

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.)
- - - - -

Pages: 1 through 126
Place: Washington, D.C.
Date: February 27, 2024

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

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

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P R O C E E D I N G S

(10:56 a.m.)

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

Mr. Taylor.

ORAL ARGUMENT OF JONATHAN E. TAYLOR

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

6 I welcome the Court's questions.

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

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

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

23 But it didn't give much guidance
24 itself in terms of what "significant interferes
25 with" means, but it did articulate that as the

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

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

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

1 that requires that the OCC examine the law's
2 impact based on substantial evidence --

3 JUSTICE KAGAN: And what does it --

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

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

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

23 JUSTICE KAGAN: I -- I appreciate
24 that, but one thing that we should think about
25 at least in considering whether the practical

1 effect test that you're suggesting is the one
2 that's codified and is the appropriate one --

3 MR. TAYLOR: Mm-hmm. Sure.

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

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

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

24 And what the national bank said in
25 that case, it identified real-world evidence

1 showing the tremendous extent to which that law
2 served as an obstacle to it attempting to accept
3 savings deposits in its business operations, and
4 the -- and the trial court in that case found
5 what is effectively significant interference.

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

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

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

24 I think it would be particularly easy
25 for it to do so here because we have a statute

1 that's been on the books for 50 years. State
2 banks have been complying with it. Most federal
3 banks, it's my understanding, have been
4 complying with it. And, indeed, there was a
5 preemption challenge that was immediately
6 brought, and it failed, and, presumably,
7 national banks were complying with it after
8 that. And so they could look at the data
9 showing the extent to which this minimum
10 interest requirement has caused banks to not
11 offer mortgage escrow services to -- which would
12 be the relevant power, to consumers.

13 JUSTICE KAVANAUGH: Well --

14 MR. TAYLOR: And to -- and --

15 JUSTICE KAVANAUGH: Keep going.

16 Sorry.

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

22 It had before it various proposals
23 that would have been a bright-line test,
24 including, you know, field preemption. That's
25 administrable, but we know that Congress didn't

1 want that. And on the other hand, the
2 Department of the Treasury submitted a proposal
3 that would have made preemption determinations
4 turn entirely on whether the law is
5 discriminatory. That's also administrable, but
6 in the judgment of Congress, that didn't go far
7 enough to provide protection to the bank --
8 banks, and Congress wanted to -- to give banks,
9 as an accommodation, the opportunity in a
10 case-by-case basis to show that there's a
11 significant interference.

12 JUSTICE KAVANAUGH: What about --

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

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

1 MR. TAYLOR: Correct.

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

4 MR. TAYLOR: Agree with that entirely.

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

10 Is that a good way to look at it?

11 MR. TAYLOR: You could put it that
12 way, yes.

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

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

23 JUSTICE KAVANAUGH: Well, let -- let
24 me stop you right there.

25 MR. TAYLOR: Sure.

1 JUSTICE KAVANAUGH: Why not? That
2 sounds like significant interference when
3 it's -- when it's affecting how much -- it's
4 almost putting a tax on the bank to sell the
5 product, which strikes me as a much more
6 significant interference than simply saying you
7 can't use the word "savings" in your
8 advertising, which was the issue in Franklin.

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

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

25 JUSTICE KAVANAUGH: But how did that

1 happen in Franklin?

2 MR. TAYLOR: So the power --

3 JUSTICE KAVANAUGH: Franklin, they
4 could do -- the bank could do everything that it
5 previously -- it just -- did. It just couldn't
6 use the word "savings" in its advertisement,
7 which didn't prevent it from exercising its
8 power.

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

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

22 And there was all kinds of -- there
23 was testimony, there was consumer polling, there
24 was lost sales, there was a significance amount
25 -- amount of data showing the degree to which

1 this prohibition had a real-world effect. And

2 --

3 JUSTICE ALITO: Isn't it -- isn't it
4 true that the New York Court of Appeals, when it
5 upheld the law, said that it had no "seriously
6 harmful effects on national banks"?

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

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

20 MR. TAYLOR: And -- and --

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

1 MR. TAYLOR: Two responses, Justice
2 Alito. I -- the -- if you look at the testimony
3 in that -- in that case, it was clear that
4 consumers had no idea what "interest-bearing
5 account" meant. I mean, there were -- the word
6 "savings" actually mattered to their purchasing
7 decisions, and it had a real-world effect, and
8 that was a law that was discriminatory and put
9 the national banks at a serious competitive
10 advantage -- disadvantage vis-à-vis state banks.

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

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

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

5 MR. TAYLOR: No, it's not bank by
6 bank. That's not how it works in our view. If
7 you look at the statute, it's clear that when
8 the OCC makes preemption determinations, it --
9 it does so on a law-by-law basis, not a
10 bank-by-bank -- basis.

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

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

18 MR. TAYLOR: The ultimate preemption
19 determination --

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

23 MR. TAYLOR: It's a legal question for
24 a court, but it -- because that -- it takes
25 account of the practical effects of the law, you

1 have to know what those effects are. And it's
2 going to be, if the OCC hasn't identified the
3 effects, then it's going to be incumbent on the
4 bank, if there's no statute on point and we're
5 talking about a non-discriminatory law, to
6 explain what those effects are.

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

11 JUSTICE ALITO: Well, but the burden
12 would --

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

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

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

24 JUSTICE ALITO: Right. Okay. All
25 right. And how do you envision this trial

1 taking place? So the -- a district judge, let's
2 say, in the Southern District of New York,
3 Eastern District of New York, wherever, is going
4 to have a trial to determine the effect of this
5 on all national banks operating in New York.

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

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

20 JUSTICE ALITO: Well, I understand
21 that, but I -- you say in your brief, either in
22 your opening brief or in your -- your reply
23 brief -- I think it's in your reply brief. You
24 say this may not even require any evidence.
25 This -- this -- this question could be decided

1 without evidence. Really?

2 MR. TAYLOR: Well --

3 JUSTICE ALITO: It's a factual
4 question or at least it's a heavily factual
5 question. How is it going to be decided without
6 evidence?

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

18 JUSTICE ALITO: The matter of economic
19 logic?

20 MR. TAYLOR: Well --

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

25 MR. TAYLOR: If you -- if you -- if --

1 if you look at page 15 of our reply brief, we
2 identify some cases involving preemption regimes
3 that affect entire industries, airline industry,
4 a motor carry industry, you know, ERISA, you
5 name it, prescription drugs, and it is often the
6 case in -- in -- in, you know, those -- those
7 contexts that there is a -- a -- a -- a -- a --
8 a factual showing that needs to be made. And
9 sometimes this Court, included in the Morales
10 decision, for example, has resolved the
11 preemption question even though it turns on
12 significant effect based on economic logic.

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

19 JUSTICE KAVANAUGH: I don't think --

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

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

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

3 JUSTICE KAVANAUGH: And Franklin, I
4 think, is kind of our North Star here at least
5 as I've unpacked the case.

6 MR. TAYLOR: Right. But -- but -- but
7 I think Franklin, you could either read it as
8 being a case about significant interference
9 based on the record, as I pointed out, or I
10 think what this Court said is it just engaged in
11 statutory interpretation.

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas, anything further?

1 Justice Alito?

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

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

6 JUSTICE ALITO: They -- they -- they
7 said that the -- that the bank has, the national
8 bank has a certain power, and the state
9 conditions the exercise of that national power
10 on compliance with a state requirement, and
11 that's enough to prove that there's preemption.
12 That's what I just understood you to say.

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

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

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

24 JUSTICE ALITO: But I -- I thought you
25 were saying -- and, again, correct me if I'm --

1 I misunderstood you because it's important to my
2 thinking about this -- that the issue -- that
3 Franklin Bank can be understood as deciding this
4 issue without examining the empirical question
5 of the extent to which there was an impact on
6 the operation of the bank. I thought that's
7 what you said.

8 MR. TAYLOR: I guess I would put it a
9 little -- little bit differently than, Justice
10 Alito. I think that the Court, in its opinion,
11 it notes the -- the -- the record that had been
12 amassed on this question as to the practical
13 consequences of the law, and I think that record
14 gave it some comfort and confirmed why it was
15 significant that Congress would have used the
16 statutory term "savings."

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

24 JUSTICE ALITO: All right. Thank you.

25 MR. TAYLOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

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

7 MR. TAYLOR: Mm-hmm.

8 JUSTICE SOTOMAYOR: You're asking us
9 to reverse.

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

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

25 JUSTICE SOTOMAYOR: I don't know

1 whether I --

2 MR. TAYLOR: -- the statutory --

3 JUSTICE SOTOMAYOR: I -- I -- I mean

4 --

5 MR. TAYLOR: I -- but I don't think --

6 JUSTICE SOTOMAYOR: -- the statute
7 doesn't speak in terms of practical effects. It
8 talks about preventing or significantly
9 interfering with the exercise of a national bank
10 power. So I do think that there is a difference
11 between practical effect and that language.

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

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

23 JUSTICE SOTOMAYOR: So your -- at what
24 point -- you mentioned earlier that the OCC
25 could decide some of these preemption issues

1 because, under your take of this law now, that
2 national banks -- all state laws would
3 apparently apply to national banks, unless and
4 until those banks obtain final judgments of
5 preemption state by state, correct?

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

8 JUSTICE SOTOMAYOR: Now the other side
9 is saying that's an alarming unpredictability.
10 And some of my colleagues are concerned about
11 that. Why don't you address that straight on
12 and -- but you mentioned in your opening that
13 you thought the OCC could do it. Well, the OCC
14 has done it here. There's a question of whether
15 they've applied the right standard in doing it.

16 MR. TAYLOR: Yeah.

17 JUSTICE SOTOMAYOR: But they have done
18 it.

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

25 But if -- I -- I think it would be

1 appropriate for a court on remand to look at
2 what the OCC has said about the effect of this
3 law. And you'll find that there's not much
4 there in -- in either the 2011 rulemaking or the
5 2004 rulemaking or in the amicus brief that the
6 OCC submitted below. But we think a -- you
7 know, it would be appropriate for a court to
8 consider that as part of the analysis.

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

23 And so then you've got the question of
24 significant interference. You could, you know,
25 point to Anderson and Franklin, as we have been

1 discussing, but the OCC has a role to play there
2 too. And the OCC does have expertise, and to
3 the extent that it thinks a particular state law
4 is -- is very troubling and poses a significant
5 interference, it can endeavor to explain why in
6 a rulemaking, consistent with the statute, and
7 courts can look at that, and to the extent that
8 it's persuasive, they can defer to it. And that
9 gives the -- you know, banks the kind of, you
10 know, predictability that they crave.

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

14 MR. TAYLOR: The statute requires it.

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

17 MR. TAYLOR: Oh, well --

18 JUSTICE SOTOMAYOR: -- to start off.

19 MR. TAYLOR: If -- I -- we -- we
20 certainly think that you should read the statute
21 and apply it as written.

22 JUSTICE SOTOMAYOR: Okay.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Could you give me an
25 example of a non-discriminatory state law that

1 would be preempted as a significant
2 interference?

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

9 JUSTICE KAGAN: Yeah. So you've
10 separated that out as a case that poses a -- a
11 clear conflict.

12 MR. TAYLOR: Correct.

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

22 MR. TAYLOR: No. And -- and, indeed,
23 that was the Treasury Department's proposal,
24 that it -- that it would -- that preemption
25 would just turn on whether a state law was

1 discriminatory, and if it wasn't discriminatory,
2 then it wouldn't be preempted.

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

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

10 MR. TAYLOR: Yeah. And so --

11 JUSTICE KAGAN: -- statutes.

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

19 Then -- but, if you're at the point of
20 -- substantial -- or significant interference,
21 rather, that's a question of degree, and it's
22 very difficult to answer that on the abstract.
23 I'd want to know whether there's a federal --
24 you know, what the federal statutory scheme,
25 what the regulatory scheme is, what the OCC has

1 said about it, what the practical on-the-ground
2 impact is. And it's ultimately a judgment call.
3 It's a question of degree. And I --

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

8 MR. TAYLOR: I -- I don't -- nothing
9 comes immediately to mind. And -- but I -- I
10 think, you know, you could imagine if a state
11 were to say you can't have mortgage escrow
12 accounts. Well, of course, that would -- as
13 applied to, you know, the covered accounts, they
14 would -- it would pose a square conflict with
15 the federal statute. But, if you totally
16 disabled states -- national banks from being
17 able to exercise a particular power, that -- you
18 know, that that's a "prevents" case.

19 But the question of significant
20 interference is necessarily one of degree, and
21 it's tough to know in the abstract exactly when
22 it would be satisfied. I need to know what --
23 what the actual on-the-ground impact is and the
24 -- you know, the -- the -- the extent to which
25 that significantly interfered with the national

1 bank's exercise of the particular power at issue
2 in the case --

3 JUSTICE KAGAN: Thank you.

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

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: I think you said
10 it's a judgment call and a matter of degree.
11 Would a 10 percent state law, would that be
12 significant interference?

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

20 JUSTICE KAVANAUGH: I understand.

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

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

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

10 JUSTICE KAVANAUGH: If it's a judgment
11 call, who's the -- we're making the judgment
12 call or the court of appeals?

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

22 JUSTICE KAVANAUGH: And I guess I'm
23 going to go back to Franklin then and say, well,
24 we're not just doing this -- we're not totally
25 at sea when we have to do this under your

1 approach. Franklin says some limits on your
2 advertising and how you describe your product.
3 That is significant interference. And you agree
4 that that's correct?

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

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

17 MR. TAYLOR: Well -- well, then Bank
18 --

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

23 MR. TAYLOR: Well, then -- then Bank
24 of America, it has -- you know, would be able
25 to, you know, try to carry its burden of

1 establishing that standard on remand.

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

5 MR. TAYLOR: Yeah.

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

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

22 And I think, you know, what made --
23 you could -- might think about that as posing a
24 First Amendment problem today. It was also a
25 discriminatory law that gave certain state

1 institutions the ability to use that word. And
2 so it posed a number of distinct problems, but I
3 think ultimately too it posed a -- a -- a
4 conflict with the text of the federal statute
5 because the -- you know, the state in that
6 scenario thought to significantly interfere with
7 the exercise and express statutory power that
8 Congress granted. So --

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

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

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

22 MR. TAYLOR: The way the Bank of
23 America articulates the power, we're not
24 disputing their articulation of the power for
25 purposes of, you know, this Court's decision, is

1 the -- the -- the power to offer mortgage escrow
2 accounts to consumers.

3 JUSTICE KAVANAUGH: Mm-hmm.

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

7 JUSTICE KAVANAUGH: And do you still
8 think McCulloch versus Maryland was correctly
9 decided?

10 MR. TAYLOR: Yes. We're -- we have no
11 issue with McCulloch, and it goes a long way to
12 answer that question.

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

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

19 So that case involved a tax, a
20 discriminatory tax on the Second Bank of the
21 United States. And I think, at that time, the
22 Second Bank of the United States functioned more
23 like the Federal Reserve Bank, and it was -- it
24 had a really -- it had a public-facing
25 component. And it doesn't -- you know, modern

1 national banks don't really resemble the Second
2 Bank of the United States.

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

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Counsel, you're
13 drawing a distinction which I also saw, excuse
14 me, in your brief between express powers and
15 incidental powers. Can you just explain to me
16 why that matters? And -- and I'll -- I'll tell
17 you kind of where I'm going with it or why I'm
18 -- I'm thinking about it.

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

1 more fact-specific inquiry.

2 Am I understanding your position?

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

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

11 And so I think the reason why we're
12 focusing on that is preemption questions
13 typically turn on what Congress says in the text
14 of the statute, and so you want to look at the
15 text of the statute.

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

21 Now what's interesting here is the
22 National Bank Act actually expressly grants
23 incidental -- incidental powers. And so there
24 is an express grant of authority for -- to
25 national banks to engage in incidental powers,

1 but the ultimate question I -- I think -- has to
2 focus on what Congress has -- has said in the
3 text of a statute.

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

13 And so it was about significant --
14 interference. And I don't read Barnett Bank to
15 be applying this kind of fact-specific inquiry
16 that you're talking about.

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

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

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

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

12 To the contrary, even the bank in --
13 in Barnett Bank at oral argument conceded that a
14 whole bunch of state regulations would be
15 appropriate as to the regulation of insurance,
16 including ensuring that agents of insurance are
17 licensed at the state level.

18 And so I think -- I don't read this
19 Court's opinion to -- to suggest that practical
20 effects aren't -- aren't -- relevant. To the
21 contrary, I think, by using significant
22 interference, the Court understood that
23 practical effect -- effects would matter, and
24 what it was trying to capture is laws that even
25 if they didn't completely prohibit the exercise

1 of the national banks' powers, they would do
2 something that would raise the same kind of
3 concern in practical effect, and the first case
4 the Court cited after it announced that standard
5 was Anderson, which can only be understood as
6 turning on the practical effect of the law.

7 JUSTICE BARRETT: Thanks.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: So I see the -- the
11 standard, "significantly interferes," in the
12 actual text of the statute, and I'm trying to
13 understand whether this really is sort of an
14 unusual or unworkable assignment for the courts.

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

19 So last term, in Roth, we looked at a
20 statute that asks whether religious
21 accommodation would impose a "undue hardship" on
22 the conduct of the employer's business. RFRA
23 imposes a "substantial burden test." So isn't
24 this sort of in the nature of statutory
25 standards of this kind and the Court looks at

1 them and we make a decision, right?

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

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

11 So, you know, the bank says we are
12 pointing to this preemption provision and we say
13 that it's -- that -- that what is going on here
14 with this state law significantly interferes
15 with our powers, and then I guess they go on to
16 say how, how is that happening.

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

25 Is that right?

1 MR. TAYLOR: That's right.

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

9 Am I right about that?

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

11 JUSTICE JACKSON: And so, similarly,
12 if it significantly interferes, if they say it's
13 a significant interference, again, we're in the
14 realm of evidence, and we're doing this on a
15 case-by-case basis because that's what the
16 statute says you have to do?

17 MR. TAYLOR: Correct.

18 JUSTICE JACKSON: All right. Thank
19 you.

20 MR. TAYLOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Stewart.

24

25

1 ORAL ARGUMENT OF MALCOLM L. STEWART
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING VACATUR

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

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

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

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

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

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

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

25 I welcome the Court's questions.

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

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

12 I would point out that the Court in
13 Barnett Bank, in the sentence immediately
14 preceding the one that we've been focused on,
15 said the prior cases, the ones that have found
16 preemption, take the view that normally Congress
17 would not want to -- states to forbid or to
18 impair significantly the exercise of a power
19 that Congress explicitly granted.

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

1 difference.

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

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

15 I think Mr. Taylor was also alluding
16 to the Court's decision in Morales, which
17 involved the Airline Deregulation Act, in which
18 the Court explained how the -- the state false
19 advertising law would impair the airlines'
20 ability to engage in the pricing practices that
21 they wanted to engage in. And the Court didn't
22 make quite clear exactly where the information
23 about the pricing practices came from, but it
24 didn't appear to come from a trial record.

25 So there may be kind of sources of

1 information other than trial evidence that would
2 allow the --

3 JUSTICE GORSUCH: Mr. --

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

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

11 It's interesting, I -- I -- I'm not
12 sure what to make of this, but in the 13 years
13 or so since Dodd-Frank, we don't have an OCCA
14 rule on escrow accounts, except for the one
15 issued in 2011 immediately after Dodd-Frank in
16 which it reaffirmed its rule banning, as I
17 understand it, any regulation by states on
18 escrow accounts under an "obstruct or impair"
19 standard that predated Dodd-Frank, it purported
20 to ratify what it had done before under the old
21 law.

22 And -- and as I took it from a couple
23 of cryptic footnotes in your brief, you're not
24 asking us to defer to that regulation. In fact,
25 you're asking -- you -- you seem to suggest that

1 it's inconsistent with the law and entitled to
2 no respect.

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

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

8 JUSTICE GORSUCH: The other way.

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

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

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

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

25 MR. STEWART: And in --

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

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

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

17 But, if the OCC tried to do it that
18 way, it would run into the provisions of
19 Dodd-Frank that say, when the OCC does these
20 determinations, it considers the impact of the
21 state law --

22 JUSTICE GORSUCH: In fact, we have
23 exactly the regulation. You say if they did
24 this. They did it. They said there are no
25 escrow regulations that are permissible under

1 state law. They're all preempted. But you're
2 not defending that regulation; you're disavowing
3 it. You've flip-flopped positions on it.

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

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

19 JUSTICE KAVANAUGH: If it -- if it has
20 expertise, why are you disagreeing with its
21 longstanding position?

22 MR. STEWART: I think the two reasons
23 -- the -- well, two or three reasons. The first
24 is that, as I say, we think that the text of
25 Dodd-Frank manifests a disapproval by Congress

1 of the way that OCC had been doing these
2 determinations. The text says case-by-case
3 determinations, and it's really the opposite of
4 an OCC rule that says here are many categories
5 of state laws that can't be enforced at all.

6 JUSTICE KAVANAUGH: Even though the
7 key members said otherwise?

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

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

15 MR. STEWART: Okay. They -- they had
16 drafted the Senate version of the preemption
17 provision, and the pre -- the Senate version
18 contained a general reference to the legal
19 standard in Barnett Bank but didn't use the
20 phrase "prevents or significantly interferes
21 with."

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

25 JUSTICE KAVANAUGH: I interrupted you.

1 Keep going with why you changed positions. So
2 one is you -- your reading of the text and
3 history.

4 MR. STEWART: That -- that -- that
5 they indicate that Congress wanted the OCC to
6 redo this.

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

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

24 And so it seemed clear that Congress
25 was happy with the way that OCC had been doing

1 things in all respects, other than preemption,
2 but not with the -- the way it had been doing --

3 JUSTICE KAGAN: Mr. --

4 MR. STEWART: Yes?

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

9 MR. STEWART: I -- I -- we -- we don't
10 have a concluded view. Certainly, as Mr. Taylor
11 points out, this is something that state banks
12 have been complying with, apparently, without
13 material impairment.

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

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

20 CHIEF JUSTICE ROBERTS: Sure.

21 JUSTICE KAGAN: Can I interpret that
22 as -- as suggesting that you're skeptical that
23 it's a significant interference?

24 MR. STEWART: Yes.

25 JUSTICE KAGAN: Okay.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas, anything further?

3 JUSTICE THOMAS: No.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

24 JUSTICE ALITO: Well, I mean, the --
25 most of those -- I -- I can't remember the whole

1 list. Most of those did not involve economic
2 determinations.

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

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

19 I -- I -- I find it hard to understand
20 how an empirical question like that can be
21 decided without evidence, which would require
22 discovery and perhaps testimony by experts. It
23 would require individual district court judges
24 to make the kind of -- I mean, certainly when
25 the OCC does this, they call -- they -- they can

1 call on a lot of economic expertise and
2 knowledge of the banking industry. Every
3 district judge in the country is potentially
4 going to have to make the same kind of
5 determination.

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

16 What if other states have -- require
17 2 percent interest and the Second Circuit says
18 one thing and the Fifth Circuit or the Tenth
19 Circuit or whatever says something else? And
20 then you have issues of collateral estoppel.

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

25 MR. STEWART: I -- I -- I guess for

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

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

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

22 JUSTICE ALITO: Right. Yeah, no, I --
23 I understand that. But all you've said about
24 the question -- put non-discrimination off the
25 table because that's not what's at issue. All

1 -- all you've said is that there are other
2 statutes that impose a -- a similar burden on
3 the court. And, I mean, the one I remember from
4 Justice Jackson's question is the undue burden
5 standard in Title VII. That's quite a bit
6 different.

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

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

10 JUSTICE ALITO: -- that involve
11 economic determinations?

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

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

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

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

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

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

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

23 Now you point out Anderson, which it
24 cost them money too. So do you have an argument
25 as to why his saying that Franklin sets a sort

1 of maximum or a minimum is a wrong way to look
2 at this?

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

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

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

22 JUSTICE SOTOMAYOR: Well, then -- then
23 answer why it's not a significant interference
24 or how do you measure that when it's costing the
25 bank money?

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

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

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

23 JUSTICE SOTOMAYOR: And -- and if --
24 if they can't earn any money on this money and
25 they have to pay out, that might be?

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

4 JUSTICE SOTOMAYOR: Okay.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

1 switch like one day the law applies and the next
2 day, 10 years later, it doesn't?

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

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

23 But the Court has also recognized
24 sometimes states will regulate something else,
25 but the regulation of something else will have a

1 predictable spillover effect on the airline's
2 ability to pursue the rates, routes, and
3 services that they want, and it's in those cases
4 at the -- the order of preemption where the
5 courts have been forced into pragmatic
6 inquiries.

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

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

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

25 And the -- by -- by adding prong B of

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

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 Justice Kavanaugh?

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

1 power ... it contains no 'indication' that
2 Congress intended to subject that power to local
3 restriction."

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

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

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

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

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

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

14 JUSTICE KAVANAUGH: Two more
15 questions. Apologies.

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

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

25 JUSTICE KAVANAUGH: How do you respond

1 to that?

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

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

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

23 MR. STEWART: Yes. I mean, we -- we
24 certainly have not seen anything up to this
25 point that said -- suggests that a bank could

1 not pay this rate --

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

6 MR. STEWART: Well --

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

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

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

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

23 MR. STEWART: Statute-by-statute
24 basis. And the -- the statute says the OCC can
25 extend its inquiry beyond the specific state

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

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

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

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

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

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

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

7 JUSTICE BARRETT: Yes.

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

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

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

1 to a --

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

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

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

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

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

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

24 MR. STEWART: Yeah. Yes.

25 JUSTICE BARRETT: But I took you to be

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

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

7 JUSTICE BARRETT: Yeah.

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

15 JUSTICE BARRETT: Of course.

16 MR. STEWART: -- by the --

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

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

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

4 JUSTICE BARRETT: Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

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

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

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

1 MR. STEWART: Right.

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

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

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

10 MR. STEWART: Sure.

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

25 MR. STEWART: Right.

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

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

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

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

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

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

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

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

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

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

18 MR. STEWART: Yes.

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

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

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

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

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

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

22 MR. STEWART: It could use what --

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

1 MR. STEWART: Yes.

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

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

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. STEWART: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Blatt.

17 ORAL ARGUMENT OF LISA S. BLATT

18 ON BEHALF OF THE RESPONDENT

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

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

1 unduly burden national banks, destroying their
2 uniform federal character.

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

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

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

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

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

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

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

22 I welcome questions.

23 JUSTICE THOMAS: Ms. Blatt, do we
24 treat express banking powers the same as
25 incidental banking powers? It would seem that

1 you would have to somehow have a way to fathom
2 what these incidental powers are.

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

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

16 JUSTICE THOMAS: Well, I agree with
17 you on that. And did -- in Franklin, though, I
18 think it was statutory, right? It was express.

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

24 MS. BLATT: That's correct. I mean,
25 13 state laws require it. Since 1973, I guess,

1 we've had the Real Estate Settlement Practice
2 Act that never required interest. It's got
3 40,000 words of regulations, 17 interpretive
4 statements, and 10 appendices regulating escrow
5 accounts and federal law, none of it requires
6 interest.

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

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

1 mean by that is we look to see is there some
2 indication that Congress wanted the -- wanted to
3 subject the power of national banks to local
4 conditions.

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

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

13 MS. BLATT: So --

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

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

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

1 Of course, states are regulating, but
2 what is being controlled? Is it the national
3 banking power or is it the financial transaction
4 and the words of that definition with the
5 consumer? And when a state dictate --

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

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

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

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

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

1 that it only changed the identity of the account
2 holder who had the lawful right to demand
3 payment, i.e., the deposit account.

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

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

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

25 The National Bank Act was passed in

1 1864. In 1870, your first case that said state
2 law has room to play on the dual banking system
3 said state contract law controls. And then
4 you've had case after case making a dividing
5 line between protecting the -- the banking power
6 at issue, these federally authorized -- confers
7 powers, and -- on the one hand, and state law,
8 where it can creep in when you're talking about
9 the interaction -- transactions with consumers.

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

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

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

1 burden on the performance of the banks'
2 functions."

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

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

20 There is a second undue burden test
21 that looks at the practical impact, but the --
22 the -- the delta between the two sides is we
23 think that can be as a matter of law and looks
24 -- it looks at a patchwork across 50 states.
25 The California case said it was preempted

1 without any factual record.

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

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

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

1 Barnett Bank, not to look at significant effect.

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

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

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

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

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

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

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

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

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

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

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

23 MS. BLATT: Well, you have, since the
24 Reagan administration, a former OCC comptroller
25 telling you it would create a seismic sea change

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

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

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

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

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

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

18 MS. BLATT: Sure. For sure.

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

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

1 means. I mean, I'm --

2 JUSTICE KAGAN: The --

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

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

6 MS. BLATT: Correct.

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

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

17 JUSTICE KAGAN: That's the question.

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

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

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

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

20 JUSTICE GORSUCH: Well, I -- I --

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

22 JUSTICE GORSUCH: -- I -- I -- I
23 totally get that impulse that national banks
24 don't want to have to deal with patchwork state
25 laws, but the presumption, the baseline that

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

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

12 JUSTICE GORSUCH: You say "upside
13 down," but I -- I'm -- that's what the statute
14 says.

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

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

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

1 JUSTICE GORSUCH: You mentioned
2 earlier that you thought state lending laws with
3 respect to race, religion, and others are not
4 preempted. Why?

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

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

12 MS. BLATT: Yeah.

13 JUSTICE GORSUCH: -- principle.

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

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

1 So I think the OCC has correctly taken
2 the view since 2004 that there is no --
3 there's -- there's simply no power to --

4 JUSTICE GORSUCH: So from -- from --

5 JUSTICE KAGAN: But if I understand --

6 JUSTICE GORSUCH: Oh, please.

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

17 MS. BLATT: Yeah, but --

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

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

1 changing the attributes of the product of
2 service? And --

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

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

10 JUSTICE GORSUCH: A four-year-old, a
11 24-year-old, whatever, and, yes, they're --

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

14 JUSTICE GORSUCH: And -- and just --
15 just a second, counsel.

16 MS. BLATT: Sure.

17 JUSTICE GORSUCH: There are going to
18 be a patchwork of states and -- with different
19 judgments, and you're going to disagree with
20 some of them. And I -- and all of them have to
21 do with the core banking powers of who you may
22 lend to, who you may open an account for, what
23 interest you can charge and all of that. And, I
24 -- I -- I -- you -- you know -- it seems to me
25 -- not to put too fine a point on it, that

1 there's a bit of wanting your cake and eating it
2 too here.

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

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

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

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

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

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

8 JUSTICE GORSUCH: But I'm asking --

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

10 JUSTICE GORSUCH: -- about
11 non-discriminatory state laws. Then what?

12 MS. BLATT: I don't think any states
13 have argued -- sorry, federal -- national banks
14 have argued disparate impact laws are preempted
15 because they are so --

16 JUSTICE GORSUCH: But, under your
17 test, why wouldn't they?

18 MS. BLATT: Well, I mean, we can talk
19 about the theory behind disparate impact
20 probably, but I -- I think it's one of those
21 areas on how you consider, how you look at
22 disparate impact.

23 JUSTICE GORSUCH: You might -- you
24 might argue those are -- are --

25 MS. BLATT: Just --

1 JUSTICE GORSUCH: -- are preempted
2 under your test?

3 MS. BLATT: I don't think so, but it
4 -- even if they did, it's still -- the line that
5 we're drawing is the line this Court has drawn I
6 think since -- since Anderson and before that,
7 that if you're not changing the attribute -- and
8 I don't think it changes the loan attribute to
9 say is the person black or white or green. It's
10 still a loan with the same interest rate, the
11 same term.

12 If you say state law says I don't want
13 national banks paying less than 2 percent or
14 3 percent or 4 percent on savings accounts or no
15 mortgage loans that are under 29 months and --
16 and 10 months, it's just the product. That is
17 literally the -- the product.

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

25 JUSTICE JACKSON: And whether or not

1 you have to pay interest on the escrow account
2 does or does not have something to do with the
3 consumer walking in?

4 MS. BLATT: Nothing. It's the nature
5 of the product. It's the interest rate on the
6 loan. It's no different than -- there's plenty
7 of state laws that control, you know, things
8 like the term of the loan, what's the maximum
9 amount you can take out on a mortgage loan.
10 Those are all -- those are all preempted, yet
11 states regulate that for state banks.

12 This has been -- I mean, again, we've
13 talked about the OCC. This has been the law
14 since 1983 for all real estate but for things
15 like escrow. The escrow regulation came in in
16 2004.

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

23 In terms of how much money, I mean,
24 these are very small dollar amounts. Bank of
25 America put in its brief and it had evidence in

1 the Lusnak, I think it's the Lusnak how I
2 pronounced it, it doesn't earn interest on these
3 accounts and it costs a lot of money to maintain
4 them.

5 So I don't think it's so much that
6 it's -- again, I -- I don't know what the
7 factual showing would be, but I do know the
8 other side would just say New York banks comply
9 with it, so it's -- it's never going to be
10 preempted under --

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

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

22 MS. BLATT: I think it would probably
23 fall on the no, the -- the state can't if you --
24 depends on how broad you interpret the sort of
25 the services associated with it. I will say

1 that there are state laws that regulate, you
2 know, how the banking statement has to look,
3 what kind of receipts you have to have.

4 If you knew the amount of federal
5 regulations that are just so exhaustive on this
6 that if banks had to comply with 50 different
7 kinds of patchwork of every law on that, but
8 sort of seeing who the bank -- meeting the bank
9 president seems to me similar on, you know, how
10 the bank -- how the banking statement has to
11 look.

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

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

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

25 MS. BLATT: But it works for every

1 case that's been addressed by OCC's regulation
2 since the 2000s. I mean, this is not -- OCC
3 goes through a laundry list of preempted, types
4 of preempted. They all go to the banking
5 product. They go to the mortgage loan. They --

6 JUSTICE GORSUCH: Well, the government
7 has disavowed the -- that regulation and said
8 it's inconsistent with the statute. So I don't
9 know much -- how much traction that gets you.

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

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

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

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

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

1 JUSTICE GORSUCH: I didn't see it.

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

3 JUSTICE GORSUCH: I'm with Justice
4 Kagan.

5 MS. BLATT: -- I think that's fair on
6 the product, we may have only mentioned the
7 product thing once. The main -- the main test
8 is the control test that the Second Circuit
9 applied.

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

12 MS. BLATT: No, because --

13 JUSTICE GORSUCH: The -- the test
14 you're asking us to adopt. And wouldn't it, you
15 know, this product versus consumer test itself
16 generate a lot of litigation over border cases?

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

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

5 MS. BLATT: Then stick with our brief.
6 (Laughter.)

7 MS. BLATT: Stick with our brief.

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

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

13 (Laughter.)

14 JUSTICE KAGAN: Well, your brief --
15 your -- your brief -- the problem is that your
16 --

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

19 (Laughter.)

20 JUSTICE KAGAN: I mean, the problem is
21 that your brief doesn't explain fair lending
22 laws. And in a way --

23 MS. BLATT: Oh.

24 JUSTICE KAGAN: -- what you're trying
25 to do is to gerrymander a world in which fair

1 lending laws, which everybody thinks kind of
2 have to apply to national banks, apply to
3 national banks, but nothing else does.

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

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

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

23 JUSTICE GORSUCH: It's pretty central.
24 Don't -- it's not -- it's not an incidental
25 question. It's -- it's what's preempted. And

1 your brief says everything's preempted, control.

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

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

7 MS. BLATT: So the amount of
8 non-preempted laws is the exact same in the
9 brief, the fair lending and all generally
10 applicable laws that go to how you form
11 contracts. The only one I add -- and Anderson.
12 The only one I added is the fraud laws. I don't
13 think those are in the briefs, but I think they
14 follow. So, if you don't want to consider the
15 fraud laws, that's fine.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 Justice Alito?

24 JUSTICE ALITO: Well, I -- I share the
25 difficulty that's been expressed in

1 understanding the -- the difference between a
2 state law that affects a national bank's
3 exercise of the banking power and a state law
4 that regulates the way in which the bank
5 exercises that power in dealing with its
6 customers.

7 I mean, maybe -- is there some other
8 way to express this? Is there something else,
9 if we look at the instances that have been held
10 to fall on the latter side of that line, some
11 other characteristic that could be identified
12 that would explain the difference?

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

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

24 If you wanted the case, it would be
25 Anderson. Anderson talks about it is just a

1 change in the identity of the -- it's no
2 different than if you had like a -- a
3 garnishment or a missing person, but it doesn't
4 affect the underlying function or powers of the
5 bank. And this is a loan. This is literally
6 like the most important thing they do other than
7 take deposits.

8 JUSTICE ALITO: But we are -- there --
9 there is the problem that -- and you've provided
10 an answer, well, I'll have to think about it, as
11 to why your interpretation doesn't preempt
12 everything. But there's the problem on the
13 other side that Mr. Taylor's argument seems to
14 preempt nothing.

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

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

24 JUSTICE ALITO: -- preempts.

25 MS. BLATT: -- my position better is

1 because I think I've got the status quo on my
2 side. What they have is that Congress was
3 really angry at OCC. But there's no suggestion
4 in the legislative history or anything else that
5 they wanted to create all this massive
6 stability.

7 This is a time of the great recession.
8 Like the notion that they wanted to impose on
9 every national bank some query of we no longer
10 know whether the laws of 50 states apply to
11 every single thing we do, without anyone
12 noticing, it just seems to me that -- that this
13 is a -- as what the former comptroller brief
14 said, it would be a sea change.

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

19 MS. BLATT: So --

20 JUSTICE ALITO: The relevant text?

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

23 JUSTICE ALITO: Right.

24 MS. BLATT: -- we've talked about. If
25 we want to talk about "significantly interfere,"

1 I think the word "significant" does some work
2 because it does -- it does a significant amount
3 of work because not any law that could be said
4 to interfere with the banking power, we've
5 talked about the fair lending laws, talked about
6 the age requirements, the writing requirements,
7 it has to be significant and it has to go to
8 the, you know, authorized federal power.

9 JUSTICE ALITO: Okay. Is -- is what
10 -- is the thing that's codified the words taken
11 from Barnett Bank, "significantly interferes,"
12 et cetera, or is it the holding of Barnett Bank?
13 Is it how Barnett Bank itself understood those
14 words?

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

20 JUSTICE ALITO: And "case by case"?

21 MS. BLATT: "Case by case" refers to
22 the OCC in terms of their saying, if you're
23 going to proceed by order or regulation, you'd
24 have to just look at escrow laws because it has
25 to be a substantial -- I mean, you might have a

1 debate about what's substantially equivalent in
2 escrow laws. But "case by case" is not
3 referring to facts. It's referring to you can't
4 just say we want to preempt everything on
5 mortgage loans. You have to look at, like, you
6 know, escrow, down payment, maximum, you have to
7 just go kind of law by law. But it's talking
8 about the OCC.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: No.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 Justice Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

17 JUSTICE JACKSON: I just --

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

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

1 MS. BLATT: Correct.

2 JUSTICE JACKSON: -- which you've
3 talked about. And the problem I'm having with
4 your distinction between product or power and
5 the transaction is that in California, the Court
6 describes the law at issue there, which it says
7 is preempted, as a statute that attempts to
8 qualify in an unusual way agreements between
9 national banks and their customers and may cause
10 them to hesitate to subject their funds to
11 possible confiscation.

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

18 MS. BLATT: So --

19 JUSTICE JACKSON: So I don't -- I'm --
20 I'm --

21 MS. BLATT: Yeah, a hundred percent.
22 And we're -- we're -- you're -- you're just
23 completely correct. What we're saying is you
24 have the control on the power of the banking
25 product, and there's a second fallback test,

1 which is the undue burden, and that undue burden
2 is the practical impact.

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

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

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

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Rebuttal, Mr. Taylor?

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

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

8 My friend says that the statute
9 contains two different tests, one for when
10 states dictate the attributes of the product or
11 service, which I think she said is preempted,
12 preempted, preempted, and a second undue burden
13 test for some other category of laws.

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

21 Now they read 30 words of the text of
22 the statute, which they say is a love letter to
23 Barnett Bank, as excising the very standard that
24 is codified and is nullifying seven pages of
25 their statutory appendix, which is the entire

1 statute, so that the statute would have no
2 real-world effect.

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

9 But it's not an exotic provision,
10 Justice Kagan. And if you look at page 15 of
11 our reply brief, this Court has actually adopted
12 a significant impact test. That's the word this
13 Court has used, even though it's not in the text
14 of the statute, in the "related to" cluster of
15 -- of cases. And this Court made that up as an
16 administrable line. And if it's comfortable
17 with that as the line when it's not in the
18 statute, then it should be comfortable with that
19 as the line when it is in the statute.

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

25 But, Justice Alito, that doesn't mean

1 that that is the entire test, just like it would
2 have been under the Treasury Department. You
3 still have laws that conflict, as in Barnett
4 Bank, and you still have laws that -- where
5 there's a real significant interference.

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

11 And there's -- the third point I would
12 make is there's still a role for the OCC to play
13 here. It can do the job that Congress had
14 expected it to do if -- if -- if there is a real
15 problem, like my other -- my friend on the other
16 side claims.

17 And their position that this would sow
18 mayhem is pretty offensive to federalism. The
19 idea is that nationwide companies might have to
20 comply with non-discriminatory state laws that
21 don't conflict with the text of a statute in the
22 states where they do business and that they
23 should be entitled to preempt those statutes as
24 a matter of law without having to show
25 significant interference. And I think that's

1 just inconsistent with the way this typically
2 approaches questions under the Supremacy Clause.

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

12 Thank you very much.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

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

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Official

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