No. 22-529

In the Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, and ILANA HARWAYNE-GIDANSKY, individually and on behalf of all others similarly situated,

Petitioners,

v.

BANK OF AMERICA, N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

HASSAN ZAVAREEI
ANNA C. HAAC
TYCKO & ZAVAREEI LLP
1828 L Street, NW
Suite 100
Washington, DC 20036
(202) 973-0900

(counsel continued on inside cover)

DEEPAK GUPTA
JONATHAN E. TAYLOR
Counsel of Record
GREGORY A. BECK
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

February 16, 2024

Counsel for Petitioners

JONATHAN M. STREISFELD
KOPELOWITZ OSTROW
FERGUSON
WEISELBERG GILBERT
1 West Las Olas Boulevard
Ft. Lauderdale, FL 33301
(954) 525-4100

TODD S. GARBER
FINKELSTEIN,
BLANKINSHIP,
FREI-PEARSON &
GARBER, LLP
1 North Broadway
Suite 900
White Plains, NY 10601
(914) 298-3283

MARK C. RIFKIN
MATTHEW M. GUINEY
WOLF HALDENSTEIN
ADLER FREEMAN &
HERZ LLP
270 Madison Avenue
New York, NY 10016
(212) 545-4600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Regulations

Other authorities

INTRODUCTION

Bank of America fully embraces the Second Circuit's control test and the OCC's preemption regime. In its view, "[s]tate laws that control or otherwise hinder national banks' exercise of their federally conferred powers"—including incidental powers not specified in any statute—"are preempted unless Congress expressly authorizes." Resp. Br. 20. State laws that do not "directly control national-bank powers," by contrast, like "[g]enerally applicable state contract laws," are preempted only if they "rise to the level of frustrating national banks' exercise of their powers." Resp. Br. 24-25, 43.

Even before section 25b amended the National Bank Act, this rule could "be found nowhere within the text of the statute." *Cuomo v. Clearing Housing Ass'n*, 557 U.S. 519, 533 (2009). For one thing, it "attempts to do what Congress declined to do: exempt national banks from all state banking laws." *Id.*; *see also* 12 U.S.C. § 36(f)(1)(A) (1994) (confirming that state "consumer protection" and "fair lending" laws generally apply to national banks). For another, it is wrong on its own terms. The NBA "*does* specifically authorize" powers that Bank of America now concedes may be subject to state regulation, like the "power to make contracts." *Cuomo*, 557 U.S. at 532-33; *see* 12 U.S.C. § 24 Third. So even under the pre-section-25b NBA, Bank of America's rule would contravene the text.

But after section 25b, the rule is simply indefensible. And sure enough, Bank of America makes little effort to defend its rule under the text of that statute. It does not try to harmonize its rule, for instance, with the statute's definition of "State consumer financial law," or to show that it is even possible for a law to satisfy that definition without also satisfying its test for preemption. The only

"State consumer financial laws" that it concedes would not be preempted are laws that undoubtedly satisfy its test.

Bank of America is also unable to explain why, on its reading, Congress even bothered to codify the "prevents or significantly interferes with" standard. To Bank of America (at 2), that is just "a phrase from the opinion" in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), which can be disregarded because the statute also mentions "the legal standard" from *Barnett Bank*. But to Congress, "prevents or significantly interferes with" *is* the legal standard from *Barnett Bank*. A law is preempted "only if" it satisfies *that* standard, 12 U.S.C. § 25b(b)(1)(B)—a standard that, by its terms, requires that the interference be "significant[]." Bank of America has no plausible interpretation of what that word means.

Nor does it attempt to reconcile its test with the test that the OCC must apply when it makes preemption determinations under section 25b. Bank of America concedes (at 18, 44) that the OCC must assess "state laws' practical 'impact'" and engage in "fact-finding." And it concedes (at 40) that there would be "glaring anomalies" were courts to apply a different standard. Yet it fails to acknowledge the import of its concessions—not that a court must heed these same procedural requirements, but that they shed light on what the *substantive* standard is.

That leads to a bigger problem for Bank of America: It has no account of why Congress would have written the statute it did if it were pleased with the OCC's preemption regulation. Nor do any of the bank's amici, who are more than eager to talk policy but loathe to engage with the text. Huge swaths of section 25b can be understood only as a repudiation of the OCC's 2004 rule—not a codification of it. Yet Bank of America takes the position that the statute kept that rule fully intact. Put another way: It argues that the statute (which takes up nearly seven pages of its appendix) was designed to have virtually no effect. But "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect"—not "act[] as though the amendment … had not taken place." *Ross v. Blake*, 578 U.S. 632, 641-42 (2016).

With the text so firmly against it, Bank of America falls back on policy. It says (at 3) that "mayhem" will ensue if the law is applied as written. But its "policy arguments cannot overcome [the] clear text[]." *Helix Energy Sols. Grp. v. Hewitt*, 598 U.S. 39, 59 (2023). They are also vastly overstated. The substantial-interference standard will come into play, and require a factual showing, only for state laws that do not discriminate against national banks vis-à-vis state banks, and do not present any clear conflict with a federal statute, as in *Barnett Bank*—limitations that take care of a lot of Bank of America's concerns.

To be sure, in such cases "courts are going to have to make judgment calls about the extent to which the laws hinder" banking powers "as a factual matter," which "will often be better made on an evidentiary record." *Bowler v. Hawke*, 320 F.3d 59, 64 (1st Cir. 2003). But there's nothing unusual about that. Congress has done the same for many other regulated industries—including motor carriers and airlines, where preemption often turns on whether a state law has a significant real-world effect on their activities. And here, the regime established by Congress has a built-in way to help ensure uniformity, predictability, and the efficient resolution of preemption questions: The OCC can make the preemption determinations contemplated by the statute. That it has thus far failed to respect the statute's commands grants no license for this Court to do the same.

ARGUMENT

I. Bank of America makes little effort to harmonize its control test with the plain text of section 25b—and instead concedes the test away.

In our opening brief (at 32-38), we gave three reasons why the control test contradicts section 25b's plain text: It would require preemption of every "State consumer financial law," undoing the statute and imposing a regime of field preemption. It would read the word "significantly" out of the statute. And it would make nonsense of the provisions governing OCC preemption determinations, which must assess the law's "impact" on national banks.

Bank of America's response (at 37-46) only highlights these flaws. It makes little effort to explain how its test comports with this statutory text. Much the contrary: In straining to give the statute meaning, Bank of America makes concessions that cannot be reconciled with its test.

"State consumer financial law." As we explained in our opening brief (at 32-33), section 25b's definition of "State consumer financial law" is incompatible with a control test because it would require that every such law be preempted, contrary to the statute's text and structure. Bank of America provides just three examples of state laws that it thinks can satisfy the definition and are not preempted: (1) "state fair-lending laws," (2) state "bans on contracting by minors," and (3) state "requirements that certain contracts be committed to writing." Resp. Br. 43.

These concessions are fatal to its control test. Even if these laws all qualify as "State consumer financial laws,"[1]

[1] Although fair-lending laws qualify for the definition, Bank of America does not explain how generally applicable laws "specifically regulate[]" consumer-financial transactions. 12 U.S.C. § 25b(a)(2).

they all control national banks' powers. Fair-lending laws control "the manner in which the national banks engage in activity expressly authorized by federal law"—real-estate lending. *Cuomo*, 557 U.S. at 550 (Thomas, J., concurring in part and dissenting in part). And "any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts"—an enumerated power expressly granted by the NBA. *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); *see* 12 U.S.C. § 24 Third. By Bank of America's own admission, however, these laws are not preempted.

Bank of America makes these concessions not just to give meaning to section 25b, but also because these laws are universally understood to apply to national banks (as even the OCC recognizes). Yet *the reasons* for that are no less true here. Congress has confirmed that *both* state "fair lending" laws *and* state "consumer protection" laws generally apply to national banks. 12 U.S.C. § 36(f)(1)(A); *see* Pet. Br. 33 n.3, 42-43 n.5. And this Court has long rejected the argument that "in every case where a national bank is empowered to make a contract[,] such contract is not subject to state law," holding instead that "[a]ll their contracts are governed and construed by state laws." *McClellan*, 164 U.S. at 357-58. The Court has done so even though the power to make contracts is an enumerated power. 12 U.S.C. § 24 Third. Here, by contrast, Bank of America asserts what is at best an unspecified incidental power, which may be "subject to law." *Id.* § 24 Seventh.

Nor can Bank of America square its control test with section 25b's command that the NBA "does not occupy the field in any area of State law." *Id.* § 25b(b)(4). Again, Bank of America identifies only one banking-specific law that it agrees is covered by the statute and is not preempted:

fair-lending laws. As just noted, that concession dooms its test. And yet it also shows that, as Bank of America reads the statute, the NBA occupies the field of consumer-protection law. *Contra id.* & *id.* § 36(f)(1)(A).

"Significantly interferes with." Nor does Bank of America offer a plausible account of what "significantly" is doing in the statute (or for that matter, why Congress added "prevents or significantly interferes with" at all).

Under subsection 25b(b)(1)(B), a law is preempted "only if" it "prevents or significantly interferes with" the exercise of a national bank's powers, "in accordance with the legal standard for preemption in . . . *Barnett Bank*." Like the Second Circuit, Bank of America reads this provision to codify *all* of this Court's banking cases, "from *McCulloch* (1819) to *Watters* (2007)." Resp. Br. 14. It puts special focus on *Watters*, mentioning it 29 times by name and calling it "this Court's lone case explicating *Barnett Bank*." Resp. Br. 21. To Bank of America, then, the "prevents or significantly interferes with" standard is just "a phrase from the opinion," to be given no more weight than any other phrase from any of this Court's NBA cases. Resp. Br. 2. On this telling, the word "significantly" is not used in its ordinary sense, but is a "term-of-art reference to the *Barnett Bank* decision" as a whole. Resp. Br. 38.

None of that is right. As Congress saw it (and it is only Congress's understanding that matters), the "prevents or significantly interferes with" standard *is* the preemption standard from *Barnett Bank*. A state law is preempted "only if" it satisfies that particular standard. And that is in keeping with *Barnett Bank* itself, which made clear that states may regulate national banks so long as they do "not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33; *see* Pet. Br. 39-41.

By deemphasizing this language in favor of "other formulations" that omit the word "significantly," Resp. Br. 18, Bank of America acts as if Congress had never added "prevents or significantly interferes with" to the statute. In doing so, it doesn't just violate the canon against surplusage; it repeats the very move that the OCC made in its 2004 rulemaking—and that caused Congress to codify the standard in the first place. *See* Pet. Br. 14.[2]

As for Bank of America's "term-of-art" argument, it is true that the statute includes a "reference to the *Barnett Bank* decision." Resp. Br. 38. But there is no reason to think that, when this Court used the words "significantly interferes with" in that opinion, it intended them to mean something other than their ordinary meaning. Bank of America then says that the ordinary meaning of "significant" that should apply here is "important," so that "'significant interference' includes interference 'important in relation to the banking power at issue.'" *Id.* But even that meaning does not help it avoid surplusage. Its test would treat *all* regulation of banking powers as important, depriving "significant" of any effect.

Bank of America invokes trespassing (at 38) as its only example of such *per se* significant interference. What it fails to mention, however, is that *any* trespassing "is an injury" that "gives rise to a cause of action"—even if it "constitutes *no interference with* or detriment to the land or its beneficial enjoyment." Restatement (Second) of Torts § 7 cmt. a (1965) (emphasis added).

---

[2] Nor does Bank of America even adhere to its own alternative reading of *Barnett Bank*. Two pages after asserting (at 41) that "*any* limitations on national-bank powers are preempted" under *Barnett Bank*, it concedes (at 43) that *some* limitations are permitted.

Bank of America does appear to give "significant" its ordinary meaning for laws that do not "directly control national-bank powers." Resp. Br. 24. For such "indirect limitations," Bank of America contends that the question is whether the laws "impose an undue burden on the performance of the banks' functions" or "rise to the level of frustrating national banks' exercise of their powers"—questions that assess the laws' practical effect. Resp. Br. 24-25. Bank of America claims that "state laws of general application" fall into this category, while equivocating on whether the same is true of the escheat laws in *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), and *First National Bank v. California*, 262 U.S. 366 (1923). *See* Resp. Br. 24-25; *but see* Resp. Br. 42 (arguing that *Anderson* "does not turn on state laws' practical effects").

We have already noted that this distinction is illusory. National banks only have the powers given to them by federal law, so any regulation of their conduct is (unless the conduct is ultra vires) an exercise of control over their powers. The distinction is also atextual. *See Cuomo*, 557 U.S. at 533. To the extent that section 25b can be read to extend the definition of "State consumer financial laws" to laws that do not directly control national-banking powers, there is no textual basis for applying a different meaning of "significantly interferes with" just for those laws. *See Anderson*, 321 U.S. at 252 (holding that a state banking law did not constitute significant interference because it would not "have that effect" any "more than would the tax laws, the attachment laws," or other general state laws).

As for *Watters*, it is telling that Bank of America feels the need to rely so heavily on excerpts from that opinion. As this Court explained in *Cuomo*: "[T]he sole question [in *Watters*] was whether operating subsidiaries of national banks enjoyed the same immunity from state visitation. The opinion addresses and answers no other question." 557 U.S. at 528; *accord* Tr. of Oral Argument in *Cuomo*, at 38. Congress then abrogated *Watters* and codified *Cuomo* by name. 12 U.S.C. § 25b(e), (i)(1).

Assessment of a law's "impact" with "substantial evidence." Bank of America's test also clashes with the provisions governing OCC preemption determinations. Bank of America acknowledges (at 18, 44) that the OCC must engage in "fact-finding" as to "'state laws' practical 'impact'" when making preemption determinations under the statute. Yet it argues (at 44-45) that these provisions are irrelevant because they don't apply to courts.

That misses the point. The point is not that these provisions apply of their own force to courts. Rather, it is that they shed light on what the standard *is*. As we pointed out in our opening brief (at 37), the statute leaves no doubt that, although the OCC must follow its own procedures when making a preemption determination, "the *substance* of the determination is the same regardless of who is making it." Bank of America agrees. Elsewhere, it admits that the substantive standard must be the same for courts and the OCC or there would be "glaring anomalies." Resp. Br. 40. But it is advocating for just such an anomaly: one test for courts, and a very different test for the OCC.

Were it otherwise, and a control test applied to the OCC, many of the law's provisions would be entirely irrational. The substantial-evidence provision? Pointless. 12 U.S.C. § 25b(c). Periodic agency review? A waste. *Id.* § 25b(d). Deference to OCC preemption determinations based on the "validity of the[ir] reasoning"? Nonsensical. *Id.* § 25b(b)(5)(A). Bank of America provides no reason to attribute such wide-scale irrationality to the statute.

II. Adopting Bank of America's control test would require reading section 25b to have no real effect.

These three textual problems are independently fatal to Bank of America's position. But they highlight a deeper issue: Bank of America reads section 25b to have no real effect except for the sentence abrogating *Watters*. "When Congress amends legislation," however, "courts must presume it intends the change to have real and substantial effect." *Ross*, 578 U.S. at 641-42. Here, the statute's text and context confirm this presumption at every turn, and allow for only one plausible interpretation: that Congress wanted to rein in OCC preemption—not ratify it.

How else to explain the statute? Right from the start, it is as much an anti-preemption clause as a preemption clause. It says that "State consumer financial laws" are preempted "only if" one of three conditions is met. 12 U.S.C. § 25b(b)(1). The word "only" is important. It is tantamount to saying: "State consumer financial laws are *not* preempted *unless*" an exception applies. The statute's definition of "State consumer financial law" reinforces this anti-preemption framing. It rejects the distinction drawn by the OCC in its 2004 rule, *see* Pet. Br. 17, while excluding the very laws that are most likely to be preempted (those that "directly or indirectly discriminate against national banks," 12 U.S.C. § 25b(a)(2)). This framing makes sense only under our reading of the statute. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (explaining that "the whole-text canon" requires consideration of "the entire text, in view of its structure and of the physical and logical relation of its many parts").

The same goes for the rest of the statute. Take, for instance, the bar on field preemption. Like the definitional provision (and really, all of section 25b), this provision was a direct response to OCC overreach. The OCC's 2004 rule was, by its own admission, "substantially identical" to a rule preempting "the entire field of real estate lending," because (to the OCC) the difference between field and conflict preemption was "largely immaterial." *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1910-11 & n.56, 1913 (Jan. 13, 2004). Congress plainly disagreed.

Or take the provisions governing judicial deference. Subsection 25b(b)(5)(A) provides that OCC preemption determinations will receive only *Skidmore* deference, while subsection 25b(b)(5)(B) provides that the deference given to OCC *non*-preemption determinations remains unaffected (that is, *Chevron* deference applies). This two-track approach makes sense if Congress was dissatisfied with the OCC's 2004 preemption regulation. But it is head-scratching if Congress intended to codify the substance of that regulation, as Bank of America maintains.

Or take Dodd-Frank's savings clause. It provides that section 25b does not affect the applicability of "any" OCC preemption determination as to "any contract entered into on or before July 21, 2010." 12 U.S.C. § 5553. This provision treats a bank's pre-Dodd-Frank reliance on OCC preemption rules as reasonable, while denying such refuge to post-Dodd-Frank contracts. That distinction makes sense only if Congress intended to disapprove the OCC's preemption regime but nevertheless respect the reliance interests formed before Dodd Frank was enacted. Bank of America's response (at 47 n.10), in keeping with its view that section 25b only overruled *Watters*, is that Congress added this provision to preserve an OCC regulation "mirroring that holding for pre-Dodd-Frank contracts." That is not a plausible account of the statute.

The only plausible understanding of the statute is that it was designed to "undo[] broader standards adopted by … the OCC in 2004," so that the "standard for preempting State consumer financial law" would "return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank*." S. Rep. No. 111-176, at 175 (2010); *see also* H.R. Rep. No. 111-517, at 875 (2010) (explaining that section 25b "revises the standard the OCC will use to preempt state consumer protection laws"). Bank of America dismisses these statements as legislative history, and relies instead (at 46-47) on a post-enactment letter from two legislators. But "whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law." *Barber v. Thomas*, 560 U.S. 474, 486 (2010).[3]

III. Bank of America's policy concerns are overblown and provide no basis to nullify the statutory text.

With no coherent textual argument to speak of, Bank of America resorts to policy. It argues that the test mandated by the statute would, if applied, "declare open season on national banks' federally conferred powers," and lists a series of hypothetical state laws that, if enforced, would unleash "mayhem." Resp. Br. 3, 47-50.

But there are good reasons why Bank of America's hypothetical laws are unlikely to arise in the real world. For starters, any state law that singles out national banks,

---

[3] Bank of America also relies (at 45) on *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), where this Court interpreted a different statute (HOLA) to grant a different agency authority to preempt state law without limit and held that the agency exercised that authority. Regardless of whether that reading of HOLA was correct in that case, it has no bearing on this one.

"directly or indirectly," 12 U.S.C. § 25b(a)(2), or that has a "discriminatory effect on" them, *id.* § 25b(b)(1)(A), is separately preempted. That independent statutory limit drastically reduces the likelihood that states will choose to adopt obviously punitive laws, like the "50% interest" law that Bank of America imagines (at 48). States have no incentive to saddle national banks with burdensome laws when those laws must apply equally to their own banks.

Many of Bank of America's other hypothetical laws would also be separately preempted because they would conflict with express statutory powers. State laws setting interest rates or mandating fixed rates, for example, will often be preempted by 12 U.S.C. § 85, which grants national banks authority to charge rates within the limits "allowed by the laws of [their home] State." *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). Likewise, state licensing requirements would likely contravene the OCC's exclusive authority to charter national banks. *See* 12 U.S.C. § 21. Bank of America is thus wrong to claim that requiring a showing of significant interference would allow states to "make different choices than Congress." Resp. Br. 48. "Where state and federal law 'directly conflict'"—as in *Barnett Bank*—the "state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011).

The significant-interference test, therefore, matters only for state laws that apply equally to state and federal banks and do not conflict with any express banking power. Even then, as in other preemption contexts, "[e]mpirical evidence [will] not [be] mandatory" in every case. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055 (7th Cir. 2016). Instead, courts would "conduct an individualized inquiry that engages with the real *and logical* effects of the state statute." *Id.* Courts could find a state law to be preempted without evidence if the law's significant effect is shown to be "obvious[]" or "clear as an economic matter." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387-88 (1992).

Courts haven't had trouble applying this test to state escrow-interest laws. One year after New York adopted its law, a court upheld the law against a preemption challenge. *Fed. Nat'l Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364, 1368-69 (S.D.N.Y. 1975). Relying on *Anderson*—"the case presenting the closest analogy"—the court explained that any burden on national banks was "insignificant." *Id.* "The purpose of prepaying certain insurance and tax expenses is not to provide [the bank] with income," the court observed, but "to protect the mortgagees' interest in the mortgaged property." *Id.* at 1369. New York's law "in no way impairs this purpose." *Id.*

National banks were therefore subject to these laws (and New York's in particular) for decades. No mayhem resulted, and Congress expressed no disagreement with *Lefkowitz* when, in 1982, it enacted the real-estate lending statute that Bank of America now invokes as the sole specific source of its powers. *See* 12 U.S.C. § 371(a).[4]

Nor is there anything exotic about a preemption test that looks to a state law's practical effects. As in other preemption contexts, the "proper analysis requires

[4] The only real-world state law that Bank of America and its amici identify is a New York statute regulating the terms of "reverse mortgage[s]," N.Y. Real Prop. Law § 280-a(2)(c)—a complex and often risky type of loan targeted at vulnerable seniors. *See* OCC Consumer Advisory 2009-2 (Sept. 25, 2009). Bank of America claims (at 48) that the law "prescribe[s] which words banks can use in advertisements." But all this part of the law does is prohibit "unfair or deceptive practices in connection with the marketing or offering of reverse mortgage loans." N.Y. Real Prop. Law § 280-b(2).

consideration of what the state law in fact does." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013). That question is "unlikely to be purely legal," as courts have recognized in the national-bank context, and will often entail a "practical" inquiry "better made on an evidentiary record created in litigation." *Bowler*, 320 F.3d at 64.

Even when Congress has adopted a far broader test for preemption—preempting any state law "related to" certain activity, which sweeps in many state laws without regard to their effects—courts regularly assess a state law's practical impact in defining the outer bounds of preemption. This Court has read the Federal Aviation Administration Authorization Act's "relates to" clause, for example, to preempt any state law with a "*significant* impact" on certain specified trucking activities. *Rowe v. N.H. Motor Trap. Ass'n*, 552 U.S. 364, 375 (2008). The Court has adopted the same reading of the "related to" clause in the Airline Deregulation Act. *Id.* at 370; *see* 49 U.S.C. § 41713(b)(1); *see also Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 87 (2020) (applying similar test under ERISA's related-to preemption provision).

So even under these vastly more expansive statutes, preemption often requires a "factual basis on which to judge the effect of" the state law. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 475 (9th Cir. 2007); *see Nw., Inc. v. Ginsberg*, 572 U.S. 273, 283-84 (2014) ("What is important … is the effect of a state law," and its "real-world consequences [on regulated entities]."); *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1243 (9th Cir. 2021) (finding no preemption where the defendant "presented no evidence" of "significant impact"). And as here, the proponents of preemption in these schemes "bear the burden of proof in establishing the affirmative defense of preemption." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014); *see also Morales*, 504 U.S. at 427 (Stevens, J., dissenting).

Finally, Bank of America argues (at 47) that requiring a practical inquiry would "creat[e] alarming unpredictability" until preemption issues are settled in the courts. Of course, Bank of America is hardly forthcoming about the contours of its own position, having elected to sacrifice the simplicity of a true control test by offering up several unexplained concessions and claiming that "myriad" more exist. Resp. Br. 43. But anyway, Congress specifically addressed this concern by building in a mechanism to promote predictability and efficiency. Section 25b allows the OCC to make "preemption determination[s] . . . on a case-by-case basis" based on "the impact of a particular State consumer financial law on any national bank." 12 U.S.C. § 25b(b)(1)(B), (3)(A). Under this provision, the OCC may use its published preemption decisions to give guidance to national banks in advance, and may adapt its decisions to changing circumstances by complying with the periodic-review requirement. *Id.* § 25b(b)(3), (d).

The OCC need not make these determinations on a "law-by-law" or "bank-by-bank" basis. *Contra* Resp. Br. 47. Its determination is not limited to the effect of a single state law. The OCC may also consider, in consultation with the CFPB, the "law of another State [with] substantively equivalent terms." 12 U.S.C. § 25b(b)(3). Nor is the OCC's determination limited to a law's effect on a single national bank. Congress authorized the OCC to assess the impact of a state law "on *any* national bank that is subject to that law." *Id.* (emphasis added); *see, e.g.*, *Preemption Opinion*, 66 Fed. Reg. 51502, 51508 (Oct. 9, 2001) (finding cost of compliance was "especially troublesome for small banks").

In addressing state escrow-interest laws, for example, the OCC could determine that a minimum interest rate does not significantly burden national banks if it is within a certain range of the current prime rate. Were the OCC to do so while making the necessary findings, and its reasoning were persuasive, courts could defer to it, *id.* § 25b(b)(5)(A), giving due weight to the agency's expertise where "the subject matter is technical[,] and the relevant history and background are complex and extensive," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

Moreover, Congress gave the OCC a one-year head start to make these determinations before the statute's effective date. The OCC refused to exercise that authority, choosing to hew to the fiction that its field-preemption rule somehow survived the statute. That does not mean, however, that it will not make the required findings going forward. It regularly made case-by-case factfinding of this sort before purporting to preempt the field in 2004. For example, it found specific facts showing that a state law governing the sale of insurance would "increase a bank's operating costs" by a specific amount and "substantively hamper" its marketing activities. 66 Fed. Reg. at 51507-08; *see also, e.g.*, *Preemption Opinion*, 66 Fed. Reg. 23977, 23978 (May 10, 2001) (finding as a factual matter that a state law "would frustrate the ability of national banks to operate their leasing businesses in an economically efficient manner"); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1014 (E.D. Cal. 2002). "The high level of specificity and the significant factual findings" the OCC made in these cases present "an extremely sharp contrast to the complete absence of a factual record" in the OCC's recent rules. Sharkey, *Inside Agency Preemption*, 110 Mich. L. Rev. 521, 582 (2012).

Until the OCC does what Congress envisioned, courts will have to perform their "own conflict determination" without the benefit of an agency record. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009); *see Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1680 (2019). That may require courts "to make judgment calls about the extent" of state interference. *Bowler* 320 F.3d at 64. But as Justice Holmes observed, "the question where to draw the line … is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit,* 268 U.S. 161, 168 (1925). Section 25b gives considerably more guidance to courts than, say, a "related to" test, which is famously "frustrating" in "its indeterminacy." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995); *see Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). Yet even there, courts endeavor to apply Congress's test, looking to the statutory objectives "as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656.[5]

In contrast to those statutes, section 25b provides a carefully reticulated scheme for resolving preemption questions. "[I]t is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre." *Cuomo*, 557 U.S. at 556 (Thomas, J., concurring in part and dissenting in part). Because Congress chose to forgo the administrative ease of field preemption in favor of a conflict-preemption regime based

[5] Flagstar Bank's amicus brief (at 17) suggests how a bank might establish preemption: by providing evidence "of how, as a factual matter, state interest-on-escrow laws would impact its operations." *But see* Br. of Flagstar Plaintiffs 4-6 (recounting how Flagstar Bank failed to show significant interference by state escrow-interest law).

on practical effects, courts are not free to disregard that choice in the name of administrative convenience.

IV. Bank of America has not shown that New York's law would have a significant impact on the exercise of an express statutory power.

Under the proper test, reversal is warranted. Bank of America invokes the same two statutes that it did below: (1) its real-estate-lending power, 12 U.S.C. § 371(a), and (2) its power to exercise, "subject to law," all "incidental powers [] necessary to carry on the business of banking," *id.* § 24 Seventh.

From these statutes, Bank of America tries to craft a statutory-construction argument like the one that this Court adopted in *Barnett Bank*. It argues (at 28) that Congress has not conditioned these powers on state-law compliance, so it did not intend for them to be "limited by state law." But *Barnett Bank* involved a state law that entirely prevented national banks from exercising a power specifically granted by a federal statute, and this Court reasoned "that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." 517 U.S. at 33.

This case couldn't be more different. It involves state regulation of a power *not* explicitly granted by Congress. And rather than signal a desire to displace all state regulations on real-estate lending by national banks, Congress did the opposite: It made clear that state "fair lending" laws and "consumer production" laws generally apply to national banks, 12 U.S.C. § 36(f)(1)(A), and the NBA does not "occupy the field" of real-estate lending, *id.* § 25b(b)(4). As to state escrow-interest laws in particular, Congress provided that, for many mortgages, national banks would have to comply with any "applicable" state law mandating the payment of interest as a matter of federal law. 15 U.S.C. § 1639d(g)(3). Congress's decision to extend that mandate to national banks refutes the idea that such laws are categorically preempted. Its decision to apply the mandate to all state banks, as well, further undercuts the idea that Congress was requiring banks to do something that would significantly impair their ability to exercise powers necessary to the business of banking.

Yet that is what Bank of America must show to prevail. It has not made that showing. Bank of America tries to argue that the discretionary aspect of New York's law, in tandem with other states' escrow-interest laws, works real harm. But variation among the states is not itself a basis for preemption. *Cf. Atherton v. F.D.I.C.*, 519 U.S. 213, 220-21 (1997). And Bank of America points to no evidence of the practical effect of these laws, much less evidence of a *significant* effect. As the case proceeds, it may build upon these points to try to prove its "demanding defense" of preemption. *Wyeth*, 555 U.S. at 573. But it has not yet done so. Reversal is therefore warranted.[6]

CONCLUSION

The Second Circuit's judgment should be reversed.

---

[6] The Second Circuit concluded that section 25b does not apply to Cantero's claims seeking interest before Dodd-Frank's effective date. Pet. App. 9a-10a. The parties agree, however, that these claims are subject to the same standard under *Barnett Bank* and section 25b. *See* Pet. Br. 36-41. If this Court disagrees, or has doubts on that score, it could vacate and remand as to Cantero's claims so the Second Circuit may apply the proper test and resolve any antecedent questions in the first instance. *See* U.S. Br. 25-26 n.7; Resp. Br. 19 n.5.

Respectfully submitted,

DEEPAK GUPTA
JONATHAN E. TAYLOR
Counsel of Record
GREGORY A. BECK
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

HASSAN ZAVAREEI
ANNA C. HAAC
TYCKO & ZAVAREEI LLP
1828 L Street, NW
Suite 100
Washington, DC 20036
(202) 973-0900

JONATHAN M. STREISFELD
KOPELWITZ OSTROW
FERGUSON WEISELBERG
GILBERT
One West Law Olas Blvd.
Suite 500
Fort Lauderdale, FL 33301
(954) 332-4218

TODD S. GARBER
FINKELSTEIN,
BLANKINSHIP, FREI-
PEARSON &
GARBER, LLP
1 North Broadway, Suite 900
White Plains, NY 10601
(914) 298-3283

MARK C. RIFKIN
MATTHEW M. GUINEY
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
(212) 545-4600

February 16, 2024 *Counsel for Petitioners*