SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ALEX CANTERO, ET AL., INDIVIDUALLY)
AND ON BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)
Petitioners,)
v.) No. 22-529
BANK OF AMERICA, N.A.,)
Respondent.)

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Washington, D.C.

Tuesday, February 27, 2024

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

APPEARANCES:

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

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

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

C O N T E N T S

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

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

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

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

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

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

based on substantial evidence --

JUSTICE KAGAN: And what does it --

MR. TAYLOR: -- and periodically review.

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

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

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

codified and is the appropriate one --

MR. TAYLOR: Mm-hmm. Sure.

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Well --

MR. TAYLOR: And to --

JUSTICE KAVANAUGH: Keep going. Sorry.

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

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

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

JUSTICE KAVANAUGH: What about --

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

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

MR. TAYLOR: Correct.

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

MR. TAYLOR: Agree with that entirely.
JUSTICE KAVANAUGH: Okay. So then the question, I think one way to look at it -- you tell me why this is wrong -- is, does this kind of state law at issue here significantly interfere more than the law did in Franklin?
Is that a good way to look at it?
MR. TAYLOR: You could put it that way, yes.
JUSTICE KAVANAUGH: Okay. And doesn't a law that interferes with the pricing of the product almost by definition interfere more with the operations of a bank than something that affects advertising?
MR. TAYLOR: I don't think so, Justice Kavanaugh. And I would -- the question isn't whether it would cost money to the bank to comply with the statute. The -- the question, rather --
JUSTICE KAVANAUGH: Well, let -- let me stop you right there.
MR. TAYLOR: Sure.
JUSTICE KAVANAUGH: Why not? That sounds like significant interference when it's -- when it's affecting how much -- it's

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

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

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

JUSTICE KAVANAUGH: But how did that happen in Franklin?

MR. TAYLOR: So the power --

JUSTICE KAVANAUGH: Franklin, they

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

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

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

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

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

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

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

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

MR. TAYLOR: And --

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

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

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

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

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

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

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

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

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

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

MR. TAYLOR: The ultimate preemption determination --

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

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

those effects are.

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

JUSTICE ALITO: Well, but the burden would --

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

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

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

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

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

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

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

MR. TAYLOR: Well --

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

evidence?

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

JUSTICE ALITO: A matter of economic logic?

MR. TAYLOR: Well --

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

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

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

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

JUSTICE KAVANAUGH: I don't think --

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

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

MR. TAYLOR: No. No, Justice --

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

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

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

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

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

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

MR. TAYLOR: I guess I would put it a

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

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

JUSTICE ALITO: All right. Thank you.

MR. TAYLOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

MR. TAYLOR: Mm-hmm.

JUSTICE SOTOMAYOR: You're asking us

to reverse.

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

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

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

MR. TAYLOR: -- the statutory --

JUSTICE SOTOMAYOR: I mean --

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

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

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

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

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

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

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

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

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

MR. TAYLOR: Yeah.

JUSTICE SOTOMAYOR: But they have done it.

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

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

But I would also just -- I -- I

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

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

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

MR. TAYLOR: The statute requires it.

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

MR. TAYLOR: Oh.

JUSTICE SOTOMAYOR: -- to start off.

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

JUSTICE SOTOMAYOR: Okay.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

conflict.

MR. TAYLOR: Correct.

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

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

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

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

MR. TAYLOR: Yeah. And so --

JUSTICE KAGAN: -- statutes.

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

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

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

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

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

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

JUSTICE KAGAN: Thank you.

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

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

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

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

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

JUSTICE KAVANAUGH: I understand.

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

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

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

JUSTICE KAVANAUGH: If it's a judgment

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

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

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

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

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

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

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

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

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

MR. TAYLOR: Yeah.

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

price of --

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

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

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

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

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

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

JUSTICE KAVANAUGH: Mm-hmm.

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

Am I understanding your position?

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

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

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

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

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

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

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

And so it was about significant

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

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

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

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

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

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

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

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

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

unusual or unworkable assignment for the courts.

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

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

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

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

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

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

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

Is that right?

MR. TAYLOR: That's right.

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

Am I right about that?

MR. TAYLOR: That's correct, yes.

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

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

MR. TAYLOR: Correct.

JUSTICE JACKSON: All right. Thank you.

MR. TAYLOR: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING VACATUR

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

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

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

would have used another formulation.

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

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

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

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

I welcome the Court's questions.

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

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

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

significantly the exercise of a power that Congress explicitly granted.

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

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

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

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

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

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

JUSTICE GORSUCH: Mr. --

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

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

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

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

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

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

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

JUSTICE GORSUCH: The other way.

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

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

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

making preemption --

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

MR. STEWART: And --

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: If it -- if it has

expertise, why are you disagreeing with its longstanding position?

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

JUSTICE KAVANAUGH: Even though the key members said otherwise?

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

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

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

or significantly interferes with."

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

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

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

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

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

determination.

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

JUSTICE KAGAN: Mr. --

MR. STEWART: Yes?

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

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

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

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

CHIEF JUSTICE ROBERTS: Sure.

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

it's a significant interference?

MR. STEWART: Yes.

JUSTICE KAGAN: Okay.

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas, anything further?

JUSTICE THOMAS: No.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

do.

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

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

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

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

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

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

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

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

practical nightmares.

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

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

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

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

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

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

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

JUSTICE ALITO: -- that involve economic determinations?

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

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

MR. STEWART: But -- but the --

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

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

Now you point out Anderson, which it

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: And if -- if they

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

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

JUSTICE SOTOMAYOR: Okay.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

But the Court has also recognized

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

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

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

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

bank operations.

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Two more questions. Apologies.

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

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

JUSTICE KAVANAUGH: How do you respond to that?

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

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

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

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

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

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

MR. STEWART: Well --

JUSTICE KAVANAUGH: And how do we assess that?

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

JUSTICE BARRETT: And do you think that --

MR. STEWART: -- but bank by bank.

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

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

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

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

JUSTICE BARRETT: Yes.

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

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

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

to a --

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

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

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

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

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

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

MR. STEWART: Yeah. Yes.

JUSTICE BARRETT: But I took you to be

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

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

JUSTICE BARRETT: Yeah.

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

JUSTICE BARRETT: Of course.

MR. STEWART: -- by the --

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

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

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

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

MR. STEWART: Right.

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

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

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

MR. STEWART: Sure.

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

MR. STEWART: Right.

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

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

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

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

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

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

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

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

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

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

MR. STEWART: Yes.

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

because we think this is odd to have it here.

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

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

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

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

MR. STEWART: Could use what --

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

MR. STEWART: Yes.

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. STEWART: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE RESPONDENT

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

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

uniform federal character.

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

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

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

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

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

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

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

I welcome questions.

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

what these incidental powers are.

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

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

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

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

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

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

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

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

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

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

So which ones are you going to say are okay?

MS. BLATT: So --

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

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

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

Of course, states are regulating, but

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

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

MS. BLATT: I'm going to --

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

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

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

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

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

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

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

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

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

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

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

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

functions."

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: But, Ms. Blatt, I

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

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

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

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

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

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

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

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

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

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

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

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

MS. BLATT: Sure. For sure.

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

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

JUSTICE KAGAN: The --
MS. BLATT: -- I'm fine with that.
JUSTICE KAGAN: The state statutes have to be non-discriminatory.
MS. BLATT: Correct.
JUSTICE KAGAN: So, you know, one way you could look at this is, if a state statute is non-discriminatory, how much damage could it really be doing?
MS. BLATT: And I think that's part of the problem, which is what the Franklin case illustrates and what this case illustrates, is the plaintiffs will always say, well, you applied it to your state banks, so what's the problem? And the problem --
JUSTICE KAGAN: That's the question.
MS. BLATT: The problem goes much deeper --
JUSTICE KAGAN: I mean, it -- it seems as though there should be a kind of presumption that if the state is doing it for the state banks, it's not really interfering with bank powers in a way that we should care about. There might be exceptions to that, and that's what the -- the -- the language is designed to

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

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

JUSTICE GORSUCH: Well, I -- I --

MS. BLATT: -- on the origination fee.

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

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

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

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

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

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

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

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

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

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

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

MS. BLATT: Yeah.

JUSTICE GORSUCH: -- that principle.

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

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

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

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

JUSTICE GORSUCH: So from --

JUSTICE KAGAN: But if I understand --

JUSTICE GORSUCH: Oh, please.

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

MS. BLATT: Yeah, but --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: But I'm asking --
MS. BLATT: -- I don't think --
JUSTICE GORSUCH: -- about non-discriminatory state laws. Then what?
MS. BLATT: I don't think any states have argued -- sorry, federal -- national banks have argued disparate impact laws are preempted because they are so --
JUSTICE GORSUCH: But, under your test, why wouldn't they?
MS. BLATT: Well, I mean, we can talk about the theory behind disparate impact probably, but I -- I think it's one of those areas on how you consider, how you look at disparate impact.
JUSTICE GORSUCH: You might -- you might argue those are -- are --
MS. BLATT: Just --
JUSTICE GORSUCH: -- are preempted under your test?
MS. BLATT: I don't think so, but even if they did, it's still -- the line that we're drawing is the line this Court has drawn I think since -- since Anderson and before that, that if you're not changing the attribute -- and I don't

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: I didn't see it.

MS. BLATT: I think it's --

JUSTICE GORSUCH: I'm with Justice Kagan.

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

is the control test that the Second Circuit applied.

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

MS. BLATT: No, because --

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

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

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

MS. BLATT: Then stick with our brief.

(Laughter.)

MS. BLATT: Stick with our brief.

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

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

(Laughter.)

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

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

(Laughter.)

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

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

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

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

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

MS. BLATT: I think our -- yeah.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: -- would preempt.

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

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

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

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

MS. BLATT: So --

JUSTICE ALITO: The relevant text?

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

JUSTICE ALITO: Right.

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

JUSTICE ALITO: Okay. Is what -- is

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

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

JUSTICE ALITO: And "case by case"?

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

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: No.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

Justice Barrett?

JUSTICE JACKSON: I just --

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: -- I just have one thing on your distinction because I'm -- I'm still trying to follow it. You -- you rely on Anderson, and I guess the other case that sort of implicates the same facts as Anderson is the California case --

MS. BLATT: Correct.

JUSTICE JACKSON: -- which you've talked about. And the problem I'm having with your distinction between product or power and the transaction is that in California, the Court describes the law at issue there, which it says is preempted, as a statute that attempts to qualify in an unusual way agreements between national banks and their customers and may cause

them to hesitate to subject their funds to possible confiscation.

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

MS. BLATT: So --

JUSTICE JACKSON: So I don't --

MS. BLATT: Yeah, a hundred percent. And you're -- you're just completely correct. What we're saying is you have the control on the power of the banking product, and there's a second fallback test, which is the undue burden, and that undue burden is the practical impact.

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

consumer and the state.

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Taylor?

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

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

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

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

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

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

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

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

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

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

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

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

And there's -- the third point I would

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

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

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

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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