No. 22-529

In the
Supreme Court of the United States

ALEX CANTERO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANK OF AMERICA, N.A.,
Respondent.

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

BRIEF OF *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS AND AMERICAN ASSOCIATION OF RESIDENTIAL MORTGAGE REGULATORS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici Conference of State Bank Supervisors (CSBS) and American Association of Residential Mortgage Regulators (AARMR) are national associations of state officials responsible for regulating state-chartered banks and state-licensed nonbank financial institutions (including mortgage lenders and mortgage servicers) in all 50 States, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

Since 1902, CSBS has played a leading role in defending our nation's dual system for regulating banks and other providers of financial services. CSBS represents its members at the federal level and promotes collaboration among its members and federal regulatory agencies. Similarly, AARMR supports effective supervision and regulation of the residential mortgage industry by its members, thereby promoting a safe and sound industry that meets the needs of local communities and protects the rights of consumers.

CSBS administers the Nationwide Multistate Licensing System (NMLS) for nonbank originators of residential mortgages pursuant to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101-17 (SAFE Act). The SAFE Act authorized CSBS and AARMR to establish NMLS to

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[1] No counsel for a party authored any part of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. This brief was funded solely by the *amici curiae* filing this brief.

"enhance consumer protection, and reduce fraud . . . [in] the residential mortgage industry." *Id.* § 5101.

CSBS and AARMR have a compelling interest in this case. The decision below violates the governing preemption standard that Congress and this Court established for national banks, and degrades the states' authority to regulate financial institutions and protect consumers of financial services.

SUMMARY OF ARGUMENT

1. This Court and Congress have affirmed the States' historic powers to regulate financial institutions and protect consumers as matters of "profound local concern." *Lewis v. BT Investment Mgrs., Inc.*, 447 U.S. 27, 38 (1980). They have also upheld the application of state laws to national banks. *Cuomo v. Clearing House Ass'n,* 557 U.S. 519, 534-36 (2009); 12 U.S.C. § 25b.

The States' authority to regulate financial institutions and protect consumers faces a grave threat from the decision below, which held that state laws are preempted whenever they seek to "exert control over a banking power granted [to national banks] by the federal government." 49 F.4th at 125. The decision below would prevent broad categories of state laws from applying to real estate lending and other federally authorized activities of national banks. Contrary to Congress's intent, the ramifications of the decision below would create a financial marketplace dominated by national banks and severely impair the States' ability to protect their residents from fraudulent and abusive financial practices.

2. The court below erred by giving weight to a regulation (12 C.F.R. § 34.4) that violates 12 U.S.C. § 25b. The Office of the Comptroller of the Currency (OCC) issued that regulation in 2011 without following the preemption process mandated by § 25b. Additionally, the regulation contains an erroneous preemption standard that contravenes § 25b(b)(1)(B).

3. The decision below also squarely conflicts with the governing preemption standard this Court established in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), and Congress codified in 12 U.S.C. § 25b(b)(1)(B). Under that standard, a state consumer financial law is preempted "only if" the law "prevents or significantly interferes with the exercise" of federally authorized powers by national banks. The court below did not conduct the nuanced, fact-specific analysis mandated by *Barnett Bank* and § 25b(b)(1)(B). Instead, it fashioned 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.

The court below based its *per se* rule principally on cases decided by this Court prior to enactment of the Federal Reserve Act of 1913. The federally chartered banks in those cases were far different from today's national banks. Given their dissimilar historical context, those cases do not govern the application of state laws to modern national banks. Moreover, *Barnett Bank*'s more narrowly tailored preemption standard—codified in § 25b(b)(1)(B)—supersedes the broad preemption rulings in those early decisions. This Court has instructed federal courts that they "must follow" a federal statute's clear

mandate and may not "override a lawful congressional command" by relying on inconsistent language "extracted" from prior Supreme Court opinions. *Brown v. Davenport*, 596 U.S. 118, 127, 141 (2022).

ARGUMENT

I. The Decision Below Severely Undermines the States' Longstanding Authority to Regulate Financial Institutions and Protect Consumers.

A. Our Federal System Empowers States to Regulate Financial Institutions and Protect Consumers of Financial Services.

The historic police powers of the states include their longstanding authority to charter and regulate banks and other financial institutions and protect consumers. In *Lewis v. BT Investment Mgrs., Inc.*, 447 U.S. 27 (1980), this Court said:

> We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. … [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities.

Id. at 38; *see also id.* at 36, 43 (discussing the States' "police powers to regulate matters of 'legitimate local concern,'" including "protecting the citizenry against fraud"); *Northeast Bancorp v. Bd. of Governors*, 472 U.S. 159, 177 (1985) (quoting *BT Investment* and observing that "our country traditionally has favored widely dispersed control of banking").

This Court has repeatedly upheld the applicability of state laws to national banks. In *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009), the Court explained that

> States . . . have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years, as evidenced by [*First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924)], in which we upheld enforcement of a state anti-bank-branching law.

Id. at 534. Similarly, in *Atherton v. FDIC*, 519 U.S. 213 (1997), this Court ruled that "federally chartered banks are subject to state law." *Id.* at 222. As support for that principle, *Atherton* cited and quoted decisions reaching back to an 1870 case, which held that national banks

> are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of

> property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870)). Likewise, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), this Court held that States have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* at 33.

Following this Court's most recent determination that state consumer financial laws were preempted, Congress restored the applicability of state laws to national banks' operations. In *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), this Court held that the National Bank Act preempted the application of state licensing, registration, and inspection laws to nonbank mortgage lending subsidiaries of national banks. However, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act), Congress overruled *Watters* and affirmed the application of state laws to the agents and nonbank affiliates and subsidiaries of national banks. *See* 12 U.S.C. §§ 25b(b)(2), 25b(e) & 25b(h).[2]

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[2] Arthur E. Wilmarth, Jr., "The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services," 36 *Journal of Corporation Law* 893, 934-35, 938-39 (2011)

Additionally, as discussed below in Part III.A, the Dodd-Frank Act codified *Barnett Bank*'s "prevent or significantly interfere" preemption standard for determining whether state consumer financial laws apply to national banks. *Id.* § 25b(b)(1)(B).

The court below recognized that *Barnett Bank*'s "prevent or significantly interfere" test, as codified in § 25b(b)(1)(B), provides the governing standard for deciding whether the challenged New York statute applies to national banks. 49 F.4th at 130-31, 135-36. However, the Second Circuit disregarded the plain meaning of that preemption standard and held that state laws are preempted whenever they seek to "exert control over a banking power granted [to national banks] by the federal government." 49 F.4th at 125. Unless overruled, the Second Circuit's *per se* rule of preemption would gravely impair the States' authority to charter and regulate financial institutions and protect consumers.

B. The Decision Below Greatly Weakens the Dual Banking System.

Thirteen States have enacted nondiscriminatory laws requiring mortgage lenders to pay minimum rates of interest on mortgage escrow accounts.[3] The decision below would preempt the application of those laws to national banks, 49 F.4th at 133-35, thereby granting national banks a competitive advantage in the mortgage servicing

(explaining that the Dodd-Frank Act "effectively overrules" *Watters*).

[3] 49 F.4th at 133; *see also Lusnak v. v. Bank of America, N.A.*, 883 F.3d 1185, 1195 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018).

market in those thirteen States over state-chartered banks and state-licensed nonbank mortgage lenders.

The business of mortgage servicing has evolved from an in-house accounting function at banks to a complex business activity attracting a variety of bank and nonbank market participants. Market participants include traditional state-chartered and national banks as well as a variety of state-licensed nonbank mortgage lending and servicing providers.[4] National banks currently hold a minority share of the mortgage servicing market, as indicated in the table below.

[4] For more information on mortgage servicing, *see* Conference of State Banking Supervisors, *Reengineering Nonbank Supervision*, Chapter Three: Overview of Nonbank Mortgage, 27 – 35 (Sept. 2019). Available at https://www.csbs.org/sites/default/files/other-files/Chapter%20Three%20-%20Overview%20of%20Nonbank%20Mortgage_updated.pdf.

Market Share of 50 Largest Mortgage Servicers (by Charter or License Type)			
	# in Top 50	Share of National Market	Decision Below Would Preempt State Interest on Escrow Laws
State-Licensed Mortgage Servicers	29	36.5%	No
National Banks	15	25.5%	Yes
State-Chartered Banks	5	4%	No

Inside Mortgage Finance, "Top 50 Firms in Owned Mortgage Servicing: 4Q22," available at https://www.insidemortgagefinance.com/ (2023). Used with permission.

The decision below would provide national banks with an unwarranted competitive advantage, as state-chartered banks and state-licensed mortgage lenders and servicers would have to comply with state laws requiring the payment of interest on mortgage escrow accounts while national banks—including the largest, most well-funded banks in America—need not bear that expense. Thus, the decision below would give national banks an unfair competitive edge produced by legal and regulatory arbitrage inconsistent with Congress's intent and this Court's precedents.

C. The Decision Below Encourages the OCC to Pursue Backdoor Preemption Efforts to Increase its Power and Budget by Overriding State Laws.

In the courts below, Respondent alleged that the challenged New York statute was preempted by 12 C.F.R. § 34.4(a), a regulation adopted by the OCC in 2004 and modified in 2011.[5] Both versions of that regulation declare that a "national bank may make real estate loans . . . without regard to state law limitations concerning: . . . (6) Escrow accounts."[6] The Second Circuit did not rule on whether § 34.4(a)(6) preempted the challenged New York statute, but the court said its "conclusion" about preemption was "consistent" with the OCC's "statements" when the regulation was adopted in 2004 and modified in 2011. 49 F.4th at 135, 139 n.13.

As shown below in Part II, Congress and this Court repudiated the 2004 version of the OCC's regulation, and the 2011 version violates several provisions of 12 U.S.C. § 25b. Moreover, the regulation represents an unauthorized attempt by the OCC to usurp authority from the states, aggrandize its power and enlarge its budget by overriding the application of state laws to national banks, and thereby encourage more national bank charters.

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[5] 49 F.4th at 128 n.5, 139 n.13.

[6] Bank Lending and Operations: Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004) ("2004 OCC Rule"); Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43569 (July 21, 2011) (2011 OCC Rule).

In 2002, the Comptroller of the Currency declared that "national banks' immunity from many state laws is a significant benefit of the national charter—a benefit that the OCC has fought hard over the years to preserve."[7] Two years later, the Comptroller acknowledged that "one reason" for the OCC's 2004 preemption rule was "to attract additional [national bank] charters, which helps to bolster the budget of the OCC." S. Rep. No. 111-176, at 16 (2010). The Financial Crisis Inquiry Commission (FCIC) found that, after the OCC issued its 2004 regulation, "three large banks with combined assets of more than $1 trillion said they would convert from state charters to national charters, which increased OCC's annual budget 15%."[8]

The potential impact of the decision below extends far beyond mortgage escrow accounts. The OCC's regulation asserts that real estate loans made by national banks are not subject to fourteen broad categories of state laws, including state laws regulating loan-to-value ratios, terms of credit, disclosure, advertising, mortgage origination and servicing, and use of credit reports. 12 C.F.R. § 34.4(a).[9] Unless reversed, the decision below would

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[7] Speech by Comptroller of the Currency John D. Hawke, Jr. (Feb. 12, 2002), at 2, https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

[8] *The Financial Crisis Inquiry Report* (Jan. 2011) [hereinafter FCIC Report], at 112, https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

[9] The OCC's regulation permits the application to national banks of general state laws, such as those governing contracts, torts,

encourage national banks to file lawsuits challenging those state laws in reliance on the OCC's regulation, negating the case-by-case analysis and other requirements demanded by Congress in 12 U.S.C. § 25b.

The decision below would return this nation to the disastrous situation that prevailed after the OCC adopted its 2004 regulation. That regulation "exempted all national banks from State lending laws . . . [and] created an environment where abusive mortgage lending could flourish without State controls." S. Rep. No. 111-176, at 16-17 (2010). Illinois Attorney General Lisa Madigan told the FCIC that, after the OCC adopted its 2004 regulation, "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."[10]

The decision below threatens to have a similar impact. State-chartered banks would have strong incentives to obtain national charters to avoid preempted state laws, and state-licensed nonbank lenders and servicers would have substantial reasons to sell their operations to national banks. The likely result would be a consolidated mortgage market dominated by national banks—a drastic change from the current market, in which state-chartered banks

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taxation, and zoning, if such laws are "consistent" with *Barnett Bank*. 12 C.F.R. § 34.4(b).

[10] FCIC Report, *supra* note 8, at 113 (quoting Ms. Madigan's testimony).

and state-licensed nonbanks are active and successful competitors.

The FCIC agreed with the Senate Banking Committee that the OCC's 2004 regulation "thwart[ed] state efforts" to protect consumers from predatory mortgage loans.[11] The decision below threatens to have the same impact, frustrating Congress's intent that States should "provide new consumer protections as problems arise," thereby furnishing "an important signal to Congress and Federal regulators of the need for Federal action." S. Rep. No. 111-176, at 174 (2010).

The OCC's 2004 and 2011 rules represent unauthorized attempts to devise backdoor preemption[12] that violates § 25b. As this Court held in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), a federal agency "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id.* at 374. As shown in Part II, the OCC's regulation defies the constraints imposed by Congress on the agency's authority.

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[11] FCIC Report, *supra* note 8, at 13, 96-97, 112-13 (quoting Ms. Madigan's testimony),126; *see also* S. Rep. No. 111-176, at 16-17 (2010) (criticizing the OCC's preemption of state laws).

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

II. The OCC's Regulation Violates the Preemption Process and Preemption Standard Mandated by Congress.

A. The OCC's Issuance of its 2011 Rule Violated the Preemption Process Required by 12 U.S.C. § 25b.

Like the OCC's 2004 regulation, the 2011 rule purports to preempt more than thirty broad categories of state laws across the nation, including fourteen categories of state laws dealing with mortgage escrow accounts and other real estate lending matters.[13] In issuing those categorical preemptions in 2011, the OCC violated § 25b's requirements that the OCC must:

- make preemption determinations on a "case-by-case basis,"
- support those determinations with "substantial evidence, made on the record of the proceeding," and
- consult with the CFPB before preempting "substantively equivalent" laws enacted by multiple States.[14]

The OCC's 2011 rule did not comply with the foregoing requirements of § 25b, and the OCC tried to justify its

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[13] *See* 12 C.F.R. §§ 4007(b), 7.4008(d) & 34.4(a), promulgated in 2011 OCC Rule, *supra* note 6, at 43565-66, 43569.

[14] 12 U.S.C. §§ 25b(b)(1)(B) & 25b(b)(3)(A) ("case-by-case" requirement); *id.* § 25b(c) ("substantial evidence" requirement); *id.* § 25b(b)(3)(B) (requirement to consult with CFPB); *see Lusnak*, 883 F.3d at 1194 (discussing the foregoing requirements).

noncompliance by claiming that the 2011 rule was based on the agency's 2004 regulation.[15]

The OCC's claim that its 2004 regulation remained valid after the Dodd-Frank Act is untenable. Under § 25b(b)(1)(B), state consumer financial laws are preempted "only if" the OCC or a court makes a preemption determination in full compliance with § 25b's requirements. The Dodd-Frank Act includes a limited exception to that statutory mandate, which preserves the applicability of preexisting OCC regulations and orders to "any contract entered into on or before July 21, 2010, by national banks . . . or subsidiaries thereof." 12 U.S.C. § 5553. That exception makes clear that preexisting OCC preemption rules and orders do *not* apply to transactions by national banks *after* July 21, 2010, *unless* the OCC reissues those preemption determinations in full compliance with § 25b. The OCC's contrary claim would make § 5553 meaningless, thereby violating "the canon against surplusage [that] is strongest when an interpretation would render superfluous another part of the same statutory scheme."[16]

The district court below correctly determined that the OCC's 2011 rule did not perform the required

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[15] 2011 OCC Rule, *supra* note 6, at 43557.

[16] *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) (A statute should be construed "so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal quotation marks and citation omitted).

case-by-case analysis of relevant state laws, did not provide substantial evidence on the record to support its preemptive determinations, and did not involve consultation with the CFPB regarding the existence of multiple state laws with substantively equivalent terms.[17] Accordingly, the district court properly refused to defer to the OCC's 2011 rule and instead made its own determination that the challenged New York statute did not run afoul of *Barnett Bank*'s "prevent or significantly interfere" preemption standard.[18]

B. The OCC's Regulation Violates the Preemption Standard Established by Congress in 12 U.S.C. § 25b(b)(1)(B).

In addition to ignoring the preemption process required by Congress, the OCC's 2011 rule disregards the plain language of the applicable preemption standard. The 2011 rule does not include *Barnett Bank*'s "prevent or significantly interfere" preemption standard. In contravention of Congress's unambiguous command in § 25b(b)(1)(B), the OCC's 2011 rulemaking declared "the Dodd-Frank Act does

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[17] *Hymes v. Bank of America, N.A.*, 408 F. Supp. 3d 171, 177-80, 191-92 (E.D.N.Y. 2019); *see also* Arthur E. Wilmarth, Jr., "Policy Brief: The OCC's Repeated Failures to Comply with the Dodd-Frank Act and Other Legal Authorities Governing the Scope of Preemption for National Banks and Federal Savings Associations," at 7-8 (Geo. Wash. Leg. Stud. Res. Paper No. 2021-51, Nov. 8, 2021), https://ssrn.com/abstract=3966510 (discussing the OCC's failures to comply with the process required by § 25b when the OCC issued its 2011 rule).

[18] *Id.* at 193-96.

not create a new, stand-alone 'prevents or significantly interferes' preemption standard."[19]

The court below stated that its broad view of preemption under the National Bank Act—which would override all state laws that "exert control over a banking power granted by the federal government" or "target, curtail, and hinder" such a power—was "consistent" with the OCC's "statements" when the OCC adopted the 2004 and 2011 versions of its regulation. 49 F.4th at 125, 134, 135. Indeed, the Second Circuit's *per se* approach would have the same sweeping impact as the 2004 version of the OCC's regulation, which sought to preempt all state laws that "obstruct, impair, or condition a national bank's ability to fully exercise" its powers under federal law.[20]

The Second Circuit should not have given any weight to the erroneous standard asserted by the OCC's regulation. Congress repudiated the OCC's 2004 regulation when it passed 12 U.S.C. § 25b in 2010. The Senate Banking Committee explained that, under § 25b(b)(1)(B), "[t]he standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson*, . . . undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175 (2010).

[19] 2011 OCC Rule, *supra* note 6, at 43555; *see* Wilmarth, *supra* note 17, at 7 (discussing the OCC's refusal to incorporate *Barnett Bank*'s "prevent or significantly interfere" preemption standard in its 2011 rule).

[20] 2004 OCC Rule, *supra* note 6, at 1904, 1911, 1912, 1916-17.

Similarly, in *Cuomo*, this Court rejected the OCC's rationale for its 2004 preemption rule. In the OCC's 2004 rule and a companion regulation, the OCC asserted that state laws apply to national banks only if they provide the "legal infrastructure that surrounds and supports the ability of national banks . . . to do business."[21] *Cuomo* held that the OCC's "legal infrastructure" rationale "can be found nowhere within the text of the statute" and "attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws." 557 U.S. at 533.

Under 12 U.S.C. § 25b(b)(5)(A), Congress made clear that OCC preemption determinations are not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, OCC preemption determinations receive deference only if reviewing courts find they are "persuasive," based on the criteria specified in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[22]

The OCC's 2011 regulation is invalid because the OCC failed to follow the preemption process required by 12 U.S.C. § 25b, and the OCC refused to incorporate the preemption standard mandated by § 25b(b)(1)(B). Giving weight to the OCC's rule grants

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[21] *Cuomo*, 557 U.S. at 532 (quoting Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004)); *see also* 2004 OCC Rule, *supra* note 6, at 1912, 1913 (presenting the same "legal infrastructure" rationale).

[22] 12 U.S.C. § 25b(b)(5)(A); *see Lusnak*, 883 F.3d at 1192 (discussing the limited *Skidmore* deference granted to OCC preemption determinations under § 25b(b)(5)(A)); Wilmarth, *supra* note 2, at 932-34 (same).

unwarranted deference to the OCC, an agency that Congress rebuked in 2010 for its sweeping approach to preemption, and also relieves the agency of its duty to follow a Congressionally mandated process. This Court should therefore reject any further attempts by Respondent to rely on the OCC's regulation.

III. The Decision Below Violates the Governing Preemption Standard Established by Congress and This Court.

A. The Decision Below Contravenes the *Barnett Bank* "Prevents or Significantly Interferes" Preemption Standard Codified in 12 U.S.C. § 25b(b)(1)(B).

Section 1044 of the Dodd-Frank Act, codified at 12 U.S.C. § 25b, "amends the National Bank Act to clarify the preemption standard relating to State consumer financial laws as applied to national banks." S. Rep. No. 111-176, at 175 (2010). The governing preemption standard in the statute provides that a "State consumer financial law" is preempted "only if" that law violates "the legal standard for preemption in . . . *Barnett Bank*" because it "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). As the conference report on the Dodd-Frank Act explained, § 25b(b)(1)(B) "codifies the standard in the 1996 Supreme Court case *Barnett Bank* . . . to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national banks' exercise of their powers." H.R. Rep. No. 111-517 (Conf. Rep.), at 875 (2010), *reprinted in* 2010 U.S.C.C.A.N. 722, 731.

Section 25b(b)(1)(B) permits the States to regulate the "powers" of national banks if their laws do not "prevent[] or significantly interfere[] with the exercise" of those powers. Under § 25b(a)(2), the term "State consumer financial law" includes any nondiscriminatory state law that "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." Thus, § 25b(b)(1)(B) allows "State consumer financial laws" to regulate deposits, loans, and other "financial transaction[s]" that national banks conduct with consumers unless those state laws "prevent[] or significantly interfere[]" with the banks' federally granted powers to engage in those transactions. *See* 12 U.S.C. §§ 24 (Seventh) & 371.

The district court below determined that the challenged New York statute (N.Y. Gen. Oblig. L. § 5-601) required national banks and other mortgage servicers to pay only a "modest" rate of interest, and the statute permitted national banks to "administer mortgage escrow accounts" in a manner that was "relatively unimpaired and unhampered by the state law." 408 F. Supp.3d at 185, 195-96. The district court therefore concluded that the New York statute's "degree of interference" with Respondent's exercise of its powers was "minimal." *Id.* at 195.[23]

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[23] The district court cautioned that a state law requiring national banks to pay "punitively high rates" on escrow accounts "could very well significantly interfere with national banks' power to administer escrow accounts." 408 F. Supp. 3d at 196 (internal quotation marks and citation omitted).

The Second Circuit rejected the district court's fact-based application of the "prevents or significantly interferes" preemption standard under *Barnett Bank* and § 25b(b)(1)(B). The Second Circuit said that it did not matter whether the New York statute's minimum interest rate for mortgage escrow accounts was "not very high." 49 F.4th at 139. According to the Second Circuit, "[t]he issue is not whether [New York's] particular rate of 2% is so high that it undermines the use of such accounts, or even if it substantially impacts national banks' competitiveness." *Id.* at 134.[24] The Second Circuit declared that the determinative question was "not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its powers." *Id.* at 131.

The Second Circuit's *per se* preemption rule squarely conflicts with the "prevents or significantly interferes" preemption standard established by *Barnett Bank* and codified in § 25b(b)(1)(B). By refusing to consider whether the New York statute was "intrusive in degree or . . . practically abrogates the power" to provide mortgage escrow accounts (49 F.4th at 137), the Second Circuit disregarded the plain meaning of § 25b(b)(1)(B).

The Second Circuit recognized that standard dictionary definitions of the term "significantly" include "[f]airly large in amount or quantity" or

[24] The Second Circuit also stated "[w]e do not endeavor to assess whether the degree of the state law's impact on national banks would be sufficient to undermine [their] power" to administer mortgage escrow accounts. 49 F.4th at 132.

"important" or "meaningful." *Id.* at 136-37 (quoting dictionaries). In three decisions that interpreted federal securities statutes and the National Environmental Policy Act (NEPA) prior to *Barnett Bank*, this Court equated the term "significant" with "material" and "important."[25]

The Second Circuit therefore erred by refusing to consider the magnitude and importance of the alleged "interference" created by the New York statute before concluding that preemption was justified under § 25b(b)(1)(B)'s "prevents or significantly interferes" standard. 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. 49 F.4th at 125, 139.

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[25] *Basic, 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).

The Second Circuit attempted to justify its departure from § 25b(b)(1)(B)'s plain meaning by "refer[ring] to the longstanding preemption test articulated in cases going back to *McCulloch* [*v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)]." 49 F.4th at 136. In so doing, the Second Circuit erred by expanding the scope of preemption beyond the express limits established by Congress in § 25b(b)(1)(B). As this Court explained in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* at 517. Additionally, as shown in Part III.C, the pre-1913 cases cited by the Second Circuit do not support its *per se* rule of preemption for modern national banks.

This Court has admonished federal courts that they "must follow" a federal statute's clear mandate and may not "override a lawful congressional command" by relying on inconsistent language "extracted" from prior Supreme Court opinions. *Brown v. Davenport*, 596 U.S. 118, 127, 141 (2022). *Brown* emphasized that "[w]hen Congress supplies a constitutionally valid rule of decision, federal courts must follow it." *Id.* at 127. This Court reiterated that holding in *Shinn v. Ramirez*, 596 U.S. 366 (2022), stating that federal courts "lack authority to amend [a federal statute's] clear text." *Id.* at 387. The Second Circuit's *per se* preemption rule is invalid under *Brown* and *Shinn* because it contravenes the more narrowly tailored preemption standard codified in § 25b(b)(1)(B).

B. The Decision Below Conflicts with *Barnett Bank* and Other Decisions of this Court.

In *Barnett Bank*, this Court held that States have "the power to regulate national banks where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. As shown in Part III.A, *Barnett Bank*'s preemption standard refutes the Second Circuit's claim that every state law seeking to "exert control over a [national] banking power" must be preempted. 49 F.4th at 125, 134. In *Barnett Bank*, the Supreme Court used the same standard twice in consecutive sentences—"to forbid, or to impair significantly" and "prevent or significantly interfere"—to describe the magnitude of state interference that justifies preemption. 517 U.S. at 33. *Barnett Bank*'s carefully articulated test makes clear state laws are preempted only if they completely block or "significantly" impair the exercise of national bank powers.

Barnett Bank cited three decisions as precedents for its "prevent or significantly interfere" preemption standard: *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1870), *McClellan v. Chipman*, 164 U.S. 347 (1896), and *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944). Decided six years after enactment of the National Bank Act, *Commonwealth* held that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." 76 U.S. (9 Wall.) at 362. The decision affirmed that the "contracts" of national banks as well as "[t]heir acquisition and transfer of property, their

right to collect their debts, and their liability to be sued for debts, are all based on State law." *Id.* The National Bank Act of 1864 (like the current statute) gave national banks express powers to make contracts, sue and be sued, and acquire, own, and transfer real property.[26] Thus, *Commonwealth* held—and *Atherton* reiterated in 1997, 519 U.S. at 222-23—that the National Bank Act allows States to regulate the exercise of "powers" granted to national banks by federal law.

McClellan upheld the application to national banks of a Massachusetts statute that prohibited creditors from receiving preferential transfers of assets from insolvent debtors. A national bank alleged that the Massachusetts law impaired its express powers to make contracts and accept transfers of real property either as security for debts previously contracted or in satisfaction of those debts. The *McClellan* Court reasoned that the national bank's argument "amounts to the assertion that national banks, in virtue of the act of congress, are entirely removed, as to all their contracts, from any and every control by the state law." 164 U.S. at 359. The Court rejected that argument and held that the powers of national banks to make contracts and accept transfers of real estate were subject to the nondiscriminatory

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[26] *See* Act of June 3, 1864, ch. 106, §§ 8 & 28, 13 Stat. 99, 101-02, 107-08 (codified as amended at 12 U.S.C. §§ 24 (Third) & (Fourth) & 12 U.S.C. § 29); *see* Arthur E. Wilmarth, Jr., "The Second Circuit's *Cantero* Decision Is Wrong About Preemption under the National Bank Act," 41 *Banking & Financial Services Policy Report* No. 11 (Nov. 2022), at 1, 5-6, https://ssrn.com/abstract=4282872 (discussing *Commonwealth*).

restrictions imposed by the Massachusetts statute. *Id.* at 358-61.[27]

McClellan held that this Court's decisions under the National Bank Act established

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

Id. at 357. Based on the foregoing "rule," *McClellan* rejected the national bank's claim that "in every case where a national bank is empowered to make a contract[,] such contract is not subject to the state law." *Id.* at 358. *McClellan* held there was "no conflict between the special power conferred by Congress upon national banks to take real estate for certain purposes and the general and undiscriminating law of the State of Massachusetts subjecting the taking of real estate to certain restrictions, in order to prevent preferences in case of insolvency[.]" *Id.* at 361.

Luckett upheld the validity of a Kentucky statute requiring banks to transfer inactive deposit

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[27] *See McClellan*, 164 U.S. at 350-56 (summarizing counsel's argument for plaintiffs in error) (citing Rev. Stat. §§ 5136 & 5137 (codified as amended at 12 U.S.C. §§ 24 (Third) & 29)); Wilmarth, *supra* note 26, at 6-7 (discussing *McClellan*).

accounts to state authorities. The Kentucky statute gave notice and an opportunity for hearing to owners of transferred deposits, and those deposits were not escheated to the state until state officials established in judicial proceedings that the deposits had been abandoned. 321 U.S. at 236-39. A national bank alleged that the Kentucky law violated the Fourteenth Amendment's Due Process Clause and "infringe[d]" the national bank's express powers "to accept deposits and to do a banking business" under 12 U.S.C. § 24.[28]

Luckett rejected the national bank's challenge, finding the Kentucky statute's application to deposits accepted by national banks did not violate the Due Process Clause or conflict with the National Bank Act. 321 U.S. at 240-49, 252-53. In reaching that conclusion, this Court affirmed that "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." *Id.* at 248. The Court also held that "an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248-49.

Commonwealth, *McClellan*, and *Luckett* each upheld the validity of nondiscriminatory state laws regulating the exercise of federally granted powers by national banks, including their authority to make contracts, acquire real property, and accept deposits.

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[28] 321 U.S. at 239-40 (summarizing the national bank's arguments); *see also* Wilmarth, *supra* note 26, at 7-8 (discussing *Luckett*).

In each case, this Court performed a careful analysis of the challenged state law's practical impact on the exercise of national bank powers. In each case—consistent with the "prevent or significantly interfere" preemption standard that *Barnett Bank* subsequently established—this Court rejected the type of *per se* preemption test the Second Circuit erroneously adopted.

C. The Second Circuit Relied on Decisions That Do Not Support Its *Per Se* Preemption Rule.

The Second Circuit relied heavily on *McCulloch v. Maryland* to justify its conclusion that the New York statute was preempted because it would exert control over "a banking power granted by the federal government." 49 F.4th at 131. The Second Circuit also cited *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824), for the proposition that the National Bank Act "exempts the trade of the [banks] . . . from the control of the States." 49 F.4th at 132. However, the historical context and reasoning of *McCulloch* and *Osborn* make clear that neither decision applies to modern national banks.

McCulloch and *Osborn* struck down Maryland and Ohio laws that imposed taxes on the Second Bank of the United States. The Second Bank was a government-sponsored enterprise that performed functions of great importance to the federal government. The federal government owned a fifth of the Second Bank's stock and appointed a fifth of the Second Bank's directors. The Second Bank served as the depositary and fiscal agent of the federal government. In addition, the Second Bank (i) created

a national currency by issuing its own bank notes, which were legal tender under federal law and represented a quarter of all notes issued by U.S. banks, and (ii) controlled the volume of the nation's outstanding paper currency by requiring state banks to redeem their own notes in gold or silver.[29] Respondent and other modern national banks are completely different institutions from the Second Bank and serve none of the Second Bank's public functions discussed in *McCulloch* and *Osborn*.

In *McCulloch*, Chief Justice John Marshall described the Second Bank as "a convenient, a useful, and essential instrument [of the federal government] in the prosecution of its fiscal operations." 17 U.S. (4 Wheat.) at 422. *McCulloch* held that the Federal Constitution barred Maryland from taxing the Second Bank because the Bank was an "instrument, employed by the [federal] government in the execution of its powers." *Id.* at 432. Thus, *McCulloch*'s broad preemption ruling was based on Marshall's conclusion that the Second Bank was "a convenient, useful, and essential instrument . . . to effect the legitimate objects of the [federal] government."[30]

Marshall's opinion for the Court in *McCulloch* was highly controversial and provoked a "barrage of criticism."[31] After Ohio imposed a punitive tax on the

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[29] Wilmarth, *supra* note 26, at 11.

[30] 17 U.S. (4 Wheat.) at 422-23; *see* Wilmarth, *supra* note 26, at 11-12 (discussing *McCulloch*).

[31] Wilmarth, *supra* note 26, at 12 (quoting Richard E. Ellis, *Aggressive Nationalism:* McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* 107

Second Bank's branches in Ohio, the Second Bank obtained an injunction to prevent state officials from collecting that tax. When *Osborn* reached the Supreme Court, Charles Hammond (counsel for the state officials) focused on the Second Bank's predominant ownership by private shareholders and the Second Bank's private banking activities. Despite the Second Bank's federal charter, Hammond argued the Second Bank was primarily a "private concern" and could not be classified as an "agency" or "public office" or "instrument" of the federal government.[32]

In his majority opinion in *Osborn*, Chief Justice Marshall acknowledged that the Second Bank "would certainly be subject to the taxing power of the State" if it were a "mere private corporation," having "private trade and private profit for its great end and principal object." 22 U.S. (9 Wheat.) at 859. The Court also admitted that the Second Bank's federal charter was not sufficient by itself to "exempt[] its operations from the action of State authority." *Id.* at 862. The Court stated, however, that "[t]he Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes . . . [as] the great instrument by which the fiscal operations of the government are effected." *Id.* at 860.

(2007)); *see also id.* at 21 n.154 (discussing the public controversy over *McCulloch*).

[32] Ellis, supra note 31 at 170-74 (summarizing and quoting Hammond's argument); Wilmarth, *supra* note 26, at 12, 21 nn.156-60 (same).

Chief Justice Marshall also maintained in *Osborn* that the Second Bank's private banking activities were "inseparably connected" and "essential" to its "public functions" because the Bank's private business gave "value to the currency in which all transactions of the [federal] government are conducted." *Id.* at 863. The Court concluded that "without [the Second Bank's] capacity to trade with individuals, the Bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. *On this point the whole argument rests.*" *Id.* at 865 (emphasis added). Thus, *Osborn*'s fundamental premise was that the Second Bank's "capacity of carrying on the trade of banking" was "essential to its character, as a machine for the fiscal operations of the government." *Id.* at 867.

Modern national banks are very different institutions from the Second Bank. Today's national banks, including Respondent, are privately owned financial corporations. They engage in private commercial banking activities to produce profits for their private shareholders. The federal government does not own stock in modern national banks and does not appoint their directors or officers. National banks do not perform any fiscal or depositary functions for the federal government that are not provided on equal terms by FDIC-insured state banks. Since the enactment of the Federal Reserve Act of 1913 (FRA), the Federal Reserve System (Fed) has performed all monetary and central banking functions for the nation

and has acted as the federal government's primary fiscal and financing agent.[33]

Present-day national banks are therefore not "machine[s] necessary to the fiscal operations of the [federal] government," and their private "trade of banking" is not "essential" to the federal government's ability to perform its public functions and responsibilities.[34] Accordingly, the preemptive immunity that *McCulloch* and *Osborn* granted to the Second Bank does not support the Second Circuit's *per se* preemption rule for modern national banks.

The Second Circuit also relied on two cases dealing with preemption under the National Bank Act of 1864 (1864 Act): *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875) and *Easton v. Iowa*, 188 U.S. 220 (1903). *See* 49 F.4th at 131, 132 n.6. *Dearing* declared that "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." 91 U.S. at 34. *Easton* similarly opined that the "operations [of national banks] cannot be limited or controlled by state legislation." 188 U.S. at 230. *Dearing* and *Easton* relied upon *McCulloch* and *Osborn* for their broad view of preemption. 91 U.S. at 33-34; 188 U.S. at 229-30.

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[33] *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 354-59 (1968) (Marshall, J., dissenting); *see* 12 U.S.C. § 265 (authorizing FDIC-insured national and state banks to act as depositaries and financial agents for the federal government on equal terms).

[34] Wilmarth, *supra* note 26, at 13 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 866-68).

Congress passed the 1864 Act to address the federal government's severe financial problems during the Civil War. The 1864 Act required national banks to issue national bank notes and purchase U.S. government bonds to provide financial backing for those notes. The 1864 Act was part of Congress's broader program to establish a uniform national paper currency comprised of national bank notes and U.S. government notes known as "greenbacks." Congress expected that national banks would buy large volumes of U.S. government bonds to back their bank notes, thereby supporting the federal government's massive funding needs during the Civil War.[35]

Dearing and *Easton* based their broad view of preemption on the "public service" provided by national banks as "instruments designed to be used to aid the [federal] government" under the 1864 Act. *Dearing*, 91 U.S. at 33-34; *Easton*, 188 U.S. at 230 (quoting *Dearing*). However, after *Dearing* and *Easton* were decided, national banks lost their public functions as partial issuers of the nation's paper currency and partial funders of the federal government's operations. In 1913, the FRA established the Fed to issue the nation's paper currency (in the form of Federal Reserve notes), regulate the nation's money supply, act as fiscal agent for the federal government, and support the federal government's funding operations. The FRA phased

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[35] *First Agric. Nat'l Bank*, 392 U.S. at 355-56 (Marshall, J., dissenting) (The original system of national banks performed "important and significant functions" for the federal government by issuing a national currency and providing a "ready market" for U.S. government bonds).

out the use of national bank notes by 1935. Hence, today's national banks do not fulfill any of the public functions performed by the Second Bank of the United States or by the national banks chartered under the 1864 Act.[36] Accordingly, the broad preemption doctrine announced in *Dearing* and *Easton* does not apply to present-day national banks.

As Petitioners have shown, two additional cases cited by the Second Circuit in support of its *per se* preemption rule are distinguishable on their facts, as they involved state laws that imposed very severe burdens on the exercise of national bank powers.[37] Moreover, all of the decisions relied on by the Second Circuit have been superseded to the extent of their inconsistency with the "prevents or significantly interferes" preemption standard adopted by this Court in *Barnett Bank* and codified by Congress in § 25b(b)(1)(B). *See Brown*, 596 U. S. at 127, 141; *Shinn*, 596 U.S. at 387.

CONCLUSION

The decision below should be reversed.

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[36] *Id*. at 354-58; Wilmarth, *supra* note 26, at 13-14, 22 nn.183-86.

[37] *See* Pet.Br. 12-13, 39-41 (discussing *First Nat'l Bank in San Jose v. California*, 262 U.S. 366, 369-70 (1923); and *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 374-78 (1954)).

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