United States Court of Appeals
For the Second Circuit

August Term 2024

Argued: March 3, 2025
Decided: May 5, 2026

Nos. 21-400, 21-403

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

Plaintiff-Appellee,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellant.

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

Plaintiffs-Appellees,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellant.

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

Before: LIVINGSTON, *Chief Judge*, and PARK and PÉREZ, *Circuit Judges*.

Plaintiffs deposited money in mortgage-escrow accounts with Bank of America ("BOA"), which refused to pay the two-percent interest rate required by New York General Obligations Law ("GOL") § 5-601. BOA argued that New York's interest-on-escrow requirement is preempted by federal banking law, which authorizes federally chartered national banks to offer mortgage-escrow accounts without requiring them to pay interest.

We previously concluded that GOL § 5-601 is preempted because it exercises "control over a banking power granted by the federal government." *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 125 (2d Cir. 2022). But the Supreme Court vacated that decision and instructed us to conduct a "nuanced comparative analysis" of New York's interest-on-escrow law and the Court's banking preemption precedents. *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 220 (2024).

Having done so, we again conclude that GOL § 5-601 is preempted. First, New York's interest-on-escrow requirement affects a national banking *power*: the power to offer mortgages. Second, it targets banks and limits their broad power to set the terms of mortgage-escrow accounts, so it is similar in nature to the preempted laws in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996). Finally, its degree of interference on banks' ability to make real-estate loans efficiently is similarly severe to the interference

created by the preempted advertising law in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954).

The nature and degree of GOL § 5-601's interference with federal law is "more akin" to the cases in which state laws were preempted than those in which state laws were not. *Cantero*, 602 U.S. at 220. We thus **REVERSE** the orders of the district court denying BOA's motions to dismiss and **REMAND** the cases for further proceedings consistent with this opinion.

Judge Pérez dissents in a separate opinion.

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Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming, and the District of Columbia, in support of Plaintiffs-Appellees in Hymes v. Bank of America.

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PARK, *Circuit Judge*:

Plaintiffs deposited money in mortgage-escrow accounts with Bank of America ("BOA"), which refused to pay the two-percent interest rate required by New York General Obligations Law ("GOL") § 5-601. BOA argued that New York's interest-on-escrow requirement is preempted by federal banking law, which authorizes

federally chartered national banks to offer mortgage-escrow accounts without requiring them to pay interest.

We previously concluded that GOL § 5-601 is preempted because it exercises "control over a banking power granted by the federal government." *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 125 (2d Cir. 2022). But the Supreme Court vacated that decision and instructed us to conduct a "nuanced comparative analysis" of New York's interest-on-escrow law and the Court's banking preemption precedents. *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 220 (2024).

Having done so, we again conclude that GOL § 5-601 is preempted. First, New York's interest-on-escrow requirement affects a national banking *power*: the power to offer mortgages. Second, it targets banks and limits their broad power to set the terms of mortgage-escrow accounts, so it is similar in nature to the preempted laws in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996). Finally, its degree of interference on banks' ability to make real-estate loans efficiently is similarly severe to the interference created by the preempted advertising law in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954).

The nature and degree of GOL § 5-601's interference with federal law is "more akin" to the cases in which state laws were preempted than those in which state laws were not. *Cantero*, 602 U.S. at 220. We thus reverse the orders of the district court denying BOA's motions to dismiss and remand the cases for further proceedings consistent with this opinion.

I. BACKGROUND[1]

A. Legal Context

1. *National Banking System*

Federal banking law authorizes national banks to exercise express and incidental powers. Express powers are specifically granted to national banks by statute. They include the powers to "make contracts," to "sue and be sued," to "loan[] money on personal security," and, as relevant here, to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. §§ 24, 371(a). National banks also have "all such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24 (Seventh).

Together, the powers to make "loans . . . secured by liens on interests in real estate" and to exercise necessary "incidental powers" allow national banks to offer and set the terms of mortgage-escrow accounts. *Id.* §§ 24 (Seventh), 371(a). A mortgage-escrow account requires a borrower to set aside money for tax and insurance payments on a home. The bank then uses that money to make payments on the borrower's behalf, reducing the possibility of default and protecting the property from uninsured damage. Mortgage-escrow accounts are a "crucial risk mitigation tool that supports safe and sound mortgage lending," Real Estate Lending Escrow Accounts, 90 Fed. Reg. 61099, 61100 (proposed Dec. 30, 2025), without which there is a "higher probability of foreclosure," Escrow Requirements

[1] The background is set out more fully in *Cantero*, 49 F.4th at 125-29. We summarize it here as necessary to explain our decision.

Under the Truth in Lending Act, 78 Fed. Reg. 4726, 4735 (Jan. 22, 2013). A national bank's ability to decide "how to structure its escrow operations and whether and what extent to offer any compensation to customers" is thus "a clear logical outgrowth of national banks' other powers to manage and protect collateral." Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61102.

"In the 1970s, Congress found that some national banks were engaging in 'certain abusive practices' and that 'significant reforms' were necessary to protect borrowers." *Cantero*, 602 U.S. at 211 (quoting 12 U.S.C. § 2601(a)). Congress thus passed the Real Estate Settlement Procedures Act of 1974 ("RESPA"), which "extensively regulates national banks' operation of escrow accounts." *Id.* RESPA requires national banks to "promptly return[] to the borrower" any "balance" left over in escrow accounts after a loan is paid, 12 U.S.C. § 2605(g), and limits the amounts banks can require borrowers to deposit in mortgage-escrow accounts, *id.* § 2609(a). But RESPA "does not mandate that national banks pay interest to borrowers on the balances of their escrow accounts." *Cantero*, 602 U.S. at 211.[2]

[2] Another federal statute, the Truth in Lending Act ("TILA"), "requires national banks to operate escrow accounts for certain mortgages," but it "does not apply to the mortgages in this case." *Cantero*, 602 U.S. at 211 n.1. TILA expressly incorporates state interest-on-escrow requirements for those mandatory accounts: national banks "must pay interest to the borrower in the manner as prescribed by an applicable State or Federal law." *Id.* (cleaned up).

2. *Preemption Framework*

The Dodd-Frank Wall Street Reform and Consumer Protection Act establishes the "controlling legal standard for when a 'State consumer financial law,' like New York's interest-on-escrow law, is preempted with respect to national banks." *Cantero*, 602 U.S. at 213 (quoting 12 U.S.C. § 25b(b)(1)). It states that state laws are preempted "only if . . . in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank* . . . the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B).

Barnett Bank requires us to survey prior Supreme Court cases "to demarcate when a state law significantly interferes with [a] national bank's exercise of its powers." *Cantero*, 602 U.S. at 215 (cleaned up). Those cases establish that "some (but not all) non-discriminatory state laws that regulate national banks are preempted." *Id.* at 221.

On one hand, *National Bank v. Commonwealth*, 76 U.S. 353 (1869); *McClellan v. Chipman*, 164 U.S. 347 (1896); and *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), upheld state laws regulating national banks. *National Bank* concerned a Kentucky tax on bank stock. *McClellan* involved a generally applicable Massachusetts law that prohibited banks from receiving preferential transfers. And *Anderson* dealt with a Kentucky escheat law that presumed inactive deposits were abandoned. The Court concluded that these laws were not preempted because they did not "prevent or significantly interfere

with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33.

On the other hand, *First National Bank of San Jose v. California*, 262 U.S. 366 (1923); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954); *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), struck down state laws. In *First National Bank of San Jose*, California escheated all deposits that were inactive for over twenty years. In *Franklin*, New York barred bank advertisements from using the word "savings." In *Fidelity*, California restricted the use of due-on-sale clauses. And in *Barnett Bank*, Florida prevented banks from selling insurance. The Supreme Court concluded that these laws were preempted.

3. *New York's Interest-on-Escrow Requirement*

GOL § 5-601 is a consumer financial law requiring "mortgage investing institution[s]" to credit escrow accounts for certain residences in New York "with dividends or interest at a rate of not less than two per centum per year." GOL § 5-601. It allows New York's Superintendent of Financial Services to prescribe a higher minimum interest rate after "consider[ing] pertinent economic and cost factors." N.Y. Banking L. § 14-b(2).

GOL § 5-601 was enacted in 1974, but no court has enforced compliance with its interest-on-escrow requirement. As early as 2004, the Office of the Comptroller of the Currency ("OCC") advised that banks may "make real estate loans . . . without regard to state law limitations." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004).

In December 2025, the OCC issued a notice proposing a rule that would "expressly codify [national] banks' power to establish and maintain escrow accounts" and "clarify that the terms and conditions of escrow accounts, including the extent of any compensation paid to customers, are business decisions to be made by each bank." Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61103. It simultaneously proposed a "preemption determination" concluding that "the National Bank Act preempts New York's Gen. Oblig. Law section 5-601" and eleven other similar state laws. Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. 61093, 61094 (proposed Dec. 30, 2025).

B. Facts and Procedural History

Plaintiffs Alex Cantero, Saul Hymes, and Ilana Harwayne-Gidansky took out mortgage loans from BOA, which required Plaintiffs to make deposits in mortgage-escrow accounts. But BOA refused to pay the two-percent interest required by GOL § 5-601. So Plaintiffs filed two putative class actions, alleging breach of contract and other claims.

BOA moved to dismiss the complaints, arguing that it did not need to pay interest because GOL § 5-601 is preempted by federal banking law. The district court disagreed. It denied BOA's motions to dismiss, *see Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019), and certified the preemption question for interlocutory appeal, *see Hymes v. Bank of Am., N.A.*, No. 18-cv-2352, 2020 WL 9174972 (E.D.N.Y. Sept. 29, 2020).

On appeal, we reversed the district court's denial of BOA's motions. We concluded that federal banking law preempts GOL § 5-

601 because an interest-on-escrow requirement "would exert control over a banking power—and thus, if taken to its extreme, threaten to 'destroy' the grant made by the federal government." *Cantero*, 49 F.4th at 132 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). But we did "not endeavor to assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power." *Id.*

The Supreme Court vacated our decision and remanded for us to conduct the "kind of nuanced comparative analysis" that the *Barnett Bank* standard requires. *Cantero*, 602 U.S. at 220. In "*Barnett Bank* and each of the earlier [banking preemption] precedents, the Court [assessed] the nature and degree of the state laws' alleged interference." *Id.* at 220 n.3. So rather than focus only on whether a state law "controls" a national bank's powers, we should make a "practical assessment of the nature and degree of the interference" based on "the text and structure of the laws, comparison to other precedents, and common sense." *Id.* at 219, 220 n.3.

With this instruction in mind, we revisit whether, under the *Barnett Bank* standard, federal banking law preempts New York's interest-on-escrow requirement.

II. DISCUSSION

A. Legal Standard

To determine whether a state law is preempted, we first ask whether the state law affects "the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). If it does, we then consider whether the state law "prevents or significantly interferes" with those

powers by analyzing two factors: (1) the "nature" of the state law's interference, and (2) the "degree" of interference. *Cantero*, 602 U.S. at 220 & n.3.

We assess these factors in a "nuanced comparative analysis" in light of the Supreme Court's preemption cases. *Id.* at 220. If the nature and degree of a 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." *Id.* Conversely, if the nature and degree of 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." *Id.*

1. *The Banking Power at Issue*

The National Bank Act authorizes national banks to exercise express and incidental powers. Historically, "grants of both enumerated and incidental 'powers' to national banks [have been interpreted] as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32.

But state laws that do not affect a national bank's "exercise . . . of its powers" are not preempted. 12 U.S.C. § 25b(b)(1)(B). Consider Kentucky's tax on "bank stock" in *National Bank*. 76 U.S. at 354. That law affected—indeed, targeted—banks. But the Court held the tax was not preempted because it was "no great[] interference with the functions of the bank" and "in no manner hinder[ed] it from performing all the duties of financial agent of the government." *Id.* at

362-63. State laws that merely affect banks, rather than banking powers, are not typically preempted.

2. *Nature of the Interference*

If a state law affects a banking power, we must identify the "nature" of the interference by analyzing the "text and structure" of the relevant state and federal laws. *Cantero*, 602 U.S. at 220 n.3. Two principles emerge from this analysis. First, generally applicable state laws are unlikely to be preempted. Second, state laws that prohibit a bank from exercising express or broad powers are likely to be preempted.

a. Generally Applicable Laws

"[N]ational banks . . . remain subject to state law governing 'their daily course of business' such as generally applicable state contract, property, and debt-collection laws." *Cantero*, 602 U.S. at 219 (quoting *National Bank*, 76 U.S. at 361-62). So even when a generally applicable state law has some effect on a bank's exercise of its powers, it is ordinarily not preempted. That was the case in *McClellan*, in which the Court upheld Massachusetts's generally applicable fraudulent transfer law because it subjected banks to "the same conditions and restrictions to which all the other citizens of the state are subjected." 164 U.S. at 358. The Court explained that "in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state" but that "the purpose and object of congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the state law." *Id.* at 358-59. So it concluded that "the general and undiscriminating law of the state of Massachusetts

subjecting the taking of real estate to certain restrictions" was not preempted by federal law "permit[ting] national banks to take real estate for given purposes." *Id.* at 358, 361.

Even state laws that target banks or banking powers are unlikely to be preempted if they are part of a generally applicable scheme. This principle helps to explain the diverging results in *First National Bank of San Jose* and *Anderson*, which both addressed state laws requiring banks to escheat abandoned deposits to the state. California's law created a *non-rebuttable* presumption that deposits unclaimed for 20 years were abandoned, but Kentucky's law created a *rebuttable* presumption that deposits unclaimed for 10 years were abandoned. *See First Nat'l Bank of San Jose*, 262 U.S. at 366-67; *Anderson*, 321 U.S. at 236-37. The Court struck down California's law but upheld Kentucky's. It emphasized that it could not "discern any greater or different effect [of the Kentucky law] . . . from the application of the ancient law of escheat or forfeiture of goods," which allowed the state to appropriate "abandoned personal property." *Anderson*, 321 U.S. at 240, 252. But California's non-rebuttable presumption of "seizure and escheat . . . for mere dormancy" was an "unusual" variation on the common-law doctrine. *Id.* at 251. Even though both laws targeted banks, only Kentucky's was consistent with the generally applicable common-law escheat rule, so it was not preempted.[3]

[3] This principle explains why fair-lending and false-advertising laws are unlikely to be preempted. *See, e.g.*, *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 522-23, 536 (2009) (permitting enforcement of New York fair-

b. Prohibitions on Express and Broad Powers

The text and structure of the relevant laws also bear on the nature of interference by illuminating how *directly* they conflict.

Of course, when state and federal laws "impose directly conflicting duties on national banks," the state law is always preempted. *Barnett Bank*, 517 U.S. at 31. But when federal statutes grant permissive powers, as opposed to imposing mandatory duties, "compliance with both" state and federal law is not "a physical impossibility," because a bank can choose not to exercise its power in the manner prohibited by state law. *Fidelity*, 458 U.S. at 155 (citation omitted). In those cases, the Court has found state laws preempted when federal law grants a "broad, not a limited, permission." *Barnett Bank*, 517 U.S. at 32.

That was the case in *Fidelity* and *Barnett Bank*, where the text and structure of federal law indicated that Congress granted banks broad authority to exercise express powers, such that state limits on those powers were preempted. In *Fidelity*, the Court emphasized that a federal regulation granted a federal savings-and-loan association the power to include due-on-sale clauses in contracts "at its option," so California's law prohibiting some due-on-sale clauses impermissibly deprived banks of the "flexibility" the regulation granted. 517 U.S. at 155. Likewise, in *Barnett Bank*, a federal statute providing, "without relevant qualification, that national banks may act as the agent for insurance sales" suggested "a broad, not a limited,

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lending law against national banks). Such laws typically apply generally applicable rules to banks, so they are similar to the escheat rule in *Anderson*.

permission." *Barnett Bank*, 517 U.S. at 32 (cleaned up). So a Florida law prohibiting banks from acting as insurance agents was preempted. *Id.*[4]

3. *Degree of Interference*

The Court has relied on "common sense" to assess *how severely* a state law interferes with a banking power. *Cantero*, 602 U.S. at 220 n.3. It has suggested that a state law's interference is severe when it prevents a bank from efficiently exercising its powers or makes a bank's product undesirable to consumers.

The first consideration led the Court in *Franklin* to conclude that New York's law prohibiting banks from using the word "savings" in advertisements was preempted by federal law permitting banks to receive savings accounts. *See Cantero*, 602 U.S. at 216. There, "the Court determined that the New York law significantly interfered with the banks' power because the banks could not advertise effectively" their power to receive savings deposits without using the word "savings." *Id.* (citing *Franklin*, 347 U.S. at 377-78). "[S]tate law could not interfere with the national bank's ability to [advertise savings accounts] *efficiently*," so it was preempted. *Id.* (emphasis added).

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[4] To be sure, not all state laws that limit broad grants of power are preempted. For example, the fraudulent transfer law in *McClellan* interfered with national banks' broad express power to take real estate, but the law was not preempted because it was generally applicable and restricted banks in only "particular and exceptional circumstances." 164 U.S. at 358. A "nuanced comparative analysis" must balance the different attributes of a state law that favor preemption against those that do not. *Cantero*, 602 U.S. at 220.

Similarly, the absence of an impact on a bank's ability to exercise its powers efficiently supported the Court's conclusion in *McClellan*. There, Massachusetts's fraudulent conveyance law was not preempted because it affected banks in only "particular and exceptional circumstances," and thus did not "impair[] the efficiency of national banks." *McClellan*, 164 U.S. at 358. These cases highlight that a state law's impact on a national bank's efficiency informs the *degree* of the state law's interference with federal law.

The second consideration—that a state law's interference is more severe if it makes a bank's services less desirable to consumers—undergirded the Court's conclusions in *First National Bank of San Jose* and *Anderson*. In *First National Bank of San Jose*, California's law imposing a non-rebuttable presumption that unclaimed deposits were abandoned, was preempted because consumers "might well hesitate to subject their funds to possible confiscation." 262 U.S. at 370. But in *Anderson*, Kentucky's similar law imposing a rebuttable presumption was not preempted because it "may operate for the benefit and security of depositors" and would not "deter them from placing their funds in national banks." 321 U.S. at 252. The Court's expectations about whether California's and Kentucky's escheat laws would deter customers thus supported the different outcomes in these cases.[5]

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[5] Plaintiffs argue that BOA must *prove* that a "state law posed a significant practical impediment to the exercise of an express power" with "evidence." Appellees' Supp. Br. at 8. In support, they argue that the "Court in *Franklin* . . . had the benefit of a 'large record' documenting the [New York] law's real-world 'consequences upon banks.'" *Id.* at 7 (quoting

B. Application

New York's interest-on-escrow law is preempted because it affects a broad federal grant of power to set the terms of mortgage-escrow accounts and it impedes national banks' ability to offer those accounts efficiently. These characteristics make GOL § 5-601 more like the laws in *Franklin*, *Fidelity*, *First National Bank of San Jose*, and *Barnett Bank*, in which the Supreme Court found preemption, than those in *Anderson*, *National Bank*, and *McClellan*, in which the Court did not.

1. *The Banking Power at Issue*

New York's interest-on-escrow requirement does not merely affect BOA, it affects BOA's "*exercise of its powers*." *Barnett Bank*, 517 U.S. at 33 (emphasis added). Federal law gives national banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate," 12 U.S.C. § 371(a), which, in conjunction with their "incidental powers," *id.* § 24 (Seventh), authorizes them to offer mortgage-escrow accounts, *see* Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61102. New York's law interferes with that power by limiting the terms on which banks may offer these accounts—specifically, by requiring them to pay at least two percent interest to customers. In short, banks may offer

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Franklin, 347 U.S. at 376). But *Franklin* never discussed that record, nor has the Court in any other preemption case considered record evidence of a state law's "real-world consequences upon banks." Following the Court's instruction to ground our analysis in "the text and structure of the laws, comparison to other precedents, and common sense," we do not require record evidence of a law's real-world effects. *Cantero*, 602 U.S. at 220 n.3.

mortgage-escrow accounts without interest under federal law, but under New York law, they may not.

2. *Nature of the Interference*

We analyze the nature of New York's interference with federal law by considering the text and structure of the state and federal laws. New York's law is not generally applicable, like the fraudulent conveyance law in *McClellan*, nor does it apply a generally applicable rule to banks, like the escheat law in *Anderson*. Rather, GOL § 5-601 targets banks. That characteristic differentiates it from the non-preempted laws in *McClellan* and *Anderson*.

We also consider whether New York's law involves a prohibition on an expressly- or broadly-granted power, as in *Fidelity* and *Barnett Bank*. GOL § 5-601 does not limit an express power because national banks' power to set interest rates on mortgage-escrow accounts is *incidental* to the power to extend "credit secured by liens on interests in real estate." 12 U.S.C. § 371(a). But other federal laws governing mortgage accounts suggest that Congress granted this incidental power broadly.

First, the Real Estate Settlement Procedures Act "extensively regulates national banks' operation of escrow accounts." *Cantero*, 602 U.S. at 211. "But as relevant to this case, RESPA . . . does not mandate that national banks pay interest to borrowers on the balances of their escrow accounts." *Id.* The omission of an interest rate requirement from RESPA, a statute regulating many other aspects of escrow accounts, suggests that national banks have a broad power to set those rates. As the OCC explained, "RESPA, in legislating a system of escrow account disclosures and amount limits, implicitly

recognizes the flexibility banks have in deciding . . . whether and to what extent to pay interest on escrowed funds." Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61102.

Second, the Truth in Lending Act requires national banks to "pay interest to the borrower in the manner as prescribed by an applicable State or Federal law" for certain mortgage-escrow accounts, but not those at issue here. *Cantero*, 602 U.S. at 211 n.1 (cleaned up). The Court has relied on statutes that, like TILA, expressly incorporated some state laws to conclude that federal law preempted other state laws regulating the same or similar activities. In *Barnett Bank*, for example, the Court inferred that federal law granted national banks a "broad, not a limited, permission" to sell insurance because federal law "specifically refer[red] to state regulation, while limiting that reference to licensing—not of banks or insurance agents, but of the insurance companies whose policies the bank, as insurance agent, will sell." 517 U.S. at 32. Similarly, in *Franklin*, the Court found "no indication that Congress intended to make this phase of national banking [*i.e.*, advertising savings accounts] subject to local restrictions, as it has done by express language in several other instances," thus inferring preemption in part from statutory silence. 347 U.S. at 378. Finally, in *Fidelity*, the Court concluded that "provisions incorporating specific aspects of state law [would be] needlessly repetitive" if similar state laws were not preempted and thus "decline[d] to construe the Act so as to render these provisions nugatory." 458 U.S. at 163. Congress's decision to adopt specific state interest-on-escrow requirements in TILA thus also suggests that similar state laws—like GOL § 5-601—are preempted.

To be sure, the breadth of the federal grant of power here is not express, as in *Fidelity* and *Barnett Bank*, where federal statutes "explicitly" granted an express power. *Barnett Bank*, 517 U.S. at 34. But the clear implication from RESPA and TILA—that national banks have broad power to set interest rates for most mortgage-escrow accounts—makes the nature of interference in this case "akin" to that in *Fidelity* and *Barnett Bank*. *Cantero*, 602 U.S. at 220.

3. *Degree of Interference*

Next, we turn to the "degree" of New York's interference by considering whether GOL § 5-601 interferes with banks' ability to offer mortgage-escrow accounts efficiently and to attract customers.

The "vast majority of home mortgages come with escrow accounts." *Cantero*, 602 U.S. at 211. Banks administering these accounts incur operational and compliance costs, which they may recover by investing escrow funds or through other means, depending on their "business strategy, costs, market demand, [and] competition." Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61100. But on each account associated with certain residences in New York, GOL § 5-601 requires banks to pay at least two percent interest. This requirement "raises the cost to national banks to use escrow accounts" for residences in New York. *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640, 648 (9th Cir. 2025). New York's mandated interest rate may cause national banks to "offer escrow accounts on fewer real estate loans; attempt to recoup costs in other ways; or even reduce lending."

Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. at 61097.

This interference is similar in degree to that of New York's advertising law in *Franklin*. Both laws restrict an incidental power that is essential to banks' exercise of an express power. The law in *Franklin* limited national banks' ability to advertise savings accounts, and advertising was "one of the most usual and useful of weapons" to solicit and receive savings deposits. 347 U.S. at 377. Likewise, GOL § 5-601 limits banks' ability to set the terms of mortgage-escrow accounts when the ability "to effectively and efficiently set the terms and conditions of their escrow accounts . . . is a core component of banks' mortgage lending powers." Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61100. Both laws also restrict banks' ability to exercise that incidental power—the *Franklin* law, by prohibiting all advertisements with the word "savings," and GOL § 5-601, by prohibiting all mortgage-escrow accounts with interest rates below two percent. [6]

If anything, GOL § 5-601 involves a more severe limit than the *Franklin* law. A "state law that alters a national bank's pricing almost

[6] The two percent floor is much higher than the prevailing interest rate on certificates of deposit, which ranged from 0.16% to 0.91% between 2010 and 2020. Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits (less than $100,000): 12 Month CD*, https://perma.cc/Y4GA-97E8 (last visited Apr. 29, 2026); *see also* Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits* (*greater or equal to $100,000): 12 Month CD*, https://perma.cc/7W8X-J36L (last visited Apr. 29, 2026) (similar range for higher-value deposits). And GOL § 5-601 authorizes the Superintendent of Financial Services to raise the minimum interest rate even higher. *See supra* at 11.

by definition interferes more with the bank's powers than a simple advertising restriction." *Kivett*, 154 F.4th at 660 (Nelson, *J.*, dissenting); *see also In re Cap. One 360 Sav. Acct. Int. Rate Litig.*, 779 F. Supp. 3d 666, 691 (E.D. Va. 2024) (A "requirement to impose a specific interest rate . . . would constitute an even more severe interference with national banks' fundamental power to receive deposits" than the law in *Franklin*.); *cf. Ill. Bankers Ass'n v. Raoul*, 760 F. Supp. 3d 636, 656 (N.D. Ill. 2024) (Law regulating interchange fees was "facially more extreme than the sort of state laws that the Supreme Court intended for national banks to be subject to.").[7]

Finally, the state law's likely effect on the attractiveness of a bank's products and services is inconclusive here. It is conceivable that GOL § 5-601 could make mortgage-escrow accounts more attractive if consumers are influenced by higher interest rates on their escrow accounts. But forcing banks to pay customers interest may cause them to "desist from using escrow accounts, implement fees, otherwise increase borrower costs to offset [their] losses, or reduce their overall mortgage lending due to decreased profitability," ultimately deterring consumers. Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61103; *see also* U.S. GEN. ACCT. OFF., B-114860, STUDY OF THE FEASIBILITY OF ESCROW ACCOUNTS ON RESIDENTIAL MORTGAGES BECOMING INTEREST BEARING 14 (1973) ("Most lending institutions reported that maintaining escrow

[7] The interference with banks' efficiency here is also unlike that in *McClellan*. Massachusetts's fraudulent-transfer law affected banks in only "particular and exceptional circumstances," so it did not "in any way impair[] the efficiency of national banks." *McClellan*, 164 U.S. at 358. In contrast, GOL § 5-601 affects mortgage-escrow accounts for a broad swath of properties in New York.

accounts was costly and that it was not feasible to pay interest on them."). We cannot predict with confidence whether GOL § 5-601 would attract or deter customers, so we do not view New York's law as comparable to the state laws at issue in either *First National Bank of San Jose* or *Anderson* in this respect.

* * *

In summary, New York's law affects a banking power, so we consider the nature and degree of its interference. As to the nature of its interference, we conclude that it is more like that of the laws in *Barnett Bank* and *Fidelity*, which affected broad grants of federal power—here, national banks' power to set interest rates for mortgage-escrow accounts—than the interference caused by the generally applicable law in *McClellan* or the common-law escheat rule in *Anderson*. As to the degree of its interference, we conclude that the impact on national banks' ability to offer mortgage-escrow accounts is at least as severe as the interference that New York's advertising law had in *Franklin*. GOL § 5-601's interference with federal law thus resembles other preempted state laws' interference in both "nature and degree," so it is preempted too. *Cantero*, 602 U.S. at 220 n.3.

The dissent reaches the opposite conclusion by divining four preemption fact patterns from the Court's precedents and then concluding that New York's law fits none of them. For instance, it writes off *Franklin* because New York's law does not "drive a wedge into national banks' and consumers' abilities to transact," like the advertising law in that case. *Infra* at 13. That approach offers little guidance for evaluating state laws that affect banks in ways that differ from the limited preemption caselaw. Indeed, it effectively guarantees the dissent's conclusion by reasoning that New York's law is preempted *only* upon proof that it "will materially disincentivize

banks from offering escrow accounts—or from offering mortgages altogether—or if banks will materially distort other mortgage terms." *Infra* at 14.

The First Circuit also reached the opposite conclusion and held that a Rhode Island law requiring "all banks operating within the state to pay mortgage borrowers interest on the funds they deposit into mortgage-escrow accounts" was not preempted by the National Bank Act. *Conti v. Citizens Bank, N.A.*, 157 F.4th 10, 12 (1st Cir. 2025). We disagree with that conclusion for two main reasons. First, *Conti* disregarded RESPA and TILA in summarily concluding that *Barnett Bank* and *Fidelity* were "generally inapposite" to its analysis. *Id.* at 20 & n.7. But federal statutes like RESPA and TILA were relevant in the Court's preemption precedents, including *Barnett Bank*, *Franklin*, and *Fidelity*. Second, *Conti* failed to acknowledge the practical reality that a state law restricting the pricing of a bank's product would have a "material impact . . . on banking operations." 157 F.4th at 23-24. We thus decline to follow the First Circuit's analysis here.

IV. CONCLUSION

New York's interest-on-escrow law is preempted because it is "akin to" the laws the Supreme Court has struck down for significantly interfering with a national bank's powers. *Cantero*, 602 U.S. at 220. As a result, BOA was not required to pay interest on Plaintiffs' escrowed funds. We thus reverse the orders of the district court denying BOA's motions to dismiss and remand the cases for further proceedings consistent with this opinion.

MYRNA PÉREZ, *Circuit Judge*, dissenting:

It is worth repeating that this case involves a state law which merely requires national banks to pay a consumer 2% interest on funds that the consumer has placed in an account with the bank. The majority opinion holds that such a law significantly interferes with national banking powers, and thus, is preempted. I respectfully disagree.

The Supreme Court unanimously rejected the "control" test that this panel had articulated for evaluating National Bank Act preemption. *See Cantero v. Bank of America, N.A.* (*Cantero II*), 602 U.S. 205, 220–21 (2024). Sharing the Supreme Court's concerns, I nonetheless joined that opinion because I believed the articulated control test did not have to be understood to "imply that every state law that impacts national banks' business interests is preempted." *See Cantero v. Bank of America, N.A.* (*Cantero I*), 49 F.4th 121, 142 (2d Cir. 2022) (Pérez, J., concurring), *vacated*, 602 U.S. 205 (2024). I wrote separately to emphasize that an overbroad application of the control test would be in tension with the Supreme Court's seminal precedent in *Barnett Bank*. *Id.* at 141–42. Our error, we were told, was that we did not conduct a "nuanced comparative analysis" of the law at issue relative to precedent, but instead "distill[ed] a categorical test that would preempt

virtually all state laws that regulate national banks." *Cantero II*, 602 U.S. at 220–21. The control test preempted too much and left states too little room to exercise their "power to regulate national banks." *Id.* at 215 (quoting *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)).

While this new majority opinion nominally sets aside the categorical test previously articulated, the majority opinion, in my view, nevertheless trudges through a strained analysis of the Supreme Court's precedents to reach an approach that is just as capacious. Moreover, the majority opinion ignores the nature of the federal banking power at issue and recharacterizes the relevant power as broadly as possible to manufacture a direct conflict with state interest-on-escrow laws. Having been warned of the dangers of such an expansive view of preemption once, I must respectfully dissent here.

I.

Undoubtedly, the Supreme Court's instructions in *Cantero II* left many questions unanswered. Therefore, I believe it is most helpful to first describe the framework for approaching National Bank Act preemption that, in my view, best adheres to the Supreme Court's instructions.

A non-discriminatory state law is preempted if it "prevents or significantly interferes with [a] national bank's exercise of its powers." *See Cantero II*, 602 U.S. at 220. To ascertain significant interference, the Supreme Court directed us to "make a practical assessment of the nature and degree of the interference caused by a state law." *Id.* at 219–20. That assessment requires a "nuanced comparative analysis" of the "interference with national bank powers" caused by the law before us relative to a specified universe of prior cases:

> 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.

Id. "[I]n accordance with [*Barnett Bank*]," 12 U.S.C. § 25b(b)(1)(B), we look at "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," *Cantero II*, 602 U.S. at 220 n.3.[1]

[1] Because the Supreme Court held that "Dodd-Frank adopted *Barnett Bank*, and because *Barnett Bank* was also the governing preemption standard before Dodd-Frank," both the majority opinion and I apply the *Barnett Bank* test throughout, as clarified by the Supreme Court, without leaning on the specifics of the statutory text that incorporates *Barnett Bank* into 12 U.S.C. § 25b(b). *See Cantero II*, 602 U.S. at 214 n.2. For similar reasons, it does not matter whether we analyze the case under § 25b(b)(1)(B) or (C), the latter of which applies to laws "preempted by a provision of Federal law other than title 62 of the Revised Statutes." 12 U.S.C. § 25b(b)(1)(C); *see id.* at 221 n.4 (reserving for remand "the relevance here (if any)" of § 25b(b)(1)(C)).

At the start of this analysis, courts must identify and describe the kind of power at issue.[2] The relevant national banking power in this appeal is the power to make real estate loans—to offer mortgages—some of which may come with escrow accounts. *See* 12 U.S.C. § 371(a). One could think of regulating escrow accounts either as regulating mortgage lending itself, or as regulating a separate national banking power that is "incidental" to the enumerated mortgage power. *See* 12 U.S.C. § 24 (Seventh). In any event, I believe we must ask how that power is exercised, or the *nature* of that power, to assess the nature of the claimed interference. Regardless of how one conceptualizes the relevant power here, it is at base a power to offer a product and engage in a transaction with consumers, and so our analysis should focus on how those transactions are impacted, if at all.[3] The Supreme Court's preemption cases do not "draw a bright line," but they do

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[2] This first step is merely a starting point, providing the context through which a national banking power is to be understood. It is not meant to be dispositive. *See infra* Section III.A. I recognize that defining the relevant banking power is susceptible to levels of abstraction—defined too generally, and virtually all regulation would be preempted; defined too narrowly, and there would never be preemption. But that is precisely why defining the relevant national banking power does little analytical work. *Cf. Cantero II*, 602 U.S. at 220 (explaining the relevant determination as whether "the state law's interference with national bank powers is more akin" to the line of cases finding preemption or the line that did not). That there is interference between state law and national banking power is all but presumed—instead, we must analyze the nature of that interference.

[3] Many national banking powers are consumer-facing, such as the power to sell insurance (at issue in *Barnett Bank*) and to take deposits (at issue in *San Jose* and others). But others are not, including many related to corporate organization and investments, and others can be both, including the power to make contracts. *See, e.g.*, 12 U.S.C. § 24.

offer guideposts for discerning when states "prevent[] or significantly interfere[]" with national banking powers to make consumer transactions. *See Cantero II*, 602 U.S. at 221. And the cases establish that where a consumer-facing national banking power is at issue, state laws significantly interfere and are preempted when they will materially reduce the likelihood that banks or consumers will make a rational choice to make a mutually beneficial transaction authorized by federal law.[4] The cases illustrate at least four "types" of significant interference with these transactions, but categorizing the cases does not yield easy answers; it is only a framework for the "nuanced comparative analysis" we must undertake. *Id.* at 220. In other words, the four types of interference identified below are useful entry points for understanding when a state regulation might significantly interfere with consumer-facing national banking powers.

First, a state law might improperly "interfere" with the exercise of national banking powers to engage with consumers by outright banning certain transactions. In *Barnett Bank*, the relevant "Federal Statute authorize[d] national

[4] The Office of the Comptroller of the Currency ("OCC") appears to agree with this distillation of the relevant authority, though it would apply the resulting standard differently. Amicus Br. of OCC at 9 ("[T]he Court should conclude that a state law that requires a national bank to pay even a nominal rate of interest on a particular category of account impermissibly conflicts with a national bank's power by disincentivizing the bank from continuing to offer the product.").

banks to engage in activities," i.e., selling insurance in small towns, "that the State Statute expressly forb[ade]." 517 U.S. at 31. New York's interest-on-escrow law is plainly not a ban on the exercise of national banks' power to make mortgage loans, and it is not a ban on mortgage-escrow accounts, so this type of interference requires no further discussion.[5]

Second, a state law might improperly interfere with a national banking power to engage with consumers by making a national bank product materially less attractive, such that a meaningful number of consumers are deterred from engaging in those transactions. In *San Jose*, the Court addressed California's law requiring escheat to the state of inactive deposit accounts after twenty years. *See First Nat'l Bank of San Jose v. California*, 262 U.S. 366 (1923). The Supreme Court reasoned that, if states were free to impose such automatic-escheat laws,

[5] Of course, as Bank of America's counsel acknowledged at oral argument, almost any regulation can be described as a ban on *something* by describing every feature of a banking product as an "incidental" national banking power and adjusting the level of generality. New York's law is, in some sense, a ban on "offering mortgages with escrow accounts that do not earn interest." But one could equally say fair-lending laws are bans on "offering mortgages using underwriting processes that include protected characteristics." And the law at issue in *McClellan* was a ban on certain kinds of loan modifications. While rhetorically powerful, it is not helpful for engaging in the required *Barnett* analysis to conceptualize mere regulations of national banking powers—e.g., whether they limit allowable interest rates on escrow accounts or factors in underwriting processes—as bans. Under the statute, the relevant question is whether those regulations "significantly interfere" with the exercise of the power. As discussed throughout, this is the same problem as focusing on defining the national banking power at stake: the majority opinion indulges in this kind of blurring-of-the-lines abstraction by conceptualizing the power at issue as a broad power, all but ensuring a direct conflict with any attempt by the states to regulate. Instead, this type of interference occurs where a state regulation on its face purports to prohibit or ban certain activities.

consumers "might well hesitate to" make deposits with national banks and thereby "subject their funds to possible confiscation." *Id.* at 370.

The Supreme Court has also recognized, however, that a similar risk of lesser magnitude would not have a material deterrent effect. The Court faced a Kentucky escheat law in *Anderson* that was triggered by a shorter period of dormancy than California's—ten years rather than twenty—but which provided depositors an avenue to recover their funds that California's law may not have offered. *See Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 250 (1944) (noting that the California Supreme Court "had declined . . . to express an opinion" on that question). The Supreme Court recognized that Kentucky's law could cause depositors hardship—certainly more than if they could leave their money indefinitely without jumping through procedural hoops—even if "in many circumstances [it] *may* operate for the benefit and security of depositors." *Id.* at 252 (emphasis added). But the Court concluded that the hardship would be no greater than the effect of "the tax laws, the attachment laws, or the laws for the administration of estates of decedents or of missing or unknown persons," which seemed to be beyond question. *Id.* at 252. Ultimately, the *Anderson* Court distinguished *San Jose* on the grounds that California's imposition of automatic

forfeiture, without proof of abandonment, was "so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks," while the Court was simply not so persuaded that Kentucky's law would deter depositors "from placing their funds in national banks in that state." *Id.* at 250–52.[6]

Third, a state law might improperly interfere with national banking powers directed towards consumers by making a product materially less attractive for the bank to offer, prompting banks either to pull the product from the market or offer it to consumers only on materially worse terms. In *Fidelity*, the Court addressed a California law limiting lenders' ability to invoke "due-on-sale" clauses in mortgage loan agreements. *See Fid. Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 145–51 (1982). Due-on-sale clauses, the Court tells us, "permit[] the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred," and they are an important risk-

[6] One could argue that *National Bank v. Commonwealth* deals with this type of interference as well, though it did not involve consumer transactions per se, 76 U.S. (9 Wall.) 353, 359–60 (1869), and according to the majority opinion, did not concern a national banking power at all, Maj. Op. at 14–15. In that case, Kentucky imposed a tax of $0.50 on each share of national bank stock worth $100. Presumably, that tax made it *marginally* less attractive for people to engage in the transaction of purchasing national bank stock, which hindered the ability of national banks to raise capital to some extent. But the Supreme Court held that Kentucky's small tax was "no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it." *Commonwealth*, 76 U.S. at 362–63.

and cash-flow-management tool for lenders. *See id.* at 145–46. The Federal Home Loan Bank Board ("Board") had even issued a regulation clarifying lenders' power to employ due-on-sale clauses. The Board found that restricting their use would threaten "the financial security and stability of Federal associations," "restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, . . . thereby reducing the flow of new funds for residential loans," and "cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally." *Id.* at 146–47 (quoting Late Charges and Due on Sale Clauses, 41 Fed. Reg. 6283, 6285 (proposed Feb. 6, 1976) (codified at 12 C.F.R. §§ 545.6–11(f) (1980)). The Court emphasized that California prohibited lenders from engaging in practices the Board "view[ed] as critical to 'the financial stability of the association,'" "limit[ed] the availability of an option the Board consider[ed] essential to the economic soundness of the . . . industry," and impaired "[t]he marketability of a mortgage in the secondary market," which "is critical to a savings and loan" for generating cash flow. *Id.* at 155–56 & n.10.

While a state law that increases banks' risk can make a product materially less attractive for the bank to offer and thus be preempted, the Supreme Court has recognized that if the impact is less significant, then the state law is not preempted. In *McClellan v. Chipman*, Massachusetts barred banks from receiving preferential transfers of real estate from insolvent debtors to secure existing debt. 164 U.S. 347, 357–58 (1896). Like the ability to demand repayment upon the sale of a property (via a due-on-sale clause), the ability of a bank to take additional collateral to secure an existing debt could be a useful tool for mitigating risk, especially if a debtor were insolvent. But the law at issue in *McClellan* did not "impair[] the efficiency of the banks to discharge the duties imposed upon them," because it applied only "under particular and exceptional circumstances." *Id.* at 358–59. This was a matter of degree, however, because the Court also recognized that permitting the state to apply a narrowly targeted law such as that did not "impl[y] the existence of a power in the State to forbid such taking in all cases." *See id.* In other words, some loans would be riskier if banks could not take additional collateral as security in certain circumstances, but that increase in risk was small enough that banks could manage or offset it without materially altering their products or operations.

Fourth, a state law might interfere without affecting the attractiveness or viability of the product itself, but rather by making it materially harder for banks and consumers to transact. This was the fact pattern at issue in *Franklin*, which addressed a New York law that had "forbidden use of the word 'savings,' or its variants, by any [national] banks." *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 374 (1954). The Supreme Court recognized that to exercise their deposit-taking power, national banks had to compete for consumers' business, and "[m]odern competition for business finds advertising one of the most usual and useful of weapons." *Id.* at 377. As discussed above, federal law does not preempt all state regulation of national banks' ability to advertise their products. But in *Franklin*, New York's law impermissibly interfered with national banks' power to engage in a particular kind of transaction specifically authorized by federal law, because it would "permit a national bank to engage in a business but g[i]ve no right to let the public know about it." *Id.* at 377–78. In other words, it would drive a wedge between banks and their prospective customers. And again, state laws that have effects similar in kind but lesser in degree are not necessarily preempted. For example, the Supreme Court has upheld state laws "prohibiting branches." *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659 (1924).

II.

Applying this approach as I believe the Supreme Court has instructed, I would hold that a 2% interest-on-escrow floor is not preempted on this record. Bank of America and its amici are well positioned to explain to this Court just how being required to pay 2% interest on escrow accounts would affect national banks' power to make mortgage loans and to mitigate risk with escrow accounts. And Bank of America bears the burden of persuasion on its affirmative defense.[7] *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("[T]he party asserting that federal law preempts a state law bears the burden of establishing preemption."). I believe it has not satisfied that burden.

A.

To be sure, Bank of America and its industry amici make a persuasive case that escrow accounts are an important part of the powers of national banks. Escrow accounts are a useful tool "for national banks to protect their security

[7] It remains unclear what quantum of proof, if any, is required of a party seeking preemption under Dodd-Frank or *Barnett Bank*, including whether and when such an argument must be supported by affidavits or, if necessary, live testimony. I would note that Congress requires the OCC to make a "case-by-case" determination, 12 U.S.C. § 25b(b)(3)(A), of whether "substantial evidence, made on the record of the proceeding" supports preemption before making its own preemption determinations, *id.* at § 25b(c). In my view, those requirements suggest some kind of factual showing is required. However, I need not address the precise substance of Bank of America's burden because at a minimum, some sort of argument derived from "common sense" would be required. *Cantero II*, 602 U.S. at 220 n.3. As explained below, Bank of America has offered none.

interest when they make real-estate loans," and "mitigate the risk of loss that would arise if the borrower failed to pay taxes or to have the property properly insured." Bank of America Cantero Opening Br. at 22–23. The industry amici tell us "[n]ational banks rely on [escrow] accounts to help manage their credit risk on multiple millions of mortgages across the United States," they are "crucial to the success of the modern home mortgage system," and a large majority of new mortgage originations come with escrow accounts. Amicus Br. of Bank Pol'y Inst. et al. at 5–6, 9. As a report put it, "through the use of an escrow account, a lender is able to protect the priority of its mortgage lien and ensure the protection of its collateral." Bruce E. Foote, Cong. Rsch. Serv., 98-979 E, *Mortgage Escrow Accounts: An Analysis of the Issues* 2 (1998).

But the importance of escrow accounts is not directly at issue in this case. The question we face is whether a state law requiring 2% interest to be paid on those accounts will significantly interfere with national banks' exercise of powers. To answer that question, I turn to the four types of interference identified above. Interest-on-escrow laws are not an outright ban like the law at issue in *Barnett Bank*, so the first type is inapplicable. Nor do they drive a wedge into national banks' and consumers' abilities to transact like the advertising law in *Franklin*, so the

fourth type of interference identified is not at issue. Instead, this case most implicates the third type, in which a state law might affect the banks' incentives to offer those products in the first place, and to a lesser extent the second type, in which a state law might operate to make a banking product less attractive for consumers. *See supra* at 6–10. Thus, the interference will be significant "akin to the interference in cases like *Franklin*, *Fidelity*, *First National Bank of San Jose*, and *Barnett Bank*," if New York's law will materially disincentivize banks from offering escrow accounts—or from offering mortgages altogether—or if banks will materially distort other mortgage terms to address the interference which might make the accounts less attractive to consumers. *See Cantero II*, 602 U.S. at 220. For the reasons explained below, New York's interest-on-escrow law does not pose such a threat, and thus, does not significantly interfere with national banking powers.

Bank of America and its amici offer platitudes and conclusions without explanation. Bank of America has asserted several times that New York's interest-on-escrow law puts it to a choice between "(i) using other means (such as higher mortgage interest rates, higher loan origination fees, or reduced loan amounts) to mitigate its risk, (ii) doing nothing and assuming greater risk, or (iii) refraining

from making the loan at all." Bank of America Cantero Reply Br. at 12; Bank of America Cantero Opening Br. at 23. But Bank of America largely omits the fourth option: continue using escrow accounts to "mitigate its risk" to precisely the same degree as it does right now, but pay 2% interest on them. Neither Bank of America nor amici have put forward anything prompting concern that any bank will change the availability of escrow accounts—a critical tool in banks' risk-mitigation toolkit—if required to pay 2% interest.

B.

A "nuanced comparative analysis of" the "text and structure" of the state and federal laws at issue here, relative to the Supreme Court's preemption cases, confirms that New York's interest-on-escrow law imposes—at most—an insignificant interference with the national banking powers relevant here. *See Cantero II*, 602 U.S. at 220.

The subtly different facts of *San Jose* and *Anderson* provide a useful starting point for assessing the degree of interference caused by an incentive-shifting state law. *Cf.* Roderick M. Hills, Jr., *Exorcising* McCulloch*: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. Pa. L. Rev. 1235, 1267–68 (2013) (asserting that *Anderson* "virtually overruled" *San Jose* by adopting

"a new and narrower reading of banks' immunity that permitted states to impose regulations on lending and deposit-taking, so long as the states did not thereby discriminate against any nationally chartered banks or contradict any policies of the federal government"). As discussed, there is no suggestion in the record that Bank of America—or any national bank—"might well hesitate to" offer mortgages, or mortgages with escrow accounts, if required to offer 2% interest. *Cf. San Jose*, 262 U.S. at 370. The same was true in *Anderson*, where the Supreme Court did not find the state law preempted. The law gave the state of Kentucky "the right to demand payment of [certain deposit] accounts in the place of the depositors" after ten years of inactivity. *Anderson*, 321 U.S. at 248. That meant that—instead of the banks continuing to invest and profit from those funds indefinitely, and the depositors always having ready access to their money—the deposits (and future interest they might earn) went to the state, and depositors would have "to demand from the state payment of the deposits" and "resort to the courts if payment [was] refused." *Id.* at 242; *see Fed. Nat'l Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364, 1368 (S.D.N.Y. 1975) ("In the absence of such a statute [as was at issue in *Anderson*], the banks presumably would have had full use of the funds until—if ever—they were claimed."). But crucially, the Court recognized that "[s]omething more" was

needed to justify preemption. *Anderson*, 321 U.S. at 248–49. The banks' lost ability to profit from the dormant accounts, and the potential burden placed on consumers to reclaim their funds, did not amount to substantial interference.

Comparison to *Fidelity* and *McClellan* is also instructive. Both concerned important risk-mitigation tools available to lenders under federal law: in *Fidelity*, it was due-on-sale clauses, 458 U.S. at 145–47, and in *McClellan*, it was the power to take real estate "conveyed to it in satisfaction of debts previously contracted in the course of its dealings," 164 U.S. at 357–58. In *Fidelity*, California law prohibited the exercise of due-on-sale clauses "unless the lender c[ould] demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." 458 U.S. at 149 (quoting *Wellenkamp v. Bank of America*, 582 P.2d 970, 977 (Cal. 1978)). Though the statute contained an exception, the Supreme Court nevertheless deemed the law preempted because "further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry" was "an obstacle to the accomplishment and execution of the full purposes and objectives" of express federal regulation. *Id.* at 156 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *Fidelity* would be more analogous here if New York prohibited lenders from requiring escrow accounts unless they could

show the payments were "reasonably necessary to protect against impairment to its security or the risk of default," or otherwise limited the availability of escrow accounts.

But New York's law does nothing like that. It is much more like the Massachusetts law at issue in *McClellan*, which impacted a risk mitigation tool but only on the margins. 164 U.S. at 353–54, 358. In *McClellan*, the state disarmed banks from exercising a risk-mitigation tool in just the circumstance where they would need it most—when their borrower was insolvent—and still, the law was not preempted because such insolvency constituted "particular and exceptional circumstances." *Id.* at 358–59. The burden of paying a bit of interest, in comparison to the total loss of a risk-mitigation tool at a crucial albeit exceptional moment, is negligible.

C.

Amici in favor of Bank of America contend that if you add up all the money in all the escrow accounts for all the millions of mortgages across the United States, you get "billions of dollars." Amicus Br. of Bank Pol'y Inst. et al. at 6. But for the inquiry demanded by the Supreme Court's preemption precedents, it does not matter how much money the industry as a whole might have to pay in interest.

The question, as explained above, is whether the interest requirement will materially distort the bank's incentives to offer mortgages, or prompt changes in other mortgage terms that might deter consumers. As discussed, Bank of America has not met its burden of persuasion on this question. In fact, there are several reasons to think interest on escrow laws do not materially distort incentives.

Congress's decisions in Dodd-Frank are informative. Congress required escrow accounts, and required interest be paid "[i]f prescribed by applicable State or Federal law," on certain mortgages. 15 U.S.C. § 1639d(b)(1), (g)(3). All agree that the mortgages at issue here are not covered by § 1639d. But the fact that Congress required interest be paid on those mandatory escrow accounts indicates that Congress at least did not think interest requirements would seriously distort the availability or the terms of the very mortgages it sought to protect by statute. *See Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1194–95 (9th Cir. 2018) (noting the same).

Common sense also tells us interest-on-escrow laws are unlikely to provoke material changes in the banks' offerings and the overall incentive structure.[8] The

[8] Bank of America and amici's argument that New York's 2% interest-on-escrow floor is sometimes higher than the national average savings rate, and that such a gap is subject to fluctuation, is not relevant to the analysis. *See, e.g.*, Amicus Br. of Bank Pol'y Inst. et al. at 6 & n.4. Instead, what is relevant is how much a national bank must pay a typical individual mortgagor in interest, and whether that amount is likely to cause the national banks to change their products in response if they seek to recoup costs, whether

amounts of consumer funds that sit in mortgage-escrow accounts and collect interest are far lower than the amounts of the mortgage loans themselves on which banks collect interest. An escrow account will rarely hold much more than the amount of one's annual property tax and insurance bill, which is typically orders of magnitude lower than the entire value of one's mortgage.[9]

Available evidence supports the intuition that the amounts held in escrow accounts, while important to individual consumers, are relatively insignificant to the economics of most mortgages, whether interest is paid or not. In 1991, the Senate Committee on Governmental Affairs held a hearing called, "Mortgage Escrow Accounts: Loopholes in Federal Consumer Protections." 102d Cong. 1 (1991). In a statement submitted by the Mortgage Bankers Association of America, the average escrow balance was estimated at $674, on which a 2% annual interest rate would require less than $15 in interest per year. *See id.* at 215 (statement of

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by altering the interest rate on the mortgage itself, the origination fee, or some other feature. The key to that inquiry is comparing the amount a bank will be required to pay in 2% interest on escrow with the income it receives from a given mortgage. Though that ratio may sometimes fluctuate, such fluctuation would be immaterial given the width of the gap.

[9] Under the Real Estate Settlement Procedures Act and its implementing regulation, monthly escrow payments are limited to the amounts needed to cover certain payments made over the course of a year—typically property taxes and insurance—plus a modest "cushion." *See* 12 C.F.R. § 1024.17(c)(1)(ii). Those payments might be made quarterly, twice yearly, or yearly, which is why monthly escrow payments help homeowners "budget the property taxes and hazard insurance on a monthly basis." *See* Bruce E. Foote, Cong. Rsch. Serv., 98-979 E, *Mortgage Escrow Accounts: An Analysis of the Issues* 2 (1998). But an escrow account should never hold much more than a year's worth of insurance and tax payments.

Stephen B. Ashley, Chairman & C.E.O., Sibley Mortg. Corp.). Senator Herbert Kohl of Wisconsin discussed the phenomenon of state-chartered lenders in his state switching to federal charters to avoid paying Wisconsin's required 5.25% interest on escrow, which he explained was "worth about $40 a year to the average mortgage holder." *Id.* at 5–6. Alan B. Morrison of Public Citizen testified that the difference between New York's minimum 2% interest on escrow and the much higher market rate at the time of 8% amounted to "$60 or $70 a year" for one homeowner. *Id.* at 23. And John C. Weicher, an official from the Department of Housing and Urban Development, testified that "the difference in the mortgage payment for a borrower whose escrow account bears interest at a market rate and one whose account bears no interest works out to a difference of a bit less than $4 a month on a mortgage for $100,000." *Id.* at 33.

The Supreme Court has recognized that the National Bank Act preempts state laws that impose significant burdens on either national banks or consumers (or both) that materially distort their behaviors. It is "common sense," as the Supreme Court put it in this case, *Cantero II*, 602 U.S. at 220 n.3, that a consumer might not want a deposit account that comes with a potentially catastrophic risk of inadvertent, irretrievable loss of their savings, *see San Jose*, 262 U.S. at 369–70. It

is common sense that a bank will require serious additional risk-mitigation and potentially much higher fees, if it has doubts about its ability to enforce a due-on-sale clause, allowing its loan to be transferred to someone whose creditworthiness the bank did not underwrite and depriving the bank of cash flow. *See Fidelity*, 458 U.S. at 149, 167–70. And it is common sense that if banks are prohibited from advertising their savings account using the word "savings," then consumers who want "savings" accounts will be less likely to seek out their products. *See Franklin*, 347 U.S. at 377–78. On the other hand, neither logic, nor anything in the record, tells us that banks paying each consumer interest on the amount the consumer has in their escrow account each month will cause banks to restructure their mortgage products in ways that either banks or consumers will shy away from. Instead, common sense indicates that it is a marginal adjustment which does not impact the overall viability of escrow accounts, and Bank of America has not suggested business as usual will be disrupted in any meaningful way.

III.

Because I do not think Bank of America has satisfied its burden to show the interest-on-escrow law is preempted, I will move on to what I see as errors

inherent in Bank of America's arguments and my disagreement with the majority opinion's reasoning.

A.

Most notably, Bank of America argues that interest-on-escrow laws are preempted because they represent a kind of ban on national banks' flexibility. They urge that federal law "extensively regulates national banks' operation of escrow accounts," but it does not require payment of interest. Bank of America Suppl. Br. at 2 (quoting *Cantero II*, 602 U.S. at 210–11). Bank of America claims that gap means that "federal law grants flexibility," and that "[l]aws limiting flexibility within federal regulatory schemes are preempted." *Id.* at 2, 7; *see also id.* at 14–17. The majority opinion adopts this argument and insists that federal law grants a "broad" power for national banks to set interest rates on mortgage-escrow accounts. *See* Maj. Op. at 23.

But this is just a relabeling of the rejected control test. Now that the Supreme Court has made clear that not every state law which "exercise[s] control over a federally granted banking power" is necessarily preempted, *see Cantero II*, 602 U.S. at 213, Bank of America and the majority opinion have opted to simply move their focus away from the effect of the state law and towards the shape of the federal

power at issue. By reframing the federal grant of power as enabling national banks to exercise discretion and flexibility, suddenly almost every state law that imposes any restriction on national banks at all necessarily conflicts with the federal grant of power so conceived, risking preemption. In short, the majority opinion and Bank of America manufacture a direct "prohibition" or "ban" where there is none, *see supra* Section I, which effectively reimposes the control test. The state laws that "limit flexibility within federal regulatory schemes" on the one hand, and the state laws that "exercise control over a federally granted banking power" in a manner that federal law does not on the other hand, form a perfectly overlapping Venn diagram. Perhaps for that reason, Bank of America admitted at oral argument that a "flexibility test" probably would not "fly." *See* Oral Arg. at 13:00–10.

Putting aside the Supreme Court's rejection of the control test, if this Court's preemption analysis hinged on whether a state law interfered with a national bank's flexibility or exercise of discretion, such a "test would obviate the need for an inquiry into whether a state law's interference with federal-banking powers was significant." *See Conti v. Citizens Bank, N.A.*, 157 F.4th 10, 25 (1st Cir. 2025) (concluding an analogous interest-on-escrow law was not preempted). Instead of looking to the material effect of a regulation, such as its effect on the incentives of

transacting parties, Bank of America and the majority opinion would simply have us look to whether the regulation constrains a national bank *at all*. Such an approach cannot possibly be squared with the Supreme Court's instruction to engage in a "practical assessment of the nature and degree of the interference." *See Cantero II*, 602 U.S. at 219–20.

The majority opinion relies on what, in my view, is a misreading of the Supreme Court's preemption precedents. Principally, the majority opinion relies upon *Fidelity* and *Barnett Bank*, where the Supreme Court did indeed reason that the grants of national banking power at issue were broad, and thus, state laws which imposed certain restrictions on the banks were preempted. *See Fidelity*, 458 U.S. at 155; *Barnett Bank*, 517 U.S. at 32. But crucially, both of those cases dealt with express powers. The majority opinion concedes that the broad power of flexibility that it constructs here "is not express, as in *Fidelity* and *Barnett Bank*, where federal statutes 'explicitly' granted an express power." Maj. Op. at 23 (quoting *Barnett Bank*, 517 U.S. at 34). To me, this is a "nuance" that distinguishes *Fidelity* and *Barnett Bank*; they merely represent the obvious proposition that state laws are preempted when they are in direct conflict with an *express* federal grant of power.

Recognizing the need to conjure a "broad" power where there is none, the majority opinion and Bank of America draw lessons from federal statutes. They insist that those statutes imply that national banks are afforded flexibility to set the terms of escrow accounts under federal law. But I believe the conclusions they draw go too far.

Bank of America and the majority opinion first hang their hat on the fact that the Real Estate Settlement Procedures Act of 1974 ("RESPA"), a statute which governs banks' abuse of escrow accounts, does not include a mandatory interest provision. Bank of America argues that here, "federal and state laws target the same concern with different, mutually incompatible solutions." Bank of America Suppl. Br. at 13. But there is no incompatibility between the safeguards prescribed by RESPA—including prompt return of leftover funds at the end of the loan term, limits on required escrow payments, and disclosures—and the modest amount of interest prescribed by New York. New York's law complements RESPA and creates no impossibility, no conflict, and apparently not even an obstacle to accomplishing Congress's purposes.

The majority opinion similarly cites the "omission" of an interest provision in RESPA and insists it shows that national banks instead "have a broad power to

set those rates." Maj. Op. at 21–22. But if both Congress's expressed intent *and* silence on an issue can be read to grant a broad national banking power, then states are left between a rock and a hard place. They certainly cannot regulate in a way that contradicts an express power, but in the majority opinion's view, they also cannot not regulate to fill in the gaps. Such a dilemma lacks any grounding in the Supreme Court's precedents; indeed, "[n]one of the cases identified by [*Cantero II*] held a state law preempted based on congressional silence." *Conti*, 157 F.4th at 22. Not only that, the majority opinion's attempt at discerning a "broad" right out of the void is at least in tension with the federal statute governing preemption, which establishes a presumption that state laws are not preempted. *See* 12 U.S.C. § 25b(b)(1) (providing that "State consumer financial laws are preempted, *only if*" certain conditions are met (emphasis added)). At bottom, such an approach does not reflect a nuanced comparative analysis focused on the nature and degree of interference, thus leaving states with little guidance on what regulation is permissible, let alone when silence equates to broad federal powers of flexibility.

Nor does the Truth in Lending Act ("TILA") support preemption. Congress, through TILA, requires national banks to pay interest on escrow accounts "in the manner as prescribed by an applicable State or Federal law" for some mortgage-

escrow accounts, but not those at issue here. *See* 15 U.S.C. § 1639d(g)(3). Bank of America and the majority opinion believe that this shows Congress wanted to immunize all mortgages that *are not* governed by TILA from state interest-on-escrow laws. But this mode of construction lacks foundation; again, the majority opinion's position is that a void of Congressional action is more valuable to ascertaining Congress's intent than its expressed preferences. The more reasonable interpretation of TILA's role, as noted above, is that it illuminates "Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations." *Lusnak*, 883 F.3d at 1194–95.

B.

For good measure, my view is that Bank of America's other arguments are similarly unpersuasive.

First, the suggestion that New York's banking superintendent can "set any interest rate (up to infinity)" is irrelevant to the question before us. Bank of America Suppl. Br. at 23. If New York were to raise its minimum interest on escrow by orders of magnitude, then yes the analysis above would be different, and perhaps *then* the law would be preempted. But the Supreme Court has already explained that in ordinary national bank preemption cases, slippery-slope

reasoning is inappropriate, since the power to impose an insignificant burden does not "impl[y] the existence of a power" to impose a significant one. *See McClellan*, 164 U.S. at 359. Otherwise, every insignificant interference could be rendered preempted with just a tweak to the hypothetical.

Second, Bank of America and several amici suggest that permitting states to require a minimum interest rate on escrow accounts implies that states can also set a minimum interest rate on savings accounts, certificates of deposit, etc. Bank of America Suppl. Br. at 27–28; Suppl. Amicus Br. of Bank Pol'y Inst. et al. at 13–14. But this is just more of the same slippery-slope reasoning that, if credited, would require preempting *everything*. Rather than speculating about the next case, courts "must make a practical assessment of the nature and degree of the interference" caused by the state law before it on its own terms. *Cantero II*, 602 U.S. at 219–20.[10] And that analysis might cash out differently for a minimum interest rate on savings accounts, because the interest rate on a savings account (relative to other features, like balance minimums and fees) is *the* key feature driving consumer behavior. On the other hand, nobody seeks out a mortgage *because* it will have an

[10] The other items listed in Bank of America's parade of horribles are irrelevant for the same reason. Bank of America Suppl. Br. at 27–28. This case does not require us to speculate about how any of those cases might come out.

escrow account that exists largely to protect the bank from risk, or because they might receive a small amount of interest on the amounts they are compelled to keep in the escrow account. The character of the interference is simply not comparable.

Third, the suggestion that state interest-on-escrow laws threaten "disuniformity," and that *every* state interest-on-escrow law must be preempted because there could theoretically be fifty different ones, is unpersuasive. Bank of America Suppl. Br. at 23–24. For one thing, this rule would also prove far too much, because if any state can regulate, every state can, and ordinarily states can choose to regulate in different ways. A "uniformity" test would also amount to "a categorical test that would preempt virtually all state laws that regulate national banks." *Cantero II*, 602 U.S. at 220–21. Further, the Supreme Court's concern for the risk of "varying limitations" state-by-state in *San Jose* is inapposite here. 262 U.S. at 370. In *San Jose*, the law required banks in California to turn over to the state any deposits left untouched for twenty years. The Supreme Court was concerned that the "depositors of a national bank" who "often live in many different States and countries," would be at risk of forfeiting their savings based on the law of "the State where the bank happened to be located," to which they

might have little connection. *Id.* Here, consumers face no similar burden. Their mortgages will simply be subject to the law of the state where they live (or own property). At stake for them is merely whether their escrow account would contain a little extra cash depending on where that account happened to be located, as opposed to having their deposits be subject to seizure. And banks cannot claim to be meaningfully burdened by paying different interest-on-escrow rates in different states. Every lender and servicer already has to keep track of the interest rates they *charge* on every mortgage every month—which vary not state-to-state but loan-to-loan. And Bank of America's suggestion that New York's interest-on-escrow floor could be "ever-fluctuating" is unpersuasive for similar reasons. Bank of America Suppl. Br. at 23. Lenders already manage to administer "ever-fluctuating" rates on variable-rate loans. There is simply no way to take a modest interest-on-escrow law like New York's and paint it convincingly as a threat to the efficient functioning of national banks.

IV.

Finally, I briefly address the role that the Office of the Comptroller of the Currency ("OCC") and its regulations play in the preemption analysis.

The OCC, which also supports Bank of America as amicus, charters, supervises, and regulates national banks. It carries real weight as the expert regulator that not only enforces the law against national banks but also supervises them through the exercise of its "visitorial powers . . . largely to the exclusion of other governmental entities." *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6–7 (2007).

The OCC's regulations purport to preempt all "state law limitations concerning . . . [e]scrow accounts." 12 C.F.R. § 34.4(a)(6). And in December 2025, the OCC issued a notice of proposed rulemaking that may "codify" the national banking power "to establish and maintain escrow accounts" and "clarify that the terms and conditions of escrow accounts, including the extent of any compensation paid to customers, are business decisions to be made by each bank." Real Estate Lending Escrow Accounts, 90 Fed. Reg. 61099, 61103 (proposed Dec. 30, 2025). Simultaneously, the OCC proposed a "preemption determination" declaring that the law at issue here, and eleven similar state laws across the country, are preempted. *See* Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. 61093, 61094 (proposed Dec. 30, 2025). If these regulations (and

proposed[11] rules) explained the OCC's position persuasively, the OCC would be statutorily and doctrinally entitled to meaningful deference. *See* 12 U.S.C. § 25b(b)(5)(A) (providing that the OCC's preemption determinations are assessed for persuasiveness); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).[12] But the OCC is not persuasive.

In 2004, the OCC issued a rule adding to a list of categories of state laws related to mortgage lending that could not be enforced against national banks, including laws concerning escrow accounts. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1905 (Jan. 13, 2004) (to be codified at 12 C.F.R. pts. 7, 34). In its final rule, the OCC alluded vaguely to its "experience supervising national banks" and its "experience with types of state laws that can materially affect and confine—and are thus inconsistent with—the

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[11] For purposes of this discussion, I assume the proposed 2025 rules will be finalized in substantially identical form.

[12] In *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), this Court deferred to different regulations promulgated by the OCC related to different aspects of national bank preemption, under the now-defunct framework of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Because the Court in *Burke* did not consider the regulations at issue here, we need not decide whether *Burke* remains good law for any purpose in this Circuit, in light of Dodd-Frank's clarification that *Skidmore* applies, 12 U.S.C. § 25b(b)(5)(A); the OCC's concession that Dodd-Frank merely confirmed existing law on that issue, Amicus Br. of OCC at 10 & n.5; the Supreme Court's overruling of *Chevron*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); and the Supreme Court's decision not to defer to the OCC's regulation in *Cantero II*, *see* 602 U.S. at 221 n.4 (leaving for us to "address as appropriate on remand . . . the significance here (if any)" of OCC's rules). Bank of America, in its post-*Cantero II* supplemental brief, appears to concede that neither *Burke* nor the OCC's regulations are binding on this Court. Bank of America Suppl. Br. at 19.

exercise of national banks' real estate lending powers." *Id.* at 1908, 1911. But it did not explain what experience led it to include laws concerning escrow accounts, much less interest-on-escrow laws specifically.

In 2011, after the enactment of Dodd-Frank, the OCC essentially reenacted the 2004 regulation in full. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43557 (July 21, 2011); Amicus Br. of OCC at 13; Hills, *supra*, at 1238–39, 1275–96. The OCC reaffirmed the preemption decisions it had made in 2004 "based on the OCC's experience with the potential impact of such laws on national bank powers and operations." Dodd-Frank Act Implementation, 76 Fed. Reg. at 43557. The OCC specifically reiterated that, "based upon [its] assessment as the primary Federal supervisor of national banks, state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, such as laws concerning the protection of collateral value, . . . risk mitigation, . . . escrow standards," and other matters, "would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks." *Id.* But again, the

OCC offered nothing beyond that bare conclusion and vague reference to its authority and experience.

That takes us to the two 2025 proposed rules, in which the OCC insists that national banks may set "the terms and conditions of escrow accounts, including the extent of any compensation paid to customers" with flexibility, *see* Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61103, and that relatedly, a slate of state interest-on-escrow laws are preempted, *see* Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. at 61096. Its position is unpersuasive for many of the reasons already discussed.

First and foremost, in recognizing a purported right to flexibility in setting the terms of escrow accounts, the OCC attempts to manufacture a direct conflict that would short-circuit courts' preemption inquiry, just like the majority opinion.[13] *See supra* at Section III.A. The OCC points out that "the flexibility to make business judgments concerning the investment and use of escrowed funds

[13] I recognize that in *Fidelity*, the Supreme Court noted that "[f]ederal regulations have no less pre-emptive effect than federal statutes," and treated a power recognized by federal regulation as the relevant banking power for purposes of preemption. *See* 458 U.S. at 153–54. But *Fidelity* dealt with a regulation promulgated by the Federal Home Loan Bank Board, which the Supreme Court confirmed had statutory authority to issue the pre-emptive regulation at issue. *Id.* at 159. In contrast, Congress expressly limited the OCC's authority to preempt state regulations and instructed courts to review those determinations for persuasiveness. *See* 12 U.S.C. §§ 25b(b), (c). I think it is plain, then, that Congress did not bestow the OCC with authority to simultaneously "clarify" national banks' unlimited discretion with one regulation and declare state law preempted for conflicting with that discretion with another regulation.

has long since been inherent to the business of banking codified in the National Bank Act." Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61101. Thus, the OCC represents, discretion in setting the terms of escrow accounts "is a core component of banks' mortgage lending powers." *Id.* at 61100. But if that description were enough, one can hardly imagine a component of bank decision making that, under the OCC's reasoning, would *not* be deemed a broad and flexible national banking power. And if that were the case, "that would preempt virtually all state laws that regulate national banks," contrary to the express directive of the Supreme Court that a more exacting preemption analysis is required. *See Cantero II*, 602 U.S. at 220–21. Moreover, the OCC explains that flexibility in setting the terms of escrow accounts allows national banks "to appropriately balance the costs and benefits . . . and the risks and rewards" of its products and activities, and that the terms of escrow accounts "are ultimately a business judgment made by each bank in accordance with safe and sound banking principles." *See* Real Estate Lending Escrow Accounts, 90 Fed. Reg. at 61100. Again, that reasoning is little more than a platitude that businesses should not be regulated—it is hard to imagine any banking activity that would not be subject to cost-benefit analysis pursuant to business judgment. The question is not whether

business judgment is implicated at all, but rather how much it is constrained by the regulation in question. And on that latter front, the OCC's reasoning is bare.

The OCC's simultaneous preemption determination otherwise relies on the same flawed reasoning, conclusory assertions, and forced analogies pressed in this case by Bank of America and adopted by the majority opinion. *See* Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. at 61096. Most glaringly, the OCC insists that *Fidelity* supports a broad reading of the relevant grant of national banking power while glossing over the fact that *Fidelity* dealt with an express grant of power. *See id.*

It is worth comparing the OCC's regulations concerning escrow accounts with the federal regulations concerning due-on-sale clauses at issue in *Fidelity*, 458 U.S. at 145–47. As the Supreme Court recited in that case, the agency explained in detail how the exact type of restrictions on lenders that California imposed "would have a number of adverse effects" in the real world, and it explained not only what those effects were but how they would come about. *Id.* at 146. "[T]he financial security and stability" of the lenders "would be endangered" if their collateral were sold to people who could not repay the loan and protect the collateral; the inability to call mortgages due early would "cause a substantial reduction of the

cash flow" of federal associations; impairment of the federal associations' ability "to sell their home loans in the secondary mortgage market" would "reduc[e] the flow of new funds for residential loans"; and overall, the restrictions would "benefit only a limited number of home sellers, but generally will cause economic hardship." *Id.* (quoting Late Charges and Due on Sale Clauses, 41 Fed. Reg. at 6285). For those specific reasons, the agency concluded that banks had the express power to include the disputed due-on-sale clauses in contracts with borrowers. The OCC offers no comparable analysis of the impact of interest-on-escrow laws here, and instead relies upon generalizations, which I find unpersuasive.

* * *

In sum, Bank of America has not shown that New York's interest-on-escrow law significantly interferes with the exercise of any national banking power, and common sense indicates that it does not. I respectfully dissent.