

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ALEX CANTERO, ET AL., INDIVIDUALLY)
4 AND ON BEHALF OF ALL OTHERS)
5 SIMILARLY SITUATED,)
6 Petitioners,)
7 v.) No. 22-529
8 BANK OF AMERICA, N.A.,)
9 Respondent.)
10 - - - - -

11
12 Washington, D.C.
13 Tuesday, February 27, 2024

14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:56 a.m.

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1 APPEARANCES:

2 JONATHAN E. TAYLOR, ESQUIRE, Washington, D.C.; on
3 behalf of the Petitioners.

4 MALCOLM L. STEWART, Deputy Solicitor General,
5 Department of Justice, Washington, D.C.; for the
6 United States, as amicus curiae, supporting
7 vacatur.

8 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of
9 the Respondent.

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P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-529, Cantero versus Bank of America.

Mr. Taylor.

ORAL ARGUMENT OF JONATHAN E. TAYLOR
ON BEHALF OF THE PETITIONERS

MR. TAYLOR: Mr. Chief Justice, and may it please the Court:

Section 25b preempts a state consumer financial law only if, as relevant here, it prevents or significantly interferes with the exercise of a national bank's powers. Bank of America argues and the Second Circuit held that this statute preempts any law that controls or otherwise hinders the exercise of a national bank's powers, regardless of whether the law has any significant effect on such powers.

This test conflicts with the statute for four reasons. First, Section 25b's definition of "state consumer financial law" is incompatible with the control test because it would require that every such law be preempted, nullifying the statute and erecting the very

1 field preemption regime that the statute
2 forbids. Bank of America's only retort is to
3 concede that state fair lending laws aren't
4 categorically preempted, a concession it doesn't
5 explain and that disproves its own test.

6 Second, the control test ignores
7 Section 25b's express codification of Barnett
8 Bank's "prevents or significantly interferes
9 with" standard and, in particular, the word
10 "significantly," which Bank of America reads out
11 of the statute.

12 Third, a control test can't be squared
13 with Section 25b's provisions for OCC preemption
14 determinations, which must assess the impact of
15 a state law and be based on substantial
16 evidence. These requirements would make no
17 sense if a control test were the law.

18 Finally and perhaps most
19 fundamentally, adopting a control test would
20 require reading virtually all of Section 25b to
21 have no real-world effect.

22 With no plausible textual argument,
23 Bank of America turns to policy, claiming that
24 its test is needed to avoid mayhem. But
25 Congress disagreed, and Section 25b has a

1 solution to this concern. The OCC can make the
2 preemption determinations contemplated by the
3 statute. That it has thus far failed to respect
4 the statute's commands grants no license to this
5 Court to do the same.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: I'd be interested in
8 you giving us your explanation as to how Barnett
9 Bank gives us guidance as to how to interpret
10 "prevents or significantly interferes."

11 MR. TAYLOR: Sure, Justice Thomas. So
12 Barnett Bank uses the -- the -- the "prevents or
13 significantly interferes with" standard as a
14 kind of distillation of the rule that emerges
15 from this Court's cases.

16 Now, of course, the conflict that was
17 at issue in Barnett Bank was a stark conflict.
18 It involved a state statute that said banks may
19 not do X and a federal statute that said
20 national banks may do X, and this Court was able
21 to resolve that as a clear conflict.

22 But it didn't give much guidance
23 itself in terms of what "significant interferes
24 with" means, but it did articulate that as the
25 standard that emerges from this Court's cases.

1 And the first case that it cited was this
2 Court's decision in Anderson. And Anderson
3 involved a Kentucky escheat law, and the Court
4 in that case -- there was a preemption challenge
5 that was brought to that statute by the national
6 bank, and the Court in that case said that's not
7 a discriminatory statute. It was the first
8 question the Court asked. It doesn't conflict
9 with any statutory text, and so we examine the
10 law's practical effect.

11 And in examining the law's practical
12 effect, it distinguished a prior decision from
13 this Court that reached the opposite outcome.
14 And the only way to explain that pair of cases
15 is that -- is that the Court examined the
16 practical effect.

17 And so I think the one thing that we
18 know of the "prevents or significantly
19 interferes with" standard and what it means is
20 that it requires an examination at a minimum of
21 the practical effect of the statute. And that's
22 clear from the ordinary meaning of the phrase,
23 and it's confirmed by the surrounding text in
24 Section 25b, including the provision that
25 requires that the OCC examine the law's impact

1 based on substantial evidence --

2 JUSTICE KAGAN: And what does it --

3 MR. TAYLOR: -- and periodically
4 review.

5 JUSTICE KAGAN: -- and what -- what
6 exactly does it mean to examine the practical
7 effect? I mean, why don't you talk about this
8 law and say how an analysis of that kind would
9 work with respect to this law and then maybe say
10 anything more general you want, because it seems
11 to provide no guidance at all to courts as to
12 what they have to do.

13 MR. TAYLOR: Yeah, I will answer that
14 question directly, but I will say that because
15 of the way that Bank of America has argued the
16 case and the way that the Second Circuit decided
17 the case, the only question that this Court has
18 to confront is whether the control test is
19 codified as part of Section 25b or whether,
20 instead, courts must look to the practical
21 effect of the law.

22 JUSTICE KAGAN: I appreciate that, but
23 one thing that we should think about at least in
24 considering whether the practical effect test
25 that you're suggesting is the one that's

1 codified and is the appropriate one --

2 MR. TAYLOR: Mm-hmm. Sure.

3 JUSTICE KAGAN: -- is what would that
4 -- what would that mean? What would it look
5 like? And then we can, you know, consider
6 whether that's what Congress had in mind.

7 MR. TAYLOR: Yeah. So it might look
8 like the -- the -- the showing that the national
9 bank made in Franklin National Bank, for
10 example, and I would recommend that you look at
11 the trial court decision in that case.

12 So that case involved a federal
13 statute that granted to national banks the
14 authority to accept savings deposits. And New
15 York had a statute that didn't prohibit national
16 banks from accepting savings deposits but
17 disabled them from using the word "savings" in
18 their business operation and in their
19 advertisements or any equivalent thereof and
20 reserved to the -- to certain state institutions
21 the privilege to use that word.

22 And what the national bank said in
23 that case, it identified real-world evidence
24 showing the tremendous extent to which that law
25 served as an obstacle to it attempting to accept

1 savings deposits in its business operations, and
2 the -- and the trial court in that case found
3 what is effectively significant interference.

4 And by the time that case got to this
5 Court, this Court, although it resolved its --
6 you know, the question before it based on
7 statutory construction grounds, emphasizing the
8 statute, the federal statute's use of the word
9 "savings," I think it had confidence based on
10 the record before it that that word mattered in
11 the real world.

12 JUSTICE KAGAN: And if it's -- if --
13 if that standard had been used here, what would
14 that have meant? What evidence would the
15 parties have put on, and how would the court
16 have addressed the issue?

17 MR. TAYLOR: So the legal question
18 would be whether there's significant
19 interference. And we think that looks to the
20 practical effect, and Bank of America would have
21 to identify what the practical effect is.

22 I think it would be particularly easy
23 for it to do so here because we have a statute
24 that's been on the books for 50 years. State
25 banks have been complying with it. Most federal

1 banks, it's my understanding, have been
2 complying with it. And, indeed, there was a
3 preemption challenge that was immediately
4 brought, and it failed, and, presumably,
5 national banks were complying with it after
6 that. And so they could look at the data
7 showing the extent to which this minimum
8 interest requirement has caused banks to not
9 offer mortgage escrow services to -- which would
10 be the relevant power, to consumers.

11 JUSTICE KAVANAUGH: Well --

12 MR. TAYLOR: And to --

13 JUSTICE KAVANAUGH: Keep going.

14 Sorry.

15 MR. TAYLOR: And I -- I think it would
16 just be a question of degree at that point. And
17 I would concede that it's not a bright-line
18 test. Congress didn't want a bright-line test.

19 It had before it various proposals
20 that would have been a bright-line test,
21 including, you know, field preemption. That's
22 administrable, but we know that Congress didn't
23 want that. And on the other hand, the
24 Department of the Treasury submitted a proposal
25 that would have made preemption determinations

1 turn entirely on whether the law is
2 discriminatory. That's also administrable, but
3 in the judgment of Congress, that didn't go far
4 enough to provide protection to the bank --
5 banks, and Congress wanted to give banks, as an
6 accommodation, the opportunity in a case-by-case
7 basis to show that there's a significant
8 interference.

9 JUSTICE KAVANAUGH: What about --

10 MR. TAYLOR: And that's the scheme
11 that --

12 JUSTICE KAVANAUGH: Can I just ask
13 about Franklin? Because I think Franklin's a
14 critical case here because it's identified in
15 Barnett, identified in Watters, so -- and in
16 figuring out, as Justice Kagan and Justice
17 Thomas say, what "significantly interferes"
18 means, I think one way to do is look at -- look
19 at the precedent applying it. So Barnett, if
20 you look at that first, but Barnett really rests
21 heavily on Franklin. We know Franklin is
22 correctly decided --

23 MR. TAYLOR: Correct.

24 JUSTICE KAVANAUGH: -- under the
25 statute. You agree with that?

1 MR. TAYLOR: Agree with that entirely.

2 JUSTICE KAVANAUGH: Okay. So then the
3 question, I think one way to look at it -- you
4 tell me why this is wrong -- is, does this kind
5 of state law at issue here significantly
6 interfere more than the law did in Franklin?

7 Is that a good way to look at it?

8 MR. TAYLOR: You could put it that
9 way, yes.

10 JUSTICE KAVANAUGH: Okay. And doesn't
11 a law that interferes with the pricing of the
12 product almost by definition interfere more with
13 the operations of a bank than something that
14 affects advertising?

15 MR. TAYLOR: I don't think so, Justice
16 Kavanaugh. And I would -- the question isn't
17 whether it would cost money to the bank to
18 comply with the statute. The -- the question,
19 rather --

20 JUSTICE KAVANAUGH: Well, let -- let
21 me stop you right there.

22 MR. TAYLOR: Sure.

23 JUSTICE KAVANAUGH: Why not? That
24 sounds like significant interference when
25 it's -- when it's affecting how much -- it's

1 almost putting a tax on the bank to sell the
2 product, which strikes me as a much more
3 significant interference than simply saying you
4 can't use the word "savings" in your
5 advertising, which was the issue in Franklin.

6 MR. TAYLOR: Well, if -- if -- if the
7 test for preemption turned entirely on
8 compliance costs, then a whole bunch of
9 generally applicable laws that my friend on the
10 other side concedes are not preempted would
11 nevertheless be preempted if it cost money to
12 the bank to comply with those. So I don't think
13 compliance costs alone are enough.

14 I think what you need instead is what
15 this Court said in Barnett Bank, which is it's
16 not enough that there just be significant
17 interference with, you know, profits. The
18 question is whether there's a significant
19 interference with a power that Congress
20 explicitly granted. And so the focus is on what
21 Congress --

22 JUSTICE KAVANAUGH: But how did that
23 happen in Franklin?

24 MR. TAYLOR: So the power --

25 JUSTICE KAVANAUGH: Franklin, they

1 could do -- the bank could do everything that it
2 previously did -- it just -- did. It just
3 couldn't use the word "savings" in its
4 advertisement, which didn't prevent it from
5 exercising its power.

6 MR. TAYLOR: That's right. But, as I
7 was explaining to Justice Kagan earlier, if you
8 take a look at the record in that case, that
9 case shows that a factual showing can be made
10 and was made in that case, and I would commend
11 the trial court's decision there because I think
12 it's illuminating for -- for this question.

13 And everyone in the case seemed to
14 understand coming on the heels of Anderson that
15 there was going to be some kind of a practical
16 showing. And this Court noted the large record
17 showing the real-world consequences of the law
18 in its opinion.

19 And there was all kinds of -- there
20 was testimony, there was consumer polling, there
21 was lost sales, there was a significant amount
22 of data showing the degree to which this
23 prohibition had a real-world effect. And --

24 JUSTICE ALITO: Isn't it -- isn't it
25 true that the New York court of appeals, when it

1 upheld the law, said that it had no "seriously
2 harmful effects on national banks"?

3 MR. TAYLOR: That -- that may be --
4 have been what it said, but if you look at the
5 trial court's finding in the case, the -- the
6 trial court found that based on the evidence
7 that I was discussing with Justice Kavanaugh,
8 the law "certainly restricts national banks
9 tremendously in obtaining savings deposits."
10 And that's effectively a finding of significant
11 interference.

12 JUSTICE ALITO: I mean, the law said
13 they couldn't use savings in their advertising,
14 but they could use a comparable phrase like
15 special interest account.

16 MR. TAYLOR: And --

17 JUSTICE ALITO: So, if -- if any
18 interference that's greater than the
19 interference there is -- is enough, that
20 wouldn't be -- I -- I don't see how you can win
21 under that.

22 MR. TAYLOR: Two responses, Justice
23 Alito. The -- if you look at the testimony in
24 that -- in that case, it was clear that
25 consumers had no idea what "interest-bearing

1 account" meant. I mean, there were -- the word
2 "savings" actually mattered to their purchasing
3 decisions, and it had a real-world effect, and
4 that was a law that was discriminatory and put
5 the national banks at a serious competitive
6 advantage -- disadvantage vis-à-vis state banks.

7 And, of course, under this statute, a
8 discriminatory law would be preempted for
9 another -- for independent reasons.

10 And so the way that this statute is
11 designed is that non-discrimination is the most
12 important principle that runs through the
13 statute. And if a law is non-discriminatory,
14 then I think we can assume that the hostility
15 that states have traditionally shown to national
16 banks are not going to be reflected in their
17 laws because we're only going to be talking
18 about laws that involve restrictions that states
19 are willing to impose on their own banks and
20 they're not going to devour their own, and so --

21 JUSTICE ALITO: Do you -- do you think
22 that the significant interference test should be
23 applied on a bank-by-bank basis or on an
24 industry basis?

25 MR. TAYLOR: No, it's not bank by

1 bank. That's not how it works in our view. If
2 you look at the statute, it's clear that when
3 the OCC makes preemption determinations, it --
4 it does so on a law-by-law basis, not a
5 bank-by-bank basis.

6 And even there, in consultation with
7 the CFPB, it can make preemption determinations
8 that go beyond that law and reach substantively
9 equivalent laws. And so --

10 JUSTICE ALITO: Is that a -- is that a
11 question of -- a pure question of law? Is it a
12 mixed question? Is it a question of fact?

13 MR. TAYLOR: The ultimate preemption
14 determination --

15 JUSTICE ALITO: No, the question of
16 whether it significantly interferes. Is that a
17 question of fact?

18 MR. TAYLOR: It's a legal question for
19 a court, but it -- because it takes account of
20 the practical effects of the law, you have to
21 know what those effects are. And it's going to
22 be, if the OCC hasn't identified the effects,
23 then it's going to be incumbent on the bank, if
24 there's no statute on point and we're talking
25 about a non-discriminatory law, to explain what

1 those effects are.

2 And then the fight is not going to be
3 about necessarily the effects of the law but
4 about whether that rises to the level of
5 significant interference --

6 JUSTICE ALITO: Well, but the burden
7 would --

8 MR. TAYLOR: -- and that's a legal
9 question.

10 JUSTICE ALITO: -- the burden would be
11 on the plaintiff challenging it, wouldn't it?

12 MR. TAYLOR: Well, this is -- I mean,
13 if the plaintiff is a national bank challenging
14 the law, then yes, the burden would be on the
15 national bank. Conversely, if the burden -- if,
16 as in this case, the preemption is raised as an
17 affirmative defense, then the burden would still
18 be on the national bank.

19 JUSTICE ALITO: Right. Okay. All
20 right. How do you envision this trial taking
21 place? So a district judge, let's say, in the
22 Southern District of New York, Eastern District
23 of New York, wherever, is going to have a trial
24 to determine the effect of this on all national
25 banks operating in New York.

1 And is that going to involve extensive
2 discovery? Would it involve testimony by
3 experts? If the court makes a decision, what
4 standard of review is going to be applied by the
5 Second Circuit?

6 MR. TAYLOR: So we don't think that
7 there are going to be a bunch of mini trials to
8 determine the preemption question. And I'll
9 just say as a predicate to my response, Justice
10 Alito, I think it's fairly unlikely that a lot
11 of the hypothetical laws that you see at the
12 back of the red brief will ever come to pass
13 because of the non-discrimination principle that
14 I was talking about.

15 JUSTICE ALITO: Well, I understand
16 that, but I -- you say in your brief, either in
17 your opening brief or in your -- your reply
18 brief -- I think it's in your reply brief. You
19 say this may not even require any evidence.
20 This -- this -- this question could be decided
21 without evidence. Really?

22 MR. TAYLOR: Well --

23 JUSTICE ALITO: It's a factual
24 question or at least it's a heavily factual
25 question. How is it going to be decided without

1 evidence?

2 MR. TAYLOR: Well, you'd have to know
3 what the effects are, so that would require some
4 evidence in the typical case. But, if it's
5 clear from the face of the statute, if it's just
6 obviously punitive and it's past the point of
7 reasonable people being able to disagree as to
8 whether there's significant interference, then I
9 think that could be decided as a matter of
10 economic logic, which is consistent with what
11 this Court has done in other --

12 JUSTICE ALITO: A matter of economic
13 logic?

14 MR. TAYLOR: Well --

15 JUSTICE ALITO: There's -- there's
16 economic logic that tells you whether something
17 substantially affects the operation of a
18 commercial enterprise?

19 MR. TAYLOR: If you -- if you -- if
20 you look at page 15 of our reply brief, we
21 identify some cases involving preemption regimes
22 that affect entire industries, airline industry,
23 a motor carry industry, you know, ERISA, you
24 name it, prescription drugs, and it is often the
25 case in -- in, you know, those -- those contexts

1 that there is a factual showing that needs to be
2 made. And sometimes this Court, included in the
3 Morales decision, for example, has resolved the
4 preemption question even though it turns on
5 significant effect based on economic logic.

6 Now I think it would be difficult to
7 do that for the ordinary case because we can
8 presume that states aren't going to inflict
9 obviously punitive -- you know, punitive
10 restrictions on their own banks. And so -- and
11 this law would be an -- an example of that.

12 JUSTICE KAVANAUGH: I don't think --

13 MR. TAYLOR: But if a state were crazy
14 enough to do that --

15 JUSTICE KAVANAUGH: Keep -- I don't
16 think Franklin did this, what you're talking
17 about and -- the -- the Supreme Court in
18 Franklin.

19 MR. TAYLOR: No, that's right. This
20 --

21 JUSTICE KAVANAUGH: And Franklin, I
22 think, is kind of our north star here at least
23 as I've unpacked the case.

24 MR. TAYLOR: Right. But -- but I
25 think Franklin, you could either read it as

1 being a case about significant interference
2 based on the record, as I pointed out, or I
3 think what this Court said is it just engaged in
4 statutory interpretation.

5 It said we've got a federal statute
6 that says national banks may accept savings
7 deposits and the word "savings" matters. It's
8 the label that Congress used for these accounts.
9 And states can't pose a serious practical
10 impediment to that by saying you can't use that
11 same label.

12 And so that case could be understood
13 on statutory construction grounds based on the
14 express statutory power that was granted by the
15 statute, and we have nothing like that here.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything further?

19 Justice Alito?

20 JUSTICE ALITO: Well, the way you just
21 described Franklin sounds to me an awful lot
22 like what the Second Circuit did here.

23 MR. TAYLOR: No. No, Justice --

24 JUSTICE ALITO: They -- they -- they
25 said that the bank has, the national bank has a

1 certain power, and the state conditions the
2 exercise of that national power on compliance
3 with a state requirement, and that's enough to
4 prove that there's preemption. That's what I
5 just understood you to say.

6 MR. TAYLOR: No, Justice Alito. If --
7 my understanding of what the --

8 JUSTICE ALITO: I must have -- maybe I
9 -- I misunderstood you, so maybe you could just
10 clarify.

11 MR. TAYLOR: No, I was -- I was simply
12 trying to clarify that Franklin National Bank
13 could be understood based on specific statutory
14 text that is nothing like any statutory text
15 that Bank of America has identified.

16 JUSTICE ALITO: I thought you were
17 saying -- and, again, correct me if I
18 misunderstood you because it's important to my
19 thinking about this -- that the issue -- that
20 Franklin Bank can be understood as deciding this
21 issue without examining the empirical question
22 of the extent to which there was an impact on
23 the operation of the bank. I thought that's
24 what you said.

25 MR. TAYLOR: I guess I would put it a

1 little -- little bit differently then, Justice
2 Alito. I think that the Court, in its opinion,
3 it notes the -- the -- the record that had been
4 amassed on this question as to the practical
5 consequences of the law, and I think that record
6 gave it some comfort and confirmed why it was
7 significant that Congress would have used the
8 statutory term "savings."

9 But, ultimately, its opinion rests on,
10 you know, statutory analysis of the word
11 "savings" and a specific statutory
12 interpretation that is -- would present a sort
13 of -- I mean, you could think of it as being a
14 conflict in that -- in that sense and is nothing
15 like the kind of conflict that we have here.

16 JUSTICE ALITO: All right. Thank you.

17 MR. TAYLOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: The government
21 asked us to vacate and remand and let the Second
22 Circuit apply whatever we say is the correct
23 test.

24 MR. TAYLOR: Mm-hmm.

25 JUSTICE SOTOMAYOR: You're asking us

1 to reverse.

2 What's the difference, and why don't
3 we do what the -- the U.S. is recommending?

4 MR. TAYLOR: We would be happy with a
5 vacatur, and I think it's the most modest way
6 for this Court to decide the -- the question
7 before it. The reason why we're asking for
8 reversal is we think that as long as there's a
9 requirement that the practical effect of the law
10 be examined, that Bank of America has failed to
11 make that showing, and since it's failed to make
12 that showing, then its motion to dismiss should
13 be denied, and it can make the showing at a
14 later stage of the litigation or put in some
15 declarations or something and seek summary
16 judgment if it thinks it can meet --

17 JUSTICE SOTOMAYOR: I don't know
18 whether I --

19 MR. TAYLOR: -- the statutory --

20 JUSTICE SOTOMAYOR: I mean --

21 MR. TAYLOR: But I don't think --

22 JUSTICE SOTOMAYOR: -- the statute
23 doesn't speak in terms of practical effects. It
24 talks about preventing or significantly
25 interfering with the exercise of a national bank

1 power. So I do think that there is a difference
2 between practical effect and that language.

3 MR. TAYLOR: Well, I think that
4 language, in ordinary parlance, could only be
5 understood to -- to say that to be able to
6 answer that question, you've got to know what
7 the practical effect of the law is.

8 And you don't have to necessarily know
9 what the degree is. I mean, that -- you know,
10 people can disagree about that, but, at a
11 minimum, you've got to -- it's got to take some
12 account of what the practical effect is. And
13 once you recognize that --

14 JUSTICE SOTOMAYOR: So your -- at what
15 point -- you mentioned earlier that the OCC
16 could decide some of these preemption issues
17 because, under your take of this law now, that
18 national banks -- all state laws would
19 apparently apply to national banks, unless and
20 until those banks obtain final judgments of
21 preemption state by state, correct?

22 MR. TAYLOR: I think that is correct,
23 but --

24 JUSTICE SOTOMAYOR: Now the other side
25 is saying that's an alarming unpredictability.

1 And some of my colleagues are concerned about
2 that. Why don't you address that straight on
3 and -- but you mentioned in your opening that
4 you thought the OCC could do it. Well, the OCC
5 has done it here. There's a question of whether
6 they've applied the right standard in doing it.

7 MR. TAYLOR: Yeah.

8 JUSTICE SOTOMAYOR: But they have done
9 it.

10 MR. TAYLOR: Well, the statute -- they
11 haven't done it consistent with the procedures
12 set up by the statute, and I don't even think
13 Bank of America is arguing they've done it
14 consistent with the procedures set up by -- by
15 the statute.

16 But if -- I think it would be
17 appropriate for a court on remand to look at
18 what the OCC has said about the effect of this
19 law. You'll find that there's not much there in
20 -- in either the 2011 rulemaking or the 2004
21 rulemaking or in the amicus brief that the OCC
22 submitted below. But we think, you know, it
23 would be appropriate for a court to consider
24 that as part of the analysis.

25 But I would also just -- I -- I

1 appreciate the -- the other side's concern about
2 the practical consequences of, you know, reading
3 the statute for what -- for what it says. And I
4 would just say a couple of things. One is that
5 I think you could in your opinion, you know,
6 remind lower courts that this is not the only
7 path to preemption. There's the requirement of
8 -- that the law be non-discriminatory, and
9 there's still, you know, the requirement that it
10 not pose a square conflict of the sort that was
11 at issue in Barnett Bank, which, you know,
12 covers "prevents."

13 And so then you've got the question of
14 significant interference. You could, you know,
15 point to Anderson and Franklin, as we have been
16 discussing, but the OCC has a role to play there
17 too. And the OCC does have expertise, and to
18 the extent that it thinks a particular state law
19 is -- is very troubling and poses a significant
20 interference, it can endeavor to explain why in
21 a rulemaking, consistent with the statute, and
22 courts can look at that, and to the extent that
23 it's persuasive, they can defer to it. And that
24 gives the, you know, banks the kind of, you
25 know, predictability that they crave.

1 JUSTICE SOTOMAYOR: Whether we like
2 the case-by-case approach, the statute requires
3 it?

4 MR. TAYLOR: The statute requires it.

5 JUSTICE SOTOMAYOR: I think I would
6 have expected you to say that --

7 MR. TAYLOR: Oh.

8 JUSTICE SOTOMAYOR: -- to start off.

9 MR. TAYLOR: We -- we certainly think
10 that you should read the statute and apply it as
11 written.

12 JUSTICE SOTOMAYOR: Okay.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: Could you give me an
15 example of a non-discriminatory state law that
16 would be preempted as a significant
17 interference?

18 MR. TAYLOR: I don't know that I can
19 answer that question in the abstract. But, I
20 mean, I -- well, I guess I can. Barnett Bank
21 would be -- would be an example. So even if
22 that's non-discriminatory, it poses a clear
23 conflict because of the total --

24 JUSTICE KAGAN: Yeah. So you've
25 separated that out as a case that poses a clear

1 conflict.

2 MR. TAYLOR: Correct.

3 JUSTICE KAGAN: What is the category
4 of that case? Are there cases that fall in
5 other categories that might pass the significant
6 interference test? I guess what I'm -- I'm --
7 I'm asking about is, you know, you say of Bank
8 of America's test that it would preempt
9 everything, but one could say about your test
10 that it would preempt basically nothing as long
11 as a statute was indeed non-discriminatory.

12 MR. TAYLOR: No. And, indeed, that
13 was the Treasury Department's proposal, that it
14 -- that it would -- that preemption would just
15 turn on whether a state law was discriminatory,
16 and if it wasn't discriminatory, then it
17 wouldn't be preempted.

18 And we know Congress didn't select
19 that regime. So it's got to do some work beyond
20 non-discrimination. I just bring that up to
21 point out that we know that ease of
22 administration wasn't top of mind for Congress.

23 JUSTICE KAGAN: Yeah. So what's the
24 work? Give me some --

25 MR. TAYLOR: Yeah. And so --

1 JUSTICE KAGAN: -- statutes.

2 MR. TAYLOR: So -- so the statute says
3 "prevents or significantly interferes with." We
4 think the word "prevents" is how you take care
5 of a case like Barnett Bank. It just -- it's a
6 square conflict. It prevents the exercise of
7 the power granted by Congress. That can be
8 resolved just with legal briefing.

9 Then -- but, if you're at the point of
10 substantial -- or significant interference,
11 rather, that's a question of degree, and it's
12 very difficult to answer that in the abstract.
13 I'd want to know whether there's a federal --
14 you know, what the federal statutory scheme,
15 what the regulatory scheme is, what the OCC has
16 said about it, what the practical on-the-ground
17 impact is. And it's ultimately a judgment call.
18 It's a question of degree. And I --

19 JUSTICE KAGAN: You might -- must know
20 a lot about state banking statutes. Is there
21 any state banking statute out there that you
22 think presents a hard question?

23 MR. TAYLOR: I don't -- nothing comes
24 immediately to mind. And -- but I think, you
25 know, you could imagine if a state were to say

1 you can't have mortgage escrow accounts. Well,
2 of course, that would -- as applied to, you
3 know, the covered accounts, it would -- it would
4 pose a square conflict with the federal statute.
5 But, if you totally disabled states -- or
6 national banks from being able to exercise a
7 particular power, that -- you know, that's a
8 "prevents" case.

9 But the question of significant
10 interference is necessarily one of degree, and
11 it's tough to know in the abstract exactly when
12 it would be satisfied. I need to know what --
13 what the actual on-the-ground impact is and the
14 -- you know, the -- the -- the extent to which
15 that significantly interfered with the national
16 bank's exercise of the particular power at issue
17 in the case --

18 JUSTICE KAGAN: Thank you.

19 MR. TAYLOR: -- which is conferred by
20 Congress.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: I think you said
25 it's a judgment call and a matter of degree.

1 Would a 10 percent state law, would that be
2 significant interference?

3 MR. TAYLOR: So, if it's
4 non-discriminatory -- I'm assuming for purposes
5 of the hypothetical it would be
6 non-discriminatory, although I think requiring
7 that it be non-discriminatory makes it
8 particularly unlikely that a state would ever do
9 something like that.

10 JUSTICE KAVANAUGH: I understand.

11 MR. TAYLOR: But indulging the
12 hypothetical, then it would -- we'd be exactly
13 where we are now. It's a question of
14 significant interference, and it would be a
15 question of degree. And --

16 JUSTICE KAVANAUGH: Judgment call for
17 whom? I guess for us, for the nine of us to
18 just decide?

19 MR. TAYLOR: Well, the -- the question
20 as to what "significant interference" means is
21 ultimately a legal question, and it turns on
22 what the actual practical on-the-ground impact
23 is. And if the bank in that scenario said, look
24 --

25 JUSTICE KAVANAUGH: If it's a judgment

1 call, who's the -- we're making the judgment
2 call or the court of appeals?

3 MR. TAYLOR: It ultimately would be a
4 legal question. And, Justice Alito, you asked
5 earlier about the standard of review. That
6 would be de novo. I mean, to the extent that it
7 rested on factual findings, you know, that would
8 be a different standard. But the ultimate legal
9 question of significant interference is for a
10 court and ultimately, you know, subject to
11 review by this Court.

12 JUSTICE KAVANAUGH: And I guess I'm
13 going to go back to Franklin then and say, well,
14 we're not just doing this -- we're not totally
15 at sea when we have to do this under your
16 approach. Franklin says some limits on your
17 advertising and how you describe your product.
18 That is significant interference. And you agree
19 that that's correct?

20 MR. TAYLOR: I think that's a way to
21 understand that case. And so, if you wanted to
22 give guidance to lower courts, you could use
23 Franklin National Bank as an example, just as
24 the Barnett Bank Court did in its -- in its
25 opinion.

1 JUSTICE KAVANAUGH: And I guess,
2 here -- I mean, this -- maybe this is for remand
3 or for us, but telling a bank not how you
4 describe your product in your advertising, but
5 you actually have to pay money that you wouldn't
6 -- wouldn't otherwise pay, I mean, that's --

7 MR. TAYLOR: Well -- well, then Bank
8 --

9 JUSTICE KAVANAUGH: -- much more
10 direct interference with the operations of the
11 bank, it seems to me. Maybe you have an
12 explanation for that.

13 MR. TAYLOR: Well, then -- then Bank
14 of America, it has -- you know, would be able
15 to, you know, try to carry its burden of
16 establishing that standard on remand.

17 JUSTICE KAVANAUGH: Isn't that just --
18 I mean, do you want -- you'd need a trial.
19 That's just common sense, isn't it?

20 MR. TAYLOR: Yeah.

21 JUSTICE KAVANAUGH: To tell -- tell
22 someone you have to pay out large sums of money
23 collectively, rather than how you describe your
24 product in your advertising, isn't one more
25 significant interference than the other, the

1 price of --

2 MR. TAYLOR: No. So I'll take Frank
3 -- the Franklin side of that question first if I
4 may. So just to be clear about the law in
5 Franklin, it went well beyond advertising and it
6 -- it disabled banks from even being able to use
7 the word "savings" in their -- on their deposit
8 slips, anywhere in their bank offices. You
9 know, it just eradicated the word or any of its
10 equivalents from the premises of the bank.

11 And I think, you know, what made --
12 you might think about that as posing a First
13 Amendment problem today. It was also a
14 discriminatory law that gave certain state
15 institutions the ability to use that word. And
16 so it posed a number of distinct problems, but I
17 think ultimately too it posed a conflict with
18 the text of the federal statute because the --
19 you know, the state in that scenario sought to
20 significantly interfere with the exercise and
21 express statutory power that Congress granted.
22 So --

23 JUSTICE KAVANAUGH: The advertising
24 was not an express power. The advertising the
25 Court made clear was an incidental power.

1 MR. TAYLOR: Right, but the -- the
2 power that I think ultimately the Court focused
3 on was the express power to accept savings
4 deposits, and in particular, the use of the word
5 "savings," I think, was critical to the Court's
6 analysis.

7 JUSTICE KAVANAUGH: Right. And, here,
8 the express power is the lending and the
9 incidental power is the escrow accounts,
10 correct?

11 MR. TAYLOR: The way the Bank of
12 America articulates the power, we're not
13 disputing their articulation of the power for
14 purposes of, you know, this Court's decision, is
15 that the power to offer mortgage escrow accounts
16 to consumers.

17 JUSTICE KAVANAUGH: Mm-hmm.

18 MR. TAYLOR: So the question is to --
19 the extent to which the law significantly
20 interferes with that power.

21 JUSTICE KAVANAUGH: Do you still think
22 McCulloch versus Maryland was correctly decided?

23 MR. TAYLOR: Yes. We have no issue
24 with McCulloch, and it goes a long way to answer
25 that question.

1 JUSTICE KAVANAUGH: And why -- why is
2 that correctly decided and this different?

3 MR. TAYLOR: So we -- we point to this
4 in our brief, but there are a couple of key
5 distinctions.

6 So that case involved a tax, a
7 discriminatory tax on the Second Bank of the
8 United States. And I think, at that time, the
9 Second Bank of the United States functioned more
10 like the Federal Reserve Bank, and it was -- it
11 had a really -- it had a public-facing
12 component. And it doesn't -- you know, modern
13 national banks don't really resemble the Second
14 Bank of the United States.

15 And the laws that we have as in this
16 case are not discriminatory laws. And, in any
17 event, it's a question of preemption and it's
18 ultimately Congress that lays down the standard,
19 and the standard is "prevents or significantly
20 interferes with."

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: Counsel, you're
25 drawing a distinction which I also saw in your

1 brief between express powers and incidental
2 powers. Can you just explain to me why that
3 matters? And -- and I'll -- I'll tell you kind
4 of where I'm going with it and why I'm thinking
5 about it.

6 It almost sounds to me -- and -- and
7 correct me if I'm wrong -- that you're saying
8 that if a power is express, that something more
9 like a control test might apply just as a matter
10 of economic logic, say, but that if it's
11 incidental and you would characterize this one,
12 I gather, as incidental, that we get into this
13 more fact-specific inquiry.

14 Am I understanding your position?

15 MR. TAYLOR: I think you're right to
16 point out that we do underscore the fact that
17 this is an incidental power so that Congress
18 hasn't said anything specific on this subject.

19 And, indeed, it's a kind of second
20 order incidental power that is at issue, which
21 is not just the ability to have the accounts but
22 then, you know, to set the interest rate.

23 And so I think the reason why we're
24 focusing on that is preemption questions
25 typically turn on what Congress says in the text

1 of the statute, and so you want to look at the
2 text of the statute.

3 And this Court in Barnett Bank, right
4 before the sentence that articulates the
5 standard as "prevents or significantly
6 interferes with," says that the relevant power
7 is the power that "Congress explicitly granted."

8 Now what's interesting here is the
9 National Bank Act actually expressly grants
10 incidental -- incidental powers. And so there
11 is an express grant of authority for -- to
12 national banks to engage in incidental powers,
13 but the ultimate question I think has to focus
14 on what Congress has -- has said in the text of
15 a statute.

16 JUSTICE BARRETT: Well, I mean, I -- I
17 do agree with that, but you've characterized
18 Barnett Bank a couple times as kind of an
19 express conflict, but Barnett Bank goes out of
20 its way to say we don't have an irreconcilable
21 conflict there. It wasn't that the -- it wasn't
22 the kind of situation where you had the federal
23 statute saying, you know, do X and the state
24 statute saying not X.

25 And so it was about significant

1 interference. And I don't read Barnett Bank to
2 be applying this kind of fact-specific inquiry
3 that you're talking about.

4 So is the difference really just that
5 the statute said something express?

6 MR. TAYLOR: Well, so in Barnett Bank,
7 you're right that there was an impossibility
8 preemption. So it wasn't impossible for the
9 bank to both comply with the federal statute and
10 the state statute. But the Court did say that
11 there was an express conflict based on the text
12 of the statute.

13 And so it really -- the irony is
14 Barnett Bank announced the standard which it
15 distilled from this Court's cases, but it really
16 didn't have occasion to flesh out the contours
17 of what "significant interference" means because
18 it involved a complete prohibition.

19 And so -- but the Court left no
20 indication in its opinion that if the law at
21 issue in that case were less than a complete
22 prohibition, that it would automatically be
23 preempted under the control test.

24 To the contrary, even the bank in --
25 in Barnett Bank at oral argument conceded that a

1 whole bunch of state regulations would be
2 appropriate as to the regulation of insurance,
3 including ensuring that agents of insurance are
4 licensed at the state level.

5 And so I think -- I don't read this
6 Court's opinion to -- to suggest that practical
7 effects aren't -- aren't relevant. To the
8 contrary, I think, by using significant
9 interference, the Court understood that
10 practical effects would matter, and what it was
11 trying to capture is laws that even if they
12 didn't completely prohibit the exercise of the
13 national banks' powers, they would do something
14 that would raise the same kind of concern in
15 practical effect, and the first case the Court
16 cited after it announced that standard was
17 Anderson, which can only be understood as
18 turning on the practical effect of the law.

19 JUSTICE BARRETT: Thanks.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I see the -- the
23 standard, "significantly interferes," in the
24 actual text of the statute, and I'm trying to
25 understand whether this really is sort of an

1 unusual or unworkable assignment for the courts.

2 So can you help me to sort of
3 contemplate how if at all this "significantly
4 interferes" standard is any different from, you
5 know, similar standards in other statutes?

6 So last term, in Roth, we looked at a
7 statute that asks whether religious
8 accommodation would impose a "undue hardship" on
9 the conduct of the employer's business. RFRA
10 imposes a "substantial burden test." So isn't
11 this sort of in the nature of statutory
12 standards of this kind and the Court looks at
13 them and we make a decision, right?

14 MR. TAYLOR: Absolutely, Justice
15 Jackson, that's -- that's correct.

16 JUSTICE JACKSON: All right. And
17 then, with respect to the arduous nature of this
18 and sort of, you know, what has to be proven, I
19 guess I'm wondering, doesn't what is necessary
20 to be established to meet this standard depend
21 on the reason that the bank says the statutory
22 standard is being met in a particular case?

23 So, you know, the bank says we are
24 pointing to this preemption provision and we say
25 that it -- that -- that what is going on here

1 with this state law significantly interferes
2 with our powers, and then I guess they go on to
3 say how, how is that happening.

4 So, when they say this significantly
5 interferes with my powers because it directly
6 conflicts with what the statute says about our
7 authority, which is what I understood was
8 happening in, you know, Barnett Bank and
9 Franklin, then I guess the Court doesn't have to
10 have a bunch of depositions or anything.
11 They're doing sort of a statutory analysis.

12 Is that right?

13 MR. TAYLOR: That's right.

14 JUSTICE JACKSON: All right. And when
15 they say instead this significantly interferes
16 with my power because it imposes an undue
17 burden, I suppose the bank would then be charged
18 by the Court with proving that. How burdensome
19 is this? What -- what -- give me evidence, says
20 the Court.

21 Am I right about that?

22 MR. TAYLOR: That's correct, yes.

23 JUSTICE JACKSON: And so, similarly,
24 if it significantly interferes, if they say it's
25 a significant interference, again, we're in the

1 realm of evidence, and we're doing this on a
2 case-by-case basis because that's what the
3 statute says you have to do?

4 MR. TAYLOR: Correct.

5 JUSTICE JACKSON: All right. Thank
6 you.

7 MR. TAYLOR: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Stewart.

11 ORAL ARGUMENT OF MALCOLM L. STEWART
12 FOR THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING VACATUR

14 MR. STEWART: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 I'd like to make three quick points
17 before taking questions.

18 The first is that the Court shouldn't
19 assume that the word "significantly" either in
20 the opinion of the Court in Barnett Bank or in
21 the statute itself is devoid of significance.
22 If Congress wanted a statute that said state law
23 is preempted when it forces the bank to deviate
24 in any way from what it would otherwise do, it
25 wouldn't have used the word "significantly," it

1 would have used another formulation.

2 Second, in Franklin National Bank, the
3 Court didn't suggest that all state law
4 restrictions on national bank advertising were
5 preempted. It emphasized that the word
6 "savings" was the very word that Congress had
7 used in the statutes to describe the product at
8 issue and that it was the very word that in
9 consumers' minds was most closely linked to the
10 product.

11 And as Mr. Taylor explained at trial,
12 the bank in that case presented extensive
13 evidence that it would be hindered in its
14 ability to obtain savings accounts if it
15 couldn't use that word.

16 And, last, I'd say, the Court should
17 look not only at Franklin, the case the Court
18 cited in Barnett Bank as an example of a
19 preemptive statute, but also at Anderson
20 National Bank, and Anderson National Bank
21 involved a state-abandoned deposit law. It
22 authorized the state to take over the deposit,
23 force the bank to turn over a deposit from -- to
24 the state upon proof that the account had been
25 inactive for a specified period of time.

1 And it's hard to imagine a more direct
2 interference with the bank's ability to do
3 business than telling the bank you would prefer
4 to hold the money and earn income on it, but we
5 require you to turn it over to us. But the
6 Court explained for various reasons that this
7 was not -- would not substantially interfere
8 with the -- the way the bank did business.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Mr. Stewart, the --
11 is there a difference in the treatment of
12 incidental powers versus the express power you
13 mentioned in Franklin?

14 MR. STEWART: I don't think generally.
15 I mean, incidental powers are powers, as you
16 know, that are not enumerated in the statute,
17 and interference with a -- an incidental power
18 can cause indirect harm to the bank's ability to
19 exercise the -- the express power.

20 I would point out that the Court in
21 Barnett Bank, in the sentence immediately
22 preceding the one that we've been focused on,
23 said the prior cases, the ones that have found
24 preemption, take the view that normally Congress
25 would not want states to forbid or to impair

1 significantly the exercise of a power that
2 Congress explicitly granted.

3 So it was focusing on express powers
4 there, and it was saying, even with respect to
5 express powers, the interference has to be --
6 the impairment has to be significant. The
7 control test doesn't apply to express powers.
8 So I don't think there's a meaningful
9 difference.

10 CHIEF JUSTICE ROBERTS: Counsel, do
11 you agree with your friend that the determining
12 whether something is significant is -- would be
13 something you can do without trial evidence?

14 MR. STEWART: I mean, certainly, if
15 the OCC were doing it, it would have kind of a
16 preexisting body of information about the way
17 the national banks operate, and it might be able
18 to draw on that font of experience in
19 determining whether restrictions that might seem
20 innocuous to a layperson could, in fact,
21 predictably have a significant adverse effect on
22 the bank's business.

23 I think Mr. Taylor was also alluding
24 to the Court's decision in Morales, which
25 involved the Airline Deregulation Act, in which

1 the Court explained how the state false
2 advertising law would impair the airlines'
3 ability to engage in the pricing practices that
4 they wanted to engage in. And the Court didn't
5 make quite clear exactly where the information
6 about the pricing practices came from, but it
7 didn't appear to come from a trial record.

8 So there may be kind of sources of
9 information other than trial evidence that would
10 allow the --

11 JUSTICE GORSUCH: Mr. --

12 MR. STEWART: -- the court of the --
13 I'm sorry.

14 JUSTICE GORSUCH: -- Mr. Stewart, that
15 raises a question for me because I -- like the
16 Chief Justice, I was wondering, you know, what
17 could -- what could the OCC do here. And you
18 alluded to that.

19 It's interesting, I'm not sure what to
20 make of this, but in the 13 years or so since
21 Dodd-Frank, we don't have an OCCA rule on escrow
22 accounts, except for the one issued in 2011
23 immediately after Dodd-Frank in which it
24 reaffirmed its rule banning, as I understand it,
25 any regulation by states on escrow accounts

1 under an "obstruct or impair" standard that
2 predated Dodd-Frank that purported to ratify
3 what it had done before under the old law.

4 And -- and as I took it from a couple
5 of cryptic footnotes in your brief, you're not
6 asking us to defer to that regulation. In fact,
7 you're asking -- you seem to suggest that it's
8 inconsistent with the law and entitled to no
9 respect.

10 Why hasn't the OCC done something here
11 under the law that actually exists?

12 MR. STEWART: Well, the OCC did file
13 an amicus brief in the Second Circuit taking --

14 JUSTICE GORSUCH: The other way.

15 MR. STEWART: The other way. And so
16 that -- that was what they did. Now I -- I
17 would --

18 JUSTICE GORSUCH: But you seem to have
19 disavowed everything the OCC has done since
20 Dodd-Frank. What do we do with that?

21 MR. STEWART: Well, I think there are
22 substantial indications in the text and history
23 of Dodd-Frank that although Congress intended to
24 codify the Barnett Bank standard, it intended to
25 revise or overturn the way that the OCC had been

1 making preemption --

2 JUSTICE GORSUCH: And then the OCC
3 said maybe you thought so, but, ha, we
4 promulgated it before Dodd-Frank, so you're
5 stuck with it.

6 MR. STEWART: And --

7 JUSTICE GORSUCH: And now you're
8 saying, nah, that's not right.

9 And is the OCC going to actually do
10 some of this work at some point under the law?

11 MR. STEWART: Well, as -- as far as
12 I'm aware, the OCC has never issued a
13 case-by-case preemption determination. And I
14 don't know what the reason is, but I would say,
15 if you imagine the OCC trying to do a
16 case-by-case preemption determination with
17 respect to the New York law at issue here, the
18 most straightforward way to do it would simply
19 be to say we have a regulation that says states
20 can't regulate mortgage escrow accounts, this is
21 a regulation of mortgage escrow accounts;
22 therefore, it's preempted.

23 But, if the OCC tried to do it that
24 way, it would run into the provisions of
25 Dodd-Frank that say, when the OCC does these

1 determinations, it considers the impact of the
2 state law --

3 JUSTICE GORSUCH: In fact, we have
4 exactly the regulation. You say if they did
5 this. They did it. They said there are no
6 escrow regulations that are permissible under
7 state law. They're all preempted. But you're
8 not defending that regulation; you're disavowing
9 it. You've flip-flopped positions on it.

10 And I'm asking, is the OCC ever going
11 to get around to doing that which Dodd-Frank
12 directs it to do?

13 MR. STEWART: Well, I -- I think I
14 would say Dodd-Frank authorizes but not --
15 doesn't direct it to do this. Now, if the
16 Petitioners' position in this case prevails and
17 if the Court holds that some inquiry into
18 practical impacts is necessary with respect to
19 the individual state law, then it's very
20 possible that the OCC will start making these
21 case-by-case determinations because, independent
22 of legal expertise, the OCC has expertise in the
23 way that national banks operate and can bring
24 that expertise to bear in determining whether --

25 JUSTICE KAVANAUGH: If it -- if it has

1 expertise, why are you disagreeing with its
2 longstanding position?

3 MR. STEWART: I think the two reasons
4 -- well, two or three reasons. The first is
5 that, as I say, we think that the text of
6 Dodd-Frank manifests a disapproval by Congress
7 of the way that OCC had been doing these
8 determinations. The text says case-by-case
9 determinations, and it's really the opposite of
10 an OCC rule that says here are many categories
11 of state laws that can't be enforced at all.

12 JUSTICE KAVANAUGH: Even though the
13 key members said otherwise?

14 MR. STEWART: They -- they were not
15 the key members. They were two members of the
16 Senate who had drafted the Senate version of the
17 preempt --

18 JUSTICE KAVANAUGH: I shouldn't have
19 used "the" but key members. I shouldn't have
20 used the word "the."

21 MR. STEWART: Okay. They had drafted
22 the Senate version of the preemption provision,
23 and the pre -- the Senate version contained a
24 general reference to the legal standard in
25 Barnett Bank but didn't use the phrase "prevents

1 or significantly interferes with."

2 And then the House bill had framed the
3 preemption standard as does the state law,
4 "prevent and" --

5 JUSTICE KAVANAUGH: I interrupted you.
6 Keep going with why you changed positions. So
7 one is your reading of the text and history.

8 MR. STEWART: That they indicate that
9 Congress wanted the OCC to redo this.

10 I think the second thing that we would
11 say is the way in which OCC's view is currently
12 manifested is in the 2011 regulations, but
13 Congress said the way that OCC is supposed to do
14 preemption determinations going forward is
15 through case-by-case determinations. And,
16 historically, it's been a requirement for
17 deference that the agency act through the
18 procedural mechanism that Congress specified.

19 The third thing is Congress said, even
20 when the OCC does case-by-case determinations,
21 it only gets Skidmore deference. It doesn't use
22 the word "Skidmore," but it basically tracks
23 language from Skidmore, and then it says nothing
24 in the preceding subparagraph alters the
25 deference that OCC gets for any other type of

1 determination.

2 And so it seemed clear that Congress
3 was happy with the way that OCC had been doing
4 things in all respects, other than preemption,
5 but not with the -- the way it had been doing --

6 JUSTICE KAGAN: Mr. --

7 MR. STEWART: Yes?

8 JUSTICE KAGAN: -- Stewart, do you
9 have a view on whether this New York statute
10 constitutes a significant interference with
11 national banking powers?

12 MR. STEWART: We don't have a
13 concluded view. Certainly, as Mr. Taylor points
14 out, this is something that state banks have
15 been complying with, apparently, without
16 material impairment.

17 I think it would depend in part on
18 evidence or a factual showing about what rate of
19 interest can the banks use on the money in the
20 escrow account because --

21 JUSTICE KAGAN: Can I interpret
22 that -- may I?

23 CHIEF JUSTICE ROBERTS: Sure.

24 JUSTICE KAGAN: Can I interpret that
25 as -- as suggesting that you're skeptical that

1 it's a significant interference?

2 MR. STEWART: Yes.

3 JUSTICE KAGAN: Okay.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: No.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: Well, suppose the OCC
9 doesn't act and suppose a bank says that
10 requiring us to pay 2 percent interest or
11 whatever rate of interest is involved in the
12 particular case costs us this amount of money,
13 and if we have to pay this additional amount of
14 money in interest, then we're not going to be
15 able to -- we're not going to continue to do
16 this or that.

17 How does -- how would a court
18 determine whether that is significant?

19 MR. STEWART: I mean, I think it -- I
20 would kind of harken back to the point that
21 Justice Jackson was making that there are many
22 standards in the law that require this sort --
23 and they're -- they're imprecise, but I think
24 the Court would ask how significant is the other
25 thing that the bank says it wouldn't be able to

1 do.

2 JUSTICE ALITO: Well, I mean, most of
3 those -- I can't remember the whole list. Most
4 of those did not involve economic
5 determinations.

6 MR. STEWART: I mean, certainly, as
7 Mr. Taylor points out, it can't be sufficient
8 that a state law would require the bank to spend
9 some amount of money on something. I'd point
10 out, in fact, that federal law --

11 JUSTICE ALITO: Could you -- can --
12 can you quantify significant interference? I --
13 I just don't -- you know, maybe this, you know,
14 ruling the way you want us to rule will not
15 cause any problems at all, but I'd appreciate it
16 if you would talk about the argument that this
17 will cause a lot of problems. There's the
18 imprecision of the significant interference
19 standard. It does seem to have a very strong
20 factual component.

21 I -- I -- I find it hard to understand
22 how an empirical question like that can be
23 decided without evidence, which would require
24 discovery and perhaps testimony by experts. It
25 would require individual district court judges

1 to make the kind of -- I mean, certainly when
2 the OCC does this, they call -- they -- they can
3 call on a lot of economic expertise and
4 knowledge of the banking industry. Every
5 district judge in the country is potentially
6 going to have to make the same kind of
7 determination.

8 And then there's the -- then there's
9 the problem that these cases are going to be
10 decided on an individual record. So suppose
11 these Petitioners lose on this record. Would
12 that ban others who -- who have
13 non-interest-bearing accounts with Bank of
14 America from being -- bringing suit and saying
15 we can compile a better record, and then you
16 have questions about the same decision -- the
17 same issue being decided in different circuits?

18 What if other states have -- require
19 2 percent interest and the Second Circuit says
20 one thing and the Fifth Circuit or the Tenth
21 Circuit or whatever says something else? And
22 then you have issues of collateral estoppel.

23 It just seems like a complicated
24 situation, but you are able to assess the whole
25 thing, so just explain why this would not cause

1 practical nightmares.

2 MR. STEWART: I -- I -- I guess for
3 two reasons. The first is that administration
4 of standards like this is routine in the law,
5 and the banks obviously have access to a lot of
6 information that I don't have access to about
7 the ways in which particular state laws would
8 affect their operations. The Flagstar amicus
9 brief has a fairly intricate argument about how
10 these sorts of laws would impair its ability to
11 securitize loans and so forth.

12 But the second thing I would say, and
13 Mr. Taylor alluded to this, is we also have
14 non-discrimination as a backstop, and that gets
15 rid of the horrors. That gets rid of the
16 extreme cases.

17 In some instances, taxation, for
18 instance, under current federal law, states can
19 tax national banks so long as they do it on a
20 non-discriminatory basis. The Court in Barnett
21 Bank pointed out that national banks can operate
22 branches only to the extent that it's
23 permissible for state banks --

24 JUSTICE ALITO: Right. Yeah, no, I --
25 I understand that. But all you've said about

1 the question -- put non-discrimination off the
2 table because that's not what's at issue. All
3 -- all you've said is that there are other
4 statutes that impose a similar burden on the
5 court. And, I mean, the one I remember from
6 Justice Jackson's question is the undue burden
7 standard in Title VII. That's quite a bit
8 different.

9 What's -- what's -- do you have any
10 that are closer to this --

11 MR. STEWART: I -- I -- I don't --

12 JUSTICE ALITO: -- that involve
13 economic determinations?

14 MR. STEWART: I -- I -- I don't really
15 other than the -- the ones that Mr. Taylor was
16 alluded -- alluding to that involve cases cited
17 in his reply brief are often under statutes like
18 the Airline Deregulation Act. There's a core of
19 things that are clearly preempted, but then,
20 when you decide where does the -- the boundary
21 of preemption lie, you're looking at practical
22 impacts, and it involves --

23 JUSTICE ALITO: All right. Thank --
24 thank you.

25 MR. STEWART: But -- but the --

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Two questions. I
4 understand my colleagues' -- some of my
5 colleagues' concerns about this case-by-case
6 approach. But I go back to the text, which is
7 the text permits the states to do this and says
8 unless, and it's the unless that's creating this
9 problem, but the presumption is that there's no
10 preemption, correct?

11 MR. STEWART: That -- that's correct.
12 And the point I was making about discrimination
13 is, even if you assume kind of the worst-case
14 scenario that this all becomes so complicated
15 that banks decide it's just not worth trying to
16 establish preemption under "prevents or
17 significantly interferes with," they're still
18 left with substantial protection against
19 discriminatory laws which in other aspects --

20 JUSTICE SOTOMAYOR: All right. Can we
21 go to inherent in Justice Kavanaugh's earlier
22 question of -- of co-counsel, and he said you're
23 costing the banks money, and that's a greater
24 burden than it was in Franklin.

25 Now you point out Anderson, which it

1 cost them money too. So do you have an argument
2 as to why his saying that Franklin sets a sort
3 of maximum or a minimum is a wrong way to look
4 at this?

5 MR. STEWART: Well, Franklin didn't
6 cost the bank money in the sense of forcing it
7 to make outlays, but it cost the bank money in
8 the sense of making it more difficult for the
9 bank to attract customers and thereby earn money
10 on the accounts. That is, the bank officers
11 testified it was more difficult to get consumers
12 to sign up for savings accounts if you couldn't
13 use the word "savings" in your pitch. They had
14 consumer surveys that showed that consumers were
15 more likely to recognize the word "savings."

16 JUSTICE SOTOMAYOR: No, I understand
17 that, but --

18 MR. STEWART: And so I -- I think it
19 would be for these purposes an artificial
20 distinction to draw a line between state laws
21 that require the state to lay out money and
22 state laws that simply make it more difficult
23 for the state to earn money.

24 JUSTICE SOTOMAYOR: Well, then -- then
25 answer why it's not a significant interference

1 or how do you measure that when it's costing the
2 bank money?

3 MR. STEWART: I mean, one thing you
4 would want to look at is to what extent could
5 the bank earn money on the escrow account and
6 what -- what relationship would that potential
7 earning have to the interest it was required to
8 pay out because, when people defend the use of
9 escrow accounts in this setting, it's never on
10 the ground that it's a good way for banks to
11 earn a little money. It's on the ground that it
12 protects the bank -- the bank's collateral
13 against the possibility of failure to pay taxes,
14 failure to maintain insurance, and escrow
15 accounts are -- are very useful for those
16 purposes.

17 JUSTICE SOTOMAYOR: So, in essence,
18 you're almost saying this would be an easy case
19 to prove? If they can earn 5 percent and they
20 just have to give up 2, there's no substantial
21 interference? There's no cost?

22 MR. STEWART: That -- that would --
23 that would certainly be right. I think the more
24 difficult --

25 JUSTICE SOTOMAYOR: And if -- if they

1 can't earn any money on this money and they have
2 to pay out, that might be?

3 MR. STEWART: Yes, then -- then you're
4 at least trying to determine whether that
5 mandatory outlet -- outlay is significant.

6 JUSTICE SOTOMAYOR: Okay.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: Mr. Stewart, it might
9 be that you have text on your side, but before
10 we get to that question, I guess I'm interested
11 in many of the inquiries that Justice Alito was
12 making, and I'll just come at it a slightly
13 different way.

14 Yes, significance tests are common in
15 the law, but they're not really common in
16 preemption inquiries. We don't really see a
17 whole lot of preemption inquiries where we have
18 to do this question of, like, how much is too
19 much.

20 And, you know, one reason we don't is
21 you -- you need an answer that applies
22 everywhere and for all time. I -- I mean,
23 significant effects, you could have no
24 significant effect now and then 10 years from
25 now, you're in a different economic environment

1 and you could have a significant effect. And
2 does that mean it would be a kind of on/off
3 switch like one day the law applies and the next
4 day, 10 years later, it doesn't?

5 So add to Justice Alito's question
6 about maybe different parties would present
7 different records, maybe different states would
8 have the exact same law, but the economic
9 circumstances in those two states would be very
10 different, so it looks as though the federal law
11 preempts one state law and doesn't preempt the
12 other state law. It seems an odd kind of
13 inquiry for a preemption question.

14 MR. STEWART: I -- I guess the first
15 thing I would say is -- and I'd point the -- the
16 Court to the cases cited at the back end of Mr.
17 Taylor's reply brief that talk about statutes
18 like the Airline Deregulation Act, which
19 preempts state laws relating to rates, routes,
20 and services, and if you have a state law that
21 specifies what rates or routes or services the
22 airline can use, that's an easy case. That --
23 that's preempted without regard to practical
24 impacts.

25 But the Court has also recognized

1 sometimes states will regulate something else,
2 but the regulation of something else will have a
3 predictable spillover effect on the airline's
4 ability to pursue the rates, routes, and
5 services that they want, and it's in those cases
6 at the -- the order of preemption where the
7 courts have been forced into pragmatic
8 inquiries.

9 And -- and as I say, the second point
10 I would make about the text is there were other
11 formulations Congress could have chosen. Some
12 statutes refer to state --

13 JUSTICE KAGAN: Yeah, I guess you're
14 not giving me a whole lot of comfort in this
15 about how peculiar this would be that we could
16 have different rules in different states, we
17 could have different rules depending on -- on --
18 on the time that the challenge is brought.

19 MR. STEWART: I think -- I think
20 that's, A, something that Congress signed up
21 for, but, B, it's really a benefit to the banks.
22 That is, if Congress had prized ease of
23 administration above all else, it could simply
24 have rested on the antidiscrimination prong, as
25 it has with respect to other aspects of national

1 bank operations.

2 And the -- by -- by adding prong B of
3 the preemption standard, Congress is giving an
4 additional opportunity to the banks to say, even
5 though the states are doing this to their own
6 state chartered banks as well, it will
7 significantly impair our operations. They can
8 invoke it or not invoke it as they want, but
9 it's an additional opportunity for the banks.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: On Barnett, the
15 statutory text directs us to Barnett, so I've
16 been trying to parse Barnett even more than
17 usual, and I have a question about the two
18 paragraphs after the articulation of the
19 standard. The Court in Barnett said it -- said,
20 "Where Congress does not expressly condition the
21 grant of power upon a grant of state permission,
22 the Court has ordinarily found that no such
23 condition applies." Then it says, "In Franklin
24 National Bank, the Court made this point
25 explicit. The federal statute before us, as in

1 Franklin National Bank, explicitly grants a
2 national bank an authorization, permission, or
3 power. It contains no indication that Congress
4 intended to subject that power to local
5 restriction."

6 What do you -- what do you -- how do
7 you interpret those sentences?

8 MR. STEWART: I -- I -- I'm -- I'm
9 sorry, I have the pages here, but can you say --

10 JUSTICE KAVANAUGH: Well, I'll say the
11 last sentence again. "And as in Franklin
12 National Bank, it contains no indication that
13 Congress intended to subject that power to local
14 restriction. Thus" -- I'll give you one more
15 sentence -- "Thus, the Court's discussion in
16 Franklin, the holding of that case, and the
17 other precedent we have cited above strongly
18 argue for a similar interpretation here, a broad
19 interpretation of the word 'may' that does not
20 condition federal permission upon that of the
21 state."

22 MR. STEWART: Yes, I think the Court
23 there was referring to one of the arguments that
24 Florida made in the case. And as Mr. Taylor was
25 pointing out, the -- the conflict in Franklin

1 was very stark. The federal statute said
2 national banks may sell insurance in small
3 towns. The state statute said that you can't.
4 And perhaps out of desperation, the state argued
5 that, well, when the federal statute says
6 national banks may sell insurance in small
7 towns, it only means they may do this if state
8 law allows it.

9 And the Court said that's not the way
10 we usually understand federal authorizations to
11 work, that ordinarily, if the federal -- if the
12 National Bank Act says you can do something and
13 state laws says you can't, the federal statute
14 controls.

15 JUSTICE KAVANAUGH: Two more
16 questions. Apologies.

17 To follow up on what Justice Gorsuch
18 said, Dodd-Frank does explicitly authorize --
19 require payment of interest for certain kinds of
20 escrow accounts. Given the OCC history and
21 Congress's involvement, Congress explicitly
22 requiring that for certain kinds would suggest
23 something else for these --

24 MR. STEWART: Well, what -- what the
25 statute --

1 JUSTICE KAVANAUGH: How do you respond
2 to that?

3 MR. STEWART: The statute says that
4 for these mandatory -- mandatory accounts,
5 accounts that are mandated by TILA, the bank
6 must pay interest under applicable state or
7 federal law. And so there's a question about
8 what "applicable" means. And, certainly, with
9 respect to applicable federal law, it would mean
10 you'd have to point to some other federal
11 statute that required interest to be paid on the
12 escrow accounts.

13 I think one -- one natural reading of
14 that provision would be it doesn't establish a
15 special rule for TILA account -- TILA-mandated
16 accounts. It just says, if you would be
17 required to pay interest on this account were it
18 voluntarily created, you have to do it if it's
19 --

20 JUSTICE KAVANAUGH: Okay. Last
21 question. You said earlier, I think, could --
22 the banks could do this without material
23 impairment. I think you predicted that.

24 MR. STEWART: Yes. I mean, we -- we
25 certainly have not seen anything up to this

1 point that said -- suggests that a bank could
2 not pay this rate --

3 JUSTICE KAVANAUGH: And if it's higher
4 costs, therefore, decreasing the availability of
5 credit or higher rates that they charge, is that
6 material impairment or not?

7 MR. STEWART: Well --

8 JUSTICE KAVANAUGH: And how do we
9 assess that?

10 MR. STEWART: -- I mean, certainly,
11 out-of-pocket expense in and of itself wouldn't
12 be sufficient, but they would have to not just
13 assert but make a showing that this would be a
14 deterrent to their -- a meaningful practical
15 deterrent to their offering of their services,
16 and --

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: Mr. Stewart, do you
21 understand "case-by-case basis" to refer to
22 bank-by-bank basis or to statute-by-statute
23 basis?

24 MR. STEWART: Statute-by-statute
25 basis. And the statute says the OCC can extend

1 its inquiry beyond the specific state statute to
2 a substantively equivalent state law. And so
3 that -- that in our view reinforces the sense
4 that it's statute by statute, not case by case
5 --

6 JUSTICE BARRETT: And do you think
7 that --

8 MR. STEWART: -- but bank by bank.

9 JUSTICE BARRETT: And do you think
10 that this language, "case by case" -- I'm just
11 looking in the statute. Do you think it is
12 designed to say something about how courts
13 conduct the preemption inquiry, you know, as in
14 this case, because it was brought by a court
15 versus the Comptroller of the Currency?

16 Because I'm just looking at the way
17 that it's structured. You know, it says, "any
18 preemption determination under this paragraph
19 may be made by a court, or by regulation or
20 order of the Comptroller of the Currency on a
21 case-by-case basis," and then all the subsequent
22 references to "case-by-case basis" refer to the
23 OCC determination. Is -- is -- and I'm just
24 asking, should I make anything of that?

25 MR. STEWART: I think -- I mean, the

1 two things you should make of it are, first,
2 yes, it is directed just to the OCC, and it
3 seems to have been a reaction to the 2004 OCC
4 regulations, which declared kind of broad
5 categories of state law to be off the table.
6 And the --

7 JUSTICE BARRETT: Yes.

8 MR. STEWART: And Congress was saying
9 don't do it that way; focus on the impacts of a
10 particular state law --

11 JUSTICE BARRETT: Totally agree, which
12 is how I -- which is how I read it, so I'm
13 wondering how much -- it just seems to me --
14 I'll try to get to the point of why I'm
15 wondering about it. It seems like, you know,
16 that phrase, "case-by-case basis," itself sounds
17 fact-laden, like we're making factual
18 determinations on a case-by-case basis, but if
19 that language, "case-by-case basis," was
20 designed to stop the OCC from doing what you're
21 saying, does it really carry that implication
22 here?

23 MR. STEWART: Well, I mean, under
24 Article III case or controversy principles, the
25 -- the courts are already going to be subject

1 to a --

2 JUSTICE BARRETT: On a case-by-case
3 basis. Yeah.

4 MR. STEWART: -- a case-by-case basis.
5 And -- and the most relevant language in that
6 provision is that in making a case-by-case
7 determination, the OCC must consider the impact
8 of the particular state law. And that seems
9 clearly to refer to the practical impact.

10 And if that's part of the -- the
11 substantive inquiry, then even though the same
12 case-by-case requirement wouldn't apply to a
13 court, the court should consider impact as well.

14 JUSTICE BARRETT: So do you think the
15 court then is bound -- even though (b)(3) is
16 referring to the Comptroller, do you think the
17 court should be implying the exact same
18 standard?

19 MR. STEWART: I mean, the court is
20 certainly bound by the same substantive
21 standard. If you look at (b)(1) --

22 JUSTICE BARRETT: Well, (b)(1)(A),
23 (B), and (C), of course.

24 MR. STEWART: Yeah. Yes.

25 JUSTICE BARRETT: But I took you to be

1 referring to (3), "case-by-case basis"
2 definition moving forward?

3 MR. STEWART: No, I wouldn't -- again,
4 the court will be naturally looking at a
5 particular state law just because that's what
6 courts do.

7 JUSTICE BARRETT: Yeah.

8 MR. STEWART: Congress didn't have to
9 worry that courts would kind of announce broad
10 lists of things that couldn't be regulated. And
11 so the -- the court should still consider the
12 impact, the practical impact, but it's not
13 otherwise bound by the procedural
14 requirements --

15 JUSTICE BARRETT: Of course.

16 MR. STEWART: -- by the --

17 JUSTICE BARRETT: So it just seems to
18 me then that the court -- I guess what I'm
19 saying is I'm not sure how much all the talk
20 about case-by-case basis does for this question
21 of whether this is primarily a legal or factual
22 inquiry for a court.

23 MR. STEWART: It -- I'd certainly -- I
24 would agree that the -- the ultimate inquiry has
25 both factual and legal components; that is, you

1 have to know the facts, but you also have to
2 make a legal determination, do these facts
3 amount to significant interference?

4 JUSTICE BARRETT: Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: Yes. So going back
8 to Justice Alito's questions, is there a reason
9 why national banks can't be subjected to the
10 same kinds of evidentiary standards that other
11 plaintiffs have to satisfy when they're making
12 legal claims?

13 MR. STEWART: No. I mean, national
14 banks -- and because we are talking about not
15 the effect that this would have on somebody else
16 but the effect it would have on the national
17 banks themselves, not only do they have the
18 wherewithal to -- to satisfy these requirements,
19 but they're in the best position to have the
20 relevant information.

21 JUSTICE JACKSON: And they have the
22 wherewithal in part because there's nothing that
23 prevents national banks from hiring lawyers and
24 gathering evidence and presenting them to the
25 court, right?

1 MR. STEWART: Right.

2 JUSTICE JACKSON: And is there
3 something about economic questions that are not
4 within the competency of the court?

5 MR. STEWART: No. And -- and I would
6 -- I'm sorry.

7 JUSTICE JACKSON: Don't the court -- I
8 mean, doesn't the court litigate issues in the
9 realm of economic regulation all the time?

10 MR. STEWART: Sure.

11 JUSTICE JACKSON: And so I guess I'm
12 wondering, is the showing here really any
13 different than the other standards that I'm
14 talking about? So, for example, I mentioned the
15 undue burden standard in the Title VII scenario.
16 I mean, it would seem to me that the showing
17 that a company employer would have to make in
18 Title VII regarding undue burden on its business
19 when accommodating religious employers is really
20 no different in kind -- religious employees,
21 excuse me -- is really no different in kind than
22 the kind of thing a national bank would have to
23 show if it says this is substantially
24 interfering with my powers.

25 MR. STEWART: Right.

1 JUSTICE JACKSON: All right. So let
2 me ask you about how often such a showing would
3 have to necessarily be made.

4 Did I understand you to say that the
5 preemption determination always requires an
6 evidentiary showing? I think you kind of
7 discussed that, but aren't there circumstances
8 in which a big evidentiary showing wouldn't be
9 necessary?

10 MR. STEWART: Yes. I mean, there
11 certainly could be cases in which the nature of
12 the restriction was -- had such an obvious
13 impact on the bank that you wouldn't need at
14 least any --

15 JUSTICE JACKSON: An obvious impact,
16 for example, like it's directly conflicting with
17 what Congress says about the bank's powers?

18 MR. STEWART: That -- that would be
19 one example. Another example would just be like
20 charging -- the bank has to pay a 15 or
21 20 percent interest rate.

22 Now, as Mr. Taylor pointed out, that
23 -- that's not going to happen in the real world
24 because states are not going to impose
25 restrictions on -- like that on their own state

1 chartered banks, and so the non-discrimination
2 requirement will take off the table a lot of the
3 most extreme --

4 JUSTICE JACKSON: So this isn't going
5 to -- the big evidentiary showing problem is not
6 going to happen in every case in which the bank
7 is making a claim about preemption?

8 MR. STEWART: That -- that's correct.
9 And I'd also point out the bank, to the extent
10 at least that it's worried about enforcement by
11 state officials, it doesn't have to wait to be
12 sued. That is, Barnett Bank was a case in which
13 the bank went into court itself and sought a
14 declaratory judgment of preemption, and that
15 would be available.

16 JUSTICE JACKSON: Bringing its
17 evidence and its lawyers and that sort of thing.

18 MR. STEWART: Yes.

19 JUSTICE JACKSON: All right. Finally,
20 with respect to Justice Kagan's question, I
21 guess I'm wondering what, if anything, we can do
22 about the oddity of the standard in this
23 context. It's in the statute, and so I don't
24 know what -- whether we can just read the
25 statute to say something other than it says

1 because we think this is odd to have it here.

2 MR. STEWART: I mean, you can -- we
3 certainly agree that you can read the statutory
4 language in light of the Barnett Bank opinion
5 because -- both because the -- the statute --

6 JUSTICE JACKSON: The statute tells
7 you you're supposed to do that.

8 MR. STEWART: It -- it did, both by
9 drawing specific language from Barnett Bank and
10 by including a separate citation to Barnett Bank
11 itself. But I -- I don't think the Court can --
12 can get away from the fact that Congress chose
13 this particular formulation as its distillation
14 of the Barnett Bank opinion.

15 JUSTICE JACKSON: And that's because,
16 as you said in the beginning, "significantly
17 affects" means something, right? That Congress
18 has actually used another formulation if it just
19 wants preemption regarding any law that relates
20 to this, right?

21 MR. STEWART: Could use what --

22 JUSTICE JACKSON: They say that in
23 ERISA, for example, it says it's preempted if it
24 relates.

25 MR. STEWART: Yes.

1 JUSTICE JACKSON: And so that's easy
2 to apply, but, here, they didn't say that.

3 MR. STEWART: Yes. And -- and
4 sometimes -- some preemption provisions say a
5 state can't enforce a law that is different from
6 or in addition to the requirements of federal
7 law, meaning a state can attach additional
8 consequences to conduct that already violates
9 federal law but can't go beyond that, and it
10 didn't choose anything like that here.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. STEWART: Thank you.

15 CHIEF JUSTICE ROBERTS: Ms. Blatt.

16 ORAL ARGUMENT OF LISA S. BLATT

17 ON BEHALF OF THE RESPONDENT

18 MS. BLATT: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 New York law significantly interferes
21 with the exercise of national banking powers in
22 two respects. First, the law controls the
23 interest rate on mortgage accounts, and, second,
24 a patchwork of 50 of these state laws would
25 unduly burden national banks, destroying their

1 uniform federal character.

2 Now the other side posits that
3 "significantly interferes" requires factual
4 proof that a state law would hinder a banking
5 power to some unspecified degree. But
6 "significantly interferes" can be both
7 quantitative and qualitative.

8 And a state law that dictates the
9 attributes of a banking product interferes with
10 national banking power in a qualitative effect,
11 just as a -- courts telling prosecutors what
12 charges to bring would significantly interfere
13 with executive power.

14 Barnett Bank uses the term
15 "significantly interferes" in a qualitative
16 sense. Barnett Bank reasons that state laws are
17 preempted absent any indication that Congress
18 intended to subject the banking power to local
19 conditions.

20 And, here, we know Congress intended
21 the opposite. First, Congress -- excuse me,
22 federal law comprehensively regulates state
23 mortgage escrow accounts in order to protect
24 consumers without requiring any interest. And,
25 second, Congress speaks expressly when it

1 contemplates state interest laws. It did so for
2 state usury laws, and Dodd-Frank itself requires
3 interest on certain mortgage escrow loans but
4 not Petitioners'.

5 It is unfathomable that Congress
6 intended the other side's test. They never told
7 you what interest rate would be too much, what
8 to do when market forces change, and how courts
9 should proceed bank by bank. But national banks
10 need to know their regulatory obligations ahead
11 of time. It would create seismic uncertainty if
12 the laws of 50 states could apply to every
13 banking product and service and not just every
14 feature of a mortgage but everything from
15 interest rates on savings and checking accounts
16 to ATM fees to credit card reward programs.

17 Congress surely intended a preemption
18 standard that preserves the stability and
19 predictability that undergirds a safe and sound
20 banking system.

21 I welcome questions.

22 JUSTICE THOMAS: Ms. Blatt, do we
23 treat express banking powers the same as
24 incidental banking powers? It would seem that
25 you would have to somehow have a way to fathom

1 what these incidental powers are.

2 MS. BLATT: Right. No, there's --
3 there's enumerated powers in the 7th of 12
4 U.S.C. 24, and incidental powers are defined as
5 necessary powers to the business of banking.

6 And I can't think of a more -- so the
7 only enumerated ones are basically lend money,
8 take deposits, and then make real estate loans
9 in 371. What interest you charge is so
10 fundamental to a banking product and the banking
11 power that it would seem absurd to say a state
12 could dictate the interest rate on something
13 like a savings account just because that's an
14 incidental power.

15 JUSTICE THOMAS: Well, I agree with
16 you on that. In Franklin, though, I think it
17 was statutory, right? It was express.

18 But what I'm more interested in is the
19 creation of an escrow account, then interest
20 rate on the escrow account, which is not sort of
21 the -- something a bank would normally have to
22 do.

23 MS. BLATT: That's correct. I mean,
24 13 state laws require it. Since 1973, I guess,
25 we've had the Real Estate Settlement Practice

1 Act that never required interest. It's got
2 40,000 words of regulations, 17 interpretive
3 statements, and 10 appendices regulating escrow
4 accounts and federal law, none of it requires
5 interest.

6 I think the other side would think
7 states now could make amendments to every single
8 one of those requirements and somehow states --
9 banks would have to run and get declaratory
10 judgment as to each and every requirement just
11 on escrows. And then, when you cascade that
12 across everything a bank does, it is
13 mind-boggling. It is mind-boggling how many
14 products and services national banks do.

15 And I'm not sure why we're talking
16 about God and the airlines in a national banking
17 case when we have 150 years of precedent that
18 culminates in Barnett Bank. And you have 30
19 words of text. You basically have Congress
20 writing you a love letter saying we really like
21 your Barnett Bank decision, and then it talks
22 about the significant prevents or significantly
23 interfere, and Barnett Bank itself five times
24 cites Franklin and five times says what we mean
25 by that is we look to see is there some

1 indication that Congress wanted the -- wanted to
2 subject the power of national banks to local
3 conditions.

4 JUSTICE SOTOMAYOR: I'm sorry. There
5 are amici and the logic of the Second Circuit
6 law would suggest -- and -- and your test and
7 the Second Circuit's test that no state consumer
8 law would be permitted. But there's an express
9 permission for state consumer laws.

10 So which ones are you going to say are
11 okay?

12 MS. BLATT: So --

13 JUSTICE SOTOMAYOR: All of them cost
14 the bank money, whether it's giving a -- giving
15 a disclosure form or a notice form. Everything
16 costs money.

17 So what's incidental that somehow
18 wouldn't be preempted under the Second Circuit
19 test?

20 MS. BLATT: Sure. Let me tell you.
21 So the definition of "state consumer financial
22 law" versus the law that's preempted under our
23 test focuses on what is being controlled. It's
24 not simply a state regulating.

25 Of course, states are regulating, but

1 what is being controlled? Is it the national
2 banking power or is it the financial transaction
3 and the words of that definition with the
4 consumer? And when a state dictates --

5 JUSTICE SOTOMAYOR: I'm sorry, what --
6 what's not --

7 MS. BLATT: I'm going to --

8 JUSTICE SOTOMAYOR: -- controlling the
9 financial transaction with the consumer here?

10 MS. BLATT: I'm going to give you both
11 the definition and a laundry list of state law.
12 The definition is this: When the state dictates
13 the attribute of the product and service as
14 opposed to the interaction with the consumer,
15 it's preempted. And under that definition, you
16 have banking-specific laws that aren't
17 preempted, like laws that prohibit racial
18 discrimination and whatnot. You have laws that
19 prohibit fraud by banks.

20 And most importantly, you have the
21 banking-specific escheat law in Anderson.
22 That's their leading case, and yet I think it's
23 our best case. The Court said that the only --
24 what the state did, the banking-specific law,
25 that it only changed the identity of the account

1 holder who had the lawful right to demand
2 payment, i.e., the deposit account.

3 But then five times in the opinion the
4 Court said you are not -- the state law is not
5 -- I'm going to quote because they rely on it --
6 "not an unlawful encroachment on the rights and
7 privileges of national banks. It's not
8 infringing or interfering with any authorized
9 function of the bank. It's not a denial of its
10 privileges as a federal instrumentality" and so
11 on.

12 The other categories of laws that are
13 not preempted that meet the definition of state
14 consumer financial law are all generally
15 applicable laws that regulate the manner and
16 terms of the financial transaction with the
17 consumer.

18 So there's lots -- every state law has
19 a law of majority when you can buy a mortgage.
20 It's -- it's usually 18. Alabama, it's 21. All
21 states have laws about when the statute of fraud
22 kicks in, on what type of contracts. And it's
23 not like I'm here making something up.

24 The National Bank Act was passed in
25 1864. In 1870, your first case that said state

1 law has room to play on the dual banking system
2 said state contract law controls. And then
3 you've had case after case making a dividing
4 line between protecting the banking power at
5 issue, these federally authorized and confers
6 powers, and -- on the one hand, and state law,
7 where it can creep in when you're talking about
8 the interaction in transactions with consumers.

9 JUSTICE JACKSON: But aren't --
10 aren't -- aren't the national banks interacting
11 with consumers pursuant to their power? So why
12 don't those two categories collapse?

13 MS. BLATT: They don't because, in
14 1870, you said they didn't. You said -- there's
15 no federal common law of contracts. There's no
16 federal law -- common law of torts. States in
17 -- the Court said, in their daily lives, banks
18 can be regulated more by states than -- than the
19 federal law because the states have to supply
20 state contract law, tort law.

21 JUSTICE JACKSON: All right. Well,
22 speaking of what we said, you mentioned the
23 Anderson case. I read that case to be about
24 whether or not state laws "impose an undue
25 burden on the performance of the bank's

1 functions."

2 So, I mean, yes, you picked out some
3 language that suggests that this is about sort
4 of power at some level of generality. But it
5 seemed to me that this was about whether this --
6 the law at issue in that case was "so
7 burdensome" as to be inapplicable. It wasn't
8 about the nature. It was about, as people have
9 said, the degree.

10 MS. BLATT: I think you're absolutely
11 correct. In Anderson, and when it contrasts the
12 California case, is talking about an undue
13 burden because it didn't affect the power. And
14 what the Court said -- and that's why we have
15 two tests. We have a fallback test. One is, if
16 it affects the national banking power and
17 controls the attribute of the product,
18 preempted, preempted, preempted.

19 There is a second undue burden test
20 that looks at the practical impact, but the --
21 the delta between the two sides is we think that
22 can be as a matter of law and looks -- it looks
23 at a patchwork across 50 states. The California
24 case said it was preempted without any factual
25 record.

1 In Anderson, it said it wasn't
2 preempted with any factual record. They say
3 with no case, not one case in 150 years of
4 precedent, would this Court look to a factual
5 record. They're relying on some trial court
6 record? That's their best case? When the --
7 the Supreme Court didn't even talk about it? I
8 think that pretty much tells you all you need to
9 know whether Congress intended a factual record
10 for banking preemption.

11 Now, on the OCC, I think, you know,
12 there are three reasons why it is just simply
13 implausible that by codifying Barnett Bank,
14 Congress tended to overrule it or somehow upset
15 it. And the first is what I already mentioned,
16 the 30 words of text that says you need to
17 follow Barnett Bank.

18 And the second is there is a specific
19 provision in 25b(c), we rely on it, the OCC
20 relies on it, that says OCC must follow the
21 legal standard of Barnett Bank, without any
22 reference to the "prevents or significantly
23 interferes." So they can't possibly mean two
24 separate things. Congress told OCC to follow
25 Barnett Bank, not to look at significant effect.

1 And the third reason we think it's
2 just completely doubly bizarre and backwards
3 that you would take Congress being mad at the
4 OCC and imposing procedural requirements is
5 somehow they intended to impose a new
6 substantive standard on courts when they weren't
7 mad at you, they weren't mad at courts, and
8 impose a standard that no one's ever heard of or
9 applied before, that you would go fact by
10 fact -- fact by fact, law by law, bank by bank.

11 And he did a little fancy footwork
12 when you said, would this proceed bank by bank?
13 He answered by saying, well, that would be the
14 OCC. He never told you what would happen with
15 Justice Alito's, you know, question about what
16 would happen if Bank of America couldn't prove
17 it, but, you know, another national bank, Citi,
18 Citibank, could do it? There's no answer to
19 that.

20 And in terms of the impact, you know,
21 the notion that -- Mr. Stewart speaking on
22 behalf not of the OCC but the Justice
23 Department, that you just have to look sort of
24 at the records of the bank, the biggest problem
25 with something like interest rates, which makes

1 this a very easy case, is today 2 percent is
2 four times the national savings. At the time of
3 Mr. Cantero's, it was 33 percent times the
4 national savings rate. And at the -- excuse me,
5 that's Mr. Hymes. At the time of Mr. Cantero,
6 it's 10 times. I don't know what you think.
7 Maybe you should let the courts know.

8 Let's look at ATM fees. Four dollars
9 sounds -- I don't know, maybe 1.50? And then we
10 can go to credit card reward programs. We'd
11 have to have a consumer survey. I think I'd
12 like 2 percent back on my credit card, but maybe
13 states say it has to be 4 percent. And I just
14 don't even know how they would do this.

15 In terms of what the impact is,
16 Justice Jackson, you know, banks are in the
17 business of money, so the impact is not just the
18 potential for confusion and duplication and
19 inconsistency and the sheer 50 state regulators
20 that you'd have to contend with and the laws are
21 constantly changing, but most things with banks,
22 if you take it out of one hand, you know, it --
23 it -- it comes out another. And when Congress
24 studied this in 1973, they said --

25 JUSTICE JACKSON: But, Ms. Blatt, I

1 thought all the national banks were pretty much
2 the same in terms of their powers. Like I
3 thought we were talking about what -- what --
4 what a state law is doing to the national bank
5 power. So it's not at the level of a particular
6 bank. It is -- and any of the banks could make
7 the argument, and once they do, it would come up
8 to the Supreme Court and we would decide
9 ultimately, right?

10 MS. BLATT: Well, that's this case.
11 The Second Circuit said a mortgage -- mortgage
12 escrow account is a direct assault on national
13 banks' power.

14 JUSTICE JACKSON: I guess I just don't
15 understand why it's so hard. Like we do --

16 MS. BLATT: I don't think it is hard.

17 JUSTICE JACKSON: No, no, no. What
18 I'm saying is you're making the argument that it
19 is really going to be very challenging for banks
20 if we rule against you in this case, and I don't
21 understand why that's the case.

22 MS. BLATT: Well, you have, since the
23 Reagan administration, a former OCC comptroller
24 telling you it would create a seismic sea change
25 and uncertainty. So that's the view of

1 comptrollers from Reagan to -- all the way with
2 Biden officials. You haven't even heard from
3 the OCC, which regulates the national banking
4 system. That alone should scare you
5 tremendously, that you don't even have the OCC
6 up here.

7 In terms of how hard it would be, I
8 don't think I've heard a satisfactory answer on
9 what interest rate would be too much and how
10 national banks could make that showing. But
11 take just interest rates on savings accounts. I
12 don't even know what the -- the bank would say.
13 They would say, well, we can do it; we'll have
14 to --

15 JUSTICE JACKSON: Don't you have to
16 say something? It's your burden. You're trying
17 -- you have the burden in the law to show this
18 substantially interferes. If your answer is I
19 don't know what we would show, then I guess you
20 lose.

21 MS. BLATT: Not if 150 years of case
22 law is relevant and Barnett Bank codified it,
23 because in no case has a bank -- the Supreme
24 Court ever say, well, where's your facts, bank?
25 Franklin itself is the best case on point. And

1 both -- and I also think it's significant that
2 the Court in Watters, that's the Supreme Court,
3 I mean, that's -- that's actually you, you read
4 Barnett Bank and had the most sweeping language
5 you could possibly have about what Barnett Bank
6 meant, and it said states cannot control banks,
7 period. That's the Supreme Court. That
8 interpreted Barnett Bank. So, you know -- and
9 that's why I think OCC has always taken this
10 position.

11 JUSTICE SOTOMAYOR: You're taking that
12 quote out of context because I looked at it. It
13 says the states can exercise no control over
14 national banks, nor in any way affect their
15 operation except insofar as Congress may see
16 proper to permit.

17 MS. BLATT: Sure. For sure.

18 JUSTICE SOTOMAYOR: And that's what
19 the whole issue is, how far did Congress permit
20 here.

21 MS. BLATT: Well, two -- two solicitor
22 generals said in briefs before you what I said.
23 So I'm happy standing on OSG's view across
24 several administrations about what Barnett Bank
25 means. I mean, I'm --

1 JUSTICE KAGAN: The --

2 MS. BLATT: -- I'm fine with that.

3 JUSTICE KAGAN: The state statutes
4 have to be non-discriminatory.

5 MS. BLATT: Correct.

6 JUSTICE KAGAN: So, you know, one way
7 you could look at this is, if a state statute is
8 non-discriminatory, how much damage could it
9 really be doing?

10 MS. BLATT: And I think that's part of
11 the problem, which is what the Franklin case
12 illustrates and what this case illustrates, is
13 the plaintiffs will always say, well, you
14 applied it to your state banks, so what's the
15 problem? And the problem --

16 JUSTICE KAGAN: That's the question.

17 MS. BLATT: The problem goes much
18 deeper --

19 JUSTICE KAGAN: I mean, it -- it seems
20 as though there should be a kind of presumption
21 that if the state is doing it for the state
22 banks, it's not really interfering with bank
23 powers in a way that we should care about.
24 There might be exceptions to that, and that's
25 what the -- the -- the language is designed to

1 accomplish, is to, you know, pick the exceptions
2 to that where something has gone kerfloey such
3 that even a non-discriminatory law does
4 something special to national banks.

5 MS. BLATT: So two responses. I think
6 Franklin would have come out the other way
7 because there was -- the New York court of
8 appeals said there's not a sufficient showing.
9 But, more importantly, and this, I think, goes
10 to the congressional design of the National Bank
11 Act, is that they're supposed to be -- you know,
12 why have your name Bank of America if you look
13 like Bank of Ocean City or Bank of Hawaii?
14 You're supposed to be able to walk into Bank of
15 America and get one product and not have 50
16 products in 50 states, and every time a state
17 says change your escrow, you have to change
18 another aspect of the loan --

19 JUSTICE GORSUCH: Well, I -- I --

20 MS. BLATT: -- on the origination fee.

21 JUSTICE GORSUCH: -- I -- I totally
22 get that impulse that national banks don't want
23 to have to deal with patchwork state laws, but
24 the presumption, the baseline that Congress set
25 is it's not preempted unless discrimination or

1 you can -- you can prove significant impact. So
2 that -- we can't take that argument very
3 seriously, that it's just too much of an
4 impairment on national banks. They have to deal
5 with reality that we live in a federal system
6 with 50 states.

7 MS. BLATT: Yeah. I mean, it just
8 seems like you're kind of reading the provision,
9 I mean, upside down. You could read Barnett
10 Bank the same way and say this Court had --

11 JUSTICE GORSUCH: You say "upside
12 down," but that's what the statute says.

13 MS. BLATT: You could say 150 years of
14 case law says states can regulate unless there's
15 a --

16 JUSTICE GORSUCH: Well, that's what
17 Congress said, right?

18 MS. BLATT: I agree. And I think that
19 the Court said it's preempted under Barnett Bank
20 if it prevents or significantly interferes. And
21 then you go to Barnett Bank and it tells you, I
22 think five times, that we read it in light of
23 Franklin.

24 JUSTICE GORSUCH: You mentioned
25 earlier that you thought state lending laws with

1 respect to race, religion, and others are not
2 preempted. Why?

3 MS. BLATT: So the -- the case --

4 JUSTICE GORSUCH: On your view, if
5 states get -- if states don't get a role and you
6 really -- Barnett Bank should be inverting the
7 statute, and the presumption is national banks
8 operate free of state control, that would seem
9 to subsume those laws too --

10 MS. BLATT: Yeah.

11 JUSTICE GORSUCH: -- that principle.

12 MS. BLATT: So no for -- for this
13 fundamental reason, and that is that states have
14 -- I'm sorry, national banks have no power
15 whatsoever to discriminate on the basis of race
16 or to commit fraud.

17 And this Court in the 1924 case of
18 First National Bank versus Missouri said when it
19 said that state law that bans national banks
20 from having bank branches, the Court said it
21 can't preempt it because there's no either -- no
22 express power or even implied power to do
23 branches.

24 So I think the OCC has correctly taken
25 the view since 2004 that there is no --

1 there's -- there's simply no power to --

2 JUSTICE GORSUCH: So from --

3 JUSTICE KAGAN: But if I understand --

4 JUSTICE GORSUCH: Oh, please.

5 JUSTICE KAGAN: If I understand your
6 test correctly, you're looking to see whether a
7 state is conditioning the exercise of a national
8 bank power. And for sure that's what fair
9 lending laws do. It says, you know, you can't
10 make the loan decisions that you want to make,
11 except conditioned on your satisfying some state
12 law. A lot of state laws can be explained in
13 just that way, and that's -- I -- I think that
14 that's the test you use in your brief.

15 MS. BLATT: Yeah, but --

16 JUSTICE KAGAN: Fair lending laws are
17 a condition on a national bank's power.

18 MS. BLATT: But -- but so is -- so is
19 a law that says you can't lend a mortgage to a
20 two-year-old. That's conditioning the bank's
21 power on, you know, making sure the person is
22 18. But those laws aren't preempted. And I
23 think the useful dividing line is, are you
24 changing the attributes of the product of
25 service?

1 JUSTICE GORSUCH: Absolutely you are.
2 You're saying I'm not -- you have to lend to
3 people you don't want to lend to.

4 MS. BLATT: Well, that's the same way
5 with a -- with a four-year-old. But if I could
6 just get, I mean, the --

7 JUSTICE GORSUCH: A four-year-old, a
8 24-year-old, whatever, and, yes, they're --

9 MS. BLATT: But there's no bank --

10 JUSTICE GORSUCH: And just -- just a
11 second, counsel. There are going to be a
12 patchwork of states and -- with different
13 judgments, and you're going to disagree with
14 some of them. And I -- and all of them have to
15 do with the core banking powers of who you may
16 lend to, who you may open an account for, what
17 interest you can charge and all of that. And,
18 you know, it seems to me, not to put too fine a
19 point on it, that there's a bit of wanting your
20 cake and eating it too here.

21 MS. BLATT: No, because we're happy
22 with again your precedent. Your precedent has
23 been very careful to make sure that states can
24 go right up to the line. And I think Anderson
25 says that.

1 You can talk about, you know, you can
2 interact with the account holder and the bank in
3 things like contract law, age requirements,
4 statute of frauds, and if I can get back to
5 discriminatory lending, banks don't have any
6 power to discriminate on the basis of race,
7 gender, sex, sexual orientation, but they sure
8 have to discriminate on the basis of income
9 status.

10 So yes, if a state law said you can't
11 discriminate on the basis of income, that's
12 going to preempt it because there's a federal
13 duty to mitigating at risk.

14 But this is, again -- and same way
15 with fraud, I don't think fair lending laws,
16 state lending laws that prohibit fraud in
17 lending are preempted either. They just have
18 never have been.

19 JUSTICE GORSUCH: So you can
20 discriminate on the basis of income but not
21 race. How about like red-lining neighborhoods
22 and things like that?

23 MS. BLATT: Disparate impact is -- I
24 mean, that's extremely heavily regulated by
25 federal law, and I don't think that --

1 JUSTICE GORSUCH: But I'm asking --

2 MS. BLATT: -- I don't think --

3 JUSTICE GORSUCH: -- about
4 non-discriminatory state laws. Then what?

5 MS. BLATT: I don't think any states
6 have argued -- sorry, federal -- national banks
7 have argued disparate impact laws are preempted
8 because they are so --

9 JUSTICE GORSUCH: But, under your
10 test, why wouldn't they?

11 MS. BLATT: Well, I mean, we can talk
12 about the theory behind disparate impact
13 probably, but I -- I think it's one of those
14 areas on how you consider, how you look at
15 disparate impact.

16 JUSTICE GORSUCH: You might -- you
17 might argue those are -- are --

18 MS. BLATT: Just --

19 JUSTICE GORSUCH: -- are preempted
20 under your test?

21 MS. BLATT: I don't think so, but even
22 if they did, it's still -- the line that we're
23 drawing is the line this Court has drawn I think
24 since -- since Anderson and before that, that if
25 you're not changing the attribute -- and I don't

1 think it changes the loan attribute to say is
2 the person black or white or green. It's still
3 a loan with the same interest rate, the same
4 term.

5 If you say state law says I don't want
6 national banks paying less than 2 percent or
7 3 percent or 4 percent on savings accounts or no
8 mortgage loans that are under 29 months and 10
9 months, it's just the product. That is
10 literally the -- the product.

11 And I think we talked about the credit
12 cards and the ATM fees, how much cash you can
13 withdraw. How much cash you can withdraw has
14 nothing know do with the consumer walking in.
15 It literally is the core banking service itself.
16 And this has been the workable standard. This
17 has been the settled expectation.

18 JUSTICE JACKSON: And whether or not
19 you have to pay interest on the escrow account
20 does or does not have something to do with the
21 consumer walking in?

22 MS. BLATT: Nothing. It's the nature
23 of the product. It's the interest rate on the
24 loan. It's no different than -- there's plenty
25 of state laws that control, you know, things

1 like the term of the loan, what's the maximum
2 amount you can take out on a mortgage loan.
3 Those are all -- those are all preempted, yet
4 states regulate that for state banks.

5 This has been -- I mean, again, we've
6 talked about the OCC. This has been the law
7 since 1983 for all real estate but for things
8 like escrow. The escrow regulation came in in
9 2004.

10 So national banks but for the Ninth
11 Circuit, which I think covers two state escrow
12 laws, national banks don't comply with state
13 escrow laws unless they want to because it's one
14 of the features they want to do to attract
15 consumers.

16 In terms of how much money, I mean,
17 these are very small dollar amounts. Bank of
18 America put in its brief and it had evidence in
19 the Lusnak, I think it's the Lusnak how I
20 pronounced it, it doesn't earn interest on these
21 accounts and it costs a lot of money to maintain
22 them.

23 So I don't think it's so much that
24 it's -- again, I -- I don't know what the
25 factual showing would be, but I do know the

1 other side would just say New York banks comply
2 with it, so it's -- it's never going to be
3 preempted under these rules.

4 JUSTICE KAGAN: I guess I'm just
5 trying to understand the sense of this
6 distinction you're making, and I didn't realize
7 that you were making this distinction, so I'm --
8 I'm making this up on the fly.

9 But suppose there were a state that
10 said something like before a loan can be denied,
11 a person has a right to see the bank president.
12 And that's very -- it's actually really super
13 inconvenient for the bank. That would fall on
14 your yes, a state can do that side of the line?

15 MS. BLATT: I think it would probably
16 fall on the no, the -- the state can't if you --
17 it depends on how broad you interpret sort of
18 the services associated with it. I will say
19 that there are state laws that regulate, you
20 know, how the banking statement has to look,
21 what kind of receipts you have to have.

22 If you knew the amount of federal
23 regulations that are just so exhaustive on this
24 that if banks had to comply with 50 different
25 kinds of patchwork of every law on that, but

1 sort of seeing who the bank -- meeting the bank
2 president seems to me similar on, you know, how
3 the bank -- how the banking statement has to
4 look.

5 JUSTICE KAGAN: Yeah, it's just
6 suggestive of the -- the idea that it's hard to
7 make this distinction between what concerns your
8 transaction with a customer and what concerns
9 your banking product, which is what I thought
10 you were saying.

11 MS. BLATT: I think it is very easy
12 when you have an interest rate. I think a
13 harder one is like the Anderson versus
14 California.

15 JUSTICE KAGAN: Well, so it works for
16 this case, but you're asking us to do something
17 that applies to every kind of case.

18 MS. BLATT: But it works for every
19 case that's been addressed by OCC's regulation
20 since the 2000s. I mean, this is not -- OCC
21 goes through a laundry list of preempted, types
22 of preempted. They all go to the banking
23 product. They go to the mortgage loan. They --

24 JUSTICE GORSUCH: Well, the government
25 has disavowed that regulation and said it's

1 inconsistent with the statute. So I don't know
2 how much traction that gets you.

3 MS. BLATT: I think you just heard --
4 you might as well have heard from the forest
5 service. I mean, they're -- they literally went
6 against the --

7 JUSTICE GORSUCH: Well, I think we
8 heard from the Solicitor General of the United
9 States on behalf of the federal government.

10 MS. BLATT: Contracting two other
11 solicitor generals and saying they didn't even
12 consult with OCC. With all due respect, this is
13 a bank -- this is --

14 JUSTICE GORSUCH: Where is this line
15 that you've been talking about in your brief?
16 Can you direct me to it?

17 MS. BLATT: I think the -- well, the
18 line is --

19 JUSTICE GORSUCH: I didn't see it.

20 MS. BLATT: I think it's --

21 JUSTICE GORSUCH: I'm with Justice
22 Kagan.

23 MS. BLATT: -- I think that's fair on
24 the product, we may have only mentioned the
25 product thing once. The main -- the main test

1 is the control test that the Second Circuit
2 applied.

3 JUSTICE GORSUCH: Yeah, it's totally
4 different than the control test, isn't it?

5 MS. BLATT: No, because --

6 JUSTICE GORSUCH: That's what you're
7 asking us to adopt. And wouldn't, you know,
8 this product versus consumer test itself
9 generate a lot of litigation over border cases?

10 MS. BLATT: I don't think so. When we
11 tried to talk about the difference with the
12 definition of "state consumer financial law," we
13 talked about -- this is where it gets very
14 close. We talked about there's a difference
15 between controlling the banking power and
16 controlling the financial transaction with the
17 consumer. And I just think the explanation to
18 that just looks to the product.

19 JUSTICE GORSUCH: It's not in your
20 brief, and it's different -- and if I think it's
21 different from the lower court opinion, what are
22 we supposed to do?

23 MS. BLATT: Then stick with our brief.

24 (Laughter.)

25 MS. BLATT: Stick with our brief.

1 JUSTICE GORSUCH: It's not -- it's not
2 in your brief.

3 MS. BLATT: Stick with our brief.
4 Don't -- don't -- you didn't hear anything I
5 said.

6 (Laughter.)

7 JUSTICE KAGAN: Well, your brief --
8 your -- your brief -- the problem is that your
9 --

10 JUSTICE GORSUCH: That's the first
11 time I've heard that.

12 (Laughter.)

13 JUSTICE KAGAN: I mean, the problem is
14 that your brief doesn't explain fair lending
15 laws. And in a way, what you're trying to do is
16 to gerrymander a world in which fair lending
17 laws, which everybody thinks kind of have to
18 apply to national banks, apply to national
19 banks, but nothing else does.

20 MS. BLATT: Yeah, and I -- I -- I
21 don't think it's gerrymandering unless you think
22 the OCC has gerrymandered. I mean, you've had
23 to have a workable rule since states have had --
24 excuse me, since national banks have had real
25 estate lending power since 1983.

1 And this has been the workable rule.
2 The -- the OCC has cordoned off the loan. But
3 it has -- it has said at the same time and it
4 wrote to Barney Frank in 2004 but we're going to
5 put fair lending laws to the side.

6 Now there might be some fair lending
7 laws that might be problematic when they run up
8 to the duty to mitigate risk, but, generally,
9 banks just don't have the power to discriminate
10 or commit fraud. And if -- if you can't ever
11 answer a question at oral argument in the brief,
12 then I'm not sure why we're having oral
13 argument.

14 JUSTICE GORSUCH: It's pretty central.
15 It's not -- it's not an incidental question.
16 It's -- it's what's preempted. And your brief
17 says everything's preempted, control.

18 MS. BLATT: I think our -- yeah.

19 JUSTICE GORSUCH: And -- and -- and
20 now you're saying, well, there's this new
21 distinction that we somehow distilled from our
22 cases that heretofore nobody has mentioned.

23 MS. BLATT: So the amount of
24 non-preempted laws is the exact same in the
25 brief, the fair lending and all generally

1 applicable laws that go to how you form
2 contracts. The only one I add -- and Anderson.
3 The only one I added is the fraud laws. I don't
4 think those are in the briefs, but I think they
5 follow. So, if you don't want to consider the
6 fraud laws, that's fine.

7 But the basic distinction and dividing
8 line, we spent pages and pages saying this Court
9 has recognized all the laws that aren't
10 preempted, starting with state contract laws.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: Well, I share the
16 difficulty that's been expressed in
17 understanding the -- the difference between a
18 state law that affects a national bank's
19 exercise of the banking power and a state law
20 that regulates the way in which the bank
21 exercises that power in dealing with its
22 customers.

23 I mean, maybe -- is there some other
24 way to express this? Is there something else,
25 if we look at the instances that have been held

1 to fall on the latter side of that line, some
2 other characteristic that could be identified
3 that would explain the difference?

4 MS. BLATT: Well, the -- the reason
5 why I like what I'm giving you is it's because
6 it's -- the statute defines "state consumer
7 financial laws" in terms of the transaction. So
8 we stuck to the text of "financial transaction."

9 And we think Barnett Bank is talking
10 about the national banking power, but because
11 there is this sort of semantic issue, while
12 "regulate" is "regulate," are you regulating the
13 power, are you regulating the transaction, it
14 helps to explain what that means.

15 If you wanted the case, it would be
16 Anderson. Anderson talks about it is just a
17 change in the identity of the -- it's no
18 different than if you had like a garnishment or
19 a missing person, but it doesn't affect the
20 underlying function or powers of the bank. And
21 this is a loan. This is literally like the most
22 important thing they do other than take
23 deposits.

24 JUSTICE ALITO: But we are -- there is
25 the problem that -- and you've provided an

1 answer, I'll have to think about it, as to why
2 your interpretation doesn't preempt everything.
3 But there's the problem on the other side that
4 Mr. Taylor's argument seems to preempt nothing.

5 If -- if you can presume that anything
6 that's good -- that's okay for a state bank is
7 also okay for a national bank, then, by
8 definition, nothing is going to be preempted.
9 Now maybe he'll have an explanation on -- on
10 rebuttal about what his -- what his
11 interpretation --

12 MS. BLATT: Right, and the reason I
13 like my --

14 JUSTICE ALITO: -- would preempt.

15 MS. BLATT: -- my position better is
16 because I think I've got the status quo on my
17 side. What they have is that Congress was
18 really angry at OCC. But there's no suggestion
19 in the legislative history or anything else that
20 they wanted to create all this massive
21 stability.

22 This is a time of the great recession.
23 Like the notion that they wanted to impose on
24 every national bank some query of we no longer
25 know whether the laws of 50 states apply to

1 every single thing we do, without anyone
2 noticing, it just seems to me that this is a --
3 as what the former comptroller brief said, it
4 would be a sea change.

5 JUSTICE ALITO: Okay. One final
6 question just for clarity. Could you walk
7 through the text and show why your
8 interpretation is consistent with the text?

9 MS. BLATT: So --

10 JUSTICE ALITO: The relevant text?

11 MS. BLATT: Yeah. So the 30 words of
12 text about Barnett Bank --

13 JUSTICE ALITO: Right.

14 MS. BLATT: -- which we've talked
15 about. If we want to talk about "significantly
16 interfere," I think the word "significant" does
17 some work because it does -- it does a
18 significant amount of work because not any law
19 that could be said to interfere with the banking
20 power, we've talked about the fair lending laws,
21 talked about the age requirements, the writing
22 requirements, it has to be significant and it
23 has to go to the, you know, authorized federal
24 power.

25 JUSTICE ALITO: Okay. Is what -- is

1 the thing that's codified the words taken from
2 Barnett Bank, "significantly interferes," et
3 cetera, or is it the holding of Barnett Bank?
4 Is it how Barnett Bank itself understood those
5 words?

6 MS. BLATT: The latter. I think you
7 could say it's both, but it's clearly the
8 latter. I think, in their view, you didn't have
9 to enact any reference to Barnett Bank because
10 they just start with significant interference.

11 JUSTICE ALITO: And "case by case"?

12 MS. BLATT: "Case by case" refers to
13 the OCC in terms of their saying, if you're
14 going to proceed by order or regulation, you'd
15 have to just look at escrow laws because it has
16 to be a substantial -- I mean, you might have a
17 debate about what's substantially equivalent in
18 escrow laws. But "case by case" is not
19 referring to facts. It's referring to you can't
20 just say we want to preempt everything on
21 mortgage loans. You have to look at, like, you
22 know, escrow, down payment, maximum, you have to
23 just go kind of law by law. But it's talking
24 about the OCC.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?
3 JUSTICE SOTOMAYOR: No.
4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Gorsuch?
6 Justice Kavanaugh?
7 Justice Barrett?
8 JUSTICE JACKSON: I just --
9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?
11 JUSTICE JACKSON: -- I just have one
12 thing on your distinction because I'm -- I'm
13 still trying to follow it. You -- you rely on
14 Anderson, and I guess the other case that sort
15 of implicates the same facts as Anderson is the
16 California case --
17 MS. BLATT: Correct.
18 JUSTICE JACKSON: -- which you've
19 talked about. And the problem I'm having with
20 your distinction between product or power and
21 the transaction is that in California, the Court
22 describes the law at issue there, which it says
23 is preempted, as a statute that attempts to
24 qualify in an unusual way agreements between
25 national banks and their customers and may cause

1 them to hesitate to subject their funds to
2 possible confiscation.

3 So it seems as though the Court in
4 this case says the reason why you're preempted
5 is because you are trying -- this law is trying
6 to regulate the transaction between the bank,
7 which you say is the reason why in Anderson they
8 would say it's not preempted.

9 MS. BLATT: So --

10 JUSTICE JACKSON: So I don't --

11 MS. BLATT: Yeah, a hundred percent.

12 And you're -- you're just completely correct.

13 What we're saying is you have the control on the
14 power of the banking product, and there's a
15 second fallback test, which is the undue burden,
16 and that undue burden is the practical impact.

17 So if you had a state law that said --
18 that is the difference between California and
19 the Kentucky law -- that said the minimum age
20 requirement is 61 to open up a mortgage, well,
21 that is a law -- you know, a law of majority.
22 It clearly would impose an unusual relationship
23 on the relationship between the bank and its
24 customers. So we do think you could go and
25 preempt these laws that do interact with the

1 consumer and the state.

2 Another one would be a state --
3 national banks or any bank can only be open for
4 one hour during the week. That's going to be
5 preempted. Or you have to pay tellers \$1,000 an
6 hour. It's good go to be preempted even though,
7 of course, Title VII applies to national banks.

8 But I do think the California case
9 leaves open, and Anderson says, if the -- if the
10 state law is so unusual with respect to the bank
11 and its consumers to the -- the point that it's
12 interfering with their operations, it will be
13 preempted.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Rebuttal, Mr. Taylor?

18 REBUTTAL ARGUMENT OF JONATHAN E. TAYLOR

19 ON BEHALF OF THE PETITIONERS

20 MR. TAYLOR: Thank you, Mr. Chief
21 Justice. Just a few quick points in rebuttal.

22 My friend says that the statute
23 contains two different tests, one for when
24 states dictate the attributes of the product or
25 service, which I think she said is preempted,

1 preempted, preempted, and a second undue burden
2 test for some other category of laws.

3 Now that test is made up, atextual,
4 and, yes, Justice Gorsuch, appears for the first
5 time at argument. And this Court in Cuomo, I'll
6 just note, rejected a similarly atextual test,
7 although it's not exactly the same, as
8 inconsistent with the text of the statute. And
9 the same is true here.

10 Now they read 30 words of the text of
11 the statute, which they say is a love letter to
12 Barnett Bank, as excising the very standard that
13 is codified and is nullifying seven pages of
14 their statutory appendix, which is the entire
15 statute, so that the statute would have no
16 real-world effect.

17 Now, Justice Sotomayor, you pointed
18 out that the statute here uses the phrase "only
19 if," which is somewhat unusual for a preemption
20 provision, and suggests that in the real world
21 it's as much an anti-preemption clause as a
22 preemption clause.

23 But it's not an exotic provision,
24 Justice Kagan. And if you look at page 15 of
25 our reply brief, this Court has actually adopted

1 a significant impact test. That's the word this
2 Court has used, even though it's not in the text
3 of the statute, in the "related to" cluster of
4 -- of cases. And this Court made that up as an
5 administrable line. And if it's comfortable
6 with that as the line when it's not in the
7 statute, then it should be comfortable with that
8 as the line when it is in the statute.

9 Now there was a cluster of questions
10 about the practical effect, and I just would say
11 three things. The first is the importance of a
12 non-discriminatory law. It's why a lot of their
13 laws are hypos and not reality, Justice Kagan.

14 But, Justice Alito, that doesn't mean
15 that that is the entire test, just like it would
16 have been under the Treasury Department. You
17 still have laws that conflict, as in Barnett
18 Bank, and you still have laws that -- where
19 there's a real significant interference.

20 Justice Kagan, you gave a hypo where a
21 bank couldn't make a loan unless a person could
22 talk to the president of the bank. If that's
23 non-discriminatory, it sounds a lot like
24 significant interference to me.

25 And there's -- the third point I would

1 make is there's still a role for the OCC to play
2 here. It can do the job that Congress expected
3 it to do if -- if there is a real problem, like
4 my other -- my friend on the other side claims.

5 And their position that this would sow
6 mayhem is pretty offensive to federalism. The
7 idea is that nationwide companies might have to
8 comply with non-discriminatory state laws that
9 don't conflict with the text of a statute in the
10 states where they do business and that they
11 should be entitled to preempt those statutes as
12 a matter of law without having to show
13 significant interference. And I think that's
14 just inconsistent with the way this typically
15 approaches questions under the Supremacy Clause.

16 And, finally, I would note that it's
17 quite clear that Congress passed this statute to
18 do something. It was reacting against what the
19 OCC had done. The OCC said the same 2004 rule
20 remains in effect and the same list of laws are
21 preempted. And Congress said no, we want the
22 statute to have some real effect. And my friend
23 on the other side reads the statute to have no
24 real-world effect.

25 Thank you very much.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 12:44 p.m., the case
5 was submitted.)

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