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Policy Brief: On Remand in Cantero, the Second Circuit Should Uphold New York's Interest-on-Escrow Law and Reject Bank of America's Preemption Claim

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Arthur E. Wilmarth, Jr.*
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Introduction

In *Cantero v. Bank of America, N.A.*,[1] the Supreme Court vacated and remanded a decision of the Second Circuit Court of Appeals.[2] Bank of America, N.A. (BofA) argued that the National Bank Act (NBA) preempted New York General Obligation Law (NYGOL) § 5-601, thereby exempting BofA from any duty to comply with the New York statute. The Second Circuit agreed with BofA's preemption claim.

NYGOL § 5-601 requires mortgage lenders operating in New York to pay at least 2% annual interest on funds deposited by borrowers in mortgage escrow accounts.[3] The New York statute is a "State consumer financial law" as defined in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[4] Under Dodd-Frank, a state consumer financial law that does not discriminate against national banks is preempted "only if" that law "prevents or significantly interferes with the exercise by the national bank of its powers."[5]

The Second Circuit declared that the NBA preempted NYGOL § 5-601 because the New York statute "would exert control over a banking power granted by the federal government, so it would impermissibly interfere with national banks' exercise of that power."[6] The Supreme Court held that the Second Circuit's decision did not conform to "the controlling legal standard" for determining whether § 5-601 "is preempted with respect to national banks."[7] The Supreme Court explained that the "controlling legal standard" for deciding cases like *Cantero* is the "prevents or significantly interferes" preemption standard established by the Supreme Court in

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[1] 144 S. Ct. 1290 (2024) [hereinafter *Cantero*].

[2] *Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir., 2022), *vacated and remanded*, 144 S. Ct. 1290 (2024). For a detailed analysis and critique of the Second Circuit's decision, *see* Arthur E. Wilmarth, Jr., "The Second Circuit's *Cantero* Decision Is Wrong about Preemption under the National Bank Act," 41 *Banking & Financial Services Policy Report* No. 11, at 1 (Nov. 2022) [hereinafter Wilmarth, "Second Circuit's *Cantero* Decision"], https://ssrn.com/abstract=4282872.

[3] *Cantero*, 144 S. Ct. at 1296.

[4] 12 U.S.C. § 25b(a)(2).

[5] *Id.* § 25b(b)(1)(B).

[6] *Cantero*, 49 F.4th at 125. The parties in *Cantero* agreed that national banks have an express power to make real estate loans under 12 U.S.C. § 371(a), as well as an "incidental" power to provide escrow account services in connection with residential mortgage loans. *Id.* at 126.

[7] *Cantero*, 144 S. Ct. at 1296-97, 1301.

Barnett Bank of Marion County, N.A. v. Nelson,[8] and codified by Dodd-Frank in 12 U.S.C. § 25b(b)(1)(B).[9]

In *Barnett Bank*, the Supreme Court derived its "prevents or significantly interferes" preemption standard from conflict preemption principles.[10] In *Cantero*, the Supreme Court confirmed that conflict preemption principles govern cases arising under § 25b(b)(1)(B). The Supreme Court explained that "Dodd-Frank ruled out field preemption . . . [and] we know that not all state laws regulating national banks are preempted."[11]

The Supreme Court made clear in *Cantero* that "*Barnett Bank* did not draw a bright line" between state laws that are preempted and those that are not preempted under the "prevents or significantly interferes" standard.[12] Rather, *Barnett Bank* "sought to carefully account for and navigate this Court's prior [national] bank preemption cases."[13] In the following passage, the Supreme Court described the correct approach for applying *Barnett Bank*'s preemption standard in light of the Court's prior national bank preemption decisions:

> A court applying that *Barnett Bank* standard must make a practical assessment of the nature and degree of the interference caused by a state law . . . with the national bank's exercise of its powers . . . . In assessing the significance of a state law's interference, courts may consider the interference caused by the state laws in *Barnett Bank*, *Franklin, Anderson,* and the other precedents on which *Barnett Bank* relied. If the state law's interference with national bank powers is more akin to the interference in cases like *Franklin*, *Fidelity*, *First National Bank of San Jose*, and *Barnett Bank* itself, then the state law is preempted. If the state law's interference with national bank powers is more akin to the interference in cases like *Anderson*, *National Bank v. Commonwealth*, and *McClellan,* then the state law is not preempted.[14]

The Supreme Court also observed that "[i]n *Barnett Bank* and each of the earlier precedents, the Court reached its conclusions about the nature and degree of the state laws' alleged interference with the national banks' exercise of their powers based on the text and structure of the laws, comparison to other precedents, and common sense."[15]

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[8] 517 U.S. 25 (1996) [hereinafter *Barnett Bank*].

[9] *Cantero*, 144 S. Ct. at 1296-97; *see also id.* at 1301 ("Under Dodd-Frank, as relevant here, courts may find a state law preempted 'only if,' 'in accordance with the legal standard' from *Barnett Bank*, the law 'prevents or significantly interferes with the exercise by the national bank of its powers.' § 25b(b)(1)(B).").

[10] *See Barnett Bank*, 517 U.S. at 31 ("In this case we must ask whether or not the Federal and State statutes are in 'irreconcilable conflict.'"); *id.* at 31-37 (holding that the challenged Florida statute created an impermissible conflict with 12 U.S.C. § 92).

[11] *Cantero*, 144 S. Ct. at 1297; *see also id.* (stating that, under Dodd-Frank, "federal banking law 'does not occupy the field in any area of State law'") (quoting 12 U.S.C. § 25b(b)(4)).

[12] *Id.* at 1301; *see also id.* at 1298 ("*Barnett Bank* did not purport to establish a clear line to demarcate when a state law 'significantly interfere[s] with the national bank's exercise of its powers.'").

[13] *Id.* at 1301.

[14] *Id.* at 1300-01.

[15] *Id.* at 1301 n.3.

The Supreme Court vacated and remanded the Second Circuit's decision because the Second Circuit "did not conduct [the] kind of nuanced comparative analysis" required by *Barnett Bank*'s "prevents or significantly interferes" preemption standard.[16] The Second Circuit erred by adopting a "categorical test," which posited that "federal law preempts any state law that 'purports to exercise control over a federally granted banking power,' regardless of 'the magnitude of its effects.'"[17] The Supreme Court rejected the Second Circuit's "categorical test" because that test "would preempt virtually all state laws that regulate national banks, at least other than generally applicable state laws such as contract or property laws."[18] The Supreme Court emphasized that any such "categorical" or "bright line" test would be contrary to *Barnett Bank*'s "prevents or significantly interferes" preemption standard, which Congress "expressly incorporated" in 12 U.S.C. § 25b(b)(1)(B) when Congress passed Dodd-Frank.[19]

The Supreme Court's decision in *Cantero* requires the Second Circuit, on remand, (i) to "make a practical assessment of the nature and degree of the interference" caused by NYGOL § 5-601 with the "exercise" of "powers" by national banks, and (ii) to perform a "nuanced comparative analysis" of the New York statute's interference consistent with the Supreme Court's evaluations of the state laws that were challenged in *Barnett Bank* and six other Supreme Court decisions identified in *Cantero*.[20] Those six decisions include (1) three cases holding that state laws were preempted – *Franklin Nat'l Bank v. New York*,[21] *First Nat'l Bank of San Jose v. California*,[22] and *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*,[23] and (2) three decisions holding that state laws were not preempted – *Anderson Nat'l Bank v. Luckett*,[24] *McClellan v. Chipman*,[25] and *Nat'l Bank v. Commonwealth*.[26]

A prominent law firm has suggested that the Supreme Court's decision in *Cantero* "reject[s] . . . a preemption standard that turns on the economic magnitude of a state law's effects on national bank powers."[27] That suggestion is clearly mistaken. As shown above, the Supreme Court disavowed the Second Circuit's "categorical test" because it ignored "the magnitude of [a state law's] effects" on national banks.[28] The Supreme Court also instructed lower courts to apply *Barnett Bank*'s "prevents or significantly interferes" preemption standard by (i) making "a practical assessment of the nature and degree of the interference caused by a state law" with the "exercise" of "powers" by national banks, and (ii) performing a "nuanced comparative analysis"

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[16] *Id.* at 1301; *see also id*. at 1294 (The Second Circuit "did not apply [the 'prevents or significantly interferes'] standard in a manner consistent with Dodd-Frank and *Barnett Bank*"); *id.* at 1301 (The Second Circuit "did not analyze preemption in a manner consistent with Dodd-Frank and *Barnett Bank*").
[17] *Id.* at 1296 (quoting 49 F.4th at 131); *id.* at 1301.
[18] *Id.* at 1301.
[19] *Id.*
[20] *Id.* at 1297-1301 (quotes at 1300, 1301).
[21] 347 U.S. 373 (1954) [hereinafter *Franklin*].
[22] 262 U.S. 366 (1923) [hereinafter *San Jose*].
[23] 458 U.S. 141 (1982) [hereinafter *Fidelity*]
[24] 321 U.S. 233 (1944) [hereinafter *Luckett*].
[25] 164 U.S. 347 (1896) [hereinafter *McClellan*].
[26] 76 U.S. (9 Wall.) 353 (1870) [hereinafter *Commonwealth*).
[27] Sullivan & Cromwell, "U.S. Supreme Court Maintains Absence of Bright-Line Standards in National Bank Act Preemption" (June 3, 2024), at 1, https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/US-Supreme-Court-Rules-National-Bank-Act-Preemption.pdf;.
[28] *Cantero*, 144 S. Ct. at 1296 (quoting 49 F.4th at 131); *id.* at 1301.

of that interference consistent with the Supreme Court's assessments of the interference caused by the state laws that were challenged in seven key precedents identified in *Cantero*.[29] As shown in Parts 2-4 below, each of those seven decisions considered the economic, financial, and competitive effects of the challenged state law on national banks in determining whether the nature and degree of the state law's interference with national bank powers justified a finding of preemption.[30]

Under 12 U.S.C. § 25b, the Office of the Comptroller of the Currency (OCC) must (i) act on a "case-by-case" basis when it makes a preemption determination under Dodd-Frank's "prevents or significantly interferes" standard, and (ii) support its preemption determination with "substantial evidence, made on the record of the proceeding."[31] Dodd-Frank's "case-by-case" and "substantial evidence" requirements are not binding on courts. However, those requirements indicate an expectation by Congress that federal authorities would perform a careful, fact-based analysis before they conclude that a state consumer financial law "prevents or significantly interferes" with the "powers" of national banks. A court's decision to preempt a state consumer financial law would be subject to reversal for "clear error" if the court refused to consider evidence regarding the magnitude of the state law's economic, financial, and competitive effects on national banks, as such evidence would be highly relevant in determining the "nature and degree" of the state law's interference with national bank powers, as *Cantero* mandates.[32]

Part 1 of this Policy Brief examines NYGOL § 5-601's legislative background and purpose and describes the statute's relatively minor economic and financial impact on national banks. Parts 2 through 4 review the Supreme Court's analysis of the economic, financial, and competitive effects of the state laws that were challenged in *Barnett Bank* and six other cases identified in *Cantero.* As shown in Part 5, NYGOL § 5-601 does not prevent or significantly interfere with the exercise of national bank powers. The New York statute's relatively minor impact on the powers of national banks is much less significant than the interference caused by the state laws analyzed in the Supreme Court's seven key precedents, including three decisions that upheld state laws against preemption claims.

As discussed in Part 6, BofA could potentially argue on remand that (i) an OCC regulation, 12 C.F.R. § 34.4(a)(6), preempts NYGOL § 5-601, and (ii) a separate provision of Dodd-Frank, 12 U.S.C. § 25b(b)(1)(C), provides an alternative basis for preempting § 5-601. Part 6 demonstrates that those two arguments are without merit and do not support BofA's preemption defense. Accordingly, the Second Circuit on remand should reject BofA's preemption arguments and uphold the validity of § 5-601.

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[29] *Id.* at 1301.

[30] *See infra* Parts 2-4.

[31] 12 U.S.C. §§ 25b(b)(1)(B), (b)(3), & (c); *see infra* notes 239-41 and accompanying text (discussing the OCC's duty to comply with Dodd-Frank's "case-by-case" and "substantial evidence" requirements when the OCC issues preemption determinations).

[32] *Cantero*, 144 S. Ct. at 1300-01; *see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 622 (1993) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been made.") (citation omitted).

The Second Circuit is one of three federal appellate courts that will review the validity of state interest-on-escrow laws following the Supreme Court's decision in *Cantero*. The First and Ninth Circuits will consider preemption defenses raised by national banks against Rhode Island's and California's interest-on-escrow statutes in *Conti v. Citizens Bank, N.A.*[33] and *Kivett v. Flagstar Bank, N.A.*[34] As shown in Part 7, the First and Ninth Circuits should uphold those state laws and reject the national banks' preemption claims in *Conti* and *Kivett*.

1. NYGOL § 5-601 serves a valid legislative purpose and has a relatively minor impact on national banks.

a. Two three-judge district courts upheld § 5-601's constitutionality after determining that the statute serves a legitimate state purpose by ensuring fair treatment for mortgage borrowers.

The New York legislature adopted NYGOL § 5-601 in 1974. In 1975, two three-judge district courts upheld the validity of § 5-601 against constitutional challenges in *Jamaica Sav. Bank v. Lefkowitz*,[35] and *Federal Nat'l Mortgage Ass'n. v. Lefkowitz.*[36] In *JSB*, which the Supreme Court summarily affirmed,[37] the district court rejected a state-chartered savings bank's challenges to the New York statute under the Contracts Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *FNMA*, another district court dismissed similar challenges filed by the Federal National Mortgage Association (FNMA) and denied FNMA's Supremacy Clause claim.

As the Supreme Court pointed out in *Cantero*, a mortgage escrow account (i) protects the lender "by ensuring that the borrower's insurance and tax bills are timely paid, thus protecting the loan collateral (the home) against tax foreclosure or uninsured damage," and (ii) "helps the borrower by simplifying expenses and budgeting."[38] On balance, the lender is the primary beneficiary of a mortgage escrow account because that account (a) protects the lender's security interest in the mortgaged property, (b) is usually part of a mortgage servicing arrangement that provides substantial fee income to the lender, (c) helps the lender maintain a long-term relationship with the borrower, and (d) enables the lender to earn "float" profits by investing the funds deposited by the borrower into the escrow account in government securities or loans.[39]

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[33] C.A. No. 1:21-CV-00296-MSM-PAS (D.R.I., Sept. 28, 2022), 2022 WL 4535251, *appeal filed*, No. 22-1770 (1st Cir. Oct. 14, 2022) [hereinafter *Conti*].
[34] No. 21-15667 (9th Cir., May 17, 2022), 2022 WL 1553266, *vacated and remanded*, 144 S. Ct. ___, 2024 WL 2883744 (June 10, 2024) [hereinafter *Kivett*].
[35] 390 F. Supp. 1357 (E.D.N.Y.) (three-judge court), *aff'd without opinion*, 423 U.S. 802 (1975) [hereinafter *JSB*].
[36] 390 F. Supp. 1364 (S.D.N.Y. 1975) (three-judge court) [hereinafter *FNMA*].
[37] 423 U.S. 802 (1975).
[38] *Cantero*, 144 S. Ct. at 1295.
[39] *See* "How retaining servicing provides a competitive advantage," *HousingWire* (Feb. 14, 2023) (reporting that mortgage servicers typically earn a mortgage servicing fee of 0.25% on the principal balances of the mortgages they service), https://www.housingwire.com/articles/how-retaining-servicing-provides-a-competitive-advantage/; "Why Lenders Are Purchasing More MSRs in 2022," *PrivoCorp* (2022) (explaining that mortgage servicing agreements allow mortgage lenders to diversify their revenues by earning fees and producing "float earnings" on balances held in mortgage escrow accounts), https://privocorp.com/blog/why-lenders-are-purchasing-more-msrs-in-2022/; *see also* *Hymes v. Bank of America, N.A.*, 408 F. Supp. 3d 171, 176 (E.D.N.Y. 2019) (explaining that a mortgage lender may use the borrower's money held in a mortgage escrow account "to generate interest and income for itself, but the

Mortgage escrow accounts operate as mandatory savings accounts for borrowers, like the plaintiffs-appellees in *Cantero*, who are required to make monthly deposits to prefund the lender's future payments of real estate taxes and property insurance premiums on behalf of the borrowers.[40] The Supreme Court pointed out in *Cantero* that BofA's "mortgage contracts required the borrowers to make monthly deposits into escrow accounts, which [BofA] used to pay the borrowers' property taxes and insurance premiums when those taxes and premiums came due."[41]

As the district court explained in *JSB*, the New York legislature adopted NYGOL § 5-601 to prevent mortgage lenders from generating unreasonable profits by denying borrowers any return on the amounts they deposit into their mortgage escrow accounts. The New York legislature found that most mortgage lenders did not agree to pay any interest on funds held in mortgage escrow accounts, and the legislature passed § 5-601 to ensure that borrowers would receive a reasonable return on the funds they deposited into those accounts:

> [In adopting § 5-601], the state legislature created a remedy to a problem it perceived—the inability of citizens seeking mortgages from mortgage lending institutions to bargain effectively for the use of funds put into the hands of the institutions to secure the mortgaged premises. It is uncontroverted that mortgagors could not have obtained mortgages if they had insisted upon a term in the contracts providing interest. These mortgage agreements—almost all identical— were drafted by the plaintiff [lender] and essentially were offered to potential mortgagors on a take it or leave it basis. The state legislature properly exercised its power to correct an imbalance in the bargaining relationship.[42]

Thus, § 5-601 was designed "to require that mortgage lending institutions share with their mortgagors the profits which are realized from the investment of monies held by the institutions."[43] After conducting an extensive investigation, which included public hearings, the New York legislature "concluded that mortgage lenders could 'well afford to pay' at least two percent interest on escrow accounts."[44] The plaintiff savings bank in *JSB* "offer[ed] no evidence to rebut this finding."[45]

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borrower has no access to it"), *rev'd sub nom. Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022), *vacated and remanded*, 144 S. Ct. 1290 (2024).

[40] *EECU Mortgage Services* ("Think of an escrow account as a savings account for your property taxes and insurance.") (information provided by a federally-insured credit union in Fort Worth, TX, visited July 29, 2024), https://eecu.org/personal-banking/mortgage-home-equity/resource-center/general-mortgage/understanding-escrow-accounts.; Dawn Papandrea, "What is Escrow?", *U.S. News* (Dec. 20, 2023) (discussing the view of David Carey, vice president of Tompkins Mahopac Bank in Brewster, NY, that a mortgage "escrow account is basically a savings account"), https://money.usnews.com/loans/mortgages/articles/what-is-escrow. Mortgage escrow balances are protected by federal deposit insurance if they are deposited in FDIC-insured banks. *See* 12 C.F.R. § 330.7(d).

[41] *Cantero*, 124 S. Ct. at 1296.

[42] *JSB*, 390 F. Supp. at 1362.

[43] *Id.* at 1363.

[44] *Id.*

[45] *Id.*

Based on § 5-601's valid legislative purpose to ensure fair treatment of mortgage borrowers, the district court in *JSB* rejected the plaintiff savings bank's challenges under the Contract Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court held that mortgage lenders "are constitutionally entitled to no more than payment in full" of the principal and interest due on their mortgages together with any contractually-required fees.[46] The court pointed out that mortgage escrow funds (i) are not part of the required payment of mortgage principal and interest, and (ii) are held by mortgage lenders in an agency-like capacity for subsequent payment to taxing authorities and insurance companies on behalf of the borrowers.[47]

The court held in *JSB* that the plaintiff savings bank could not prevail on its constitutional claims unless "it could prove that to pay the [required] interest to mortgagors it would have to dip into its own general funds if the profits from the escrow accounts could not cover the required payments."[48] The savings bank did not satisfy that burden of proof because it failed to show that it would suffer any loss on its mortgage escrow accounts as a result of paying the interest required by § 5-601.[49]

In *FNMA*, the court adopted the reasoning of *JSB* in dismissing FNMA's constitutional challenges to NYGOL § 5-601 under the Contract Clause and the Equal Protection Clause of the Fourteenth Amendment.[50] The court in *FNMA* also rejected FNMA's constitutional challenge under the Supremacy Clause. FNMA alleged, based on its status as a "federal instrumentality," that the Supremacy Clause exempted it from paying the interest required by § 5-601.[51]

The court agreed that FNMA was a "federal instrumentality" because "FNMA performs a significant governmental function in its secondary mortgage market operations, [and] the federal government has an extensive interest and involvement in mortgage market assistance."[52] However, the court dismissed FNMA's Supremacy Clause claim because § 5-601 did not impose an impermissible "burden" on FNMA. In determining that § 5-601 did not impose "such a burden on the performance of FNMA's function as to invalidate the statute," the court found that the "closest analogy" to FNMA's claim was the preemption claim that the Supreme Court rejected in *Anderson Nat'l Bank v. Luckett*, discussed below in Part 4(a).[53]

The court in *FNMA* pointed out that, "[a]s in *Anderson*, the state law at issue here does not discriminate against FNMA as a federal mortgage lending institution [and] there is nothing in [the New York statute] which explicitly conflicts with either a federal statute or regulation."[54]

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[46] *Id.* at 1363 (quoting *Gelfert v. National City Bank*, 313 U.S. 221, 233 (1941)).
[47] *Id.*; *see also id.* (explaining that borrowers paid mortgage escrow funds "to the bank for the specific purpose of paying a third party, either the taxing authority or the insurance company, [and] the money was never intended to belong to the mortgage institution for its benefit").
[48] *Id.*
[49] *Id.* ("The fact that the plaintiff might currently be losing money on its mortgage loans as a whole sheds no light on the escrow account problem. We are concerned only with the profits and losses realized specifically from the investment of escrow funds. We find that no such showing [of losses] has been made.").
[50] *FNMA*, 390 F. Supp. at 1367.
[51] *Id.* at 1367-68.
[52] *Id.* at 1368.
[53] *Id.*
[54] *Id.* at 1369 (discussing *Luckett*).

The court also concluded that the "insignificant" burdens imposed on FNMA by § 5-601 did not violate the Supremacy Clause. In reaching that conclusion, the court explained that § 5-601 regulates

> funds which are kept by FNMA for the ultimate benefit of the original homeowner-mortgagor. The purpose of prepaying certain insurance and tax expenses is not to provide FNMA with income but rather to protect the mortgagees' interest in the mortgaged property. [Section 5-601] in no way impairs this purpose. It is also significant that the statute does not regulate how FNMA must keep or invest the escrow funds in its possession. Thus, there is no attempt by the state to interfere directly with the internal management of the corporation.[55]

Accordingly, the court rejected FNMA's claim that § 5-601 imposed an "undue economic burden on the operation and administration of FNMA."[56] The court held that "although the burden [on FNMA] may be somewhat greater than that found in *Anderson*, [§ 5-601] is not so burdensome as to violate the Supremacy Clause."[57]

As discussed above, NYGOL § 5-601 has a relatively minor impact on national banks and other mortgage lenders in New York.[58] As shown in Parts 4(a) and 5 below, the nature and degree of § 5-601's interference with national banks' power to administer mortgage escrow accounts are much less significant than the burden imposed on national banks by the Kentucky statute upheld in *Luckett*. In *Luckett*, the Kentucky statute required national and state banks to transfer long-dormant deposits to state authorities, thereby depriving banks of any further profits from investing those deposits.

In contrast, NYGOL § 5-601 requires mortgage lenders only to "share with [borrowers] the profits which are realized from the investment of monies held" in mortgage escrow accounts by paying 2% annual interest on those funds.[59] Unlike the Kentucky law upheld in *Luckett*, § 5-601 does not deprive mortgage lenders of control over their customers' funds held in mortgage escrow accounts, and the statute allows lenders to retain all profits derived from investing those funds that exceed the statute's required interest payments.[60]

b. The district court's decision in *Hymes* found that § 5-601 places a "minimal" burden on national banks and does not conflict with federal statutes governing mortgage escrow accounts.

In *Hymes v. Bank of America, N.A.*,[61] which the Second Circuit reversed in *Cantero*, the district court found that NYGOL § 5-601's "degree of interference" with BofA's power to

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See supra* notes 43-49, 54-56 and accompanying text.
[59] *JSB*, 390 F. Supp. at 1363.
[60] *See supra* notes 42-45, 55, *infra* notes 62-65 and accompanying text.
[61] 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), *vacated and remanded*, 144 S. Ct. 1290 (2024).

administer mortgage escrow accounts was "minimal."[62] The district court pointed out that § 5-601 "does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use."[63] While complying with § 5-601 "will cost [BofA] money" by requiring BofA to pay a "modest" rate of interest on funds held in mortgage escrow accounts,[64] the statute allows BofA to administer mortgage escrow accounts in a manner that is "relatively unimpaired and unhampered by the state law."[65] In contrast to the "modest" 2% annual interest payment required by § 5-601, the district court said that "[a] state escrow interest law 'setting punitively high rates' on mortgage escrow accounts could very well significantly interfere with national banks' power to administer escrow accounts."[66]

In assessing § 5-601's degree of interference with the "power" of national banks to administer escrow accounts, the district court considered the relevance of § 1639d(g)(3) of the Truth in Lending Act,[67] as amended by Dodd-Frank. Under §1639d(g)(3), mortgage lenders must pay interest on funds held in escrow accounts for certain types of mortgages that are specified in § 1639d(b) – including mortgages that are insured or guaranteed by federal or state agencies – if payment of such interest is "prescribed by applicable State or Federal law."[68]

Although § 1639d(g)(3) did not apply to the mortgages at issue in *Hymes* and *Cantero*, the district court found that "Section 1639(d)(g)(3) represents Congress's judgment that mortgage lenders can comply with reasonable state escrow interest laws."[69] The district court therefore concluded that NYGOL § 5-601 did not create a forbidden "obstacle" to the accomplishment of Congress' purposes expressed in the NBA and other federal statutes governing mortgage escrow accounts administered by national banks.[70]

In *Cantero*,[71] the Second Circuit reversed the district court's decision in *Hymes*. The Second Circuit did not agree with the district court's view that the 2% annual interest payment specified in NYGOL § 5-601 was "modest."[72] However, the Second Circuit concluded that the

[62] *Id.* at 195.
[63] *Id.*
[64] *Id.* at 195, 185-86.
[65] *Id.* at 195-96.
[66] *Id.* at 185-86, 196 (quoting *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1195 n.7 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018)) [hereinafter *Lusnak*]).
[67] 15 U.S.C. § 1639d(g)(3).
[68] *Id.* § 1639d(b) & (g)(3).
[69] *Id.* at 178-79, 189-90, 198 (quote); *see also id.* at 196 ("[S]ection 1639d(g)(3) evinces a policy judgment that there is little incompatibility between requiring mortgage lenders to maintain escrow accounts and requiring them to pay a reasonable rate of interest on sums thereby received."); *Lusnak*, 883 F.3d at 1194-96 (The "language" and "legislative history" of § 1639d(g)(3) indicate "Congress's view that [state interest-on-escrow] laws would not necessarily prevent or significantly interfere with a national bank's operations," and "creditors, including large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers."). By contrast, in *Cantero*, 49 F.4th at 137, the Second Circuit declared that § 1639d(g)(3) "has no relevance to this case" because it did not apply to the mortgages involved in *Hymes* and *Cantero*.
[70] *Hymes*, 408 F. Supp. 3d at 198.
[71] *Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022), *vacated and remanded*, 144 S. Ct. 1290 (2024).
[72] *Cantero*, 49 F.4th at 134 n.8 ("If we were to consider the magnitude of the minimum rate New York has prescribed, we could not endorse the district court's unexplained conclusion that this rate was 'modest.' *Hymes*, 408 F. Supp. 3d at 185. Plaintiffs have not pleaded facts showing that 2% is in fact a 'modest' rate of interest in this

NBA preempted § 5-601 regardless of the actual economic, financial, and competitive impact of § 5-601 on national banks.[73] In the Second Circuit's view, "the question is not whether a law's 'degree of interference is minimal,' . . . or 'punitively high'."[74] Instead, the dispositive issue for the Second Circuit was whether the state law "purports to 'control' the [national bank's] exercise of its powers."[75] The Second Circuit emphasized that "[c]ontrol is not a question of the 'degree' of the state law's effects on national banks," and it therefore was not necessary "to assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power."[76]

Thus, the Second Circuit disclaimed any need to consider § 5-601's actual economic, financial, and competitive effects on national banks. Instead, the Second Circuit promulgated a blanket rule invalidating any state law that "would exert control over a banking power granted by the federal government" because such a law, by its very nature, "would impermissibly interfere with national banks' exercise of that power."[77] The Second Circuit explained that its blanket rule would override any state law that is "usurping control over federally granted powers to a federally created entity," even if that law was not "intrusive in degree" and would not "practically abrogate[] the power."[78]

c. The Supreme Court's decision in *Cantero* requires the Second Circuit to make "a practical assessment of the nature and degree" of § 5-601's "interference" with national bank powers, and to compare § 5-601 with the state laws evaluated in seven previous Supreme Court decisions.

The Supreme Court vacated and remanded the Second Circuit's decision in *Cantero*.[79] As discussed above, the Supreme Court rejected the Second Circuit's "categorical test" for preemption because it did not conform to the "controlling legal standard" established by *Barnett Bank* and codified by Dodd-Frank.[80] The Supreme Court held that the Second Circuit must apply the governing "prevents or significantly interferes" preemption standard by (i) making "a practical assessment of the nature and degree of the interference caused by a state law" with a national bank's powers, and (ii) performing a "nuanced comparative analysis" of that

context, and indeed, Plaintiffs have offered no response to BOA's contention that this rate is far higher than the prevailing interest rates for the time period at issue."). However, as shown below (see *infra* notes 200-15 and accompanying text), FDIC-insured depository institutions have produced average yields on earning assets during the past 15 years that were well above § 5-601's required 2% annual interest rate. Thus, there is no evidence indicating that national banks would suffer a net loss from administering mortgage escrow accounts if they complied with § 5-601.

[73] *Id.* at 131 ("[T]he question is not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its powers.").

[74] *Id.* at 132-33 (citations omitted); *see also id.* at 134 ("The issue is not whether [New York's] particular rate of 2% is so high that it undermines the use of [escrow] accounts, or even if it substantially impacts national banks' competitiveness.").

[75] *Id*. at 131.

[76] *Id.* at 131, 132.

[77] *Id.* at 125 (quote), 132, 134.

[78] *Id.* at 137.

[79] *Cantero v. Bank of America, Inc*, 144 S. Ct. 1290 (2024).

[80] *Id.* at 1296-97, 1300-01; *see also supra* note 7-8, 16-19 and accompanying text (discussing the Supreme Court's rejection of the Second Circuit's "categorical test" for preemption and the Supreme Court's affirmation that *Barnett Bank*'s "prevents or significantly interferes" test provides the "controlling legal standard").

interference consistent with the Supreme Court's assessments of the state laws that were challenged in *Barnett Bank* and six other Supreme Court decisions identified in *Cantero*.[81]

As shown in Parts 1(a) and 1(b) above, and Parts 2-5 below, NYGOL § 5-601 has a relatively minor impact on national banks, and the nature and degree of its interference with the powers of national banks are much less significant than the nature and degree of the interference caused by the state laws that were challenged in all seven decisions. Accordingly, the Second Circuit on remand should uphold the validity of § 5-601 and dismiss BofA's preemption claim.

2. The Supreme Court's evaluation of the Florida statute that was preempted in *Barnett Bank*

In *Barnett Bank*, the Supreme Court held that a federal statute (12 U.S.C. § 92) preempted a Florida law. Florida's law prohibited national banks from selling insurance from offices located in small towns if those banks were subsidiaries of bank holding companies.[82] Applying conflict preemption principles, the Court held that the dispositive question was "whether or not the Federal and State Statutes are in 'irreconcilable conflict.'"[83] The Court pointed out 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."[84] The Court held that § 92 preempted Florida's statute because § 92 "does not condition federal permission [for national banks' exercise of their power to sell insurance] upon that of the State."[85]

Florida's statute created a very severe interference with the power to sell insurance that § 92 granted to national banks, as Florida's law prohibited insurance sales by national banks that were subsidiaries of bank holding companies.[86] When *Barnett Bank* was decided in March 1996, more than 75% of U.S. commercial banks were subsidiaries of bank holding companies,[87] and "nearly all U.S. banking assets" were controlled by bank holding companies.[88] Consequently,

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[81] *Id.* at 1301; *see supra* notes 12-26 and accompanying text (discussing the Supreme Court's instructions to the Second Circuit on remand).

[82] *Barnett Bank*, 517 U.S. at 28-29. Under 12 U.S.C. § 92, national banks that are "located and doing business" in towns of 5,000 or less may sell insurance as agents for insurance companies that are licensed by the relevant state authorities. The challenged Florida statute prohibited banks (including national banks) from selling insurance in the state if they were "a subsidiary or affiliate of a bank holding company." *Barnett Bank*, 517 U.S. at 29 (quoting Fla. Stat. § 626.988(2)).

[83] *Barnett Bank*, 517 U.S. at 31.

[84] *Id.* at 31-32.

[85] *Id.* at 34-35.

[86] *Id.* at 29; *see also* Brief for the Petitioner in *Barnett Bank*, 1995 WL 668010 (U.S., Nov. 9, 1995), at *9 (stating that Florida's statute "forbids any national bank affiliated with a bank holding company from exercising the authority granted by Section 92 to sell insurance from a small-town branch") [hereinafter Petitioner's Brief in *Barnett Bank*].

[87] *Bank Holding Companies* (Bd. of Governors of the Fed. Res. Sys.) ("Bank Ownership by BHCs December 1980 to December 2012" chart, showing that 76.7% of U.S. commercial banks were owned by bank holding companies in December 1995), https://www.fedpartnership.gov/bank-life-cycle/manage-transition/bank-holding-companies.

[88] 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, Panel A), https://www.newyorkfed.org/medialibrary/media/research/epr/12v18n2/1207avra.pdf.

the "condition" imposed by Florida's statute on insurance sales by banks amounted to a near-total prohibition against national banks' exercise of their power to sell insurance under § 92.

As the Supreme Court explained in *Barnett Bank*, the legislative history of § 92 indicated a congressional understanding that "providing small town national banks with authority to sell insurance would help them financially."[89] In 1986, the OCC issued an interpretive letter stating that § 92 authorized national banks to sell insurance on a nationwide basis from branches located in small towns. The OCC's letter said that allowing "small-town branches to sell insurance" would "enhance [national] banks' revenues, diversify their business without creating any threat to their solvency, and increase competition."[90]

Thus, the challenged Florida statute in *Barnett Bank* prohibited most national banks operating in Florida from taking advantage of the economic and financial opportunities offered by 12 U.S.C. § 92. Florida's statute also had a negative competitive impact on national banks by preventing most banks from "competing with insurance agencies."[91] Florida's statute therefore had very significant and highly adverse economic, financial, and competitive effects on national banks doing business in Florida.

3. The Supreme Court's assessments of state laws that were preempted in three other key decisions.

a. *Franklin Nat'l Bank v. New York*

The Supreme Court held in *Franklin* that federal banking laws preempted a New York statute. The New York law prohibited commercial banks, including national banks, from using the words "saving" or "savings" in advertising for savings deposits.[92] The Supreme Court determined that New York's statute created a "clear conflict" with provisions of the Federal Reserve Act (FRA) and the National Bank Act (NBA).[93] The FRA expressly authorized national banks "to receive time and savings deposits,"[94] and the NBA empowered national banks "to receive deposits without qualification or limitation."[95]

The Supreme Court pointed out that national banks "depend upon their success in attracting private deposits."[96] The Court found that New York's law significantly interfered with the express authority of national banks to accept savings deposits as well as their "incidental" power under the NBA to advertise their deposit services.[97] The Supreme Court observed that

[89] *Barnett Bank*, 517 U.S. at 35.
[90] *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 632 (7th Cir. 1995) (summarizing the OCC's 1986 interpretive letter); *see also Barnett Bank*, 517 U.S. at 37 (citing the OCC's 1986 letter).
[91] Petitioner's Brief in *Barnett Bank*, *supra* note 86, at *7-*9, *12 (quote), *15-*21; *see also* Petitioner's Reply Brief in *Barnett Bank*, 1995 WL 763730 (U.S., Dec. 28, 1995), at *11, *9 (contending that Florida's statute was an "anti-competitive" law designed to exclude large national banks "from the ranks of those who may sell insurance in Florida").
[92] *Franklin*, 373 U.S. at 374, 374-75 n.1, 378.
[93] *Id.* at 375-78 (quote at 378).
[94] *Id.* at 375-76 (quoting 44 Stat. 1232-33).
[95] *Id.* at 376 (citing 12 U.S.C. § 24 (Seventh)).
[96] *Id.* at 375.
[97] *Id.* at 375-78 (discussing 12 U.S.C. § 24 (Seventh)).

"[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."[98] 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."[99]

The Supreme Court explained that the federal statutes granting deposit-taking powers to national banks were consistent with a broader federal policy of ensuring that national banks were "at no disadvantage in competition with state-created institutions."[100] New York's law undermined that policy by restricting the ability of national banks to compete for savings deposits with New York state-chartered savings institutions. New York's statute intentionally discriminated against national banks (and other commercial banks) in favor of state-chartered savings institutions by allowing only the latter institutions to use the terms "saving" or "savings" in advertising their savings accounts.[101]

The New York state trial court in *Franklin* found that New York's law created a "violent conflict" with the FRA's provision authorizing national banks to accept savings deposits.[102] To support that finding, the New York trial court cited extensive testimony and a public poll, which showed that "the public understands the meaning of the term 'savings account' . . . far better than it understands the meaning of any of the substitute terms" that national banks were allowed to use in advertising for savings accounts, such as "special interest account" or "thrift account."[103] The trial court found that the New York statute's elaborate restrictions on advertising imposed a "crippling obstruction" that severely impaired the ability of national banks to attract savings deposits.[104] The trial court also determined that accepting savings deposits was "a necessary part" of the "banking business" conducted by national banks.[105] Accordingly, the trial court held that New York's law caused an "*impairment* of [Franklin National Bank's] banking business" by "*restrict[ing]* it 'tremendously' . . . in obtaining 'savings deposits'."[106]

Two New York state appellate courts disagreed with the trial court's decision. Both courts held that New York's statute did not "unduly" interfere with the power of national banks to accept savings deposits.[107] However, the appellate courts acknowledged that New York's law imposed an "advertising handicap" on national banks,[108] and that Franklin National Bank offered evidence showing that it was "seriously inconvenient . . . to carry on the business" of receiving savings deposits without using the words "saving" or "savings" in its advertising.[109]

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[98] *Id.* at 377.
[99] *Id.* at 378.
[100] *Id.* at 375.
[101] *Id.* at 374, 374-75 n.1.
[102] *People v. Franklin Nat'l Bank*, 200 Misc. 557, 568-69, 105 N.Y. Supp. 2d 81, 92-93 (1951), *rev'd*, 281 App. Div. 757, 118 N.Y. Supp. 2d 210, *aff'd*, 305 N.Y. 453, 113 N.E.2d 796 (1953), *rev'd*, 347 U.S. 373 (1954).
[103] *Id.*, 200 Misc. at 561-66, 105 N.Y Supp. 2d at 86-90.
[104] *Id.*, 200 Misc. at 570-71, 105 N.Y. Supp. 2d at 94-95.
[105] *Id.* at 571, 105 N.Y. Supp. 2d at 95.
[106] *Id.*
[107] *People v. Franklin Nat'l Bank*, 211 App. Div. 757, 758, 118 N.Y. Supp. 2d 210, 214, *aff'd*, 305 N.Y. 453, 461, 113 N.E.2d 796, 799 (1953), *rev'd*, 347 U.S. 373 (1954).
[108] *Id.*, 281 App. Div. at 758, 118 N.Y. Supp. 2d at 214.
[109] *Id.*, 305 N.Y. at 461, 113 N.E.2d at 799.

The U.S. Supreme Court overturned the decisions of both New York appellate courts. The Supreme Court agreed with the New York trial court's conclusion that New York's statute created an impermissible "conflict" with federal banking laws.[110] While the Supreme Court did not refer specifically to the New York trial court's detailed findings of fact, the Supreme Court agreed with the trial court that national banks "depend upon their success in attracting private deposits" and, therefore, "must be deemed to have the right to advertise [their savings deposits] by using the commonly understood description that Congress has specifically selected."[111] The trial court's findings of fact demonstrated that New York's discriminatory statute imposed severe economic, financial, and competitive harms on national banks by (i) significantly interfering with their power to solicit and accept savings deposits and (ii) placing them at a severe disadvantage to state-chartered savings institutions in competing for savings deposits.

b. *First Nat'l Bank of San Jose v. California*

In *San Jose*, the Supreme Court held that the NBA preempted a California law. The California statute required all bank deposits that remained inactive for more than twenty years to be escheated to the state. California's law mandated the escheat of such inactive deposits based on "mere dormancy," without any notice or opportunity for hearing, and without "proof that the forfeited accounts had been in fact abandoned."[112] The Supreme Court held in *San Jose* that California's escheat law "directly impair[ed]" and "interfere[d]" with the "plainly granted powers" of national banks to solicit and accept deposits.[113] The Supreme Court determined that California's escheat statute created an impermissible "conflict" with the NBA by attempting "to qualify in an unusual way agreements between national banks and their customers."[114]

As the Supreme Court subsequently explained in *Luckett*, the California statute's "unusual alteration of depositors' accounts" in *San Jose* was tantamount to a threatened "confiscation" of those accounts.[115] The Court observed in *Luckett* that California's 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."[116]

Thus, the Supreme Court based its finding of preemption in *San Jose* on its determination that California's escheat law created "an effective deterrent to depositors' placing their funds in national banks doing business within the state,"[117] thereby undermining the "plainly granted

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[110] *Franklin*, 347 U.S. at 376-77 (citing the New York trial court's finding of a "conflict" between the challenged New York law and federal banking statutes); *id.* at 378 (finding a "clear conflict between the law of New York and the law of the Federal Government").
[111] *Id.* at 375, 378; *accord, People v. Franklin Nat'l Bank*, 200 Misc. at 571, 105 N.Y.S.2d at 94 ("[R]eceiving 'savings deposits' is a necessary part of defendant's banking business," and New York's law "*restricts* it 'tremendously' . . . in obtaining 'savings deposits'.").
[112] *Luckett*, 321 U.S. at 250, 251 (analyzing California's escheat statute that was preempted in *San Jose*); *see also San Jose*, 262 U.S. at 366-70 (same).
[113] *San Jose*, 262 U.S. at 369-70.
[114] *Id.*
[115] *Luckett*, 321 U.S. at 251.
[116] *Id.* at 250.
[117] *Id.* at 250-51 (discussing *San Jose*).

powers" of national banks to solicit and accept deposits.[118] Like New York's savings deposit law in *Franklin*, California's escheat statute in *San Jose* imposed severe economic, financial, and competitive harms on national banks by significantly interfering with their power to accept deposits. The Court emphasized in *San Jose* that "[t]he success of almost all commercial banks depends upon their ability to obtain loans from depositors," and that ability was significantly impaired by California's "unusual" decision to "dissolve contracts of deposit . . . after 20 years" of dormancy.[119]

c. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*

In *Fidelity*, the Supreme Court held that a regulation issued by the Federal Home Loan Bank Board (FHLBB) preempted a California judicial rule. The California rule severely restricted the ability of federal savings associations to enforce due-on-sale clauses in their mortgages. Due-on-sale clauses allow a mortgage lender "to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred."[120]

The FHLBB issued a regulation in 1976 that gave federal savings associations unrestricted authority to enforce due-on-sale clauses. The FHLBB issued its regulation after determining that state laws limiting on the enforcement of such clauses endangered "the financial security and stability" of federal savings associations by (i) "caus[ing] a substantial reduction of the cash flow and net income of Federal associations" and (ii) "impair[ing] the ability of Federal associations to sell their home loans in the secondary mortgage market."[121]

In 1978, the California Supreme Court adopted a judicial rule, known as the "*Wellenkamp* doctrine," which prohibited the enforcement of due-on-sale clauses "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default."[122] The U.S. Supreme Court held in *Fidelity* that the *Wellenkamp* doctrine was preempted because it created an "actual conflict" with the FHLBB's regulation.[123]

As the Supreme Court explained, "the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely 'at its option' and have deprived the lender of the 'flexibility' given it by the [FHLBB]."[124] The *Wellenkamp* doctrine "confine[s] a federal association's right to accelerate a loan to cases where the lender's security is impaired," and it thereby "explicitly bars a federal savings and loan from exercising a due-on-sale clause to adjust a long-term mortgage's interest rate towards current market rates"[125] Consequently, the

[118] *Id.* at 250 (quoting *San Jose*, 262 U.S. at 370).
[119] *San Jose*, 262 U.S. at 369-70.
[120] *Fidelity*, 458 U.S. at 145.
[121] *Id.* at 146-47 (quoting the FHLBB's 1976 regulation).
[122] *Id.* at 149 (quoting *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 953, 148 Cal. Rptr. 379, 386, 582 P.2d 970, 977 (1978)).
[123] *Id.* at 154-59, 159 n.14 (quote).
[124] *Id.* at 155.
[125] *Id.* at 156.

Wellenkamp doctrine severely limited "the availability of an option the [FHLBB] considers essential to the economic soundness of the thrift industry."[126]

Given the clear conflict between California's judicial rule and the FHLBB's regulation, the dispositive question in *Fidelity* was "whether the [FHLBB] acted within its statutory authority in issuing the pre-emptive due-on-sale regulation."[127] The Supreme Court held that the Home Owners' Loan Act (HOLA) "invested the [FHLBB] with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the [FHLBB] need not feel bound by existing state law."[128] HOLA empowered the FHLBB "to ensure that [federal savings associations] would remain financially sound institutions able to supply financing for home construction and purchase," and the FHLBB's "due-on-sale regulation was promulgated with these purposes in mind."[129] Accordingly, the FHBB "reasonably exercised the authority, given it by Congress, so as to ensure the financial stability" of federal savings associations.[130]

The Supreme Court decided *Fidelity* at a time when the savings and loan industry was facing a severe nationwide crisis. During the 1980s, most savings and loans struggled to earn profits, and hundreds of them failed, because (i) they were forced to pay significantly higher interest rates on their deposits after the Federal Reserve raised interest rates to fight inflation, and (ii) most of their earnings came from 30-year, fixed-rate residential mortgages with relatively low interest rates.[131] The FHLBB identified the use of due-on-sale clauses as "one of the few contractual tools available to [federal savings] associations . . . to remain financially viable."[132] The Supreme Court gave great weight to the FHLBB's determination that "due-on-sale clauses are essential to the financial soundness of federal savings and loans," and the Court pointed out that "preservation of the associations' very existence . . . is one of the functions delegated to the [FHLBB] by Congress."[133] The Supreme Court held that California's judicial rule was preempted because it had extremely negative economic and financial effects on federal savings associations and threatened their survival by severely limiting their ability to exercise their "essential" power of enforcing due-on-sale clauses.[134]

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[126] *Id.*
[127] *Id.* at 159.
[128] *Id.* at 162; *see also id.* at 160 (stating that HOLA "gave the [FHLBB] plenary authority to issue regulations governing federal savings and loans").
[129] *Id.* at 168.
[130] *Id.* at 170.
[131] *See* Brief for Federal Home Loan Bank Board as Amicus Curiae in *Fidelity*, 1981 WL 389659 (U.S., Nov. 19, 1981), at *9 ("The combination of spiraling interest rates, which increase the cost to savings and loan associations of acquiring money, and the existence of fixed, long-term loan commitments at lower interest rates has placed the entire federal savings and loan system in a precarious financial situation.") [hereinafter FHLBB Amicus Brief in *Fidelity*]; Fed. Deposit Ins. Corp., 1 *History of the Eighties – Lessons for the Future* 167-88 (1997) (providing an overview of the savings and loan crisis of the 1980s), https://www.fdic.gov/resources/publications/history-eighties/volume-1/history-80s-volume-1-part1-04.pdf.
[132] FHLBB Amicus Brief in *Fidelity*, *supra* note 131, at *9.
[133] *Fidelity*, 458 U.S. at 145-47, 154-56, 160-62, 168-70, 170 n.23 (quotes).
[134] *Id.* at 154-56, 168-70.

The Supreme Court relied on conflict preemption principles in *Fidelity* and did not decide whether HOLA created a regime of field preemption.[135] In 1996, the Office of Thrift Supervision (OTS) – the FHLBB's successor agency – issued a regulation declaring that HOLA granted field preemption authority to the OTS over the real estate lending activities of federal savings associations.[136] The Second, and Ninth Circuit Courts of Appeal subsequently upheld the OTS's assertion of field preemption authority under HOLA.[137] The Second and Ninth Circuits also held that the OTS's regulation preempted the application to federal savings associations of New York's and California's interest-on-escrow laws.[138]

The foregoing decisions of the Second and Ninth Circuit do not have any continuing precedential force following the enactment of Dodd-Frank in 2010. Dodd-Frank abolished the OTS and transferred the OTS's regulatory authority over federal saving associations to the OCC.[139] Congress decided to abolish the OTS based on the agency's abysmal record of regulatory and supervisory failures during the subprime mortgage lending debacle that led to the global financial crisis of 2007-09.[140]

Dodd-Frank established the same preemption rules for federal savings associations under HOLA as the preemption rules that govern national banks under the NBA.[141] Under Dodd-Frank, the preemption rules for both federal savings associations and national banks are based on principles of conflict preemption, not field preemption.[142] In addition, *Barnett Bank*'s "prevents or significantly interferes" preemption standard governs the application of state consumer financial laws to both federal savings associations and national banks.[143]

4. The Supreme Court's evaluations of state laws that were upheld against preemption claims in three key decisions.

a. *Anderson Nat'l Bank v. Luckett*

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[135] *Id.* at 154-59, 159 n.14.

[136] *McShannock v. JPMorgan Chase Bank NA*, 976 F.3d 881, 887-90 (9th Cir. 2020) (discussing the OTS's adoption of 12 C.F.R. § 560.2 in 1996); 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, 910 (2011) (same) [hereinafter Wilmarth, "Dodd-Frank"], https://hq.ssrn.com/abstract=1891970.

[137] *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 182-84 (2d Cir.), *cert. denied*, 546 U.S. 817 (2005); *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004-05 (9th Cir. 2008); *McShannock*, 976 F.3d at 887-90, 894-95.

[138] *Flagg*, 396 F.3d at 181-84; *McShannock*, 976 F.3d at 885 n.3, 887 n.4, 888-90, 894-95.

[139] 12 U.S.C. §§ 5411-13.

[140] H.R. Rep. No. 111-517 (Conf. Rep.) at 866, 2010 U.S.C.C.A.N. 722, 723; S. Rep. No. 111-176, at 16-17, 25-26, 65-66; *see also* Wilmarth, "Dodd-Frank," *supra* note 136, at 896-98, 901-19, 930 (discussing the OTS's regulatory and supervisory failures that caused Congress to abolish the OTS and transfer the OTS's authority over federal savings associations to the OCC); Financial Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 13, 96-97, 112-13, 173-74, 178, 274, 304-07, 346, 350-52 (2011) (criticizing the OTS's regulatory and supervisory failures) [hereinafter FCIC Report], available at https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

[141] 12 U.S.C. §§ 25b, 1465; *see also* S. Rep. No. 111-176, at 176 (2010) (Dodd-Frank "amends [HOLA] to clarify that State law preemption standards for Federal savings associations and their subsidiaries shall be made in accordance with the standards applicable to national banks.").

[142] 12 U.S.C. §§ 25b(b)(4), 1465(b).

[143] 12 U.S.C. §§ 25b(b)(1)(B), 1465(a).

In *Luckett*, the Supreme Court rejected a national bank's preemption challenge to a Kentucky statute. The Kentucky law required banks to transfer to state authorities deposit accounts that remained dormant (inactive) for ten years (for demand deposits) or twenty-five years (for other types of deposits). Kentucky's statute provided owners of transferred deposits with notice and an opportunity for hearing, and their transferred deposits could not be escheated to the state unless state authorities proved in subsequent judicial proceedings that the deposits had been abandoned. A national bank alleged that Kentucky's statute violated the due process rights of the bank and its depositors and "infringe[d] the national banking laws, . . . which authorize national banks to accept deposits and to do a banking business."[144]

The national bank's preemption claim in *Luckett* relied heavily on *San Jose.*[145] The national 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."[146] The bank also maintained that Kentucky's statute unlawfully "interferes with the National Banks' custody of the funds which have been deposited with it [sic]."[147] The bank emphasized that the Kentucky law's removal of national banks' control over dormant deposits would prevent national banks from investing those deposits in government securities and loans:

> Every dollar of deposit, the custody of which is taken away from the National Banks and vested in the State, reduces, *pro tanto*, the National Banks' ability to buy Government Bonds, or to lend money to borrowers in the prosecution of its Federally authorized business of banking. That certainly interferes with the National Bank's conduct of its business. 'Dormant' deposits are the very ones that can most safely be invested in U. S. Bonds.
>
> To carry out the mandate of the Kentucky Act, National Banks must, *pro tanto*, reduce their cash on hand, or call loans, or sell securities, to enable them to comply annually with the Act.[148]

The Supreme Court rejected the national bank's constitutional challenges to the Kentucky statute in *Luckett*. The Court determined that Kentucky's law "does not deprive [the bank] or its depositors of property without due process of law" and did not create an impermissible conflict with the NBA.[149] The Court pointed out that Kentucky's law "does not discriminate against national banks," as it applied equally to national and state banks.[150] In addition, Kentucky's law did not "infringe or interfere with any authorized function of the [national] bank."[151]

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[144] *Luckett*, 321 U.S. at 239-40 (summarizing arguments made by the national bank's counsel).
[145] Brief in Behalf of Anderson Nat'l Bank in *Anderson Nat'l Bank v. Reeves*, 1944 WL 42454, at *1, *26-*29 (U.S., Jan. 18, 1944) [hereinafter Anderson Nat'l Bank Brief].
[146] *Luckett*, 321 U.S. at 249 (summarizing the national bank's argument); *see also* Anderson Nat'l Bank Brief, *supra* note 145, at *13-*24.
[147] Anderson Nat'l Bank Brief, *supra* note 145, at *18.
[148] *Id*.
[149] *Luckett*, 321 U.S. at 247-49 (quote at 247), 252-53.
[150] *Id.* at 247.
[151] *Id.* at 249; *see also id.* at 247-48 ("Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes.").

Citing several previous decisions, the Supreme Court affirmed 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."[152] Consequently, "[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 [sic] 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."[153]

The Supreme Court observed that "escheat or appropriation by the state of property in fact abandoned or without an owner is . . . as old as the common law itself."[154] In addition, "the protective custody of long inactive bank accounts for which the Kentucky statute provides . . . in many circumstances may operate for the benefit and security of depositors."[155] The Supreme Court had previously confirmed the states' authority "to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned."[156]

The Supreme Court determined that Kentucky's nondiscriminatory statute did not create any "danger of unlimited control by the state over the operations of national banking institutions."[157] The Court explained that its previous decision in *San Jose* was based "on the effect of the [California] 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."[158] In contrast to California's statute in *San Jose*, which mandated escheat to the state of bank deposits upon "mere proof of dormancy," Kentucky's law required state officials to establish "proof of abandonment" in judicial proceedings after giving notice to the affected banks and depositors.[159]

After examining the Kentucky statute's procedural protections, the Supreme Court concluded that Kentucky's law would not "deter [depositors] from placing their funds in national banks" to any greater degree than other nondiscriminatory state laws that "apply to depositors in national banks," such as state laws governing attachments by creditors, the administration of decedents' estates, and the disposition of missing persons' property.[160] Hence, the Kentucky statute caused "no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks."[161]

b. *McClellan v. Chipman*

[152] *Id.* at 248.
[153] *Id.* (citations omitted).
[154] *Id.* at 251.
[155] *Id.* at 252.
[156] *Id.* at 241 (citing *Provident Instit. for Sav. v. Malone*, 221 U.S. 660, 664 (1911)).
[157] *Id.* at 249.
[158] *Id.* at 250.
[159] *Id.* at 250-52 (quotes at 250, 252).
[160] *Id.* at 248, 252 (quote).
[161] *Id.* at 252.

In *McClellan*, the Supreme Court rejected a national bank's preemption claim against a Massachusetts law, which prohibited insolvent debtors from making preferential transfers of assets to favored creditors. The national bank argued that the Massachusetts statute would "tend to impair the operations" of national banks by interfering with the banks' express powers to make contracts and accept transfers of real property, either as security for debts previously contracted or in satisfaction of those debts.[162] The bank also contended that the Massachusetts law undermined the "stability" of national banks by obstructing their ability to "take additional security for an existing debt," via transfers of real property, "whenever necessary for the protection of [the banks'] property and assets."[163]

The Supreme Court overruled the national bank's preemption claim, finding that it "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."[164] The Court held that the powers of national banks to make contracts and accept transfers of real estate were subject to the "general and undiscriminating" provisions of the Massachusetts law.[165] The Supreme Court explained that its prior 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.[166]

Based on the foregoing "rule," the Supreme Court 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."[167] The 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."[168] The Court dismissed the national bank's argument that the Massachusetts law would have adverse economic and financial effects on national banks, and the Court 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

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[162] *McClellan*, 164 U.S. at 350-56 (summarizing argument of the national bank's counsel) (quote at 350) (citing Rev. Stat. §§ 5136 & 5137 (codified as amended at 12 U.S.C. §§ 24 (Third) & 29)).
[163] *Id.* at 352-53 (summarizing argument of the national bank's counsel).
[164] *Id.* at 358-59.
[165] *Id*. at 358-61 (quote at 361).
[166] *Id.* at 356-57.
[167] *Id.* at 358.
[168] *Id.* at 361; *see also id.* at 358 (finding "no express conflict between the grant of power by the United States to take real estate for previous debts, and the provisions of the Massachusetts law" providing that "the taking of real estate, as a security for an antecedent debt, . . . cannot be done under particular and exceptional circumstances").

> and restrictions to which all the other citizens of the State are subjected, one of which . . . in case of insolvency seeks to forbid preferences between creditors.[169]

c. *National Bank v. Commonwealth*

In *Commonwealth* – decided six years after the NBA's enactment – the Supreme Court upheld a Kentucky law, which required national and state banks to pay Kentucky's tax on bank shares on behalf of their shareholders. The Supreme Court observed 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."[170] The Court 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."[171] Accordingly, Kentucky's law requiring a national bank to pay the bank shares tax owed by its shareholders created "no greater interference with the functions of the [national] bank than any other legal proceeding to which its business operations may subject it."[172]

The plaintiff in error, a national bank, argued that Kentucky's statute was "in substance and in fact, a tax upon the operations of the bank itself."[173] The national bank also contended that Kentucky's law unlawfully compelled the bank to as a "State servant" in performing the "burdensome duty" of collecting Kentucky's bank shares tax from its shareholders "[w]ithout remuneration."[174] Additionally, Kentucky's statute imposed "penalties of a grave and serious character" on the national bank and its officers if they failed to collect Kentucky's tax from its shareholders.[175] Citing *McCulloch v. Maryland*,[176] the national bank argued 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."[177]

Commonwealth rejected the national bank's attempt to rely on *McCulloch*. The Supreme Court in *Commonwealth* explained that the "principle" established in *McCulloch*

> 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.*[178]

[169] *Id.* at 358.
[170] *Commonwealth*, 76 U.S. (9 Wall.) at 361.
[171] *Id.* at 362.
[172] *Id.* at 362-63.
[173] *Commonwealth*, 1869 U.S. LEXIS 972, at ***7 (summarizing argument of the national bank's counsel).
[174] *Id.* at ***8, ***9 (same).
[175] *Id.* at ***9 (same).
[176] 17 U.S. (4 Wheat.) 316 (1819) [hereinafter *McCulloch*].
[177] *Commonwealth*, 76 U.S. (9 Wall.) at 361 (summarizing the national bank's argument); *see also* 1869 U.S. LEXIS 972, at ***7 (same).
[178] *Commonwealth*, 76 U.S. (9 Wall.) at 361 (emphasis added).

The Supreme Court in *Commonwealth* clarified that, under *McCulloch*, national banks and other "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.[179]

Commonwealth rejected any broader rule of immunity for national banks from state laws because a broader rule would "convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."[180] The Court defined the NBA's limited scope of preemption in the following passage, which affirmed 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, 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.*[181]

The Court concluded that the NBA did not preempt Kentucky's statute because the state law "in no manner hinders [the national bank] from performing all the duties of financial agent of the [federal] government."[182]

In *Atherton v. FDIC*,[183] the Supreme Court – in an opinion written by Justice Breyer, the author of *Barnett Bank* – reiterated the Court's core holdings in *Commonwealth*. *Atherton*

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[179] *Id.* at 362. In *Cantero*, the Second Circuit cited *McCulloch* as the primary authority supporting its blanket preemption rule. 49 F.4th at 125, 131-36. As discussed above, the Supreme Court rejected the Second Circuit's "categorical test" for preemption because it did not conform to the "prevents or significantly interferes" preemption standard established by *Barnett Bank* and codified in 12 U.S.C. § 25b(b)(1)(B). *Cantero*, 144 S. Ct. at 1294, 1296, 1301; *see also supra* notes 7-26 and accompanying text (discussing the Supreme Court's rejection of the Second Circuit's blanket preemption rule). The Supreme Court did not expressly say in *Cantero* whether *McCulloch* has any continuing relevance to the determination of preemption issues under *Barnett Bank*'s "prevents or significantly interferes" standard. The Supreme Court's decision in *Cantero* suggests that *McCulloch* does not have any such relevance because the Supreme Court did not include *McCulloch* among the key Supreme Court decisions that courts must consult in applying the "prevents or significantly interferes" standard. *See* 144 S. Ct. at 1296-1301. As I have previously argued, the Supreme Court's decision in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), makes clear that the broad preemptive immunity granted to the Second Bank of the United States by *McCulloch* does not apply to modern national banks. Since the enactment of the FRA in 1913, the Federal Reserve has performed all monetary and central banking functions for the nation and has acted as the federal government's fiscal and financing agent. The FRA terminated the public functions that national banks previously performed for the federal government under the NBA as enacted in 1864 (*e.g.*, issuing a national currency in the form of national bank notes and purchasing bonds to help finance the federal government's operations). Today's national banks are privately-owned, for-profit corporations and do not perform any public functions for the federal government that are not performed on equal terms by FDIC-insured state banks. Accordingly, today's national banks do not qualify for the broad preemptive immunity provided by *McCulloch* to the Second Bank of the United States. Wilmarth, "Second Circuit's *Cantero* Decision," *supra* note 2, at 11-15.

[180] *Commonwealth*, 76 U.S. (9 Wall.) at 362.

[181] *Id.* (emphasis added).

[182] *Id.* at 363.

[183] 519 U.S. 213 (1997) [hereinafter *Atherton*].

pointed out that *Commonwealth* "distinguished *McCulloch* by recalling that Maryland's taxes were 'used . . . to destroy'" the Second Bank of the United States.[184] *Atherton* quoted in full the passage from *Commonwealth*, reproduced above, which recognized the general applicability of state laws to national banks.[185] Based on *Commonwealth* and several subsequent Supreme Court decisions (including *Luckett*), the Court in *Atherton* reaffirmed that "federally chartered banks are subject to state law.[186]

5. A comparison of NYGOL § 5-601 with the state laws evaluated in seven key Supreme Court decisions demonstrates that § 5-601 does not prevent or significantly interfere with the exercise of national bank powers.

The Supreme Court's decision in *Cantero* requires the Second Circuit to perform a "nuanced comparative analysis" of the "nature and degree of [NYGOL § 5-601's] interference" with the "powers" of national banks, consistent with the Supreme Court's assessments of the state laws that were challenged in *Barnett Bank* and six other Supreme Court decisions.[187] As shown below, the comparative analysis mandated by *Cantero* reveals that the nature and degree of § 5-601's interference with national bank powers are far less significant than any of the state laws analyzed in those seven decisions. Accordingly, § 5-601 does not prevent or significantly interfere with the exercise of national bank powers and is not preempted under 12 U.S.C. § 25b(b)(1)(B).

Like the state laws upheld against preemption claims in *Luckett*, *McClellan*, and *Commonwealth*, NYGOL § 5-601 does not discriminate against national banks and treats all mortgage lenders equally. Section 5-601's lawful purpose of ensuring fair treatment for borrowers is comparable to the legitimate goals of the state laws upheld in *Luckett*, *McClellan*, and *Commonwealth*. As previously discussed, each of those state laws served a valid state objective – protecting long-dormant deposits in *Luckett*, preventing insolvent creditors from giving preferences to favored creditors in *McClellan*, and collecting a lawful state tax owed by bank shareholders in *Commonwealth*.[188]

BofA has failed to demonstrate that NYGOL § 5-601 significantly interferes with the exercise of national bank powers. As the district court determined in *Hymes*, § 5-601 places a "minimal" burden on national banks and other mortgage lenders by requiring them to pay a "modest" rate of interest on their mortgage escrow accounts.[189] The New York statute does not otherwise restrict the terms and conditions of mortgage escrow accounts or affect their administration. The statute does not deprive national banks and other mortgage lenders of control over their borrowers' escrowed funds, and it allows national banks and other mortgage lenders to retain all profits from investing escrowed funds that exceed the statute's required 2% annual interest payment.[190] The statute does not create a direct conflict with any federal statute,

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184 *Atherton*, 519 U.S. at 222.
185 *Id.* at 222-23 (quoting *Commonwealth*, 76 U.S. (9 Wall.) at 362).
186 *Id*. (quote at 222).
187 *Cantero*, 144 S. Ct. at 1300-01.
188 *See supra* Part 4 (discussing *Luckett*, *McClellan*, and *Commonwealth*).
189 *Hymes*, 408 F. Supp. 3d at 195; *see also supra* Part 1(b) (discussing *Hymes*).
190 *See supra* Parts 1(a) & 1(b) (describing NYGOL § 5-601's terms, purpose, and relatively minor impact on national banks and other mortgage lenders).

and its policy is consistent with 12 U.S.C. § 1639d(g)(3), which requires mortgage lenders for certain types of mortgages to pay interest on customer balances in mortgage escrow accounts in accordance with "applicable" state laws.[191]

As the district court explained in *JSB*, the New York legislature passed NYGOL § 5-601 after conducting an extensive investigation, which showed that mortgage lenders could "'well afford to pay' at least two percent interest on escrow accounts" out of the profits they earned from investing their borrowers' funds held in those accounts.[192] The New York legislature adopted § 5-601 to ensure fair treatment of mortgage borrowers by providing them with a reasonable return on their funds held in escrow accounts, thereby "correct[ing] an imbalance in the bargaining relationship" between mortgage lenders and borrowers.[193]

NYGOL § 5-601 represents a valid exercise of New York's unquestioned authority to protect consumers.[194] The New York statute reasonably requires mortgage lenders to pay a modest interest rate on balances that borrowers must maintain in their mortgage escrow accounts, which operate as mandatory savings accounts.[195] The statute's purpose of providing a fair return on borrowers' funds is justified in view of the significant benefits that lenders receive from mortgage escrow accounts, including greater protection for their security interests in mortgaged properties, the opportunity to earn mortgage servicing fees, and the ability to earn additional profits from investing customer balances in those accounts.[196]

The Second and Ninth Circuits have held that "consumer protection law is a field traditionally regulated by the states, [and] compelling evidence of an intention to preempt [by Congress] is required in this area."[197] The First Circuit similarly recognized that the fields of "banking" and "consumer protection" fall "squarely within the ambit of the states' historic powers," and "any preemption provision [affecting those state powers] must be construed cautiously and with due regard for state sovereignty."[198] In adopting Dodd-Frank, Congress expressed a strong policy in favor of applying state consumer protection laws to national banks. Under 12 U.S.C. § 25b(b)(1)(B), a state consumer financial law is preempted "only if" a court or the OCC determines that the state law "prevents or significantly interferes with the exercise by the national bank of its powers."

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[191] *See supra* notes 67-70 and accompanying text (discussing § 1639d(g)(3)).
[192] *JSB*, 390 F. Supp. at 1363.
[193] *Id.* at 1362-63.
[194] *See New York State Telecommunications Ass'n v. James*, 101 F.4th 135, 148 (2d Cir. 2024) (explaining that "consumer protection law is a field traditionally regulated by the states") [hereinafter *James*].
[195] *See supra* notes 40-45 and accompanying text (explaining that mortgage escrow accounts function as mandatory savings accounts for borrowers, and the New York legislature enacted § 5-601 to provide borrowers a fair return on the amounts they must deposit into those accounts).
[196] *See supra* notes 38-39 and accompanying text (discussing the benefits lenders receive from mortgage escrow accounts).
[197] *James*, 101 F.3d at 148 (quoting *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990)); *Lusnak*, 883 F.3d at 1191 (same).
[198] *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1992), *cert. denied*, 506 U.S. 1052 (1993) [hereinafter *Greenwood Trust*].

Like the plaintiff savings bank in *JSB*, BofA has not shown that § 5-601 would prevent national banks from earning profits on the mortgage escrow accounts they administer.[199] During the past 15 calendar years, FDIC-insured depository institutions have produced average annual yields on earning assets of 5.43% (2023),[200] 3.50% (2022),[201] 2.71% (2021),[202] 3.24% (2020),[203] 4.33% (2019),[204] 4.16% (2018),[205] 3.73% (2017),[206] 3.50% (2016),[207] 3.40% (2015),[208] 3.49% (2014),[209] 3.68% (2013),[210] 3.96% (2012),[211] 4.32% (2011),[212] 4.70% (2010),[213] and 4.75% (2009).[214] During the first quarter of 2024, FDIC-insured depository institutions generated an average yield on earning assets of 5.77%.[215]

The foregoing yields on earning assets have been well above the 2% annual interest payment required by § 5-601 during the entire period since 2008. Those figures strongly indicate that national banks doing business in New York would be very unlikely to incur any net losses from administering mortgage escrow accounts after paying the required 2% annual interest out of the earnings they generate from investing borrowers' funds held in those accounts. Moreover, as shown above, national banks receive significant additional benefits from mortgage escrow

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[199] *JSB*, 390 F. Supp. at 1363 (explaining that the district court's decision addressed "the profits and losses realized specifically from the investment of escrow funds," and the plaintiff savings bank "offer[ed] no evidence to rebut" the New York legislature's finding that mortgage lenders could "well afford to pay" the 2% annual interest required by § 5-601 out of their profits from investing such funds).

[200] 18 *FDIC Quarterly* No. 1, at 10 (2024) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2024-vol18-1/fdic-v18n1-4q2023.pdf.

[201] 17 *FDIC Quarterly* No. 1, at 10 (2023) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2023-vol17-1/fdic-v17n1-4q2022.pdf.

[202] 16 *FDIC Quarterly* No. 1, at 6 (2022) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2022-vol16-1/fdic-v16n1-4q2021.pdf.

[203] 15 *FDIC Quarterly* No. 1, at 6 (2021) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2021-vol15-1/fdic-v15n1-4q2020.pdf.

[204] 14 *FDIC Quarterly* No. 1, at 6 (2020) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2020-vol14-1/fdic-v14n1-4q2019.pdf.

[205] 13 *FDIC Quarterly* No. 1, at 6 (2019) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2019-vol13-1/fdic-v13n1-4q2018.pdf.

[206] 12 *FDIC Quarterly* No. 1, at 6 (2018) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2018-vol12-1/fdic-v12n1-4q2017.pdf.

[207] 11 *FDIC Quarterly* No. 1, at 6 (2017) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2017-vol11-1/fdic-v11n1-4q16.pdf.

[208] 10 *FDIC Quarterly* No. 1, at 6 (2016) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2016-vol10-1/fdic-v10n1-4q2015-quarterly.pdf.

[209] 9 *FDIC Quarterly* No. 1, at 6 (2015) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2015-vol9-1/fdic-4q2014-v9n1.pdf.

[210] 8 *FDIC Quarterly* No. 1, at 6 (2014) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2014-vol8-1/fdic-quarterly-vol8no1.pdf.

[211] 7 *FDIC Quarterly* No. 1, at 6 (2013) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2013-vol7-1/fdic-quarterly-vol7no1.pdf.

[212] 6 *FDIC Quarterly* No. 1, at 6 (2012) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2012-vol6-1/fdic-quarterly-vol6no1.pdf.

[213] 5 *FDIC Quarterly* No. 1, at 6 (2011) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2011-vol5-1/fdic-vol5no1-quarterly-final-v1.pdf.

[214] 4 *FDIC Quarterly* No. 1, at 6 (2010) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2010-vol4-1/fdic-quarterly-vol4no1-full.pdf.

[215] 18 FDIC Quarterly No. 2, at 9 (2024) (Tbl. III-A), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2024-vol18-2/fdic-v18n2-1q2024.pdf.

accounts in the form of greater protection for their security interests in mortgaged properties and the opportunity to earn mortgage servicing fees.[216]

Some national banks – like Wells Fargo, one of the nation's largest national banks and a leading competitor of BofA – have complied with NYGOL § 5-601 and similar interest-on-escrow laws enacted by California and other states.[217] The compliance of Wells Fargo and other national banks with § 5-601 and similar state laws undermines BofA's claim that § 5-601 significantly interferes with the "exercise" of national bank "powers."

The New York statute's relatively minor burden on national banks is far less significant than the very severe restrictions imposed by the state laws that the Supreme Court found to be preempted in *Barnett Bank*, *Franklin*, *San Jose*, and *Fidelity.* In *Barnett Bank*, the challenged Florida law prohibited most national banks from exercising their federally-granted power to sell insurance in small towns.[218] In *Franklin*, the New York state trial court determined that the challenged New York statute – which forbade national banks from using the terms "saving" or "savings" in advertising for savings deposits – imposed a "crippling obstruction" on a "necessary part" of the defendant national bank's "banking business" by "*restrict[ing]* it 'tremendously' . . . in obtaining 'savings deposits'."[219] The Supreme Court agreed in *Franklin* that national banks "depend on their success in attracting private deposits," and the Court found that the New York statute created a "clear conflict" with federal statutes authorizing national banks to accept savings deposits.[220]

In *San Jose*, the Supreme Court determined that the challenged California escheat law "directly impair[ed]" and "interfere[d]" with the "plainly granted powers" of national banks to solicit and accept deposits.[221] The Court concluded that California's escheat law created an impermissible "conflict" with the NBA by attempting "to qualify in an unusual way agreements between national banks and their customers,"[222] as deposits were escheated to the state upon "mere proof of dormancy" and "without any determination of abandonment in fact."[223] The Supreme Court concluded that 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."[224]

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[216] *See supra* notes 38-39 and accompanying text (discussing the benefits lenders receive from mortgage escrow accounts).
[217] *Hymes*, 408 F. Supp. 3d at 195 (discussing Wells Fargo's compliance with NYGOL § 5-601). Wells Fargo and other national banks have complied with California's interest-on-escrow law and similar laws enacted by other states. *See Lusnak*, 885 F.3d at 1190; Answering Brief of Plaintiffs-Appellees in *Kivett v. Flagstar Bank, FSB*, 2021 WL 5702573 (9th Cir., Nov. 22, 2021), at *14-*15 [hereinafter Kivett Ninth Circuit Answering Brief]; Brief in Opposition of Respondents to Petition for Writ of Certiorari in *Flagstar Brief, FSB v. Kivett*, 2022 WL 17811345 (U.S. Dec. 13, 2022), at *4.
[218] *See supra* Part 2 (discussing *Barnett Bank*).
[219] *People v. Franklin Nat'l Bank*, 200 Misc. at 571, 105 N.Y. Supp. 2d at 95; *see also supra* Part 3(a) (discussing *Franklin*).
[220] *Franklin*, 347 U.S. at 375-78 (quotes at 375 and 378).
[221] *San Jose*, 262 U.S. at 369-70.
[222] *Id*.
[223] *Luckett*, 321 U.S. at 250-51 (discussing California's escheat law in *San Jose*).
[224] *Id.* at 250 (same); *see also supra* Part 3(b) (discussing *San Jose*).

In *Fidelity*, the Supreme Court held that a California judicial rule created an "actual conflict" with a valid FHLBB regulation, which gave federal savings associations unrestricted authority to enforce due-on-sale clauses in their mortgages.[225] California's judicial rule prohibited the enforcement of due-on-sale clauses except in "cases where the lender's security is impaired,"[226] thereby "limiting the availability of an option the [FHLBB] considers essential to the economic soundness of the thrift industry."[227] The Supreme Court held that California's rule was preempted because it undermined the FHLBB's ability "to ensure the financial stability" of federal savings associations.[228]

NYGOL § 5-601 is not preempted under *Barnett Bank*'s "prevents or significantly interferes" preemption standard because § 5-601's relatively minor burden on national banks is far less significant than the very severe burdens imposed by the state laws that were preempted in *Barnett Bank*, *Franklin*, *San Jose*, and *Fidelity*. Section 5-601's relatively minor impact on national banks is also considerably less substantial than the burdens placed on national banks by the state laws that were upheld against preemption claims in *Luckett*, *McClellan*, and *Commonwealth*. In *Luckett*, a national bank argued that a Kentucky statute caused significant economic and financial harm to national banks by removing their control over dormant deposits, thereby terminating their ability to earn profits from investing those deposits in loans and government securities.[229] In *McClellan*, a national bank contended that a Massachusetts statute undermined the "stability" of national banks by interfering with their ability to "take additional security for an existing debt," via transfers of real property, "whenever necessary for the protection of their property and assets."[230] In *Commonwealth*, a national bank alleged that a Kentucky law forced the bank to act as a "State servant" in performing the "burdensome duty" of collecting Kentucky's tax on bank shares from its shareholders "[w]ithout remuneration."[231]

The Supreme Court rejected the national banks' preemption arguments in *Luckett*, *McClellan*, and *Commonwealth* after determining that the challenged state laws did not discriminate against national banks and did not create any impermissible conflict with federal banking laws. The Supreme Court also found that the challenged state statutes were reasonable laws designed to accomplish legitimate state purposes – protecting dormant deposits in *Luckett*, preventing insolvent debtors from making preferential transfers to favored creditors in *McClellan*, and collecting a state tax owed by bank shareholders in *Commonwealth*.[232] Similarly, as shown above, § 5-601 does not discriminate against national banks, does not create a direct conflict with any federal statute, and fulfills a valid state purpose – requiring mortgage lenders to provide a reasonable return to borrowers on the balances they must maintain in their escrow accounts.[233]

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[225] *Fidelity*, 458 U.S. at 154-59, 159 n.14 (quote).
[226] *Fidelity*, 458 U.S. at 155-56.
[227] *Id.* at 156.
[228] *Id.* at 154-56, 168-70 (quote at 170); *see also supra* Part 3(c) (discussing *Fidelity*).
[229] Anderson Nat'l Bank Brief, *supra* note 145, at *18.
[230] *McClellan*, 161 U.S. at 352-53 (summarizing argument of the national bank's counsel).
[231] *Commonwealth*, 1869 U.S. LEXIS 972, at ***8 (summarizing argument of the national bank's counsel).
[232] *See supra* Part 4 (discussing the preemption arguments made by national banks in *Luckett*, *McClellan*, and *Commonwealth* and the reasons why the Supreme Court rejected those arguments).
[233] *See supra* notes 40-45 and accompanying text (discussing § 5-601's legislative purpose).

In sum, a "nuanced" comparison of NYGOL § 5-601 with the state laws reviewed in the seven key Supreme Court decisions identified in *Cantero* makes clear that § 5-601 does not prevent or significantly interfere with national bank powers and, therefore, is not preempted by 12 U.S.C. § 25b(b)(1)(B).[234] Accordingly, the Second Circuit on remand should uphold the validity of § 5-601 and dismiss BofA's preemption claim.

6. Two other potential legal issues on remand in *Cantero* do not support BofA's preemption claim.

In the final footnote of its decision in *Cantero*, the Supreme Court said that the Second Circuit "may address as appropriate on remand" the following additional issues: (i) "the significance . . . (if any) of the preemption rules" issued by the OCC, and (ii) "the relevance . . . (if any)" of 12 U.S.C. § 25(b)(1)(C), which provides that a state consumer financial law may be preempted by a federal law other than the NBA.[235] As shown below, neither of those issues provides any support for BofA's preemption claim.

a. The OCC's preemption rule violates 12 U.S.C. § 25b and is not entitled to judicial deference.

BofA previously argued that NYGOL § 5-601 is preempted by 12 C.F.R. § 34.4(a), which the OCC adopted in 2004 and reissued in 2011.[236] Both versions of that regulation provide that a "national bank may make real estate loans . . . without regard to state law limitations concerning: . . . (6) Escrow accounts."[237] As shown below, the OCC's regulation violates 12 U.S.C. § 25b in several respects and therefore does not preempt § 5-601. The OCC's regulation is not entitled to any judicial deference because Congress and the Supreme Court repudiated the 2004 version of that regulation, and the OCC adopted the 2011 version in a manner that was "not in accordance with law."[238]

i. The OCC's regulation violates several provisions of 12 U.S.C. § 25b.

Under 12 U.S.C. § 25b(b)(1), the OCC has authority to issue a regulation or order preempting a state consumer financial law "only if—. . . (B) in accordance with the legal standard for preemption in . . . *Barnett Bank*," the state law "prevents or significantly interferes with the exercise by the national bank of its powers." The OCC may not issue a preemptive regulation or order unless "substantial evidence, made on the record of the proceeding, supports the [OCC's] specific finding regarding the preemption of such [state law] in accordance with the legal standard of . . . *Barnett Bank*."[239]

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[234] *See Cantero*, 144 S. Ct. at 1300-01.
[235] *Id.* at 1301 n.4. The Second Circuit did not decide whether the OCC's regulation had independent preemptive effect. *Cantero*, 49 F.3d at 128 n.5, 139 n.13. The Second Circuit held that BofA "forfeited" its preemption claim under 12 U.S.C. § 25b(b)(1)(C) because it did not raise that claim until it filed its reply brief. *Id.* at 136 n.9.
[236] *See Cantero*, 49 F.3d at 128n.5, 139n.13.
[237] Bank Lending and Operations: Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004) [hereinafter 2004 OCC Preemption Rule]; Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43569 (July 21, 2011) [hereinafter 2011 OCC Preemption Rule].
[238] 5 U.S.C. § 706(2)(A).
[239] 12 U.S.C. § 25b(c).

The OCC must act on a "case-by-case basis" when it issues a preemption rule or order. To satisfy the "case-by-case" requirement, the OCC must consider "the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms."[240] In addition, the OCC must "first consult" with the Consumer Financial Protection Bureau (CFPB) and "take the views of the [CFPB] into account" before the OCC determines that "a State consumer financial law of another State has substantively equivalent terms as the one that the [OCC] is preempting."[241]

The current version of 12 C.F.R. § 34.4(a), which the OCC issued in 2011, violates several provisions of 12 U.S.C. § 25b. First, the OCC's 2011 rule does not incorporate *Barnett Bank*'s "prevents or significantly interferes" preemption test as required by the unambiguous terms of 12 U.S.C. § 25b(b)(1)(B). The Supreme Court's *Cantero* decision confirmed that *Barnett Bank*'s "prevents or significantly interferes" test provides the "controlling legal standard" for determining "when a 'State consumer financial law' . . . is preempted with respect to national banks."[242]

The OCC intentionally omitted *Barnett Bank*'s "prevents or significantly interferes" test from its 2011 rule. The OCC's preamble to that rule erroneously asserted that "the Dodd-Frank Act does not create a new stand-alone 'prevents or significantly interferes' preemption standard."[243] The OCC's 2011 rule is unlawful and void for failing to incorporate *Barnett Bank*'s "prevents or significantly interferes" preemption test. That failure creates a direct and fatal conflict with the plain language of 12 U.S.C. § 25b(b)(1)(B) and the Supreme Court's *Cantero* decision.

Second, like the OCC's 2004 regulation, the 2011 version of 12 C.F.R. § 34.4(a) seeks to preempt fourteen broad categories of state consumer financial laws across the nation, including state laws regulating mortgage escrow accounts.[244] In adopting the 2011 rule's sweeping nationwide preemptions, the OCC did not comply with § 25b's requirements that (i) the OCC must make preemption determinations on a "case-by-case basis," (ii) the OCC must support those determinations with "substantial evidence, made on the record of the proceeding," and (iii) the OCC must consult with the CFPB before preempting "substantively equivalent" laws enacted by more than one state.[245]

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[240] 12 U.S.C. §§ 25b(b)(1)(B) & (b)(3)(A).
[241] *Id.* § 25b(b)(3)(B).
[242] *Cantero*, 144 S. Ct. at 1297.
[243] 2011 OCC Preemption Rule, *supra* note 237, at 43555; *see also* 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," at 7 (Geo. Wash. Leg. Stud. Res. Paper No. 2021-51, Nov. 8, 2021) (discussing the OCC's refusal to adopt *Barnett Bank*'s "prevents or significantly interferes" preemption standard) [hereinafter Wilmarth, "OCC's Repeated Failures"], https://ssrn.com/abstract=3966510. In July 2024, the Acting Comptroller of the Currency acknowledged, "in light of the recent *Cantero* decision," that the OCC "need[s] to develop a more nuanced and balanced approach to *Barnett*." Remarks of Acting Comptroller of the Currency Michael Hsu before the Exchequer Club, "Size, Complexity, and Polarization in Banking," at 15-16 (July 17, 2024), https://www.occ.treas.gov/news-issuances/speeches/2024/pub-speech-2024-79.pdf.
[244] 2004 OCC Preemption Rule, *supra* note 237, at 1917; 2011 OCC Preemption Rule, *supra* note 237, at 43569.
[245] 12 U.S.C. §§ 25b(b)(1)(B) & (b)(3)(A) ("case-by-case" requirement); *id.* § 25b(c) ("substantial evidence" requirement); *id.* § 25b(b)(3)(B) (requirement to consult with CFPB); *see* Wilmarth, "Dodd-Frank," *supra* note 136,

The OCC erroneously argued that its 2011 rule did not need to comply with § 25b's requirements. According to the OCC, the agency's 2011 rule was based on its 2004 regulation, which remained valid after Congress enacted § 25b in 2010.[246] That argument is untenable. Under § 25b(b)(1), a State consumer financial law is preempted "only if" the OCC or a court makes a preemption determination in full compliance with § 25b's requirements. As a narrow exception to that explicit mandate, Dodd-Frank included a grandfather clause, which preserved the applicability of preexisting OCC regulations and orders to "any contract entered into on or before July 21, 2010, by national banks . . . or subsidiaries thereof."[247]

As Dodd-Frank's limited grandfather clause makes clear, the OCC's preexisting preemption rules and orders – including its 2004 regulation – do *not* apply to transactions by national banks *after* July 21, 2010, *unless* the OCC reissues those preemption determinations in full compliance with § 25b.[248] The OCC's contrary claim would make Dodd-Frank's grandfather clause meaningless, thereby violating "the canon against surplusage [that] is strongest when an interpretation would render superfluous another part of the same statutory scheme."[249]

Third, Dodd-Frank requires the OCC to "conduct a review, though notice and public comment," of each of its preemption determinations at least once every five years.[250] After completing each review, the OCC must issue a notice and report describing the results of its review to the public and the OCC's oversight committees in Congress. The required notice and report must state whether the OCC intends to continue, rescind, or amend the preemption determination it reviewed.[251] The OCC has not conducted any review of 12 C.F.R. § 34.4(a) pursuant to § 25b(d), even though that regulation was issued in July 2011.[252]

Thus, 12 C.F.R. § 34.4(a) is invalid because it violates 12 U.S.C. § 25b in several respects.[253] The OCC's regulation does not preempt NYGOL § 5-601 because it exceeds the

at 931-32 (discussing the foregoing requirements); Wilmarth, "OCC's Repeated Failures," *supra* note 243, at 7-8 (describing the OCC's violations of the foregoing requirements when it issued its 2011 preemption rule).

[246] 2011 OCC Preemption Rule, *supra* note 237, at 43557.

[247] 12 U.S.C. § 5553.

[248] Wilmarth, "Dodd-Frank," *supra* note 136, at 939-40; Wilmarth, "OCC's Repeated Failures," *supra* note 243, at 8.

[249] *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698-99 (2022) (holding that a statute should be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal quotation marks and citation omitted).

[250] 12 U.S.C. § 25b(d)(1).

[251] *Id.* § 25b(d)(2).

[252] *See* OCC 2011 Preemption Rule, *supra* note 237; Wilmarth, "OCC's Repeated Failures," *supra* note 243, at 9.

[253] *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) ("[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . . To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."); *see also SEC v. Sloan*, 436 U.S. 103, 119 (1978) ("[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.") (quoting *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

OCC's delegated authority[254] and represents an unlawful attempt by the OCC to engage in "backdoor" preemption.[255]

ii. The OCC's regulation is not entitled to any judicial deference.

Under 12 U.S.C. § 25b(b)(5)(A), the OCC's preemption rules and orders are entitled to judicial deference only if a reviewing court finds that the OCC's preemption determinations are "persuasive," based on the criteria specified in *Skidmore v. Swift & Co.*[256] Following the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*,[257] all of the OCC's interpretations of federal statutes governing national banks are entitled only to *Skidmore* deference.[258] Under *Skidmore*, 12 C.F.R. § 34.4(a) is not entitled to any deference because Congress and the Supreme Court repudiated the 2004 version of that regulation, and the 2011 version violates several provisions of 12 U.S.C. § 25b, as shown above.

Congress passed Dodd-Frank in 2010, "in response to a 'financial crisis that nearly crippled the U.S. economy.'"[259] The Senate Banking Committee determined that "a major cause" of the financial crisis was the "failure" of the OCC and other federal regulators "to stop abusive lending, particularly unsustainable home mortgage lending."[260] Instead of supporting the states' efforts to combat predatory mortgage lending, the OCC preempted those efforts by adopting 12 C.F.R. § 34.4(a) in 2004.[261] The OCC's 2004 regulation "exempted all national banks from State lending laws, including the anti-predatory lending laws."[262] The Senate Banking Committee strongly criticized the OCC's 2004 rule because it "actively created an environment where abusive mortgage lending could flourish without State controls."[263]

Congress repudiated the OCC's 2004 regulation by adopting 12 U.S.C. § 25b(b)(1)(B). Under that statute, as the Senate Banking Committee explained, "[t]he standard for preempting State consumer financial law would return to what it had been for decades, those [sic] recognized by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004."[264] The Senate Banking Committee and the House Conference Committee emphasized that Dodd-Frank's codification of

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[254] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374 ("[A federal] agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

[255] *See* Catherine M. Sharkey, "Preemption by Preamble: Federal Agencies and the Federalization of Tort Law," 56 *DePaul Law Review* 227, 227-30, 251-52, 258-59 (2007) (criticizing federal agencies for seeking to achieve "backdoor federalization" by including unauthorized preemption claims in the preambles to their rules).

[256] 323 U.S. 134, 140 (1944) [hereinafter *Skidmore*]; *see Lusnak*, 883 F.3d at 1192 (discussing the limited *Skidmore* deference granted to the OCC's preemption determinations under § 25b(b)(5)(A)); Wilmarth, "Dodd-Frank," *supra* note 136, at 932-34 (same).

[257] 144 U.S. 2244 (2024) [hereinafter *Loper Enterprises*].

[258] *Id.* at 2259, 2262, 2267 (majority opinion); *see also id.* at 2309 (Kagan, J., dissenting) (stating that *Skidmore* provides the applicable standard of judicial deference under the majority opinion).

[259] *Lusnak*, 883 F.3d at 1189 (footnote omitted) (quoting Senate Report No. 111-176, at 2 (2010)).

[260] Senate Report No. 111-176, at 15 (2010) (quoting testimony by Travis Plunkett).

[261] OCC 2004 Preemption Rule, *supra* note 237, at 1911-12, 1917 (codified at 12 C.F.R. § 34.4(a)).

[262] Senate Report No. 111-176, at 16.

[263] *Id.* at 17 (2010); *see also* FCIC Report, *supra* note 140, at 13, 96-97, 111-13, 126 (criticizing the OCC's 2004 regulation for preempting state anti-predatory lending laws); Wilmarth, "Dodd-Frank," *supra* note 136, at 909-19 (same).

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

Barnett Bank's "prevents or significantly interferes" test in § 25b(b)(1)(B) would establish the governing standard for determining whether a state consumer financial law is preempted by reason of its interference "with a national bank's exercise of its power."[265]

In *Cuomo v. Clearing House Ass'n*,[266] the Supreme Court rejected the OCC's policy rationale for its 2004 preemption rule. The OCC's 2004 rule and a companion regulation declared that state laws applied to national banks only if they provided the "legal infrastructure that surrounds and supports the ability of national banks . . . to do business."[267] *Cuomo* disavowed the OCC's "infrastructure" rationale because it "can be found nowhere within the text of the statute" and "attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws."[268]

Granting any deference to 12 C.F.R. § 34.4(a) would severely undermine the states' authority to protect consumers, thereby inflicting great harm on the American public that would extend far beyond mortgage escrow accounts. The OCC's regulation asserts that real estate loans made by national banks are exempted from fourteen broad categories of state consumer financial laws, including state laws regulating loan-to-value ratios, terms of credit, disclosure, advertising, mortgage origination and servicing, and the use of credit reports.[269] Granting any deference to the OCC's regulation would frustrate Dodd-Frank's goal of empowering the states to provide "new consumer protections as problems arise," thereby furnishing "an important signal to Congress and Federal regulators of the need for Federal action."[270]

Deferring to 12 C.F.R. § 34.4(a) would threaten to return this nation to the disastrous situation that prevailed after the OCC adopted the first version of that regulation in 2004. As discussed above, the Senate Banking Committee condemned the OCC's 2004 rule because it "created an environment where abusive mortgage lending could flourish without State controls."[271] Illinois Attorney General Lisa Madigan described the devastating consequences of the OCC's 2004 preemption rule in her testimony to the Financial Crisis Inquiry Commission in 2010. As she explained, after the OCC adopted its 2004 rule, "many of the largest mortgage-lenders shed their state licenses and sought shelter behind the shield of a national charter," leading to "the worst lending abuses in our nation's history."[272]

The Second Circuit should reject any further claim by BofA that 12 C.F.R. § 34.4(a)

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[265] *Id.* at 175-76; *accord*, H.R. Report No. 111-517, at 875 (2010) (Conf. Rep.), 2010 U.S.C.C.A.N. 722, 731 (Dodd-Frank "revises the standard the OCC will use to preempt state consumer protection laws. It codifies the standard in [*Barnett Bank*] to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national banks' exercise of their powers.").
[266] 557 U.S. 519 (2009) [hereinafter *Cuomo*].
[267] *Cuomo*, 557 U.S. at 532 (quoting Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004)); *see also* 2004 OCC Preemption Rule, *supra* note 237, at 1912, 1913 (presenting the same "infrastructure" rationale).
[268] *Cuomo*, 557 U.S. at 533.
[269] 12 C.F.R. § 34.4(a). The regulation recognizes the application to national banks of general state laws, such as state laws governing contracts, torts, taxation, and zoning, if such laws are "consistent" with *Barnett Bank*. 12 C.F.R. § 34.4(b).
[270] Senate Report No. 111-176, at 174-75 (2010).
[271] *Id.* at 16-17.
[272] FCIC Report, *supra* note 140, at 113 (quoting Ms. Madigan's testimony).

preempts NYGOL § 5-601. The OCC's regulation is not entitled to any deference, and should be "h[e]ld unlawful and set aside," because Congress and the Supreme Court repudiated the 2004 version of that rule and the OCC adopted the 2011 version in a manner that was "not in accordance with law."[273]

b. 12 U.S.C. § 25b(b)(1)(C) does not provide an alternative basis for BofA's preemption claim.

BofA argued in its reply brief to the Second Circuit that 12 U.S.C. § 25b(b)(1)(C) provided an alternative basis for preempting NYGOL § 5-601.[274] The Second Circuit did not consider that alternative claim because BofA failed to raise it until it filed its reply brief.[275] The Supreme Court indicated, however, that the Second Circuit could consider that claim on remand.[276]

Section 25b(b)(1)(C) provides that a state consumer financial law may be preempted "by a provision of Federal law other than Title 62 of the Revised Statutes." Title 62 of the Revised Statutes includes most of the NBA's provisions. Title 62 does not include 12 U.S.C. § 371, a provision of the FRA that authorizes national banks to make real estate loans. BofA argued in its reply brief that 12 U.S.C. § 371 should be treated as "a provision of Federal law other than Title 62" within the scope of § 25b(b)(1)(C), thereby providing a separate basis for preempting NYGOL § 5-601. BofA's argument is untenable because its preemption claim under § 371 is governed exclusively by *Barnett Bank*'s "prevents or significantly interferes" preemption standard codified in 12 U.S.C. § 25b(b)(1)(B).

Unlike § 25b(b)(1)(C), the "prevents or significantly interferes" preemption standard codified in § 25b(b)(1)(B) does not contain any reference to Title 62. The lack of any reference to Title 62 in § 25b(b)(1)(B), contrasted with the explicit reference to Title 62 in § 25b(b)(1)(C), demonstrates that the scope of the "prevents or significantly interferes" preemption standard codified in § 25b(b)(1)(B) is not limited to cases arising under Title 62.[277] The unambiguous terms of § 25b(B)(1)(B) apply to every preemption claim alleging that a "State consumer financial law prevents or significantly interferes with the exercise by the national bank of its

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[273] *Loper Enterprises*, 144 S. Ct. at 2261 (quoting 5 U.S.C. § 706(2)(A)); *see also Lusnak*, 883 F.3d at 1192, 1192 n.4, 1193-94 (concluding 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*"); *Clark v. Bank of America, N.A.*, 2020 WL 902457 at *3-*4 (D. Md., Feb. 24, 2020) (holding that 12 C.F.R. § 34.4, was "entitled to minimal deference" because the OCC in 2011 "determined that the agency was not bound by Congress's mandate to review state consumer protection laws on a 'case-by-case' basis" and also "did not engage in a substantive reevaluation of preemption, in light of Dodd-Frank").

[274] Reply Brief of Bank of America, N.A., in *Cantero v. Bank of America, N.A.*, 2021 WL 4726982 (2d Cir., Oct. 4, 2021), at *4, *25.

[275] *Cantero*, 49 F.4th at 136 n.9.

[276] *Cantero*, 144 S. Ct. at 1301 n.4.

[277] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 938, 952 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted); *Gallado By and Through Vassaller v. Marstiller*, 596 U.S. 420, 431 (2022) ("[W]e must give effect to, not nullify, Congress' choice to include limiting language in some provisions but not others" of the same statute.).

powers." In addition, § 25b(b)(1)(B) mandates that all such claims must be determined "in accordance with the legal standard for preemption in . . . *Barnett Bank*."[278]

As previously discussed, Congress intended that *Barnett Bank*'s "prevents or significantly interferes" preemption test codified in § 25b(b)(1)(B) would provide the governing standard for determining all preemption claims based on allegations that state consumer financial laws forbid or significantly impair the "exercise" of national bank "powers."[279] Given Congress's decision to codify *Barnett Bank*'s preemption test as the controlling legal standard in § 25b(b)(1)(B), it is highly significant that *Barnett Bank* established that test in a case arising under 12 U.S.C. § 92, which Congress enacted as an amendment to the FRA, not the NBA.[280]

The Supreme Court did not draw any distinction between the FRA and the NBA when the Court adopted its "prevents or significantly interferes" preemption standard in *Barnett Bank*. The Court focused on § 92's reference to the "powers" of national banks, and the Court said that, "[i]n using the word 'powers,' the statute chooses a legal concept that, in the context of national bank legislation, has a history."[281] Thus, § 92's status as a provision granting a "power" to national banks – not its statutory provenance – caused the Supreme Court in *Barnett Bank* to review its prior decisions dealing with the "powers" of national banks under both the FRA and the NBA as precedents for *Barnett Bank*'s preemption standard.[282]

The Supreme Court in *Barnett Bank* conducted a detailed review of *Franklin*, which upheld a national bank's preemption claim based on provisions of the FRA and the NBA that granted deposit-taking powers to national banks.[283] As the Supreme Court pointed out in *Barnett Bank*, its decision in *Franklin* gave great weight to a provision of the FRA that authorized national banks to accept "savings deposits."[284] As in *Barnett Bank*, the Supreme Court in *Franklin* did not draw any distinction between the power-granting provisions of the FRA and the NBA in performing its preemption analysis.

The plain language of 12 U.S.C. § 25b(b)(1)(B) applies to all preemption claims based on allegations that state consumer financial laws interfere with the "exercise" of "powers" by national banks. That statutory language is consistent with the Supreme Court's equivalent treatment of power-granting provisions of the FRA and NBA in *Barnett Bank* and *Franklin*. Accordingly, the "prevents or significantly interferes" preemption standard in § 25b(b)(1)(B) governs every case involving an alleged conflict between a state consumer financial law and a

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[278] 12 U.S.C. § 25b(b)(1)(B).
[279] *See supra* notes 264-65 and accompanying text (discussing and quoting H.R. Rep. No. 111-517, at 875 (2010) (Conf. Rep.), 2010 U.S.C.C.A.N. 722, 731; S. Rep. No. 111-176, at 175-76 (2010)).
[280] *United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455-63 (1993) (holding that Congress enacted 12 U.S.C. § 92 in 1916 as an amendment to § 13 of the FRA).
[281] *Barnett Bank*, 517 U.S. at 32.
[282] *Id.* at 32-35.
[283] *Id.* at 33, 34-35.
[284] *See Barnett Bank*, 517 U.S. at 33 (discussing *Franklin*'s reliance on the FRA's provision empowering national banks to accept "savings deposits"); *Franklin*, 347 U.S. at 375-79 (emphasizing the importance of the same provision of the FRA).

federal law that grants a "power" to a national bank, regardless of whether that power-granting law is codified in the NBA or in some other federal statute such as the FRA.[285]

To preserve the intended scope of *Barnett Bank*'s governing preemption standard, as manifested in § 25b(b)(1)(B)'s unambiguous terms, the scope of § 25b(b)(1)(C)'s alternative basis for preemption should be limited to federal laws that do not grant "powers" to national banks and are not codified in Title 62 of the Revised Statutes. Read in context with the plain language of § 25b(b)(1)(B), the proper scope of § 25b(b)(1)(C) should be limited to federal laws of general application that do not relate specifically to the "powers" of national banks, such as federal criminal laws, environmental laws, occupational safety laws, and tax laws.[286]

Restricting the application of § 25b(b)(1)(C) to federal laws that are not codified in Title 62 and do not relate specifically to the "powers" of national banks would avoid any conflict with the plain meaning and clearly intended scope of § 25b(b)(1)(B).[287] As previously discussed, Congress passed § 25b(b)(1)(B) to ensure that *Barnett Bank*'s "prevents or significantly interferes" preemption test would be the controlling legal standard for deciding all preemption claims based on allegations that state consumer financial laws interfere with the "exercise" of "powers " by national banks.[288] BofA's preemption claim under 12 U.S.C. § 371(a) is therefore governed exclusively by § 25b(b)(1)(B), as Section 371(a) is a power-granting provision that authorizes national banks to make real estate loans.

In sum, BofA's preemption claims are governed exclusively by § 25b(b)(1)(B), and the Second Circuit should reject any attempt by BofA to assert an alternative preemption claim under § 25b(b)(1)(C). BofA maintains that NYGOL § 5-601 interferes with the "exercise" by national banks of their "powers" under 12 U.S.C. § 371(a) and § 24 (Seventh). In accordance with the unambiguous terms of § 25b(b)(1)(B), BofA's preemption claims under both statutes must be determined in accordance with *Barnett Bank*'s "prevents or significantly interferes" preemption test.

7. In *Conti* and *Kivett*, the First and Ninth Circuits should uphold the validity of Rhode Island's and California's interest-on-escrow laws.

As discussed above, the First and Ninth Circuit Courts of Appeal will consider preemption challenges to Rhode Island's and California's interest-on-escrow laws in *Conti* and *Kivett*.[289] For the reasons set forth below, both courts should uphold those state laws after applying the analysis prescribed in the Supreme Court's *Cantero* decision.

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[285] Wilmarth, "Dodd-Frank," *supra* note 136, at 930.
[286] *Id.*
[287] *See Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 370 (1986) (citing "the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict"); *United States Nat'l Bank v. Indep. Ins. Agents of Am. Inc.,* 508 U.S. 439, 455 (1993) ("Over and over we have stressed that 'in expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (citations omitted).
[288] *See supra* notes 264-65 and accompanying text (discussing and quoting H.R. Rep. No. 111-517, at 875 (2010) (Conf. Rep.), 2010 U.S.C.C.A.N. 722, 731; and S. Rep. No. 111-176, at 175-76 (2010)).
[289] *Se supra* notes 33-34 and accompanying text (referring to *Conti* and *Kivett*).

a. The First Circuit should reverse the district court's decision in *Conti* and affirm the validity of Rhode Island's interest-on-escrow law.

In *Conti*, the First Circuit will review a district court decision holding that the NBA preempted Rhode Island General Laws (RIGL) § 19-9-2(a).[290] The First Circuit suspended its consideration of that decision until the Supreme Court issued its decision in *Cantero*.[291] The Rhode Island statute requires all mortgage lenders doing business in the state to pay interest on borrowers' funds held in escrow accounts "at a rate equal to the rate paid to the mortgagee on its regular savings account, if offered, and otherwise at a rate not less than the prevailing market rate of interest for regular savings accounts offered by local financial institutions."[292]

The district court held in *Conti* that the NBA preempted RIGL § 19-9-2(a) because that statute "places 'limits' on an 'incidental power' [of national banks] to establish [mortgage] escrow accounts" and "therefore 'significantly interfere[s]'" with that power.[293] Thus, the district court adopted a blanket preemption rule that would override all state consumer financial laws that place any "limits" on the exercise of a "power" by national banks.[294] In adopting that mistaken and overbroad preemption rule, the district court relied on the erroneous categorical test for preemption adopted by the Second Circuit in *Cantero*[295] as well as a similarly sweeping and invalid approach to preemption adopted by the First Circuit in a 2007 decision.[296]

The district court committed reversible error by adopting a blanket preemption rule that directly conflicts with the Supreme Court's decision in *Cantero*.[297] In accordance with the Supreme Court's instructions in *Cantero*, the First Circuit should (i) evaluate the "nature and degree of the interference" that RIGL § 19-9-2(a) causes with the "exercise" of "powers" by national banks, and (ii) conduct a "nuanced comparative analysis" of the Rhode Island statute's "interference" in accordance with the Supreme Court's assessments of the state laws that were challenged in *Barnett Bank* and the other six Supreme Court decisions identified in *Cantero*.[298]

After conducting the analysis required by *Cantero*, the First Circuit should reverse the district court's decision and uphold the validity of RIGL § 19-9-2(a). The Rhode Island statute

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[290] *Conti*, *supra* note 33.
[291] *Conti v. Citizens Bank, N.A.*, No. 22-1770 (1st Cir., *appeal filed* (Oct. 14, 2022), *appeal stayed*, Nov. 27, 2023).
[292] *Conti*, *supra* note 33, 2022 WL 4535251 at *2 (quoting RIGL § 19-9-2(a)).
[293] *Id.* at *4.
[294] *Id.*
[295] *Id.* at *2-*4 (discussing and quoting the Second Circuit's decision in *Cantero*).
[296] *Id.* at *3-*4 (discussing and quoting *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007)). *Ayotte* held that the NBA preempted a New Hampshire law. The New Hampshire statute prevented national banks from selling, through nonbank agents, gift cards worth $100 or less that included administrative fees and expiration dates. *Ayotte* held that New Hampshire's law was preempted because it "regulate[d] the terms and conditions" of gift cards issued by national banks and thereby "limit[ed]" their "power" to sell gift cards through agents under the NBA. 488 F.3d at 531-33. Congress overruled *Ayotte*'s core holding when it enacted Dodd-Frank in 2010. Dodd-Frank includes a provision, 12 U.S.C. § 25b(h)(2), which stipulates that the NBA and 12 U.S.C. § 371 do *not* preempt the application of state laws to nonbank subsidiaries, affiliates, and agents of national banks. Accordingly, *Ayotte* does not have any continuing precedential force after Dodd-Frank. *See* Wilmarth, "Dodd-Frank," *supra* note 136, at 935 & n.318.
[297] *Cantero*, 144 S. Ct. at 1301 (rejecting the Second Circuit's "categorical test" for preemption and holding that *Barnett Bank*'s "prevents or significantly interferes" test does not "draw a bright line" between preempted and non-preempted state consumer financial laws).
[298] *Id.* at 1300-01.

places a relatively minor burden on national banks and other mortgage lenders, as it requires them to pay interest on escrow accounts at the same rate they pay on their regular savings accounts, if offered, or at the "prevailing market rate" paid by local financial institutions on regular savings accounts. The interest rate required by § 19-9-2(a) is modest, reasonable, and consistent with the fact that mortgage escrow accounts function as mandatory savings accounts for borrowers.[299]

The interest payment required by the Rhode Island statute is considerably lower than the 2% annual rate required by NYGOL § 5-601 and Cal. Civ. Code § 2954.8(a). The national average rates paid on savings accounts by federally-insured depository institutions and credit unions since 2009 have ranged between a high of 0.47% in March 2024 and a low of 0.04% in March 2021.[300] As shown above, since 2009 FDIC-insured depository institutions have produced annual yields on their earning assets ranging between a high of 5.43% in 2023 and a low of 2.71% in 2021.[301] During the first quarter of 2024, FDIC-insured depository institutions generated an average yield on earning assets of 5.77%.[302]

Thus, national banks doing business in Rhode Island could easily pay the interest required by RIGL § 19-9-2(a) out of the earnings they generate by investing their borrowers' funds held in mortgage escrow accounts. National banks also receive significant additional benefits from mortgage escrow accounts, including greater protection for their security interests in mortgaged properties as well as the opportunity to earn mortgage servicing fees.[303]

Like NYGOL § 5-601, RIGL § 19-9-2(a) has a relatively minor impact on the "exercise" of "powers" by national banks. The limited effects of both state statutes on national banks are far less significant than the very severe burdens imposed by the state laws that were preempted in *Barnett Bank*, *Franklin*, *San Jose*, and *Fidelity*.[304] Additionally, the relatively minor impact of New York's and Rhode Island's statutes on national bank "powers" is much less substantial than the burdens created by the state laws that were upheld against preemption claims in *Luckett*, *McClellan*, and *Commonwealth*.[305] As was true for the state laws that were sustained in those three decisions, RIGL § 19-9-2(a) does not discriminate against national banks, does not create any direct conflict with a federal banking statute, and serves a valid state purpose by ensuring

[299] *See supra* notes 40-41 and accompanying text (explaining that mortgage escrow accounts operate as mandatory savings accounts, which require borrowers to make monthly deposits into their accounts to prefund future payments of their real estate taxes and property insurance premiums by lenders on their behalf).
[300] *See* Fed. Deposit Ins. Corp., "National Rates and Rate Caps – Previous Rates (updated June 17, 2024), https://www.fdic.gov/resources/bankers/national-rates/previous-rates.html.
[301] *See supra* notes 200-14 and accompanying text.
[302] *See supra* note 215 and accompanying text.
[303] *See supra* notes 38-39 and accompanying text (discussing the benefits mortgage lenders receive from escrow accounts).
[304] *See supra* notes 218-28 and accompanying text (comparing NYGOL § 5-601 to the state laws preempted in *Barnett Bank*, *Franklin*, *San Jose*, and *Fidelity*).
[305] *See supra* notes 229-33 and accompanying text (comparing NYGOL § 5-601 with the state laws that were upheld against preemption claims in *Luckett*, *McClellan*, and *Commonwealth*).

that mortgage borrowers receive a modest and reasonable return on the balances they are required to maintain in their mortgage escrow accounts.[306]

Thus, a "nuanced comparative analysis" of RIGL § 19-9-2(a) with the state laws challenged in *Barnett Bank* and the other six decisions identified in *Cantero* demonstrates that the "nature and degree of [§ 19-9-2(a)'s] interference" with the "powers" of national banks is far less significant than any of the state laws evaluated in those seven decisions.[307] The First Circuit should therefore uphold the validity of RIGL § 19-9-2(a), and dismiss Citizen Bank's preemption claim, because § 19-9-2(a) does not "prevent or significantly interfere" with the "exercise" of "powers" by national banks.[308]

b. The Ninth Circuit should uphold the validity of California's interest-on-escrow statute in *Kivett*.

On remand in *Kivett*, the Ninth Circuit should reaffirm its previous holding that the NBA does not preempt Cal. Civ. Code § 2954.8(a).[309] The California statute "requires '[e]very financial institution' to pay 'at least 2 percent simple interest per annum' on escrow account funds."[310] Thus, California's interest-on-escrow law places the same evenhanded burden on mortgage lenders as NYGOL § 5-601. Consequently, the "prevents or significantly interferes" preemption standard established by *Barnett Bank* and codified in 12 U.S.C. § 25b(b)(1)(B) does not preempt the California statute for the same reasons that it does not preempt the New York statute.[311]

During the district court proceedings in *Kivett*, defendant-appellant Flagstar Bank, N.A. (Flagstar) submitted declarations by two of its employees, who asserted that the California statute "causes significant interference with Flagstar's operations."[312] After deposing Flagstar's employees, the plaintiffs argued that the employees' declarations presented only "conjecture, not fact," based on their "mere speculation regarding how [payment of interest on] escrow accounts *might* relate to Flagstar's underwriting practices, product pricing, or participation in the secondary mortgage market."[313]

Flagstar's employees acknowledged that Flagstar complied with state interest-on-escrow laws, including Cal. Civ. Code § 2954.8(a), for mortgage loans that Flagstar "subserviced" on behalf of third-party holders of mortgage servicing rights. Additionally, Flagstar's portfolio of

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306 *See supra* note 299 and accompanying text; *see also Greenwood Trust*, 971 F.2d at 828 (affirming that "banking" and "consumer protection" fall "squarely within the ambit of the states' historic powers," and "any preemption provision [affecting those state powers] must be construed cautiously and with due regard for state sovereignty").
307 *Cantero*, 144 S. Ct. at 1297-1301.
308 12 U.S.C. § 25b(b)(1)(B).
309 *Kivett*, *supra* note 34.
310 *Lusnak*, 883 F.3d at 1190 (quoting Cal. Civ. Code § 2954.8(a)).
311 *See supra* Parts 1-5.
312 Opening Brief of Appellant Flagstar Bank, FSB in *Kivett*, 2021 WL 4507608 (9th Cir., Sept. 24, 2021), at *27-*30; *see also* Kivett Ninth Circuit Answering Brief, *supra* note 217, at *4 ("Flagstar's evidentiary presentation in the cross-motions [for summary judgment] consisted solely of the declarations of two of its employees.").
313 Kivett Ninth Circuit Answering Brief, *supra* note 217, at *5 ("mere speculation" quote); *id.* at *8-*14 (summarizing the depositions of Flagstar's two employees); *id.* at *26 ("Flagstar's witnesses consistently testified . . . that any suggestion of interference in their declarations was conjecture, not fact").

"subserviced" mortgage loans represented about 80% of its total mortgage servicing portfolio. Flagstar did not comply with state interest-on-escrow laws only for the 20% of mortgage loans that it serviced for its own account.[314] The plaintiffs argued that Flagstar "offered no evidence" to show that its compliance with state interest-on-escrow laws for 80% of its mortgage servicing portfolio "interfere[d] in any way with its banking operations."[315]

Moreover, evidence produced during the district court proceedings in *Kivett* indicated that the mortgage lending industry's compliance with Cal. Civ. Code § 2954.8(a) "became the all-but universal norm after the [Ninth Circuit issued its] *Lusnak* decision" in 2018, and that "norm" was followed by leading national banks such as Wells Fargo, JPMorgan Chase, and Citibank.[316] According to the plaintiffs, "Flagstar failed to offer any evidence . . . that this pervasive compliance with state [interest-on-escrow] laws in the [mortgage lending] industry was in fact interfering with banking powers in general."[317]

In sum, the evidentiary record in *Kivett* does not provide any support for Flagstar's claim that Cal. Civ. Code § 2954.8(a) "prevents or significantly interferes" with the "exercise" by national banks of their "powers" to make mortgage loans and administer mortgage escrow accounts.[318] Accordingly, the Ninth Circuit should uphold the validity of § 2954.8(a) and reject Flagstar's preemption claim.

Conclusion

For the reasons set forth above, the Second Circuit on remand in *Cantero* should uphold the validity of NYGOL § 5-601 and reject BofA's preemption claim. Additionally, the First and Ninth Circuits should uphold the validity of Rhode Island's and California's similar interest-on-escrow laws in *Conti* and *Kivett* and dismiss the preemption claims asserted in those cases.

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[314] *Id.* at *7-*8, *13-*14.
[315] *Id.* at *14; *see also id.* at *26 ("Given that Flagstar complies with state [interest-on-escrow] laws (including Section 2954.8 in California) except in the roughly 20% of cases where it owns the [mortgage servicing] rights, the absence of any actual factual support for its interference claims is fatal to its position.").
[316] *Id.* at *14-*15.
[317] *Id.* at *15.
[318] 12 U.S.C. § 25b(b)(1)(B).