significantly interfere" preemption standard, and (ii) the OCC's rules

[128] *See supra* notes 43-45, 61-66, 111-27 and accompanying text.
[129] Dodd-Frank, § 1044, 124 Stat. 2014-15 (codified at 12 U.S.C. § 25b(a)(2)).
[130] *See, e.g.*, 12 U.S.C. §§ 24 (Third), 24 (Seventh) & 371.

undermined efforts by many states to enact and enforce laws that would protect their residents from abusive and predatory mortgage lending by national banks.[131]

Notwithstanding the plain meaning and clear purpose of Section 25b(b)(1)(B), the Second Circuit declared that "Plaintiffs' focus on the words 'significantly interferes' in isolation is misguided because 'the language of an opinion is not always to be parsed as though we were reading [the] language of a statute.'"[132] The Second Circuit evidently believed that it could peruse the entire opinion in *Barnett Bank* as well as other Supreme Court opinions and use selected quotations from those opinions to support a *per se* preemption rule that is far broader than the "prevents or significantly interferes" preemption standard that Congress chose to codify in Section 25b(b)(1)(B).

The Second Circuit's refusal to apply the plain meaning of Section 25b(b)(1)(B) is indefensible in view of the Supreme Court's recent decision in *Brown v. Davenport*.[133] In *Brown*, the Supreme Court instructed federal courts that they must follow the clear mandate of a federal statute and may not evade Congress's command by relying on inconsistent language drawn from previous Supreme Court opinions.

Brown reversed a decision of the Sixth Circuit Court of Appeals, which granted a petition for habeas corpus filed by a convicted criminal defendant. The Sixth Circuit held that the defendant was entitled to habeas relief under the Supreme Court's decision in *Brecht v. Abramson*.[134] The Sixth Circuit also concluded that it did not need to determine whether the requested habeas relief complied with a federal statute, 28 U.S.C. § 2254(d), which was enacted

---

[131] *See supra* notes 110-17, 122 and accompanying text.
[132] *Cantero*, 49 F.4th at 136 (quoting *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). The quoted statement from *Brown v. Davenport* obviously does not support the Second Circuit's refusal to apply the plain meaning of a crucial term ("significantly interferes") *codified in a federal statute* (12 U.S.C. § 25b(b)(1)(B)).
[133] 142 S. Ct. 1510 (2022) [hereinafter *Brown*].
[134] 507 U.S. 619 (1993) [hereinafter *Brecht*].

after *Brecht*. The Supreme Court reversed the Sixth Circuit's decision, declaring that "[w]hen Congress supplies a constitutionally valid rule of decision, federal courts must follow it."[135] The Supreme Court further held that "a federal court cannot grant [habeas] relief without first applying both the test this Court outlined in *Brecht* and the one Congress prescribed in [Section 2254(d)]."[136]

The defendant in *Brown* attempted to evade the requirements of Section 2254(d) by relying on two Supreme Court decisions that interpreted *Brecht*: *Fry v. Pliler*[137] and *Davis v. Ayala*.[138] The defendant asserted that certain statements in those decisions allowed federal courts to "override a lawful congressional command—that no federal habeas relief should issue 'unless' [Section 2254(d)]'s applicable conditions are satisfied."[139] The Supreme Court firmly rejected that argument, holding that federal courts cannot ignore or avoid Section 2254(d)'s mandate "on the basis of a handful of sentences extracted from decisions that had no reason to pass on the argument [the defendant] presents today."[140] In a subsequent habeas case,[141] the Supreme Court reiterated that "we lack authority to amend [Section 2254's] clear text."[142]

Like the defendant's argument in *Brown*, the Second Circuit's decision in *Cantero* improperly relied on language "extracted" from various Supreme Court decisions to "override a lawful congressional command" contained in a federal statute.[143] As shown in the next section

---

[135] *Brown*, 142 S. Ct. at 1520.
[136] *Id.* at 1517.
[137] 551 U.S. 112 (2007).
[138] 576 U.S. 257 (2015).
[139] *Brown*, 142 S. Ct. at 1528.
[140] *Id.*
[141] *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).
[142] *Id.* at 1737; *see also id.* at 1736 (holding that Section 2254 "is a statute that we have no authority to amend").
[143] *Brown*, 142 S. Ct. at 1528; *see Cantero*, 49 F.4th at 131 (stating that "the Supreme Court has used various formulations to describe when states impermissibly regulate national banks," and concluding that the Supreme Court's previous decisions support the view 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") (citations omitted).

of this article, all of the Supreme Court opinions cited by the Second Circuit were issued before Congress passed the Dodd-Frank Act, and any inconsistent reasoning in those opinions has been superseded by the "prevents or significantly interferes" preemption standard that Congress codified in Section 25b(b)(1)(B). *Brown* makes clear that "federal courts must follow" the plain meaning of Congress's chosen preemption standard in Section 25b(b)(1)(B).[144]

3. *Cantero*'s erroneous *per se* preemption rule relies on judicial decisions that do not apply to present-day national banks and have been superseded by Congress's codification of *Barnett Bank*'s "prevents or significantly interferes" preemption standard.

The Supreme Court decisions cited by the Second Circuit do not support the *per se* preemption rule it adopted in *Cantero*. Most of those decisions were issued many years ago, involved very different historical circumstances, and dealt with federally-chartered institutions that were not comparable to today's national banks. Some of those decisions are distinguishable on their facts, and all of them were decided prior to Congress's enactment of Section 25b(b)(1)(B) in 2010. Thus, all of the decisions relied upon by the Second Circuit have been superseded by Congress's decision to codify *Barnett Bank*'s "prevents or significantly interferes" preemption standard in Section 25b(b)(1)(B).

***a.* McCulloch *and* Osborn**

The Second Circuit relied heavily on *McCulloch* to support its conclusion that the NBA preempted NYGOL § 5-601. Citing *McCulloch*, the Second Circuit held that the New York statute could not be applied to national banks because it "would exert control over a

[144] *Brown*, 142 S. Ct. at 1520.

banking power granted by the federal government."[145] The Second Circuit also cited *Osborn v. Bank of the United States*[146] for the proposition that the NBA "exempts the trade of the [banks] . . . from the control of the States."[147] A careful analysis of the historical background of *McCulloch* and *Osborn* and the Supreme Court's reasoning in those cases demonstrates that neither decision applies to modern national banks.

McCulloch and *Osborn* struck down Maryland and Ohio laws that imposed taxes on the Second Bank of the United States. The Second Bank was a government-sponsored enterprise that performed functions of great importance to the federal government. The federal government owned a fifth of the Second Bank's stock and appointed a fifth of the Second Bank's directors. The Second Bank served as the depositary and fiscal agent of the federal government. In addition, the Second Bank (i) created a national currency by issuing its own bank notes, which had the status of legal tender under federal law and accounted for about a quarter of all notes issued by U.S. banks, and (ii) controlled the volume of the nation's outstanding paper currency by deciding whether to require state banks to redeem their notes in specie. Nicholas Biddle, who served as the Second Bank's president from 1823 until the Bank's demise in 1836, adopted

---

[145] *Cantero*, 49 F.4th at 125 (citing *McCulloch*); *see also id.* at 131 (citing *McCulloch* for the proposition 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"); *id.* at 134-35 (citing *McCulloch* to support the view that "[t]he power to set minimum rates [in NYGOL § 5-601] is the 'power to control,' and the power to control is the 'power to destroy.'").

[146] 22 U.S. (9 Wheat.) 738 (1824) [hereinafter *Osborn*].

[147] *Cantero*, 49 F.4th at 132 (quoting, with significant modifications, *Osborn*, 22 U.S. (9 Wheat.) at 866). The full text of the passage from *Osborn* quoted by the Second Circuit reads as follows: "[T]the sound construction of the act [chartering the Second Bank of the United States is] that it exempts the trade of the Bank, *as being essential to the character of a machine necessary to the fiscal operations of the government*, from the control of the States." *Osborn*, 22 U.S. (9 Wheat.) at 866 (emphasis added). The Second Circuit omitted the clause shown in italics from its truncated quotation. As the omitted clause clearly indicates, the Supreme Court based its decision in *Osborn* on its finding of an "essential" connection between the Second Bank's private banking "trade" and the Second Bank's public functions as "a machine necessary to the fiscal operations of the [federal] government." For further discussion of the Supreme Court's emphasis in *Osborn* on the "essential" connection between the Second Bank's private activities and public functions, see *infra* notes 161-71 and accompanying text. The "essential" connection that existed between the Second Bank's private and public operations does not exist in present-day national banks because they do not perform any important public functions for the federal government. *See infra* notes 166-75, 183-89, 193 and accompanying text.

policies that made the Second Bank "a central bank with effective power over the nation's money market."[148]

Chief Justice John Marshall issued the Court's unanimous opinion in *McCulloch*. Marshall described the Second Bank as "a convenient, a useful, and essential instrument [of the federal government] in the prosecution of its fiscal operations."[149] Marshall declared that the Constitution prohibited Maryland from taxing the Second Bank because the Bank was an "instrument, employed by the [federal] government in the execution of its powers."[150] As Marshall explained, if the states could tax the Second Bank, "they may tax any and every other instrument" of the federal government, including the mint, the post office, customs houses, and federal courts, thereby "defeat[ing] all the ends of government."[151] Thus, Marshall based the Court's opinion in *McCulloch* on the Second Bank's status as an "essential instrument" of the federal government in conducting its fiscal operations and implementing its financial policies.

McCulloch provided the foundation for the intergovernmental immunity doctrine, which prohibits the states from "interfering with or controlling the operations of the Federal Government."[152] That doctrine, as currently applied by the Supreme Court, invalidates "state laws that *either* 'regulat[e] the United States directly or discriminat[e] against the Federal Government or those with whom it deals' (e.g., contractors)."[153] The intergovernmental immunity doctrine clearly does not apply to NYGOL § 5-601 because that statute does not

---

[148] Paul Studenski & Herman E. Krooss, *Financial History of the United States* 83–88, 103–07 (2d ed. 1963) (quote at 87); *see also* Richard E. Ellis, *Aggressive Nationalism:* McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* 41-47 (2007); Herman E. Krooss & Martin R. Blyn, *A History of Financial Intermediaries* 44–45, 52–54 (1971); *First Agricultural National Bank v. State Tax Comm'n*, 392 U.S. 339, 355 (1968) (Marshall, J., dissenting) [hereinafter *First Agricultural National Bank*].
[149] *McCulloch*, 17 U.S. (4 Wheat.) at 422; *see also id.* at 423 (recognizing the "importance of this instrument, as a means to effect the legitimate objects of the government").
[150] *Id.* at 431-32.
[151] *Id.* at 432.
[152] *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (citing *McCulloch*).
[153] *Id.* (quoting *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion)).

regulate the United States or discriminate against the federal government or its contractors. The New York statute applies equally to all mortgage lenders that are "located" in New York, and BofA was acting solely in its private capacity—not as a federal contractor—when BofA established and administered mortgage escrow accounts for the *Cantero* Plaintiffs and *Hymes* Plaintiffs.

Chief Justice Marshall's opinion in *McCulloch* was highly controversial and provoked a "barrage of criticism."[154] The strongest opposition to *McCulloch* occurred in Ohio. Ohio's state legislature imposed a punitive tax on the Second Bank's branches in the state. Ralph Osborn, the state's auditor, ordered state officials to collect that tax by seizing assets from the Second Bank's branches. The Second Bank sued those officials and obtained an injunction from the federal circuit court in Ohio. The *Osborn* case proceeded to the Supreme Court, where Marshall and his colleagues again considered the question of whether the Second Bank was exempt from state taxation as an "instrument" of the federal government.[155]

Charles Hammond, representing the Ohio officials, focused much of his argument in *Osborn* on the Second Bank's predominant ownership by private individuals and the Second Bank's private lending and other commercial banking activities that benefited its private shareholders. Chief Justice Marshall did not address those features of the Second Bank in his opinion in *McCulloch*.[156] Hammond maintained that the Second Bank was primarily a "private

---

[154] Ellis, *supra* note 148, at 107. Marshall's conclusions and reasoning in *McCulloch* were publicly challenged by numerous commentators and political figures and by several state legislatures. Marshall wrote two series of newspapers essays (published under pseudonyms) to defend his opinion in *McCulloch* against vigorous attacks by two leading Virginia state court judges, William Brockenbrough and Spencer Roane. *Id.* at 107-43, 156-67, 185-88, 193-202.

[155] *Id.* at 6-8, 143-69.

[156] *Id.* at 4-5, 74-75, 86-88 (stating that Marshall's opinion in *McCulloch* "ignored" the Second Bank's "essentially privately controlled and profit-making characteristics" despite references to those features in the argument presented by Walter Jones, counsel for Maryland); *id.* at 170-74 (discussing Hammond's argument in *Osborn*); *see also McCulloch*, 17 U.S. (4 Wheat.) at 364-65 (quoting Jones' argument that the Second Bank was "a commercial

concern" and could not be classified as an "agency" or "public office" or "instrument" of the federal government.[157] Hammond contended that Marshall was mistaken in *McCulloch* when he compared the Second Bank to the mint and the post office. Unlike the Second Bank, each of those entities was a "public institution" that was owned entirely by the federal government and "created purely for public purposes."[158]

Hammond acknowledged that the Second Bank would be a "public corporation" if it were "created by the [federal] government for its own uses" and if its stock were "exclusively owned" by the federal government. Hammond argued, however, that the Second Bank was not a "public corporation" or an "instrument of the government" because (i) the great majority of the Bank's stock was owned by private individuals, (ii) "private trade" was "the principal, if not the sole object" of the Bank, and (iii) the Bank's "public business" was "subordinate and incidental, and . . . in reality, a very essential means of promoting [the Bank's] private gain."[159] The fact that Congress issued a federal charter to the Second Bank was not enough to transform the Second Bank into a "public corporation" or an "instrument" of the United States that was exempt from state taxation.[160]

In his majority opinion for the Supreme Court in *Osborn,* Chief Justice Marshall responded directly to Hammond's arguments. Marshall admitted that the Second Bank "would

---

institution, a partnership, incorporated for the purpose of carrying on the trade of banking," and constituted a "great banking corporation, branching out into every district of the country").

[157] Ellis, *supra* note 148, at 170-74 (summarizing and quoting Hammond's argument); *see also Osborn,* 22 U.S. (9 Wheat.) at 765-67, 774-77, 785-86 (quoting Hammond's argument).

[158] *Osborn*, 22 U.S. (9 Wheat.) at 774-75, 784-89 (quoting Hammond's argument); *see also* Ellis, *supra* note 148, at 170-74 (summarizing and quoting Hammond's argument).

[159] *Osborn*, 22 U.S. (9 Wheat.) at 765-70, 774-75, 778-80, 784-85, 788 (quoting Hammond's argument); *see also id.* at 790 (quoting Hammond's claim that "the persons who compose [the Second Bank] are not public officers; that the business it pursues is not a public business, and that its agency for the government is that of a private individual: from none of which it can derive any exemption not common to private corporations").

[160] *Id.* at 767-84, 790-95 (quoting Hammond's argument); *see also* Ellis, *supra* note 148, at 173-74 (summarizing and quoting Hammond's argument).

certainly be subject to the taxing power of the State" if the Bank were a "mere private corporation, engaged in its own business," and "having private trade and private profit for its great end and principal object."[161] Marshall also conceded that the Second Bank's federal charter was not sufficient by itself to "exempt[] its operations from the action of State authority."[162] Marshall's concessions did not matter because he concluded that "[t]he Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes."[163] He declared that the Second Bank was exempt from state taxation as "the great instrument by which the fiscal operations of the government are effected."[164]

Thus, Marshall's opinion in *Osborn* drew a sharp distinction between (i) the public functions conducted by the Second Bank on behalf of the federal government and (ii) "the mere business of banking [that] is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government."[165] Marshall acknowledged that the Second Bank was "transacting private as well as public business" by "lending and dealing in money."[166] However, Marshall maintained that the private activities of the Second Bank were "inseparably connected" to its "public functions" because the Bank's

[161] *Osborn*, 22 U.S. (9 Wheat.) at 859.
[162] *Id.* at 862.
[163] *Id.* at 860.
[164] *Id.*; *see also id.* at 861 (describing the Second Bank as "an instrument which is 'necessary and proper' for carrying on the fiscal operations of government"); *id.* at 866 (declaring that the federal statute chartering the Second Bank "exempts the trade of the Bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States").
[165] *Id.* at 860; *see also* Wilmarth, "OCC's 2004 Preemption Rules," *supra* note 113, at 240-41 (explaining that Marshall "sharply distinguished the public functions of the Second Bank from 'the mere business of banking [that] is, in its own nature, a private business") (quoting *Osborn*, 22 U.S. (9 Wheat.) at 860).
[166] *Osborn*, 22 U.S. (9 Wheat.) at 860-61.

private business gave "value to the currency in which all transactions of the [federal] government are conducted."[167]

In sum, the fundamental premise of Marshall's majority opinion in *Osborn* was that the Second Bank's "capacity of carrying on the trade of banking" was "essential to its character, as a machine for the fiscal operations of the government."[168] Marshall determined that "without [the Second Bank's] capacity to trade with individuals, the Bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. *On this point the whole argument rests*."[169] Given the "essential" connection between the Second Bank's "trade of banking" and its public functions "as a machine for the fiscal operations of the government," Marshall concluded that the Bank's "trade must be as exempt from State control as the actual conveyance of the public money."[170] *Osborn* reaffirmed the Supreme Court's prior decision in *McCulloch* based on the Court's determination that a "necessary" link existed between the Second Bank's private business and the Bank's ability to serve as a "fit instrument for the [public] objects for which it was created."[171]

Marshall's reasoning in *Osborn* makes clear that the preemptive immunity granted to the Second Bank of the United States by *McCulloch* and *Osborn* does not apply to modern national banks. Modern national banks are far different institutions from the Second Bank. Today's national banks are privately-owned financial corporations that engage in commercial banking activities and produce profits for the benefit of their private shareholders. The federal government does not own stock in national banks and does not appoint their directors or officers.

[167] *Id.* at 863.
[168] *Id.* at 867.
[169] *Id.* at 865 (emphasis added).
[170] *Id.* at 865, 867.
[171] *Id.* at 867-68.

National banks do not perform any fiscal or depositary functions for the federal government that are not provided on equal terms by FDIC-insured state banks.[172] Since the enactment of the Federal Reserve Act ("FRA") in 1913,[173] the Federal Reserve System (Fed) has performed all monetary and central banking functions for the nation and has acted as the federal government's fiscal and financing agent. As discussed below, the FRA ended the public functions that national banks previously performed for the federal government under the original NBA by issuing a national currency and purchasing bonds to help finance the federal government's operations.[174]

It is therefore clear that present-day national banks are not public institutions comparable to the Second Bank of the United States. Modern national banks do not serve as "machine[s] necessary to the fiscal operations of the [federal] government," and their private "trade of banking" is not "essential" to the federal government's ability to perform its public functions and responsibilities.[175] The preemptive immunity granted by *McCulloch* and *Osborn* to the Second Bank of the United States does not support the Second Circuit's erroneous *per se* preemption rule for modern national banks.

b. Dearing *and* Easton

The Second Circuit's decision in *Cantero* also relied heavily on two Supreme Court opinions dealing with preemption under the original NBA—*Farmers' & Mechanics National Bank v. Dearing*[176] and *Easton v. Iowa*.[177] In *Dearing*, an 1875 decision, the Supreme Court declared that "the States can exercise no control over [national banks], nor in any wise affect

---

[172] *First Agricultural National Bank*, 392 U.S. at 354, 357-58 (Marshall, J., dissenting); Wilmarth, "OCC's 2004 Preemption Rules," *supra* note 113, at 241-45; *see also* 12 U.S.C. § 265 (authorizing FDIC-insured national and state banks to serve as depositaries for public moneys of the United States).
[173] Act of Dec. 23, 1913, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221–522).
[174] *See infra* notes 183-89 and accompanying text.
[175] *See Osborn*, 22 U.S. (9 Wheat.) at 866-68; *see also* Wilmarth, "OCC's 2004 Preemption Rules," *supra* note 113, at 241-45.
[176] 91 U.S. 29 (1875) [hereinafter *Dearing*]; *see Cantero*, 49 F.4th at 131, 132 n.6 (citing and quoting *Dearing*).
[177] 188 U.S. 220 (1903) [hereinafter *Easton*]; *see Cantero*, 49 F.4th at 131, 132 n.6, 134 (citing and quoting *Easton*).

their operation, except in so far as Congress may see proper to permit."[178] In *Easton*, a 1903 decision, the Court similarly opined that the "operations [of national banks] cannot be limited or controlled by state legislation."[179]

The Supreme Court based its broad view of preemption in *Dearing* and *Easton* on the authority of *McCulloch* and *Osborn*. *Dearing* held that "[t]he constitutionality of the [NBA] of 1864 . . . rests on the same principle as the act creating the second bank of the United States" because "[t]he national banks organized under the [NBA] are instruments designed to be used to aid the government in the administration of an important branch of the public service."[180] *Easton* affirmed that "[t]he principles enunciated in [*McCulloch* and *Osborn*], though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks."[181] *Easton* also quoted a passage from *Osborn* in which Chief Justice Marshall described the Second Bank as a "public corporation created for public and national purposes."[182]

Dearing and *Easton* applied the sweeping preemption doctrine of *McCulloch* and *Osborn* based on the Supreme Court's determination that national banks chartered under the original NBA—like the Second Bank of the United States—were "public corporations" and "instruments" of the federal government conducting public functions of great importance.[183] The

---

[178] *Dearing*, 91 U.S. at 30-34 (quote at 34) (holding that a New York statute, which required forfeiture of the principal of a usurious loan, could not be applied to a national bank because New York's forfeiture penalty was preempted by the federal statute governing usury claims against national banks (Section 30 of the original NBA, codified as amended at 12 U.S.C. §§ 85 & 86)).

[179] *Easton*, 188 U.S. at 229-32 (quote at 230) (holding that an Iowa statute, which made it a crime for any bank officer to accept deposits while the bank was insolvent, could not be applied to the president of a national bank because the original NBA did not create a comparable crime for officers of national banks).

[180] *Dearing*, 91 U.S. at 33.

[181] *Easton*, 188 U.S. at 229.

[182] *Id.* at 229-30 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 860)).

[183] *Dearing*, 91 U.S. at 33-34; *Easton*, 188 U.S. at 229-30. When Congress adopted the original NBA, "[t]he NBA's framers referred to national banks not as private businesses subject to federal regulation but as 'agencies' or 'instruments' of the federal government. The national banking system 'is an instrument in the public service,' said [Senator Charles] Sumner. . . . 'Is it not as much an instrument as your navy-yard, or your arsenal, or your mint?'"

original NBA—enacted in 1863 and modified in 1864—required national banks to issue national bank notes and purchase U.S. government bonds to provide financial backing for those notes. Congress wanted to establish a uniform paper currency consisting of national bank notes and U.S. government notes (popularly known as "greenbacks"). Congress expected that national banks would buy large volumes of U.S. government bonds to back their bank notes, thereby supporting the federal government's massive funding operations during the Civil War. In 1865, Congress imposed a punitive 10% tax on state bank notes to drive those notes out of existence and ensure that national banks would have the exclusive privilege of issuing paper currency in the form of bank notes.[184]

National banks lost their roles as issuers of the nation's paper currency and as leading funders of the federal government's operations after Congress passed the FRA in 1913. The FRA empowered the Fed to issue the nation's paper currency (in the form of Federal Reserve notes), to regulate the nation's money supply, to serve as the federal government's fiscal agent, and to support the federal government's funding activities through the sale of government securities. The FRA phased out the use of national bank notes by 1935. As a consequence of the FRA, present-day national banks do not fulfill any of the public functions that were performed

---

Lev Menand & Morgan Ricks, "Federal Corporate Law and the Business of Banking," 88 *University of Chicago Law Review* 1361, 1389 (2021) (quoting Cong. Globe, 38th Cong., 1st Sess. 1894 (1864) (remarks of Sen. Sumner)).

[184] Menand & Ricks, *supra* note 183, at 1374, 1384-94; Studenski & Krooss, *supra* note 148, at 154-55; *see also Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1874) (stating that, under the original NBA, 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"); *First Agricultural National Bank*, 392 U.S. at 355-56 (Marshall, J., dissenting) (explaining that, under the original NBA, national banks performed "important and significant functions" for the federal government by issuing a national currency and providing a "ready market" for U.S. government bonds); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 549 (1869) (affirming the validity of Congress's 1865 tax on state bank notes because Congress, having undertaken "in the exercise of its undisputed constitutional powers, . . . to provide a currency for the whole country, . . . may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress . . . may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.").

by the Second Bank of the United States or by the system of national banks established under the original NBA.[185]

In *First Agricultural National Bank*, decided in 1968, three dissenting Justices argued that modern national banks should no longer be treated as "tax-immune federal instrumentalit[ies]," in view of their status as privately-owned, profit-seeking corporations that do not perform any special public functions for the federal government. The dissenters explained:

> [A] national bank [today] cannot be considered a tax-immune federal instrumentality. It is a privately owned corporation existing for the private profit of its shareholders. It performs no significant federal governmental function that is not performed equally by state-chartered banks. Government officials do not run its day-to-day operations nor does the Government have any ownership interest in a national bank.
>
> . . . [T]he fact that [national banks] 'owe their existence to,' i.e., are chartered by, the [federal] Government, has been definitively rejected as a basis alone for determining that they should be tax immune. . . . Similarly, a whole host of businesses and institutions are subject to extensive federal regulation and that has never been thought to bring them within the scope of the 'federal instrumentalities' doctrine.[186]

---

[185] *First Agricultural National Bank*, 392 U.S. at 356-58 (Marshall, J., dissenting); *see also* House of Representatives Report No. 63-69, at 16-19, 22-29 (1913) (explaining that the FRA would phase out the use of national bank notes and establish the Fed as the sole issuer of the nation's paper currency and as regulator of the nation's money supply); *The Fed Explained: What the Central Bank Does* 20-44, 98-104 (Bd. of Governors of Fed. Res. Sys., 11th ed. Aug. 2021) (describing the Fed's functions under the FRA), https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf; Studenski & Krooss, *supra* note 148, at 257-61 (same).

[186] *First Agricultural National Bank*, 392 U.S. at 354-55 (Marshall, J., dissenting) (citations omitted); *see also id*. at 358 ("Today the national banks perform no significant fiscal services to the Federal Government not performed by

The majority opinion in *First Agricultural National Bank* held that the application of Massachusetts' sales and use taxes to national banks was preempted by 12 U.S.C. § 548. As of 1968, Section 548 allowed states to tax national banks in four specified areas but did not authorize states to impose sales and use taxes on national banks. The majority opinion concluded that Section 548 established "the outer limit within which States can tax national banks."[187]

Based on its finding of statutory preemption, the majority opinion in *First Agricultural National Bank* determined that it was "unnecessary to reach the constitutional question" of whether modern national banks should be taxable by the states because they "lack any unique quality giving them the character of a federal instrumentality."[188] Accordingly, the majority opinion did not address the argument of the three dissenting Justices that modern national banks no longer qualified as tax-immune federal instrumentalities. The Supreme Court has not referred to a national bank as an "instrumentalit[y] of the federal government" since its *Marquette* decision in 1978.[189]

In 1969, Congress responded to the decision in *First Agricultural National Bank* by amending 12 U.S.C. § 548. As amended, Section 548 provides that a national bank is subject to state taxation to the same extent as a state bank having its principal office in the same state.[190] In adopting the 1969 amendment, Congress determined that "there is no longer any justification for

---

their state competitors."); *see supra* note 172 and accompanying text (explaining that FDIC-insured national and state banks have equal authority to act as depositaries of the federal government under 12 U.S.C. § 265).

[187] *First Agricultural National Bank*, 392 U.S. at 345 (opinion for the Court by Black, J.). In contrast to the majority, the three dissenters in *First Agricultural National Bank* concluded that Section 548 was not intended to prohibit other forms of "nondiscriminatory state taxation" of national banks. *Id.* at 358–59 (Marshall, J., dissenting).

[188] *Id.* at 341 (opinion for the Court by Black, J.).

[189] *Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 307 (1978) (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896)).

[190] 12 U.S.C. § 548; *see United States v. State Board of Equalization*, 639 F.2d 458, 459-61 (9th Cir. 1980) (discussing the 1969 amendment to Section 548), *cert. denied sub nom. Crocker National Bank v. State Board of Equalization*, 451 U.S. 1028 (1981) [hereinafter *State Board of Equalization*].

Congress continuing to grant national banks immunities from State taxation which are not afforded State banks."[191] Thus, the 1969 amendment established equivalent treatment for national banks and state banks under state tax laws because Congress could not discern any principled basis for providing national banks with special immunities from those laws.[192]

Applying Chief Justice Marshall's analysis in *Osborn*, present-day national banks should be viewed as "private corporation[s]" that engage in the "mere business of banking" with a "principal object [of] individual trade and individual profit."[193] Given the disappearance of the public functions of national banks after the FRA's enactment in 1913, the broad preemption doctrine announced in *Dearing* and *Easton* is not applicable to present-day national banks. Moreover, Congress rejected and superseded the broad view of preemption expressed in *Dearing* and *Easton* when Congress codified *Barnett Bank*'s more narrowly-tailored "prevents or significantly interferes" preemption standard in Section 25b(b)(1)(B).

c. Davis, San Jose, Franklin, *and* Watters

The Second Circuit also cited *Davis, San Jose, Franklin National Bank v. New York,*[194]

---

[191] The Senate committee report on the 1969 amendment to Section 548 stated:

> There may have at one time been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal government, and, as such, hold a unique and distinct position from that of other institutions. Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks.

Senate Report No. 91-530, at 2 (1969), reprinted in 1969 U.S. Code Cong. & Admin. News 1594, 1595 (quoted in *State Board of Equalization*, 639 F.2d at 460-61).

[192] *See State Board of Equalization*, 639 F.2d at 464 ("The general purpose of [the 1969 amendment to Section 548] was to promote equality in state taxation of state banks vis-a-vis national banks, and banks vis-a-vis non-bank corporations.")

[193] *Osborn*, 22 U.S. (9 Wheat.) at 860; *see also* Wilmarth, "OCC's 2004 Preemption Rules, *supra* note 113, at 241-45.

[194] 347 U.S. 373 (1954) [hereinafter *Franklin*].

and *Watters* to support its decision in *Cantero*. As shown below, those cases are distinguishable on their facts, and their reasoning has been superseded by subsequent Supreme Court decisions as well as Congress's codification of *Barnett Bank*'s preemption standard in 12 U.S.C. § 25b(b)(1)(B).

In *Davis*, the Supreme Court held that the NBA preempted the application of a New York statute to an insolvent national bank. The New York statute required receivers of insolvent banks to grant a preference in favor of deposits held in those banks by New York savings banks. In contrast, the NBA required receivers of insolvent national banks to make "ratable distribution[s]" that ensured a "just and equal distribution . . . among all unsecured creditors." The Supreme Court held that there was an "absolute repugnance" between the New York statute and the NBA's "plain text."[195] The facts in *Davis* were very different from those in *Cantero*. Unlike the preempted state law in *Davis*, NYGOL § 5-601 does not impose any obligation or restriction on national banks that creates a direct conflict with the NBA's express terms.

The Supreme Court explained in *Davis* that its decision recognized "the operation of 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 [the NBA]."[196] As discussed above, the Supreme Court subsequently made clear in *McClellan* that *Davis* represented an "exception" to the general "rule" upholding the application of state laws to national banks. The general "rule" announced in *McClellan* affirmed the "operation of general state laws upon the dealings and contracts of national banks" as long as those state laws did not "expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were

[195] *Davis*, 161 U.S. at 283-84.
[196] *Id.* at 290; *see also id.* at 287 (stating that "[i]t is certain, that in so far as not repugnant to acts of Congress, the contracts and dealings of national banks are left subject to the state law").

created, or impair their efficiency to discharge the duties imposed on them by the law of the United States."[197] The Supreme Court decided *Davis* and *McClellan* in 1896, while national banks were still performing important "duties" for the federal government in their roles as leading issuers of the nation's paper currency and prominent buyers of U.S. government bonds.[198]

San Jose held that the NBA preempted the application to national banks of California's escheat statute. As discussed above, the California statute required deposits to be escheated to the state based on "mere dormancy," without notice or opportunity for hearing on the question of whether those deposits had actually been abandoned by their owners.[199] The Supreme Court determined that California's escheat law created an impermissible conflict with the NBA because it attempted "to qualify in an unusual way agreements between national banks and their customers," with the result that depositors in California national banks "might well hesitate to subject their funds to possible confiscation" under the state statute.[200] As the Court subsequently explained in *Anderson National Bank*, California's escheat law "alter[ed] 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."[201]

Thus, the finding of preemption in *San Jose* was based on the Supreme Court's determination that California's "unusual" escheat law created "an effective deterrent" to the solicitation of deposits, thereby creating an "unlawful encroachment on the rights and privileges

---

[197] *McClellan*, 164 U.S. at 357. As previously discussed, the Supreme Court reiterated *McClellan*'s general "rule" upholding the application of state laws to national banks in *St. Louis*, 263 U.S. at 656. *See supra* notes 81-91 and accompanying text.
[198] *See supra* notes 183-85 and accompanying text (discussing the public functions performed by national banks under the original NBA prior to the FRA's enactment in 1913).
[199] *See Anderson National Bank*, 321 U.S. at 250-51 (describing the California law at issue in *San Jose*); *supra* notes 101-03 and accompanying text (same).
[200] *San Jose*, 262 U.S. at 369-70.
[201] *Anderson National Bank*, 321 U.S. at 250.

of national banks."[202] In contrast to the California statute in *San Jose*, NYGOL § 5-601 simply requires all mortgage lenders doing business in New York to pay a reasonable rate of interest on their mortgage escrow accounts. The record in *Cantero* contains no indication that NYGOL §5-601 significantly burdens the mortgage escrow services of national banks in New York, or that it deters New York residents from obtaining those services from national banks. Wells Fargo Bank, one of BoA's largest and most important competitors in the residential mortgage market, has complied with California's and New York's minimum-interest-on-mortgage-escrow statutes.[203]

Franklin held that federal law preempted the application to national banks of a New York statute that prohibited all banks—except for state-chartered savings banks and savings and loans—from using the words "saving" or "savings" (or their equivalent) in advertising their deposit services.[204] The Supreme Court held that the New York statute created a "clear conflict" with provisions of the FRA and NBA, which authorized national banks to accept savings deposits. In addition, the state law significantly impaired the incidental power of national banks to advertise their services. The Court explained that "[m]odern competition for business finds advertising one of the most usual and useful of weapons," and there was no indication that Congress intended to "preclude the use [by national banks] of advertising in any branch of their authorized business." The Court concluded that national banks "must be deemed to have the right to advertise [their savings deposits] by using the commonly understood description which Congress has specifically selected."[205]

[202] *Id.* at 250-52 (quotes at 251, 252).
[203] *See Lusnak*, 883 F.3d at 1190; *Hymes*, 408 F. Supp. 3d at 195.
[204] *Franklin*, 373 U.S. at 374, 374-75 n.1.
[205] *Id.* at 377-78.

The New York statute at issue in *Franklin* imposed a significant burden on the ability of national banks to compete for savings deposits in New York. As indicated above, the Supreme Court described advertising as "one of the most usual and useful of weapons" in competing for business, and the Court found it implausible that Congress "would permit a national bank to engage in a business but gave no right to let the public know about it."[206] In *Barnett Bank*, the Supreme Court evidently viewed *Franklin*'s preemption analysis as being consistent with *Barnett Bank*'s "prevent or significantly interfere" preemption standard. The Court cited and discussed *Franklin* both before and after it adopted that standard in *Barnett Bank*.[207]

In contrast to the state law preempted in *Franklin*, NYGOL § 5-601 does not impose a significant burden on the ability of national banks to offer mortgage escrow services in New York. As indicated above, the district court in *Hymes* found that Section 5-601 had a "minimal" impact on the operations of national banks.[208] Consequently, the Second Circuit should have upheld Section 5-601 under *Barnett Bank*'s "prevents or significantly interferes" preemption standard codified in 12 U.S.C. § 25b(b)(1)(B).

Much of the Supreme Court's discussion of preemption in *Watters* is consistent with *Barnett Bank*. As previously discussed, *Watters* reiterated *Barnett Bank*'s "prevent or significantly interfere" preemption standard.[209] To the extent that other statements in *Watters*

---

[206] *Id*.
[207] *Barnett Bank*, 517 U.S. at 33-35.
[208] *See supra* notes 18-19 and accompanying text (discussing the district court's finding that § 5-601 had a "minimal" impact on national banks in *Hymes*, 408 F. Supp. 3d at 185-86, 195-96) (quote at 195).
[209] *Watters*, 550 U.S. at 12 ("States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.") (citing *Barnett Bank*, 517 U.S. at 32-34)); *see supra* note 53 and accompanying text (discussing the same passage from *Watters*).

could arguably be construed as supporting a broader view of preemption,[210] *Watters* has been superseded by subsequent events and is no longer a controlling precedent.

Watters held that the NBA preempted Michigan statutes that authorized state officials to exercise licensing, inspection, and enforcement powers over state-chartered operating subsidiaries of national banks.[211] In *Cuomo*—decided two years after *Watters*—the Supreme Court narrowly limited the scope of its holding in *Watters*. *Cuomo* explained:

> *Watters* held that a State may not exercise "'general supervision and control'" over a subsidiary of a national bank. . . . All parties to the case agreed that Michigan's general oversight regime could not be imposed on national banks; the sole question was whether operating subsidiaries of national banks enjoyed the same immunity from state visitation. *The opinion addresses and answers no other question.*[212]

In 2010, the Dodd-Frank Act effectively overruled the "sole question" decided in *Watters.* Three of Dodd-Frank's provisions declare that the NBA does *not* preempt the application of state laws to state-chartered subsidiaries, affiliates, and agents of national banks.[213] In view of *Cuomo* and Dodd-Frank, *Watters* no longer has any precedential effect.

---

[210] *See Cantero*, 49 F.4th at 131, 139 (indicating that the Second Circuit viewed certain statements in *Watters* as supporting the Second Circuit's broad view of preemption).

[211] *Watters*, 550 U.S. at 8-10, 15-21 (explaining that the operating subsidiaries in question were engaged in mortgage lending activities authorized for their parent banks).

[212] *Cuomo*, 557 U.S. at 529 (citations omitted; emphasis added). In a previous work, I discussed possible reasons for the Supreme Court's decision in *Cuomo* to limit the scope of its previous opinion in *Watters*. Arthur E. Wilmarth, Jr., "*Cuomo v. Clearing House Ass'n, L.L.C.*: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection" (Geo. Wash. Univ. Legal Stud. Res. Paper No. 479, Nov. 2009), at 2-3, 10-19, available at https://ssrn.com/abstract=1499216.

[213] Wilmarth, "Dodd-Frank," *supra* note 59, at 934-35 (explaining that three provisions of Dodd-Frank—codified at 12 U.S.C. §§ 25b(b)(2), 25b(e) & 25b(h)(2)—"affirm the applicability of state laws to [state-chartered] subsidiaries, affiliates and agents of national banks" and "effectively overrule[] *Watters*"); *see also* Senate Report No. 111-176, at 176 (2010) (stating that Dodd-Frank "clarifies that State law applies to State-chartered nondepository institution subsidiaries, affiliates, and agents of national banks").

As shown above, none of the Supreme Court decisions cited by the Second Circuit provides persuasive support for *Cantero*'s *per se* preemption rule. In addition, the Supreme Court's recent decision in *Brown* makes clear that all of the decisions cited by the Second Circuit have been superseded to the extent of their inconsistency with *Barnett Bank*'s "prevents or significantly interferes" preemption standard codified in 12 U.S.C. § 25b(b)(1)(B). In *Brown*, the Supreme Court held that "[w]hen Congress supplies a constitutionally valid rule of decision, federal courts must follow it."[214] The Court also instructed federal courts that they may not rely on inconsistent statements "extracted" from prior Supreme Court decisions to "override a lawful congressional command."[215] The Second Circuit's *per se* preemption rule is clearly invalid under *Brown* because it conflicts with the more narrowly-tailored preemption standard that Congress codified in Section 25b(b)(1)(B).

Conclusion

The Second Circuit's decision in *Cantero* adopted a *per se* preemption rule under the NBA that is contrary to the "prevents or significantly interferes" preemption standard established by the Supreme Court in *Barnett Bank* and codified by Congress in 12 U.S.C. § 25b(b)(1)(B). The Second Circuit's decision creates a direct conflict with the Ninth Circuit's correct interpretation of Section 25b(b)(1)(B) in *Lusnak*. The Supreme Court should reject the Second Circuit's erroneous view of preemption in *Cantero* and endorse the Ninth Circuit's proper analysis of preemption in *Lusnak*.

[214] *Brown*, 142 S. Ct. at 1520.
[215] *Id.* at 1528; *see supra* notes 133-44 and accompanying text (discussing *Brown*).