OCC Preemption Determination: State Interest-on-Escrow Laws and Real Estate Lending Escrow Accounts

COMMENT LETTER

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Re: Preemption Determination: State Interest-on-Escrow Laws [Docket ID OCC-2025-0735]
Real Estate Lending Escrow Accounts [Docket ID OCC–2025–0736]

The Conference of State Bank Supervisors ("CSBS")1 and the American Association of Residential Mortgage Regulators ("AARMR") strongly oppose two proposed rules issued by the Office of the Comptroller of the Currency ("OCC"): *Preemption Determination: State Interest-on-Escrow Laws*2 ("preemption determination") and *Real Estate Lending Escrow Accounts*3 ("escrow rule"). We ask that both be withdrawn immediately.

The escrow rule manufactures a "new" national bank power solely as a pretext for the corresponding preemption determination. This approach brazenly disregards both the letter and spirit of the National Bank Act ("NBA"), ignores decades of judicial precedent, and if allowed to stand, would eviscerate any meaningful constraint on the ability of national banks to disregard state consumer financial laws.

The "prevents or significantly interferes" standard required by the courts and the NBA, along with the mandated nuanced analysis of state law, is a purposefully high bar to preemption. Congress set this standard to balance the convenience of a national, dual-banking framework for financial services with the imperative that states retain their authority to set appropriate consumer protections and, thus, preserve local economic accountability. Congress understood that certain state consumer financial laws should apply to all market participants, ensuring that economic prosperity is grounded in household resilience and that financial services are tailored to meet the expectations and needs of local communities.

The OCC's proposed rules, by contrast, would deny homeowners interest payments on their own money – purportedly to reduce "unnecessary burden" on some of the nation's largest banks. At a time when many

Americans are struggling to afford their own home, the OCC is prioritizing the operational convenience of national banks over the interests of those banks' customers. Not only is this woefully out-of-step with the Administration's priorities of supporting Main Street growth and tackling housing affordability, but it is precisely the type of short-sighted federal overreach that led Congress to limit the OCC's authority to preempt state laws in the first place. The OCC's new "unnecessary burden" standard, which would preempt consumer protection laws that it finds "inefficient," inflexible," or "unusual" is also clearly inconsistent with the statutory bar of significant interference.

Given the fatal flaws in both proposals, they should be withdrawn in their entirety.

Executive Summary

The proposals would benefit national banks at the direct expense of consumers and market competition.

The combined effect of the proposed rules would be to deny homeowners interest on funds held in escrow by national banks. The funds at issue are trivial to trillion-dollar financial institutions, but meaningful to households navigating increasing escrow balance requirements due to rising insurance premiums and property taxes. For many borrowers, particularly first-time homebuyers and low- and moderate-income families, escrow accounts are mandatory because they cannot make a 20% downpayment. State interest-on-escrow laws ensure these homeowners are paid a modicum of interest on escrow funds they are required to hold with their mortgage servicer.

The proposals would also create an unlevel playing field among similarly situated financial institutions engaged in mortgage servicing. State-chartered banks and nonbank mortgage servicers would remain subject to applicable state interest-on-escrow laws, while national banks would not. This disparity undermines competition in the mortgage servicing market, favoring national charters based solely on the OCC's unlawful and unwise attempt to preempt state interest-on-escrow laws.

The proposed escrow rule is a manufactured pretext for preemption.

The proposed rule on escrow account powers is an effort to create a federal-state "conflict" that the OCC can subsequently cite to support its corresponding preemption determination. It serves no genuine regulatory or supervisory purpose, and it should be abandoned.

Aggressively interpreting the incidental powers of OCC-regulated institutions for the express purpose of creating conflicts with state consumer protection laws is a preemption strategy the OCC has previously employed to disastrous effect, namely, in the lead up to the 2008 financial crisis.

The proposed preemption determination fails to comply with Section 25b of the National Bank Act and the standard affirmed by the Supreme Court in *Cantero*.

Congress sharply limited the OCC's authority to preempt state consumer financial laws in response to its pre? crisis preemption practices. In 2010, Congress codified Section 25b of the NBA, which authorizes preemption only where a state law "prevents or significantly interferes" with the exercise of a national bank power, applying the standard articulated in *Barnett Bank*.

The proposed preemption determination is legally invalid because it fails to meet the substantive and procedural requirements applicable to preemption determinations under Section 25b – a standard reaffirmed in the recent

Cantero decision. Ultimately, the OCC's proposed preemption determination shows only a theoretical interference with national bank powers, falling far short of the actual "prevents or significantly interferes" requirements articulated by statute and the Supreme Court.

Extensive judicial precedent shows that state interest-on-escrow laws do not significantly interfere with escrow account powers.

If the OCC had conducted the requisite analysis under Section 25b, it would have led inescapably to the same conclusion reached by every court that has thoroughly reviewed this question: state interest-on-escrow laws do not significantly interfere with national bank powers and are not preempted by the NBA.

The state interest-on-escrow laws at issue are not new, with some dating back 50 years. Courts have repeatedly upheld these state interest-on-escrow laws against preemption challenges over the intervening decades, including recent post-*Cantero* court decisions that reaffirm that these laws do not "prevent or significantly interfere" with national bank escrow account powers.

National banks and federal savings associations ("FSAs") operate in a federalist, dual-banking system. In this system, state and local governments retain the authority to enact consumer protection laws that apply equally to all financial institutions. Such laws are a manifestation of states' ability to exercise some measure of control over the financial and economic well-being of their citizens. When a remote federal agency ignores the requirements of the law and treats these state authorities as subordinate to the "business decisions" of the entities it regulates, it subverts the federalist system that Congress established.

For all these reasons, the proposed rules must be withdrawn.

Policy and Legal Concerns with the Proposals

I. The proposed escrow rule, together with the proposed preemption determination, benefits national banks at the direct expense of consumers and competition, and should be withdrawn.

Setting aside the non-existent legal rationale for the proposed rules, the OCC should decline to adopt them because they are simply bad policy. Indeed, the proposed escrow rule, together with the preemption determination, will upset the competitive balance of the mortgage servicing market, negatively impact current and aspiring homeowners, and resurrect a dangerous playbook for NBA preemption determinations that has been explicitly rejected by Congress and the courts.

A. The proposed escrow rule will negatively impact the competitiveness of the mortgage market.

The proposed escrow rule will result in an unlevel playing field in the mortgage market by giving national bank mortgage servicers an advantage over nonbank and state bank mortgage servicers. State banks and nonbank mortgage servicers will be required to continue to pay interest and avoid assessing fees on escrow accounts in the 12 affected states, whereas national banks will not.

The proposed rule erroneously claims that it will create parity between national banks and state banks because the three-quarters of states that have not enacted interest-on-escrow laws permit their state-chartered banks to avoid paying interest on escrow accounts.[4] That assertion is patently false.

As the OCC should be well aware, state interest-on-escrow laws apply equally to all mortgages on *residences located within that state*, whether the servicer is a national bank, state-chartered bank, or nonbank. Out-of-state state-chartered banks are not exempted from complying with state interest-on-escrow laws where they apply,

even though they may not be required to pay interest on property mortgaged in their home state. National banks, likewise, pay interest on mortgage escrow accounts in states that require it, and need not pay interest in states that do not.

The proposed rule will undermine the even application of state interest-on-escrow laws across all mortgage servicers, giving a competitive advantage to national banks over their nonbank and state bank competitors.

B. The proposed escrow rule prioritizes the operational efficiency of national banks over reducing the cost of homeownership.

There could not be a worse time for the OCC to finalize this proposed rule, enriching OCC-regulated national banks on the backs of consumers. Housing affordability in the United States has reached what is widely considered a crisis level.[5] Hazard insurance and property taxes are surging nationwide and contributing to overall unaffordability.[6] It would seem prudent to allow states to maintain laws that provide consumers a modicum of interest on the funds they place in escrow accounts, offsetting these rising costs and helping improve housing affordability. While it is certainly a small sum to the institutions that the OCC regulates, it is not immaterial to current and aspiring homeowners.

C. The proposed rule continues a pattern and practice of OCC preemption positions that harm consumers and exceed the plain language of the law.

This is not the first time that the OCC has adopted a rule to deliberately create a conflict with state consumer financial laws in a contrived attempt to preempt such laws.[7]

In previous iterations of this preemption strategy, the OCC would, as here, issue an interpretive letter or rule which would aggressively fill in "gaps" where the NBA is silent regarding the extent of national bank powers. These pronouncements would purport to clarify or codify long-standing national bank powers which coincidentally conflicted with a state consumer protection law. Having set the stage for conflict, when litigation ensued over whether the state law was preempted, the OCC would almost always support the preemption claims asserted by national banks. In fact, an informal survey determined that the OCC filed amicus briefs in 60 court cases between 1994 and 2006, and that the OCC supported the positions taken by national banks in all but two of those cases.[8]

One prior aggressive OCC preemption campaign culminated in the financial crisis, where it was cited as a contributing factor enabling "the worst lending abuses in our nation's history."[9] To prevent systemic risk from building up in the financial system because of overly expansive NBA preemption, Congress explicitly required the OCC to demonstrate, with substantial evidence on the record, that a state consumer protection law "prevents or significantly interferes" with a national bank's powers before preempting it. Congress also rescinded *Chevron* deference for OCC preemption determinations.[10]

The ability of national banks and FSAs to operate and manage escrow accounts is not in question. They have done so for decades, just as certain states have, for decades, regulated the amount of interest that should be paid or fees that should be assessed on such escrow accounts. The OCC offers no safety and soundness or consumer protection rationale for adopting an escrow account powers rule, because there is none. The only rationale for adopting the proposed rule is to manufacture a conflict that provides a mechanism to preempt the application of state laws that have protected consumers for over half a century.

Congress and the courts have explicitly prohibited this strategy of contrived preemption, and the OCC must act within the confines of the law and withdraw the proposed rules.[11]

II. The proposed preemption determination is legally invalid and must be withdrawn.

The proposed preemption determination is legally invalid for several reasons. As an initial matter, the OCC did not comply with Section 25b in issuing the preemption determination because it failed to provide substantial evidence showing significant interference with national bank powers and failed to conduct a case-by-case analysis of state interest-on-escrow laws. Moreover, the OCC has failed to conduct both the "practical assessment" regarding the conflict between national bank powers and state interest-on-escrow laws and the "nuanced comparative analysis" of preemption precedent required by *Cantero*.

If the OCC had conducted such an analysis and assessment, it would have led inescapably to the same conclusion reached by every court that has performed the mandated reviews: state interest-on-escrow laws do not meet the "prevent or significantly interfere" standard warranting NBA preemption.

Instead of meeting its obligations under the NBA, the OCC has created a new, weaker preemption standard constructed from whole cloth and applied in contravention of the NBA and multiple court opinions. This administrative practice will not withstand judicial scrutiny and undermines principles of democratic accountability.12

A. The proposed preemption determination is invalid because it fails to comply with Section 25b requirements to provide substantial evidence and to act on a case-by-case basis.

The proposed preemption determination is invalid for failing to comply with Section 25b of the NBA. Enacted through the Dodd-Frank Act, Section 25b imposes various substantive and procedural requirements that must be met by the OCC in issuing preemption determinations.

Under Section 25b(b)(1), the OCC has authority to issue a regulation or order preempting a state consumer financial law "only if. . . in accordance with the legal standard for preemption in . . . *Barnett Bank*," the state law "prevents or significantly interferes with the exercise by the national bank of its powers." As mentioned above, the OCC may not issue a preemptive regulation or order unless "substantial evidence, made on the record of the proceeding, supports the [OCC's] specific finding regarding the preemption of such [state law] in accordance with the legal standard of . . . *Barnett Bank*."13

The NBA mandates that the OCC act on a "case-by-case basis" when it issues a preemption determination. To satisfy the "case-by-case" requirement, the OCC must consider "the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms."14 In addition, the OCC must "first consult" with the Consumer Financial Protection Bureau ("CFPB") and "take the views of the [CFPB] into account" before the OCC determines that "a State consumer financial law of another State has substantively equivalent terms as the one that the [OCC] is preempting."15

While the OCC acknowledges that Section 25b applies to the proposal, the proposed determination nevertheless fails to comply with Section 25b in several respects.

First, the proposed preemption determination fails to provide substantial evidence in support of the proposition that state interest-on-escrow laws prevent or significantly interfere with escrow account powers of national banks. Despite the breadth of information available to the OCC, the OCC's sole finding regarding conflict with bank powers is purely theoretical in nature. Courts have made clear that "[s]uspicion, conjecture, and theoretical speculation register no weight on the substantial evidence scale."16 The OCC's proposed rules have failed to provide any evidence, let alone substantial evidence, to support the proposition that state interest-on-escrow laws interfere with national bank escrow account powers and, as a result, the proposed preemption determination is invalid.

Second, the OCC fails to comply with the NBA's case-by-case requirement. Although the OCC asserts that the laws of 11 other states are substantively equivalent to New York's interest-on-escrow law, it does not include any analysis to support this contention which the public may comment on. The OCC's contention that these state laws are so variable that the "cumulative effect" of complying with each constitutes a significant interference with national bank powers conflicts with its contention that the laws are substantively similar such that a "case-by-case" analysis of each state's law is not required.[17] Quite simply, the laws are either variable or similar, they cannot be both. These conflicting assertions alone warrant a robust analysis of the purported substantive equivalence of these state laws.

Third, Section 25b clearly does not empower the OCC to include a catch-all category for state laws that do not yet exist but purportedly have substantively equivalent terms. Yet, in addition to the 12 state laws identified in the proposal, proposed Section 12 CFR 34.7(b)(13) would preempt "[t]he laws of any other state with substantively equivalent terms."[18] The inclusion of this catch-all category is a clear circumvention of the case-by-case analysis and CFPB consultation requirements. Section 25b allows the OCC to preempt laws that exist today. It lacks the authority under Section 25b to chill the enactment of state consumer financial laws through the inclusion of sweeping, anticipatory preemption regulations.

B. The OCC failed to conduct a "practical assessment" of state-interest-on-escrow laws as required by Cantero.

The Supreme Court has made clear that, in determining whether the NBA preempts state law, courts and the OCC must make "a practical assessment of the nature and degree of the interference caused by a state law."[19] This required assessment is entirely lacking from the OCC's preemption determination.

While the OCC compares the New York interest-on-escrow law to the state laws at issue in certain NBA preemption cases, it gives only perfunctory consideration to the practical effects that the application of the New York law would have on the exercise of national bank powers. For instance, the proposed determination only notes that the New York law creates a "direct conflict" with the OCC's proposed regulation on escrow account powers. There is no discussion of the significance or degree of interference with national bank powers as required by *Cantero*.

The only mention of practical effects on national bank operations is a speculative statement that "[i]f, for example, the state's mandated interest rate renders escrow accounts unprofitable in light of dynamic market rates and variable business conditions, this may cause national banks to, among other things, offer escrow accounts on fewer real estate loans; attempt to recoup costs in other ways; or even reduce lending, . . .".[20] But state law is not preempted if it could theoretically interfere with national bank powers to some extent, it is preempted only if it actually interferes with bank powers to a significant extent.[21]

The interest rate required to be paid by state interest-on-escrow laws and current market rates are known quantities. Hence, the OCC could easily determine whether state interest-on-escrow laws have, in fact, had the consequences postulated by the proposal. It has simply failed to do so – almost certainly because the results would not support the OCC's predetermined outcome.

In failing to do so, the OCC has employed the same cursory method of analysis expressly rejected in *Cantero*. Like the Second Circuit's analysis rejected by the Supreme Court in *Cantero*, the current OCC proposal focuses not on the "magnitude" of a state law's effects on national banks, but rather on "the kind of intrusion on the banking powers" and whether an intrusion of that kind "if taken to its extreme" could sufficiently interfere with national bank powers to warrant preemption.[22] In doing so, the OCC has employed a method of analysis explicitly rejected by the Supreme Court in *Cantero* and, for this reason, the proposed preemption determination is unlawful.

C. The proposed preemption determination's comparative analysis of preemption precedent is inconsistent with recent court decisions.

As the proposal acknowledges, *Cantero* rejected the Second Circuit's *per se* preemption test and directs courts to conduct a "nuanced comparative analysis" of the preemption cases relied on in *Barnett Bank*.23 This analysis involves determining whether the state law at issue is more akin to the interference in cases where state law was preempted — *Franklin*, *Fidelity*, *First National Bank of Jose*, and *Barnett Bank* — or more akin to the conflict presented in cases where state law was not preempted — *Anderson*, *Commonwealth*, and *McClellan*.

While the proposed preemption determination seemingly attempts to conduct a comparative analysis between New York's interest-on-escrow law and NBA preemption precedent, it does so in an outcome-oriented manner and without the nuance demanded by *Cantero*. As explained below, the OCC's proposed preemption determination failed to conduct the nuanced comparative analysis because it (1) misconstrues the nature of the state law in the *Anderson* decision and (2) errs in deeming the conflict of federal law and state interest-on-escrow laws akin to the conflict in *Fidelity*, *Barnett Bank*, *San Jose*, and *Franklin*.

1. The proposed preemption determination misconstrues the nature of the state law in *Anderson*.

The OCC finds that state interest-on-escrow laws are unlike the state law at issue in *Anderson*, which was found not to be preempted because that state law was "a state law[] of general applicability" whereas state interest-on-escrow laws are "banking-specific."24 This classification of the state law in *Anderson* is patently incorrect and directly contradicts the very precedent that the proposal cites in support.

Indeed, the dormant account law at issue in *Anderson* was, as is clearly indicated by its name, banking-specific, not a law of general applicability. The state law was an escheatment law requiring banks to confer to the state any deposits from inactive bank accounts. As such, and as courts have recognized, the state law in *Anderson* was a banking-specific law and was deemed applicable to national banks because it did not significantly interfere with national bank powers, and not because, as the proposal claims, it was a law of general applicability.25 Moreover, the proposal's assertion that the state law in *Anderson* was one of general applicability cannot be squared with the proposal's conclusion that the state law in *FirstNational Bank of San Jose* was banking-specific. The two laws were indistinguishable in any respect that is relevant to determining whether a law is "banking specific."

The proposal's misclassification of the state law in *Anderson* is intended to support the OCC's erroneous assertion that only state laws of general applicability are not preempted by the NBA. This method of analysis is clearly not the "nuanced comparative analysis" called for in *Cantero*, but rather is the "categorical test that would preempt virtually all state laws that regulate national banks, at least other than generally applicable state laws"which the Court specifically rejected.26

2. The proposed preemption determination misconstrues and misrelies on *Fidelity, Barnett Bank, San Jose*, and *Franklin*.

The proposed determination also clearly fails to conduct a "nuanced comparative analysis" by misreading and misrelying on *Fidelity*, *Barnett Bank*, *San Jose*, and *Franklin*. As explained below, the proposal misreads these cases by construing them to mean that a direct conflict, absent significant interference, is sufficient to establish preemption of a state law by the NBA. Furthermore, the proposal inappropriately likens the conflict created by state interest-on-escrow laws with that seen in these cases by disregarding the federal statutory scheme present in those cases, but totally absent here.

i. Absent a showing of significant interference, a mere conflict between state law and the NBA or OCC regulations by itself is not sufficient to establish preemption.

The proposal misconstrues *Fidelity* to incorrectly conclude that a direct conflict between state law and the NBA or OCC regulations by itself is sufficient to establish preemption regardless of whether the conflict amounts to significant interference with banking powers.

In *Fidelity*, the Supreme Court held that a California judicial rule created an actual conflict with a valid regulation issued by the Federal Home Loan Bank Board ("FHLBB"). The FHLBB's regulation gave federal savings associations "unrestricted" authority to enforce due-on-sale clauses in their mortgages. In contrast, California's judicial rule permitted the enforcement of due-on-sale clauses only in "cases where the lender's security is impaired," thereby "limiting the availability of an option the [FHLBB] considers essential to the economic soundness of the thrift industry."

The OCC reads *Fidelity* as having held that this state law was preempted because it created a "direct conflict" with the federal regulation by interfering with the "flexibility" that the regulation gave FSAs, "which was critical to the federal scheme."27 So construed, the proposal finds the holding in *Fidelity* to be "particularly apt" because New York's interest-on-escrow law "would forbid national banks from exercising discretion . . . and thus deprive them of the flexibility granted by federal law and confirmed by the OCC's proposed escrow rule" and "creates a direct conflict with this OCC regulation."28 This conclusion rests on a misreading of the holding in *Fidelity*.

Neither *Fidelity* nor any other NBA preemption case has held that a state law is preempted by the NBA if it merely creates a "direct conflict" with a federal regulation recognizing a particular bank power. Even when such a direct conflict is present, it still must be shown that the state law conflicts with this national bank power to a significant extent for the law to be preempted. Indeed, in *Conti*, the court specifically rejected the notion that a direct conflict with federal law was sufficient to establish preemption because "such a test would obviate the need for an inquiry into whether a state law's interference with federal-banking powers was significant."29 Accordingly, the OCC misreads *Fidelity* in concluding that state interest-on-escrow laws are preempted solely because they create a direct conflict with federal law – a poorly disguised effort to circumvent the "prevents or significantly interferes" analysis required by law.

ii. The conflict presented by state interest-on-escrow laws is not akin to that in Fidelity, Barnett Bank, San Jose, or Franklin based on differences in the relevant federal statutory schemes.

The federal-state conflict that the OCC attempts to manufacture in the proposals is clearly not akin to the conflict in *Fidelity* or the other cases finding NBA preemption.

For instance, unlike the federal regulation in *Fidelity*, the proposed escrow rule is not critical to any federal statutory scheme. Indeed, the *Fidelity* regulation was issued, and the case was decided, in the 1980s when the savings and loan industry was facing a severe nationwide crisis. During that time, thrift institutions struggled to earn profits because they were forced to pay high rates on their deposits after the Federal Reserve raised interest rates to fight inflation, while most of their earnings came from fixed-rate mortgages with relatively low interest rates. The use of due-on-sale clauses was an essential tool to help thrifts remain a going concern, and the state law at issue could have extreme negative and economic consequences for thrifts. It would be preposterous to contend that the ability to avoid paying interest on escrow accounts has a financial impact on national banks anywhere close to the impact that the ability to enforce due-on-sale clauses had on federal thrifts. Yet, the proposed preemption determination proceeds on this assumption, over 50 years after the enactment of New York's interest-on-escrow law.

Fidelity is also distinguishable based on the authority given to the FHLBB relative to that given to the OCC. As the *Fidelity* Court recognized, the FHLBB was invested with plenary authority to issue regulations governing federal thrifts in the context of mortgage lending. However, as courts have recognized, no such authority has been given to the OCC.30 Thus, a nuanced comparative analysis in line with *Cantero* could not deem the conflict presented by state interest-on-escrow laws akin to the conflict presented in *Fidelity*.

Similarly, despite OCC assertions to the contrary, a nuanced comparative analysis could not deem the state interest-on-escrow laws interference with national bank powers akin to the state law conflicts in any of the other cases where preemption was found. As courts have found, *Barnett Bank* is itself inapposite because that case involved a conflict between a state law and a national bank power expressly authorized in federal statute, not a federal regulation.31 Unlike *Franklin* and *First National Bank of San Jose*, in the context of interest-on-escrow laws, there is no conflict between state law and the overall scheme of federal banking law.32

As explained above, national banks are not subject to a comprehensive regulatory scheme in the context of mortgage lending or real estate escrow accounts. The OCC's contrived proposal on escrow account powers does not change this. Indeed, in an analogous situation, when faced with a conflict between an OCC regulation granting a national bank unfettered discretion to impose deposit account service charges and a state law limiting such charges, a court found the assertion that national banks were subject to a comprehensive federal statutory scheme governing such charges to be "palpably erroneous."33

Given that the nuanced comparative analysis required by *Cantero* would find that the interference of state interest-on-escrow laws with national bank escrow account powers is not akin to any of the preemption cases which found state law to be preempted, the OCC must conclude that state interest-on-escrow laws are not preempted under the NBA.34

D. The conclusion that state interest-on-escrow laws do not significantly interfere with escrow account powers is supported by extensive judicial precedent.

State interest-on-escrow laws are not new. New York's law35 was enacted in the 1970s. National banks and FSAs have been complying since enactment, and courts have routinely upheld the New York law and similar interest-on-escrow laws.

If the OCC had conducted the "practical assessment" and "nuanced comparative analysis" required by *Cantero* and garnered "substantial evidence" as required by Section 25b, it would have reached the same conclusion as every court that has addressed the issue: state interest-on-escrow laws do not significantly interfere with national bank powers. The proposed rule directly conflicts with these holdings, despite the fact that the Supreme Court has held that "the final 'interpretations of the laws' would be 'the proper and peculiar province of the courts'"36 – not federal agencies.

Three months prior to the proposed rule, the First Circuit analyzed Rhode Island's interest-on-escrow law through the lens of *Cantero*. The First Circuit held that, when applying *Cantero,* the challenging national bank did not establish that the "statute's practical implications will significantly interfere with [the bank's] exercise of its federal-banking powers."37

The Ninth Circuit also ruled against preemption for California's interest-on-escrow law. In *Lusnak v. Bank of America*, the Ninth Circuit stated, "Applying [the *Barnett Bank*] standard here, we hold that California Civil Code § 2954.8(a) is not preempted because it does not prevent or significantly interfere with Bank of America's exercise of its powers."38 A panel decision by the Ninth Circuit upheld the *Lusnak* holding on remand in *Flagstar v. Kivett*.39

In addition to *Conti* and *Kivett*, caselaw from 50 years ago demonstrates why interest-on-escrow laws were never deemed to significantly interfere with a national bank's powers. In 1975, two district courts upheld the constitutionality of § 5-601 in *Jamaica Sav. Bank v. Lefkowitz* and *Federal Nat'l Mortgage Ass'n. v. Lefkowitz.* 40 After determining that § 5-601 served a valid purpose by ensuring fair treatment for borrowers, the district court in *JSB* rejected the plaintiff savings bank's challenges under the Contract Clause and the Fourteenth Amendment's Due Process and Equal Protection Clauses.41 As the court emphasized, the plaintiff savings bank failed to show that it would suffer any net loss on its mortgage escrow accounts after complying with § 5-601.42

In *FNMA*, the district court adopted the reasoning of *JSB* in dismissing FNMA's similar constitutional challenges to § 5-601.43 The district court also rejected FNMA's Supremacy Clause claim.44 The court found that the "closest analogy" to FNMA's Supremacy Clause claim was the preemption claim rejected by the Supreme Court in *Anderson*.45 The district court determined that, "[a]s in *Anderson*, the state law at issue here does not discriminate against FNMA as a federal mortgage lending institution" and did not conflict with any federal statute.46 The court held that the "insignificant" burdens imposed by § 5-601 did not violate the Supremacy Clause. As the court explained, § 5-601 "does not regulate how FNMA must keep or invest the funds in its possession," and the statute did not "interfere directly with [FNMA's] internal management."47 Additionally, § 5-601 "in no way impairs" the purpose of mortgage escrow accounts "to protect [FNMA's] interest in the mortgaged property."48 The district court concluded that "although the burden [on FNMA] may be somewhat greater than that found in *Anderson*, [§ 5-601] is not so burdensome as to violate the Supremacy Clause."49 In fact, § 5-601's relatively minor impact on national banks is much less substantial than the burden imposed by the Kentucky statute in *Anderson*.

In *Hymes v. Bank of America, N.A.*, the Eastern District of New York determined that § 5-601's "degree of interference" with a national bank's power to administer mortgage escrow accounts is "minimal."50 As the court explained, § 5-601 "does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use."51 While § 5-601 requires national banks and FSAs to pay a "modest" interest rate on funds held in mortgage escrow accounts, § 5-601 allows them to administer mortgage escrow accounts in a manner that is "relatively unimpaired and unhampered by the state law."52 Critically, *Hymes* was appealed to the Second Circuit and consolidated with *Cantero*. When the Second Circuit's preemption ruling was appealed to the Supreme Court, the Court unanimously rejected the Second Circuit's broad preemption standard and reiterated the type of analysis undertaken by the Eastern District of New York in *Hymes*.

The OCC has not shown that § 5-601 would cause its regulated institutions to suffer net losses on mortgage escrow accounts. The average yields on earning assets produced by FDIC-insured depository institutions are well above § 5-601's required 2% annual interest payments. Thus, national banks and FSAs would be highly unlikely to incur net losses from administering mortgage escrow accounts in compliance with § 5-601.

Section 5-601's relatively minor impact on national banks is plainly insignificant compared to the severe burdens imposed by the state laws preempted in *Barnett Bank*, *Franklin*, *San Jose*, and *Fidelity*.53 Additionally, § 5-601's impact on national banks is much less substantial than the burdens created by the state laws upheld in *Anderson, McClellan*, and *Commonwealth*. It is for this reason that the two circuit courts that have issued decisions after *Cantero* – *Conti* and *Kivett* – have both held that state interest-on-escrow laws do not prevent or significantly interfere with national bank powers.54

Thus, a "nuanced comparative analysis" of § 5-601 with the state laws evaluated in the seven Supreme Court decisions identified in *Cantero* confirms that the "nature and degree of [§ 5-601's] interference" with the "exercise" of national bank "powers" is much less substantial than any of the state laws assessed in those decisions.55 Accordingly, the conclusion that the state interest-on-escrow laws covered by the proposed

preemption determination do not significantly interfere with national bank powers is simply unavoidable.

E. The proposed preemption determination sets out an invalid preemption standard.

In the proposed preemption determination, the OCC concocts a preemption standard based on its analysis of NBA preemption cases that bears no resemblance to the "prevents or significantly interferes" standard that is actually required by the NBA. Specifically, the proposed determination states that:

a state law prevents or significantly interferes with a federal power, at a minimum, when it interferes with critical *flexibility* granted to a national bank under federal law, interferes with a national bank's *efficiency* and effectiveness in exercising its federal power, or qualifies a federal power in an *unusual* way. In contrast, as discussed above, generally applicable infrastructure laws typically apply to national banks.[56]

This creative, yet erroneous, articulation of the *Barnett Bank* preemption standard truly underscores that the OCC failed to conduct the comparative analysis required by *Cantero.* In fact, the OCC standard is exactly the type of categorical test which the Supreme Court specifically rejected. The Supreme Court did so because a categorical test would preempt all state consumer financial laws other than generally applicable state laws.

Indeed, none of the three prongs of this concocted "inflexible, inefficient, and unusual" preemption standard look to "the nature and degree of interference caused by a state law" as required by *Cantero*.[57] Rather, the OCC's contrived standard merely asks whether a state law impacts a federal banking power to any extent at all, and, if so, deems the law preempted in contravention of *Cantero*. In limiting NBA preemption to state laws that cause significant interference with national bank powers, Congress intended that only those state laws which have a "material" or "important" impact on the exercise of national bank powers should be preempted – not all state laws that have any impact all.[58]

Given its breadth, it is difficult to view this "inflexible, inefficient, and unusual" standard as anything other than a thinly veiled attempt to resurrect the "obstruct, impair, or condition" standard which Congress specifically overturned in enacting Section 25b, but which the OCC has sought to keep alive through its existing preemption rules.[59]

III. OCC's existing preemption regulations also violate the substantive and procedural requirements of Section 25b and should be rescinded.

CSBS has repeatedly requested that the OCC revise or rescind its existing preemption regulations – 12 CFR 7.4407, 7.4008, 34.4 – to bring them into compliance with Section 25b, and the OCC has repeatedly ignored or summarily denied these requests.[60] This proposed preemption determination is the first acknowledgment that Section 25b applies to OCC regulations that are intended to preempt state consumer financial laws and, by extension, represents a tacit concession that its existing preemption regulations, which were unquestionably issued without complying with Section 25b, are invalid. More specifically, the existing OCC preemption regulation already purports to preempt state laws on escrow accounts tied to lending. If the existing preemption regulation was valid, then there would be no need for these proposed rules.

Given that we have outlined all the reasons that the existing OCC preemption rules are invalid elsewhere, we will not belabor the point here, but encourage you to review the many petitions, briefs, and comment letters we have submitted to this effect. For this reason, we once again urge the OCC to rescind its existing preemption regulations and only issue future preemption regulations in a form and manner consistent with *Cantero* and which complies with the substantive and procedural requirements of Section 25b.

IV. **Conclusion**

CSBS and AARMR oppose the unlawful and unwise proposed rules. They must be withdrawn by the OCC.

Sincerely,

Brandon Milhorn
President & CEO
CSBS

Kirsten Anderson
President
AARMR

- 1

  CSBS is the nationwide organization of state banking and financial regulators from all 50 states, the District of Columbia, and the U.S. territories.

- 2

  [1] OCC, Notice of Proposed Rulemaking, *Preemption Determination: State Interest-on-Escrow Laws*, 90 Fed. Reg. 61093 (Dec. 30, 2025) (hereinafter *Preemption Determination*).

- 3

  OCC, Notice of Proposed Rulemaking, *Real Estate Lending Escrow Accounts*, 90 Fed. Reg. 61099 (Dec. 30, 2025)(hereinafter *Escrow Rule)*.

- 4

  Id. at 61103.

- 5

  See Fox Business, *Treasury's Bessent says fixing housing affordability crisis will be one of his 'big projects' this fall* (Aug. 14, 2025).

- 6

  See J.D. Power, Homeowners Insurance Premium Increases Threaten Customer Loyalty, Long-Term Profitability, J.D. Power Finds (Sept. 16, 2025).

- 7

  See Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 289-292 (2004).

- 8

  See Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN.

L. 225, 289-292 (2004).

- 9

  The Financial Crisis Inquiry Commission, 113 (Jan. 2011) (after the OCC adopted its 2004 preemption regulations, "many of the largest mortgage-lenders shed their state licenses and sought shelter behind the shield of a national charter," leading to "the worst lending abuses in our nation's history"); *see also* S. Rep. No. 111-176, at 16-17 (2010) (criticizing the OCC's preemption of state laws).

- 10

  12 U.S.C. 25b(b)(5)(A).

- 11

  Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 ("And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.").

- 12

  Id.

- 13

  12 U.S.C. 25b(c).

- 14

  12 U.S.C. 25b(b)(1)(B) & (b)(3)(A).

- 15

  12 U.S.C. 25b(b)(3)(B).

- 16

  NLRB v. Metallic Lathers Union Local 46, 149 F.3d 93, 104 (2d Cir. 1998).

- 17

  Preemption Determination, supra note 2, at 61097, n.55.

- 18

  Preemption Determination, supra note 2, at 61099.

- 19

  Cantero v. Bank of Am., N.A., 602 U.S. 205, 219-20 (2024).

- 20

Preemption Determination, supra note 2, at 61094.

- 21

  SeeCantero, 602 U.S. at 217.

- 22

  Cantero v. Bank of Am., N.A., 49 F.4th 121, 131 (2d Cir. 2022) *vacated by* 602 U.S. 205 (2024).

- 23

  Cantero, 602 U.S. at 218. *See also* Brief of Amici Curie in Support of Petitioners, *Cantero v. Bank of Am.*, N.A., 602 U.S. 205 (No. 22-529) ("Instead of applying the nuanced, fact-specific analysis mandated by § 25b(b)(1)(B), the Second Circuit adopted a blunt *per se* rule that would always result in preemption whenever a state law exerts any degree of "control" over the exercise of national bank powers.).

- 24

  Preemption Determination, *supra* note 2, at 61096, n.43. *See alsoid*. at 61095 (characterizing the state law in *Anderson* as "a kind of generally applicable state 'infrastructure' law that is typically not preempted.").

- 25

  See Conti v. Citizens Bank, N.A., 157 F.4th 10, 22 (1st Cir. 2025) (finding that *Anderson* and *First National Bank of San Jose* "involved state laws that were banking-specific").

- 26

  Cantero, 602 U.S. at 220-21.

- 27

  Preemption Determination, *supra* note 2, at 61095-61096.

- 28

  Id.

- 29

  Conti, 157 F.4th at 25; *see also Cantero*, 602 U.S. at 207 ("For purposes of applying Dodd-Frank's preemption standard, *Franklin*, *Fidelity*, and *Barnett Bank* together illustrate the kinds of state laws that significantly interfere with the exercise of a national bank power and thus are preempted.").

- 30

  See, e.g., *Conti*, 157 F.4th at 21 ("While section 371(a) does grant the OCC regulatory oversight, it does not grant the OCC exclusive oversight. Were the OCC to have exclusive regulatory authority, states would be entirely divested of concurrent regulatory power. Congress did not intend this.").

- 31

See Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 31 (1996) (stating that "the Federal Statute authorize[d] national banks to engage in activities that the State Statute expressly forb[ade]"). *See also Conti*, 157 F.4th at 20 ("Unlike *Barnett Bank*, nothing in the National Bank Act expressly prohibits state interest-on-escrow laws . . . .").

- 32

See Conti, 157 F.4th at 24 ("In each of these cases, to determine whether the state banking law at issue significantly interfered with the exercise of federal power such that preemption was warranted, the Court considered whether the state law was generally consistent with the federal-banking scheme that Congress intended . . . ").

- 33

Perdue v. Crocker National Bank, 38 Cal. 3d 913, 938 (Cal. 1985) ("The assertion in the regulation that state laws limiting bank service charges 'are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks' (12 C.F.R. § 7.8000, subd. (c)) is palpably erroneous. There is no comprehensive federal statutory scheme governing the taking of deposits. There is one relevant statute, section 24 of the National Bank Act, and that merely authorizes banks to accept deposits. Section 24 may by implication also authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits, but such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law.").

- 34

See, e.g., *Conti*, 157 F.4th at 28 ("Applying the standard adopted by the Supreme Court in *Cantero*, we conclude that Citizens has failed to satisfy its burden of showing the Rhode Island statute should be preempted as a matter of law.").

- 35

NYGOL, § 5-601.

- 36

Loper Bright Enters., 603 U.S.at 385 (citing The Federalist No. 78, at 525 (A. Hamilton)).

- 37

Conti, 157 F.4th at 28.

- 38

Lusnak v. Bank of Am., N.A., 883 F.3d 1185, 1194 (9th Cir. 2018).

- 39

Kivett v. Flagstar Bank, 154 F.4th 640, 649 (9th Cir. 2025) ("We do not think that *Cantero* has prescribed a mode of analysis that is clearly irreconcilable with what we did in *Lusnak*. That means that we have no warrant as a three-judge panel to declare *Lusnak* overruled and decide the question of California's interest-

on-escrow rule anew. In reaching this conclusion, we hold only that *Lusnak* remains good law. Whether we would have reached the same conclusion is irrelevant.").

- 40

  Jamaica Sav. Bank v. Lefkowitz, 390 F. Supp. 1357 (E.D.N.Y. 1975), *aff'd without opinion*, 423 U.S. 802 (1975) (hereinafter *JSB*); *Federal Nat'l Mortgage Ass'n. v. Lefkowitz*, 390 F. Supp. 1364 (S.D.N.Y. 1975)(three-judge court) (hereinafter *FNMA*).

- 41

  JSB, 390 F. Supp. at 1362-63.

- 42

  Id. at 1363 ("The fact that the plaintiff might currently be losing money on its mortgage loans as a whole sheds no light on the escrow account problem. We are concerned only with the profits and losses realized specifically from the investment of escrow funds. We find that no such showing [of losses] has been made.").

- 43

  FNMA, 390 F. Supp. at 1367.

- 44

  Id. at 1367-71.

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  Id. at 1368.

- 46

  Id. at 1369.

- 47

  Id.

- 48

  Id.

- 49

  Id.

- 50

  Hymes v. Bank of Am., N.A., 408 F. Supp. 3d 171, 195 (E.D.N.Y. 2019).

- 51

Id.

- 52

  Id. at 185-86, 195-96.

- 53

  Id. at 194-96 (comparing § 5-601 to the state laws preempted in *Barnett Bank* and *Franklin*).

- 54

  Kivett v. Flagstar Bank, 154 F.4th 640, 649 (9th Cir. 2025)("the NBA does not preempt California Civil Code § '2954.8(a)."); *Conti v. Citizens Bank, N.A.*, 157 F.4th 10, 28 (1st Cir. 2025)("Citizens has therefore failed to satisfy its burden of showing that as a matter of law, the Rhode Island statute is preempted by the National Bank Act." citing *Me. Forest Prods. Council v. Cormier*, 51 F.4th 1, 6 stating that "the burden of proving preemption lies with the parties asserting it.").

- 55

  Cantero, 602 U.S. at 217.

- 56

  Preemption Determination, *supra* note 2, at 61095 (emphasis added).

- 57

  Cantero, 602 U.S. at 219.

- 58

  The Supreme Court has repeatedly equated the term "significant" with "material" and "important" in interpreting other federal statutes. *SeeBasic, Inc. v. Levinson*, 485 U.S. 224,231-32 (1988) (Under §10(b) of the Securities Exchange Act of 1934 (1934 Act), (i) the "materiality" standard for securities fraud requires plaintiffs to show "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having *significantly* altered the 'total mix' of information made available," and (ii) "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it *important* in deciding how to vote") (emphasis added) (quoting *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976) (establishing the same standard for "materiality" under §14(a) of the 1934 Act)); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989) (Under NEPA, federal agencies must prepare environmental impact statements with respect to proposals " *significantly* affecting the quality of the human environment"; NEPA thereby "ensures that *important* [environmental] effects will not be overlooked or underestimated") (emphasis added).

- 59

  See, e.g., Arthur E. Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L 225, 233 (2004).

- 60

  CSBS, *Petition to Reconsider Preemption Regulations Amended in Docket ID, OCC-2011-0018*, 78 Fed. Reg. 43549 (June 29, 2012); CSBS, *Letter to Acting Comptroller of the Currency Michael J. Hsu on the OCC's 5-Year Review of Preemption* (July 28, 2024); CSBS, *Letter Re: Executive Orders 14219 and 14267 – Rescission of OCC Preemption Regulations* (May 8, 2025); CSBS Complaint, *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, No. 1:20-cv-03797 (D.D.C. filed Dec. 22, 2020); CSBS & AARMR, Brief of Amici Curie in Support of Petitioners, *Cantero v. Bank of Am., N.A.*, 602 U.S. 205 (No. 22-529); CSBS & AARMR, Brief of Amici Curiae in Support of Plaintiff-Appellant and Reversal, *Conti v. Citizens Bank, N.A.*, 157 F.4th 10 (1st Cir. 2025)(No. 22-1770); CSBS & AARMR, Brief of Amici Curiae in Support of Appellees and Affirmance, *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025)(No. 21-15667).

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