No. 18-___

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DONALD M. LUSNAK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. LONG, JR.
Counsel of Record
MARK W. MOSIER
ANDREW SOUKUP
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
rlong@cov.com

Counsel for Petitioner

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QUESTIONS PRESENTED

The National Bank Act created a system of federally-chartered national banks that derive their banking powers from federal law and are extensively regulated by the federal government. This Court has long held that a national bank's federal banking powers are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996). The Office of the Comptroller of the Currency ("OCC"), the primary regulator of national banks, has promulgated regulations providing that national banks may exercise their real-estate lending powers without regard to certain state banking laws, including state laws regulating the terms of credit and mortgage loan escrow accounts. *See* 12 C.F.R. § 34.4(a)(4), (6). The Ninth Circuit nevertheless held that California can compel national banks to comply with a state law requiring payment of interest at a specified minimum rate on mortgage loan escrow accounts.

The questions presented are:

1. Whether the National Bank Act preempts state laws regulating national bank loan terms, such as California's law requiring payment of interest on mortgage loan escrow accounts.

2. Whether the Ninth Circuit erred in disregarding OCC regulations concerning the applicability of state real-estate lending laws to national banks.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bank of America, N.A. is an indirect, wholly owned subsidiary of the publicly-traded Bank of America Corporation. Bank of America Corporation has no parent company and no publicly-traded corporation owns 10% or more of Bank of America Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank of America, N.A. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision (App. 1a–22a) is reported at 883 F.3d 1185. The district court's decision (App. 23a–46a) is unreported. The court of appeals' order denying rehearing en banc (App. 47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2018. A timely petition for rehearing en banc was denied on May 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 48a–53a.

INTRODUCTION

The Ninth Circuit held in this case that states (and, by extension, local governments) may directly regulate national banks' mortgage lending activity by requiring the payment of interest on mortgage loan escrow accounts and by specifying a minimum interest rate. The court of appeals' decision is of exceptional importance to the national banking system and cannot be squared with the decisions of this Court and other courts of appeals applying preemption principles to national banks. The Court should grant certiorari to review the decision before it causes the disruption and divergent regulation that Congress sought to avoid when it enacted the National Bank Act.

This is not just petitioner's view of this case. It is also the view of the federal agency primarily responsible for regulating national banks, which has spoken directly about the significance of this issue. In urging the Ninth Circuit to rehear this case en banc, the Office of the Comptroller of the Currency ("OCC") declared that "[t]his case is one of exceptional importance." C.A. Amicus Br. of Office of the Comptroller of the Currency, 2018 WL 3702582, at *5 (filed Apr. 23, 2018) ("OCC Amicus Br."). As the OCC explained, the Ninth Circuit "fundamentally misapprehend[ed]" this Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996), and the court of appeals' "mistaken interpretation" of *Barnett Bank* "introduces significant uncertainty" on "a matter of foundational consequence to the OCC and the federal banking system." OCC Amicus Br., 2018 WL 3702582, at *5.

The National Bank Act establishes a system of federally-chartered national banks that derive their banking powers from federal law and are extensively regulated by federal banking authorities, primarily the OCC. This Court has long "interpret[ed] grants of both enumerated and incidental 'powers' to national banks . . . as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank*, 517 U.S. at 25-26. Thus, for example, the Court held that a state law prohibiting the use of the word "savings" in advertising was preempted because it interfered with national banks' exercise of their federal deposit-taking powers. *Franklin Nat. Bank of Franklin Square v. New York*, 347 U.S. 373 (1954). In numerous cases, federal appellate courts have applied this preemption standard to hold that state laws seeking to regulate core banking activities of national banks are preempted.

The Ninth Circuit has departed from this long line of decisions. There is no dispute that real estate lending is a core banking activity, or that the terms of mortgage loan escrow accounts are a key aspect of real estate lending. The Ninth Circuit nevertheless held that California may prohibit a national bank from establishing a mortgage loan escrow account unless the bank pays interest at a state-specified above-market rate on the funds held in the account.

The Ninth Circuit's decision warrants further review because it creates significant uncertainty about whether national banks must comply with similar laws in other states. Indeed, since the Ninth Circuit's ruling, numerous lawsuits have been filed in states with laws requiring lenders to pay interest on mortgage escrow accounts. The decision below also creates significant uncertainty about whether a wide range of other state banking laws apply to national banks. This uncertainty is magnified because the Ninth Circuit disregarded and refused to enforce longstanding OCC regulations that have been upheld by other courts of appeals and are widely relied upon by national banks.

The petition should be granted.

STATEMENT

A. Statutory and Regulatory Background

1. Congress enacted the National Bank Act more than 150 years ago "to facilitate . . . a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (internal quotation marks and citation omitted). National banks, unlike state-chartered financial institutions, are "instrumentalit[ies] of the federal government, created for a public purpose, and . . . subject to the paramount authority of the United States." *Id.* at 308. By creating a system of federally-chartered banks that derive their banking powers from federal law, Congress sought to "protect [national banks] against possible unfriendly State legislation." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 412 (1873). Congress also sought to prevent the "[d]iverse and duplicative" regulation of national banks that would occur if their banking activities were subject to multiple states' laws. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007).

This Court has held that when the National Bank Act provides that national banks "may" exercise their federal "authorization, permission, or power," and contains no "express language" or "indication that Congress intended to subject" the banking powers of national banks "to local restriction[s]," "no such condition applies." *Barnett Bank*, 517 U.S. at 34-35. In other words, the "enumerated and incidental powers" granted to national banks under the National Bank Act "ordinarily pre-empt[] contrary state law." *Id.* at 32 (quotation marks omitted); *see also Watters*, 550 U.S. at 11 (noting that states "can exercise no control" over national banks, "nor in any wise affect their operation, except in so far as Congress may see proper to permit" (quotation marks and citation omitted)). For these reasons, state laws that "prevent or significantly interfere with the national bank's exercise of its powers" are preempted. *Barnett Bank*, 517 U.S. at 33. *See also* 12 U.S.C. § 25b(b)(1)(B) (codifying this Court's *Barnett Bank* preemption standard).

2. Congress has expressly authorized national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 371(a). National banks are also authorized to exercise "all such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24(Seventh). The OCC has long interpreted national banks' powers to include requiring borrowers to maintain escrow accounts on terms established by the bank, in order to protect collateral securing the borrower's loan.[1] Such OCC determinations regarding the scope of national banks' incidental

[1] *See, e.g.*, OCC Amicus Br., 2018 WL 3702582, at *2-3. ("the statutory authority for national banks' real estate lending powers . . . include[s] requiring, establishing, and maintaining escrow accounts"); OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005) ("OCC has approved national banks providing escrow services in the context of collecting real estate taxes.");

banking powers are entitled to substantial deference. *See NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). Neither the Ninth Circuit nor Respondent questioned that national banks have such powers under federal law.

When a national bank establishes a mortgage loan escrow account, it collects money from mortgage customers to pay property taxes and insurance premiums. Escrow accounts reduce the risk that the value of the property securing the loan will be impaired by tax liens or uninsured property damage. Federal law extensively regulates the circumstances in which a national bank may require an escrow account and the maximum balance that may be held in such accounts. *See, e.g.*, 12 U.S.C. §§ 2605, 2609. But no federal law requires national banks to pay interest on the escrow account balances, or specifies a required interest rate.

3. The OCC has promulgated regulations that address when national banks must comply with state laws in exercising their federal banking powers. *See, e.g.*, 12 C.F.R. § 34.4. Under these longstanding regulations, national banks may exercise their mortgage-lending authority "without regard to state law limitations concerning . . . [e]scrow accounts, impound

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OCC, Corporate Decision No. 99-06, 1999 WL 74103, at *2 (Jan. 29, 1999) ("[N]ational banks are authorized to provide . . . escrow services to their loan . . . customers as activities that are part of or incidental to the business of banking."); OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998) ("National banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time, particularly when such loans involve tax and insurance escrow accounts.").

accounts, and similar accounts." 12 C.F.R. § 34.4(a)(6). The regulations further provide that national banks may exercise their mortgage-lending authority without regard to state laws relating to the "terms of credit," *id.* § 34.4(a)(4), or "[t]he ability of a creditor to require or obtain . . . risk mitigants," *id.* § 34.4(a)(2).[2]

The Dodd-Frank Act, enacted in 2011, codified this Court's *Barnett Bank* preemption standard. *See* 12 U.S.C. § 25b(b)(1)(B). Following the enactment of Dodd-Frank, the OCC reexamined its regulations and "confirm[ed] that the specific types of state laws cited in the rules are consistent with the standard for conflict preemption in the Supreme Court's *Barnett* decision." Office of Thrift Supervision Integration and Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011). The OCC reaffirmed that state laws that "affect the ability of national banks to underwrite and mitigate credit risk" and "manage credit risk exposures" interfere with the banks' powers "in the lending arena." *Id.* With respect to escrow accounts, the OCC concluded that

> state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, such as laws concerning . . . risk mitigation . . . [and] escrow standards . . . would meaningfully interfere with

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[2] An escrow account is both a "term of credit" and a "risk mitigant" because it affects the payment a borrower must make each month and the nature of the security that the borrower has given to the bank.

> fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks.

Id. As a result, the OCC regulations continue to provide that national banks may exercise their mortgage-lending authority "without regard to state law limitations concerning . . . [t]he ability of a creditor to require or obtain . . . risk mitigants, . . . [t]he terms of credit [and] . . . [e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(2), (a)(4), (a)(6).

B. Facts and Procedural History

1. Petitioner Bank of America, a national bank, made a mortgage loan to Respondent Donald Lusnak in 2009, before Dodd-Frank was enacted. Respondent agreed, as a term of the loan, that a portion of his monthly mortgage payment would be placed in an escrow account to pay real estate taxes and insurance premiums. *See* C.A. Excerpts of Record 25 § 3; *id.* at 109 ¶ 10. Respondent received a notice stating that "[t]he federal law and regulations that Bank of America is subject to do not require the payment of interest on escrow accounts. Accordingly, you will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts." *Id.* at 74.

2. Respondent filed this action in March 2014. He alleged that California Civil Code § 2954.8(a) required Bank of America to pay interest at an above-market rate of at least 2 percent on his escrow funds

after enactment of the Dodd-Frank Act.[3] Respondent contended that Dodd-Frank requires national banks to comply with § 2954.8(a) because it includes a provision stating: "If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any . . . escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). Respondent did not contend that Bank of America was subject to the California law before Dodd-Frank was enacted.

The district court granted Bank of America's motion to dismiss. The court first concluded that the National Bank Act preempts Section 2954.8(a). The court observed that *Barnett Bank* provides "the appropriate standard for courts . . . to apply to [National Bank Act] preemption decisions," meaning a state law is preempted if it "'prevents or significantly interferes with the exercise by the national bank of its powers.'" App. 32a-33a (quoting 12 U.S.C. § 25b(b)(1)(B)). The court next identified the specific federal banking power at issue, and observed that there is no dispute that the National Bank Act gave national banks the power "to offer and service escrow accounts." App. 39a; *see also id.* 37a n.10. The court held that Section 2954.8(a) "constitutes a significant interference" with this federal banking power because the law "seeks to directly impede [Bank of America]'s authority under

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[3] From 2010-2016, the average interest rate on a one-year CD was less than 0.30%. *See* Denise Mazzucco, *Historical CD Interest Rates – 1984–2016*, Bankrate (Apr. 19, 2016) https://bit.ly/2w5oCh0.

the [National Bank Act] to provide and service its escrow accounts as it sees fit." App. 42a.

The district court rejected Respondent's argument that Dodd-Frank alters this preemption analysis. The court observed that Section 1639d "contains no language from which we can 'reasonably infer' that Congress intended to limit [National Bank Act] preemption." App. 44a. With respect to Respondent's argument that Section 1639d(g)(3) required Bank of America to comply with California's escrow-interest law, the court observed that "Section 1639d was not meant, in and of itself, to override established rules of preemption in a different statutory scheme." App. 45a. The district court also observed that Section 1639d(g)(3) could not apply to Respondent's account, which was established before the provision was enacted. App. 46a-47a. The district court thus dismissed Respondent's claims with prejudice. App. 49a.

3. The Ninth Circuit reversed. Although the court of appeals agreed with the district court that the relevant Dodd-Frank provision does not apply to Respondent's escrow account, App. 22a-23a, the Ninth Circuit held that Respondent's case could proceed under a different and much broader theory than Respondent had advanced. The Ninth Circuit held that it makes no difference whether the Dodd-Frank provision applies to Respondent's escrow account, because the National Bank Act *never* preempted the California law at issue. In reaching this conclusion, the court disregarded national banks' long-recognized federal authorization to establish the terms on which they extend credit, including the authority to require

escrow accounts on terms specified by a bank in order to protect the collateral securing mortgage loans. The court instead based its decision on a conclusion that a provision of Dodd-Frank, codified at 15 U.S.C. § 1639d(g)(3), reflects Congress's view that state laws like Section 2954.8(a) "would not necessarily prevent or significantly interfere with a national bank's operations," App. 17a, or "with a national bank's business," *id.* at 19a n.7.

The court of appeals recognized that its decision is contrary to longstanding OCC regulations, but held that the version of the regulations in effect when Respondent's escrow account was established are entitled to "little, if any, deference" because they "inaccurately" stated the preemption test. App. 14a-15a. The court added that the similar, post-Dodd-Frank version of the OCC regulations is entitled to "no greater deference than" the earlier version. App 15a.

The court of appeals denied Bank of America's petition for rehearing en banc. App. 50a.

REASONS FOR GRANTING THE PETITION

I. This Case Presents Issues of Exceptional Importance Concerning the Applicability of State Law to National Banks

The OCC, the primary federal regulator of national banks, believes that "[t]his case is one of exceptional importance." OCC Amicus Br., 2018 WL 3702582, at *5. In the OCC's view, "the interpretation of *Barnett* is a matter of foundational consequence to the OCC and to the federal banking system." *Id.* As the OCC has explained, the Ninth Circuit's decision cannot be reconciled with numerous decisions of this Court and other courts of appeals, and its departure from foundational precedent "introduces significant uncertainty in a vital area of law . . . ." *Id.* For these reasons, review by this Court is warranted.

A.1. In *Barnett Bank*, this Court provided a comprehensive overview of preemption under the National Bank Act. The Court observed that some provisions of the National Bank Act "accompany a grant of explicit power with an explicit statement that the exercise of that power is subject to state law." 517 U.S. at 34. When Congress has expressly required compliance with state law, "this Court has interpreted those explicit provisions to mean what they say." *Id.* But "where Congress has *not* expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* That is because "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. Thus, absent a provision of federal law expressly permitting states to regulate national banks, such regulation is permitted only where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.*

Applying these principles, the *Barnett Bank* Court held that the National Bank Act preempted a state law prohibiting national banks from selling insurance. Even though federal and state law did not impose conflicting duties on national banks, the Court concluded that the state law prevented or significantly interfered with the bank's exercise of its federal powers. *See id.*

The Court's unanimous opinion in *Barnett Bank* cited and relied on *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954). In *Franklin,* a state law prohibited banks from using the words "saving" or "savings" in their advertising or business. *Id.* at 374. Although the state law did not otherwise limit a bank's ability to take deposits or advertise for such deposits, the Court nevertheless held that the state law was preempted because it interfered with national banks' incidental power to advertise their banking services. *See id*. at 378-79. In reaching this conclusion, the Court noted that the federal grant of authority to national banks contains "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by *express language* in several other instances." 347 U.S. at 378 (emphasis added).

2. Federal courts of appeals and state supreme courts have applied this Court's preemption standard to hold that the National Bank Act preempts state laws seeking to regulate the terms of banking products and services. These decisions have followed a consistent approach: The court first identifies the specific federal banking powers at issue, and then analyzes the effect that the state law has on the exercise of those federal powers. If the state law prevents or significantly interferes with national banks' exercise of a particular federal power, it is preempted. *See Barnett Bank*, 517 U.S. at 33. In conducting this analysis, courts do not view a single state's law in isolation, but instead consider the interference that would arise if each state and local government were permitted to impose different and potentially conflicting requirements. *See Watters*, 550 U.S. at 13-14

(National Bank Act preemption prevents "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking").

As these decisions illustrate, under the *Barnett Bank* standard "the level of 'interference' that gives rise to preemption under the [National Bank Act] is not very high." *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009). When a state law purporting to limit national banks' federal authority to set the terms for their products and services, it is preempted by the National Bank Act.

In *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011), for example, the Eleventh Circuit held that a state law regulating check-cashing fees was preempted because it substantially interfered with national banks' exercise of their federal power to determine the fees they charge for banking services. *See id.* at 1196-97. The court of appeals held that "[t]he state's prohibition on charging fees to non-account-holders, which reduces the bank's fee options by 50%, is in substantial conflict with federal authorization to charge such fees." *Id.* at 1198.

In *Wells Fargo Bank of Tex. NA v. James*, 321 F.3d 488, 491 & n.3 (5th Cir. 2003), the Fifth Circuit similarly held that a Texas law regulating check-cashing fees was preempted. *See id.* at 491. The court of appeals explained that, "where a state statute interferes with a power which national banks are authorized to exercise, the state statute irreconcilably conflicts with the federal statute and is preempted." *Id.* at 491-92.

In *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 532-33 (1st Cir. 2007), the plaintiff challenged a national bank's practice of charging administrative fees on stored-value gift cards. *See id.* at 527. The First Circuit explained that "a state law may be preempted by the National Bank Act when it frustrates or limits the ability of a national bank to exercise its statutorily granted powers." *Id.* at 531. Because federal law authorized the bank to sell stored-value gift cards, the court concluded that a state law regulating administrative fees was preempted because it "limits the bank's ability to exercise that power." *Id.* at 531.[4]

And in *Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376 (2012), the California Supreme Court held that the National Bank Act preempted a state law requiring banks to make specific disclosures on convenience checks. In holding that the state law significantly interfered with national banks' exercise of their federal powers, the court refused to draw a distinction between state laws that prohibit national banks from exercising a particular federal power and laws that impose additional requirements on the exercise of the power. *See id.* at 387-88. For purposes of preemption, the court explained that it makes no difference whether the state law is "phrased as a

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[4] *Baptista*, *James*, and *SPGGC* are among the many cases in which federal courts of appeals have followed the approach to national bank preemption laid out in this Court decisions, by first identifying the specific federal banking powers at issue, and then determining whether the state law at issue prevents or significantly interferes with the exercise of those powers. *See, e.g.*, *National City Bank of Indiana v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Monroe Retail, Inc. v. RBS Citizens, N.A.,* 589 F.3d 274 (6th Cir. 2009); *Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844 (8th Cir. 1999).

conditional permission" (a bank "may offer convenience checks so long as it complies with" state law), or whether it is phrased "as a contingent prohibition" (a bank "may not offer convenience checks unless it complies with" state law). *Id.* (emphasis omitted). In either case, the law poses a significant interference with the national bank's exercise of its lending power and is preempted. *Id.*

3. The Ninth Circuit's decision in this case cannot be reconciled with this body of precedent, and the Ninth Circuit's opinion makes little effort to do so. Under a straightforward application of *Barnett Bank*, the California law significantly interferes with Bank of America's exercise of its federal banking powers, and therefore is preempted.

California Civil Code § 2954.8(a) directly and significantly interferes with Bank of America's exercise of its federal powers to determine the terms on which it provides credit in the form of mortgage loans, including its authority to require escrow accounts as a condition to making such loans and to make pricing decisions concerning such loans. Based on California law, Respondent seeks to prohibit Bank of America from exercising its federal authority to establish escrow accounts unless it pays at least 2 percent interest on escrow account balances—an amount far above market rates during the period at issue. The California law thus directly regulates core banking decisions—whether and how much interest to pay on an account the bank requires to protect loan collateral. Section 2954.8(a) makes escrow accounts a more costly mechanism for mitigating lending risks, thereby requiring banks to assume greater risk of loss, adopt some other means to mitigate their risk (such as higher mortgage interest rates), or decline to make certain mortgage loans at all. Under the analysis applied in *Barnett Bank*, *Franklin National Bank*, and numerous other cases, California's escrow-interest law is preempted as applied to national banks.

The Ninth Circuit did not follow this established method of analyzing the preemption issue. It did not identify the specific federal banking powers at issue. Nor did it meaningfully consider the ways in which the state law interferes with the exercise of those powers. Nor did the court of appeals consider the cumulative effect of allowing each state (and local governments) to impose its own distinct requirements for escrow accounts.

B. Longstanding OCC regulations authorize national banks to exercise their banking powers "without regard to state law limitations concerning" a variety of subjects. 12 C.F.R. § 34.4(a). Given the range and scope of the listed state laws, this regulation governs a substantial portion of national banks' real-estate lending operations and plays a critically important role in ensuring that the OCC, and not the states, is the primary regulator of national banks' lending activities. As relevant here, the regulation expressly preempts state-law limitations on "[t]he terms of credit" and "escrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(4), (a)(6).

The Ninth Circuit's decision effectively invalidates this regulation. Concluding that it is entitled to "little, if any, deference," the court of appeals disregarded the regulation and refused to enforce it. App.

14a. The decision effectively invalidates the regulation because courts have no discretion to refuse to apply valid regulations, and yet the Ninth Circuit decided not to enforce 12 C.F.R. § 34.4. As the OCC explained, the court of appeals "identifie[d] no authority in the Administrative Procedure Act or elsewhere that would justify its disregard of a duly promulgated federal regulation, the validity of which ha[d] not been challenged." OCC Amicus Br., 2018 WL 3702582, at *10. The decision below creates a circuit split on the deference owed to, and the enforceability of, this important OCC regulation.

The Second Circuit addressed the regulation at issue here—12 C.F.R § 34.4—in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005). Far from holding that the regulation is entitled to "little, if any, deference," App. 14a, the Second Circuit determined that courts "must defer to the [OCC's] regulations if they reflect a reasonable construction of the statutory scheme," *Wachovia*, 414 F.3d at 318. Concluding that § 34.4 reflected such a reasonable construction, the court of appeals applied this regulation to preempt the state law at issue. *See id.* at 321.

The Ninth Circuit's decision is also contrary to this Court's decision in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000). There, the Court considered whether to defer to the government's position that a state law would "stan[d] as an obstacle to the accomplishment and execution" of federal law and was thus preempted. *Id.* The Court concluded that the agency's view was entitled to "some weight" because "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Id.* If an agency's view on preemption is entitled to "some" weight even when advanced for the first time in a litigation brief, then surely it is entitled to more than "little, if any, deference" when adopted through notice-and-comment rulemaking. And regardless of the amount of deference owed, as *Wachovia* and *Geier* demonstrate, courts may not simply disregard an agency regulation. Yet the Ninth Circuit did so here.

C. This Court's review is warranted because the Ninth Circuit's decision "introduces significant uncertainty in a vital area of law." OCC Amicus Br., 2018 WL 3702582, at *5. The Ninth Circuit has created this uncertainty by rejecting settled case law and regulations governing matters "of foundational consequence to the OCC and to the federal banking system." *Id.*

At the most basic level, the court of appeals' decision creates significant uncertainty regarding whether national banks are subject to state laws requiring payment of interest on escrow accounts. California is a large state with a large number of mortgage loans, but it is only one of at least 13 states with laws that seek to regulate the payment of interest on mortgage escrow accounts. *See* App. 19a.

Before this case, no court had ever held that national banks are subject to these state laws. Indeed, Petitioner is not aware of any prior case in which a plaintiff even argued that national banks are subject to these laws.[5] Following the Ninth Circuit's decision, the situation has changed dramatically. Multiple lawsuits have been filed against national banks, not only in California, but also in New York, which is one of the states with a similar law.[6]

Moreover, the uncertainty created by the Ninth Circuit's decision is not limited to mortgage escrow accounts. The decision also creates uncertainty regarding a wide range of state banking laws that have long been understood not to apply to national banks.[7] The court of appeals has applied this Court's *Barnett* standard in a way that departs from settled precedent and disregards longstanding federal regulations. Review by this Court is warranted because

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[5] Some plaintiffs raised such arguments in cases involving federally chartered depository institutions other than national banks, but courts uniformly held that state escrow laws are preempted as applied to those institutions. *See, e.g., Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 181-85 (2d Cir. 2005); *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417, 425-26 (1st Cir. 1979); *cf. Wis. League of Fin. Insts., Ltd. v. Galecki*, 707 F. Supp. 401, 404-06 (W.D. Wis. 1989) (federal law preempted state-law attempts to regulate escrow-related disclosures).

[6] *See McShannock v. JP Morgan Chase Bank N.A.*, No. 3:18-cv-01873 (N.D. Cal. filed Mar. 27, 2018); *Hymes v. Bank of America, N.A.*, No. 2:18-cv-02352 (E.D.N.Y. filed Apr. 16, 2018); *Chandler v. JP Morgan Chase Bank, N.A.*, 3:18-cv-02735 (N.D. Cal. filed May 9, 2018); *Cantero v. Bank of America, N.A.*, No. 1:18-cv-04157 (E.D.N.Y. filed July 20, 2018); *Moody v. Citibank, N.A.*, No. 3:18-cv-04496 (N.D. Cal. filed July 25, 2018).

[7] For example, just as the OCC has promulgated regulations providing that national banks are not subject to many state laws that seek to regulate national banks' mortgage-lending powers, *see* 12 C.F.R. § 34.4, it also has promulgated similar regulations addressing numerous state laws that would restrict national banks' deposit-taking and non-real-estate-lending powers, *see* 12 C.F.R. §§ 7.4007, 7.4008.

the court of appeals' decision "introduces significant uncertainty in a vital area of law." OCC Amicus Br., 2018 WL 3702582, at *5; *see also* C.A. Amicus Br. of Clearing House Ass'n L.L.C., et al., at 1 (filed Apr. 20, 2018) (explaining that the case is "highly consequential" to the federal banking system).

II. The Ninth Circuit's Decision Is Incorrect.

As explained above, the application of California's escrow-interest law to national banks is preempted under a straightforward application of *Barnett Bank*. *See supra* pp. 12-17. In reaching a contrary conclusion, the Ninth Circuit did not meaningfully address the specific federal banking powers at issue or consider how the state law interferes with the exercise of those powers.

Instead, the court of appeals concluded that the Dodd-Frank provision codified at 15 U.S.C. § 1639d(g)(3) "expresse[d] Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations." App. 17a. The court relied on this provision to determine Congress's intent despite acknowledging that the provision does not apply to Respondent's escrow account. App. 22a-23a. This ruling is incorrect.

As the court of appeals acknowledged, Section 1639d does not apply to Respondent's escrow account because his account was established before the Dodd-Frank provision was enacted. *Id.* The Ninth Circuit nevertheless ignored this Court's "oft-repeated warning that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980) (quotation marks and citations omitted).

Moreover, even if the views of a subsequent Congress were relevant, they would not change the result. For purposes of preemption under the National Bank Act, the relevant inquiry is whether Congress has "expressly conditioned" the exercise of the federal power on compliance with state law. *Barnett Bank*, 517 U.S. at 34. If so, then a national bank must comply with the state law regardless of whether compliance significantly interferes with its operations. *See id.* But when Congress has not "expressly conditioned" the exercise of the federal power on compliance with state law, this Court "has ordinarily found that no such condition applies." *Id.* In such a case, the court applies the *Barnett Bank* preemption standard to determine whether the state law prevents or significantly interferes with the exercise of federal power. *See id.*

Section 1639d(g)(3) does not expressly require national banks to comply with state escrow laws. This provision states that: "If prescribed by *applicable* State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that *applicable* State or Federal law." 15 U.S.C. § 1639d(g)(3) (emphasis added). By definition, a preempted law is not an "applicable" law. The word "applicable" means "able to be applied; appropriate," Webster's II New College Dictionary 55 (1999), and a preempted law is neither "able to be applied" nor "appropriate." *Cf. Fidelity*

Federal Sav. & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 157 n.12 (1982) (deed of trust providing that it "is to be governed by the 'law of the jurisdiction' in which the property is located" does not require a national bank to comply with preempted state law).

Contrary to the Ninth Circuit's decision, the term "applicable" does not reflect Congress's recognition that some states have escrow interest laws and some do not. Congress accounted for the absence of escrow interest laws in some states with the phrase "[i]f prescribed by." 15 U.S.C. § 1639d(g)(3). Interpreting "applicable" to account for the absence of escrow interest laws in some states would render "[i]f prescribed by" superfluous, in violation of the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

Ultimately, the Ninth Circuit itself conceded that Congress's use of the term "applicable" does not mean "that a state escrow law can *never* be preempted by the NBA." App. 19a n.7. This concession provides additional confirmation that the court of appeals reached the wrong result. Where Congress has expressly provided that national banks must comply with state law, they must do so without regard to the extent the state law interferes with the national bank's activity. But absent such an express statutory provision—and Section 1639d(g)(3) is not such a provision—the *Barnett* Bank standard applies and leads to preemption in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert A. Long, Jr.
Counsel of Record
Mark W. Mosier
Andrew Soukup
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

August 2018 *Counsel for Petitioner*

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-56755
D.C. No. 2:14-cv-01855-GHK-AJW

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

OPINION

Appeal from the United States District Court for the Central District of California George H. King, District Judge, Presiding

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Argued and Submitted November 7, 2016
Pasadena, California

Filed March 2, 2018

Before: Marsha S. Berzon, Morgan Christen, and Jacqueline H. Nguyen, Circuit Judges.

OPINION

NGUYEN, Circuit Judge:

Congress significantly altered the regulation of financial institutions with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). This sweeping piece of legislation was a response to the worst financial crisis since the Great Depression, in which millions of Americans lost their homes. This appeal requires us to determine whether in light of Dodd-Frank, the National Bank Act ("NBA") preempts California's state escrow interest law, California Civil Code § 2954.8(a).

California's escrow interest law, enacted in 1976, requires financial institutions to pay borrowers at least two percent annual interest on the funds held in the borrowers' escrow accounts. This type of account is often set up in conjunction with a mortgage, either as a condition set by the lender or at the request of the borrower. Its purpose is to ensure payment of obligations such as property taxes and insurance. These accounts often carry a significant positive balance.

Plaintiff Donald Lusnak, on behalf of a putative class, filed suit against Bank of America, which does not pay borrowers any interest on the positive balance in their accounts. The district court dismissed the suit on the ground that the NBA preempted California Civil Code § 2954.8(a).

We reverse. Although Dodd-Frank significantly altered the regulatory framework governing financial institutions, with respect to NBA preemption, it merely codified the existing standard established in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). Applying that standard here, we hold that the NBA does not preempt California Civil

Code § 2954.8(a), and Lusnak may proceed with his California Unfair Competition Law ("UCL") and breach of contract claims against Bank of America.

I. Background

A. The National Bank Act

"In 1864, Congress enacted the NBA, establishing the system of national banking still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10 (2007) (citations omitted). The NBA provides for the formation of national banks and grants them several enumerated powers as well as "'all such incidental powers as shall be necessary to carry on the business of banking.'" *Id.* at 11 (quoting 12 U.S.C. § 24 (Seventh)). Congress established the Office of the Comptroller of the Currency ("OCC") to charter, regulate, and supervise these national banks. National Bank Act, 38 Cong. Ch. 106, § 1, 13 Stat. 99, 99–100 (1864)[1]; *About the OCC*, Office of the Comptroller of the Currency, https://www.occ.treas.gov/about/what-we-do/mission/index-about.html (last visited Jan. 25, 2018) ("The OCC charters, regulates, and supervises all national banks . . . .").

The NBA also ushered in a "dual banking system," wherein banks could be chartered either by the OCC or by a State authority and be subject to different legal requirements and oversight from different regulatory bodies. *See First Nat'l Bank of Fairbanks v. Camp*, 465 F.2d 586, 592 (D.C. Cir. 1972); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1 (1977). Since the NBA's enactment, the Supreme Court has often ruled on the

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[1] The Act was renamed "the national-bank act" in 1874. An Act Fixing the Amount of United States Notes, 43d Cong. Ch. 343, § 1, 18 Stat. 123, 123 (1874).

scope of State authority to regulate national banks. *See Watters*, 550 U.S. at 11–13. Congress has also enacted legislation "[t]o prevent inconsistent or intrusive state regulation from impairing the national system." *See id.* at 11.

B. Dodd-Frank

In 2010, Congress enacted Dodd-Frank in response to a "financial crisis that nearly crippled the U.S. economy."[2] S. Rep. No. 111-176, at 2 (2010); *see also id.* at 15 ("It has become clear that a major cause of the most calamitous worldwide recession since the Great Depression was the simple failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending." (quoting *The Creation of a Consumer Financial Protection Agency to Be the Cornerstone of America's New Economic Foundation: Hearing Before S. Comm. On Banking, Hous., and Urban Affairs*, 111th Cong. 82 (2009) (Statement of Travis Plunkett, Legislative Director, Consumer Federation of America))). Dodd-Frank brought about a "sea change" in the law, affecting nearly every corner of the nation's financial markets. *See, e.g.*, *Loan Syndications & Trading Ass'n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016); Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, Wall St. J., July 16, 2010, at A1 ("Congress approved a rewrite of rules touching every corner of finance . . . ."). One of Congress's main goals in this sweeping legislation was to prevent another mortgage crisis, which resulted in "unprecedented levels of defaults

[2] The crisis resulted in 9.3 million lost homes, 8.8 million lost jobs, and $19.2 trillion in lost household wealth. *See* U.S. Dep't of the Treasury, The Financial Crisis Response in Charts 3 (2012); Laura Kusisto, *Many Who Lost Homes to Foreclosure in Last Decade Won't Return*, Wall St. J., Apr. 20, 2015, at A2.

and home foreclosures." *See, e.g.*, H.R. Rep. No. 111-94, at 48 (2009).

Titles X and XIV of Dodd-Frank, at issue in this case, aim to prevent, and mitigate the effects of, another mortgage crisis. In a section of Title X called "Preservation of State Law," Congress addressed the framework of NBA preemption determinations. These provisions were designed to address "an environment where abusive mortgage lending could flourish without State controls." S. Rep. No. 111-176, at 17. Congress aimed to undo broad preemption determinations, which it believed planted the seeds "for long-term trouble in the national banking system." *Id.* at 17. In a section of Title XIV called "Escrow and Impound Accounts Relating to Certain Consumer Credit Transactions," Congress established a series of measures to help borrowers understand their mortgage obligations. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1461, 124 Stat. 1376, 2178–81 (2010) (codified at 15 U.S.C. § 1639d). These provisions were designed to correct abusive and deceptive lending practices that contributed to the mortgage crisis, specifically with regard to the administration of escrow accounts for property taxes and insurance. H.R. Rep. No. 111-94, at 53–56.

C. Factual Background

In July 2008, Lusnak purchased a home in Palmdale, California with a mortgage from Countrywide Financial. Soon thereafter, Bank of America purchased Countrywide Financial and assumed control over Lusnak's mortgage. In March 2009, Lusnak refinanced his mortgage, and in January 2011, he and Bank of America agreed to modify certain terms. The 2009 agreement and 2011 modification contain the relevant terms governing Lusnak's mortgage. The agreements provide that Lusnak's mortgage "shall be governed by federal law and the law of the jurisdiction in which the Property is located." The parties agree that the terms of Lusnak's mortgage require Bank of America to pay interest on escrow funds if required by federal law or state law that is not preempted.

As a condition for obtaining a mortgage, Lusnak was required to open a mortgage escrow account into which he pays $250 per month. Lusnak alleges that Bank of America is able to enrich itself by earning returns on funds in his account. Bank of America acknowledges that it does not comply with state escrow interest laws and that Wells Fargo—its chief competitor and the largest mortgage banker in America—does. But it contends that no federal or "applicable" state law requires it to pay interest on Lusnak's escrow account funds.

D. Procedural History

On March 12, 2014, Lusnak filed this lawsuit on behalf of himself and a proposed class of similarly situated Bank of America customers. Pursuant to the "unlawful" prong of California's UCL, Lusnak alleged that Bank of America violated both state law, Cal. Civ. Code § 2954.8(a), and federal law, 15 U.S.C. § 1639d(g)(3), by failing to pay interest on his escrow account funds. Lusnak also brings a breach of contract claim, alleging that Bank of America's failure to pay interest violated his mortgage agreement. Bank of America promptly moved to dismiss on the ground that California Civil Code § 2954.8(a) is preempted by the NBA.

The district court granted the motion to dismiss. *Lusnak v. Bank of Am., N.A.*, No. CV 14-1855-GHK (AJWx), 2014 WL 6779131 (C.D. Cal. Oct. 29, 2014).

It first acknowledged that Dodd-Frank clarified and amended the NBA preemption framework. *Id.* at *3–5. The district court then concluded that California's escrow interest law "prevents or significantly interferes with" banking powers and therefore is preempted by the NBA. *Id.* at *7–8. In so concluding, the district court determined that section 1639d(g)(3) of Dodd-Frank did not impact the preemption analysis. *Id.* at *8–9. This appeal followed.

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. This court reviews de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). "Questions of statutory interpretation are reviewed de novo . . . as are questions of preemption." *Lopez v. Wash. Mut. Bank*, 302 F.3d 900, 903 (9th Cir. 2002) (citations omitted).

III. Discussion

The central question here is whether the NBA preempts California Civil Code § 2954.8(a). Section 2954.8(a) requires "[e]very financial institution" to pay "at least 2 percent simple interest per annum" on escrow account funds.[3] The portion of Dodd-Frank to

[3] In full, California Civil Code § 2954.8(a) states:

> Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be

which the parties draw this court's attention, section 1639d(g)(3), which amends the Truth in Lending Act ("TILA"), states:

> (3) Applicability of payment of interest
>
> If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law.

15 U.S.C. § 1639d(g)(3). According to Lusnak, this section's plain language—requiring creditors to pay interest on escrow fund accounts like his if "prescribed by applicable" state law—made clear that Congress perceived no conflict between state laws like California Civil Code § 2954.8(a) and the powers of national banks. Therefore, Congress clearly did not intend for these state laws to be preempted by the NBA. Bank of America counters that such state laws are preempted because they prevent or significantly interfere with the exercise of its banking powers, and a preempted law cannot be an "applicable" law under section 1639d(g)(3). We begin by examining the relevant preemption framework.

A. Preemption Framework

1. *Guiding Principles of Preemption*

Our analysis is governed by "the two cornerstones of . . . preemption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485

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credited to the borrower's account annually or upon termination of such account, whichever is earlier.

(1996)). "[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Second, we start with the assumption that the State's historic police powers are not preempted "unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (quoting *Medtronic*, 518 U.S. at 485).

In the context of the NBA, Dodd-Frank provides that state laws are preempted if they "prevent[] or significantly interfere[] with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). Applying this standard, there is no presumption against preemption. *See Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). This does not, however, absolve a national bank of the burden of proving its preemption defense. *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014) ("Defendants . . . bear the burden of proof in establishing the affirmative defense of preemption."). Where, as here, we are confronted with state consumer protection laws, "a field traditionally regulated by the states, compelling evidence of an intention to preempt is required." *Aguayo*, 653 F.3d at 917 (quoting *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990)). Accordingly, because this case involves state regulation of consumer credit, Bank of America must affirmatively demonstrate that Congress intended to preclude states from enforcing their escrow interest laws.

2. *Dodd-Frank's Amendments to the NBA Preemption Framework*

Dodd-Frank addressed the preemptive effect of the NBA in several ways. First, it emphasized that the legal standard for preemption set forth in *Barnett*

Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996), applies to questions of whether state consumer financial laws are preempted by the NBA. 12 U.S.C. § 25b(b)(1)(B). Second, it required the OCC to follow specific procedures in making any preemption determination. *See id.* §§ 25b(b)(1)(B) (requiring the OCC to make any preemption determination on a "case-by-case basis"); 25b(b)(3)(B) (requiring the OCC to consult the Bureau of Consumer Financial Protection when making a preemption determination). And third, it clarified that the OCC's preemption determinations are entitled only to *Skidmore* deference. 12 U.S.C. § 25b(b)(5)(A); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that an agency's views are "entitled to respect" only to the extent that they have the "power to persuade"). Of these, only the second amendment was an actual change in the law. The first and third amendments merely codified existing law as set forth by the Supreme Court.

Before Dodd-Frank, the Supreme Court held in *Barnett Bank* that states are not "deprive[d] . . . of the power to regulate national banks, where . . . doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers." 517 U.S. at 33 (emphasis added). This is because "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.*

Following *Barnett Bank*, the OCC issued in 2004 its interpretation of the NBA preemption standard: "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. § 34.4(a) (effective Jan. 13, 2004).

The OCC framed its interpretation as merely reflecting *Barnett Bank* and earlier obstacle preemption case law. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) ("The OCC intends this phrase as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in Hines and Barnett, and not as a replacement construct that is in any way inconsistent with those standards."). But its formulation raised concern and confusion over the scope of NBA preemption.[4]

We never addressed whether the OCC's interpretation was inconsistent with *Barnett Bank*, or whether the regulation was owed deference while it was in effect. The Supreme Court, however, has indicated that regulations of this kind should receive, at most, *Skidmore* deference—and even then, only as to a conflict analysis, and not as to the legal conclusion on preemption. In *Wyeth v. Levine*, the Supreme Court noted that when Congress has not authorized an

[4] The OCC's preemption rule reads more broadly than *Barnett Bank*'s "prevent or significantly interfere" standard in two respects. First, the OCC omitted the intensifier "significantly" and used the terms "impair" and "condition" rather than "interfere." Second, it insisted that banks be able to "fully" exercise their NBA powers. *See* Staff of H. Comm. on Fin. Servs., 108th Cong., Views and Estimates of the Committee on Financial Services on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005 15–16 (Comm. Print 2004) ("[The OCC's 2004] rules may represent an unprecedented expansion of Federal preemption authority . . . ."); Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. Rev. 1273, 1280 (2011) ("[T]here is reason to believe that the OCC went beyond clarifying Barnett Bank and in fact made it much easier for the OCC to preempt state laws than the Barnett Bank standard would allow.").

agency to preempt state law directly, the Court "ha[s] not deferred to an agency's *conclusion* that state law is pre-empted." 555 U.S. at 576. Rather, it "ha[s] attended to an agency's explanation of how state law affects the regulatory scheme" based on the agency's "unique understanding of the statutes [it] administer[s] and [its] attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 576–77 (citations omitted). And the weight to be accorded an agency's explanation of a state law's impact on a federal scheme "depends on its thoroughness, consistency, and persuasiveness." *Id.* at 577; *see* *Skidmore*, 323 U.S. at 140.

We conclude that under *Skidmore*, the OCC's regulation would have been entitled to little, if any, deference in light of *Barnett Bank*, even before the enactment of Dodd-Frank. This regulation was the OCC's articulation of its legal analysis; the OCC simply purported to adopt the Supreme Court's articulation of the applicable preemption standards in prior cases, but did so inaccurately. *See* 69 Fed Reg. at 1910 ("We have adopted in this final rule a statement of preemption principles that is consistent with the various formulations noted [in Supreme Court precedent] . . . ; that is, that state laws do not apply to national banks if they impermissibly contain a bank's exercise of a federally authorized power."). The OCC did not conduct its own review of specific potential conflicts on the ground. *See id.* It follows that the OCC's 2004 preemption regulation had no effect on the preemption standard prior to Dodd-Frank, which was governed by *Barnett Bank*.

In Dodd-Frank, Congress underscored that *Barnett Bank* continues to provide the preemption standard; that is, state consumer financial law is preempted *only if* it "prevents or significantly interferes with the exercise by the national bank of its powers," 12 U.S.C. § 25b(b)(1)(B). Congress also made clear that only *Skidmore* deference applies to preemption determinations made by the OCC.[5] *See id.* § 25b(b)(5)(A). The OCC has recognized as much. *See, e.g.*, 76 Fed. Reg. at 43557 (conceding that section 25b(b)(1)(B) "may have been intended to change the OCC's approach by shifting the basis of preemption back to the [*Barnett Bank*] decision itself"). Therefore, to the extent that the OCC has largely reaffirmed its previous preemption conclusions without further analysis under the *Barnett Bank* standard, *see* 76 Fed. Reg. at 43556, we give it no greater deference than before Dodd-Frank's enactment, as the standard applied at that time did not conform to *Barnett Bank*. That is, the OCC's conclusions are entitled to little, if any, deference.

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[5] That these provisions were among those that had a future effective date, *see* 124 Stat. at 2018, makes no difference to our analysis. If we were to apply the "previous" NBA preemption standard and level of deference to OCC preemption determinations, we would apply, as explained above, the *Barnett Bank* standard and *Skidmore* deference required by the Dodd-Frank amendments.

Of course, a statute should be "so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). But no such superfluity exists here where the effective date provision applies to the whole subtitle, which imposes other requirements upon the OCC, and not just the provisions clarifying the preemption and agency deference standards. 124 Stat. at 2018. In fact, the OCC appears to have interpreted the effective date in just such a manner. *See* 76 Fed. Reg. at 43557.

The one substantive change in the law that Dodd-Frank enacted was to require the OCC to follow certain procedures in making preemption determinations. Dodd-Frank mandates that all of the OCC's future preemption determinations be made "on a case-by-case basis, in accordance with applicable law." 12 U.S.C. § 25b(b)(1)(B). Under the "case-by-case basis" requirement, the OCC must individually evaluate state consumer laws *and* consult with the Bureau of Consumer Financial Protection before making any preemption determinations. 12 U.S.C. § 25b(b)(3). In addition, the OCC may not deem preempted a provision of a state consumer financial law "unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with [*Barnett Bank*]." 12 U.S.C. § 25b(c). Finally, the OCC must review its preemption determinations at least once every five years. 12 U.S.C. § 25b(d). These changes have no bearing here where the preemption determination is made by this court and not the OCC.

We now turn to the question of whether the NBA preempts California's escrow interest law.

B. The NBA Does Not Preempt California's Escrow Interest Law

Under both *Barnett Bank* and Dodd-Frank, we must determine whether California Civil Code § 2954.8(a) "prevents or significantly interferes" with Bank of America's exercise of its national bank powers.[6]

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[6] Ordinarily, affirmative defenses such as preemption may not be raised on a motion to dismiss except when the defense raises no disputed issues of fact. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam); *see also Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 n.4 (9th Cir. 2008) (declining to remand for further discovery because "no amount of discovery

As Congress provided in Dodd-Frank, the operative question is whether section 2954.8(a) *prevents* Bank of America from exercising its national bank powers or *significantly interferes* with Bank of America's ability to do so. *See* 12 U.S.C. § 25b(b)(1)(B). Minor interference with federal objectives is not enough. *Watters*, 550 U.S. at 11 ("[F]ederal control shields national banking from *unduly* burdensome and duplicative state regulation." (emphasis added)); *id.* at 12 ("[W]hen state prescriptions *significantly* impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." (emphasis added)).

Applying that standard here, we hold that California Civil Code § 2954.8(a) is not preempted because it does not prevent or significantly interfere with Bank of America's exercise of its powers. Again, section 1639d(g)(3) of Dodd-Frank states, "If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any . . . escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). This language requiring banks to pay interest on escrow account balances "[i]f prescribed by applicable State [] law" expresses Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations.

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would change the central holding that Congress intended for the NBA to preempt [this] state restriction[] on national banks . . . ."). Such is the case here. Bank of America's arguments are purely legal and do not depend on resolution of any factual disputes over the effect of California law on the bank's business. Indeed, Bank of America confirms that "[n]o discovery is necessary . . . because this is a legal inquiry, not a factual one."

Dodd-Frank does not define the term "applicable." But the Supreme Court recently explained:

> "Applicable" means "capable of being applied: having relevance" or "fit, suitable, or right to be applied: appropriate." Webster's Third New International Dictionary 105 (2002). See also New Oxford American Dictionary 74 (2d ed. 2005) ("relevant or appropriate"); 1 Oxford English Dictionary 575 (2d ed. 1989) ("[c]apable of being applied" or "[f]it or suitable for its purpose, appropriate"). So an expense amount is "applicable" within the plain meaning of the statute when it is appropriate, relevant, suitable, or fit.

Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69 (2011); *see also Applicable*, Collins English Dictionary 97 (12th ed. 2014) ("being appropriate or relevant"); *Applicable*, Oxford Dictionaries (Oxford University Press), https://premium.oxforddictionaries.com/definition/american_english/applicable (last visited Jan. 25, 2018) ("[r]elevant or appropriate"). Accordingly, "applicable" law in the context of section 1639d(g)(3) would appear to include any relevant or appropriate state laws that require creditors to pay interest on escrow account funds.

The inclusion of this term makes sense because not every state has escrow interest laws. In a regulation implementing Dodd-Frank's amendments to the TILA, the Consumer Financial Protection Bureau explained that:

> [T]he creditor may be able to gain returns on the money that the consumers keep in their escrow account. Depending on the State, the creditor might not be required to pay interest

> on the money in the escrow account. The amount that the consumer is required to have in the consumer's escrow account is generally limited to two months' worth of property taxes and home insurance. However, some States require a fixed interest rate to be paid on escrow accounts, resulting in an additional cost to the creditors.

Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4726, 4747 (Jan. 22, 2013). Lusnak notes that only thirteen states appear to have escrow interest laws similar to California's. Through its requirement that creditors pay interest "in the manner as prescribed by" the relevant state law, Congress demonstrated an awareness of, and intent to address, the differences among state escrow interest laws. 15 U.S.C. § 1639d(g)(3). "[W]e may reasonably presume that Congress was aware of [existing law when it legislated]," *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155 (9th Cir. 2010), and that it used the term "applicable" to refer to state escrow interest laws where they exist.[7]

Although we need not resort to legislative history, we note that it, too, confirms our interpretation of section 1639d(g)(3). A House Report discusses how mortgage servicing, and specifically escrow accounts,

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[7] In so construing the term "applicable," we do not suggest that a state escrow interest law can *never* be preempted by the NBA. For example, a state law setting punitively high rates banks must pay on escrow balances may prevent or significantly interfere with a bank's ability to engage in the business of banking. We simply recognize that Congress's reference to "applicable State . . . law" in section 1639d(g)(3) reflects a determination that state escrow interest laws do not necessarily prevent or significantly interfere with a national bank's business.

contributed to the subprime mortgage crisis. H.R. Rep. No. 111-94, at 53–56. The Report notes that mortgage servicers are typically “large corporations” who “may . . . earn income from the float from escrow accounts they maintain for borrowers to cover the required payments for property insurance on the loan.” *Id.* at 55. The Report’s section-by-section analysis of Dodd-Frank then explains Congress’s purpose behind section 1639d(g)(3), stating:

> Servicers must administer such accounts in accordance with the Real Estate Settlement Procedures Act (RESPA), [Flood Disaster Protection Act], and, if applicable, the law of the State where the real property securing the transaction is located, *including* making interest payments on the escrow account if required under such laws.

Id. at 91 (emphasis added). This passage shows Congress’s view that creditors, including large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers.

No legal authority supports Bank of America’s position that California Civil Code § 2954.8(a) prevents or significantly interferes with the exercise of its powers. Bank of America falls back on the OCC’s pre-Dodd-Frank preemption rule, 12 C.F.R. § 34.4(a) (2004), but as we explained, Congress has since clarified that *Barnett Bank*’s preemption standard applies. Bank of America’s reliance on the OCC’s post-Dodd-Frank revision of section 34.4(a) also fails. Reading section 34.4(a) in isolation, Bank of America argues that state escrow interest laws necessarily prevent or significantly impair its real estate lending authority. However, the OCC’s amendments specifically altered the language of section 34.4(b) to clarify that state laws "that [are] made applicable by Federal law" (which would include Dodd-Frank's TILA amendments) "are not inconsistent with the real estate lending powers of national banks . . . to the extent consistent with [*Barnett Bank*]." 12 C.F.R. § 34.4(b)(9) (2011).

All of Bank of America's cited cases are inapposite. *Flagg v. Yonkers Savings & Loan Association* concerned the Office of Thrift Supervision's ("OTS") authority to regulate federal savings associations, and the Second Circuit's holding in that case was based on the OTS's field preemption over the regulation of such associations. 396 F.3d 178, 182 (2d Cir. 2005). Unlike the OTS, the OCC does not enjoy field preemption over the regulation of national banks.[8] *Aguayo*, 653 F.3d at 921–22 ("[W]hile the OTS and the OCC regulations are similar in many ways . . . the OCC has explicitly avoided full field preemption in its rulemaking and has not been granted full field preemption by Congress."). *First Federal Savings and Loan Association of Boston v. Greenwald* also fails to support Bank of America's position. 591 F.2d 417 (1st Cir. 1979). *Greenwald* concerned a direct conflict between a state regulation requiring payment of interest on certain escrow accounts and a federal regulation expressly stating that no such obligation was to be imposed on federal savings associations "apart from the duties imposed by this paragraph" or "as provided by contract." *Id*. at 425. Here, there is no federal regulation that directly conflicts with section 2954.8(a).[9]

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[8] Nor does the OCC enjoy field preemption over the regulation of federal savings associations. 12 U.S.C. § 1465(b).

[9] Bank of America's district court authorities are nonbinding and unpersuasive. *See Hayes v. Wells Fargo Bank, N.A.*, No.

In sum, no legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated that they do not. Accordingly, we hold that the NBA does not preempt California Civil Code § 2954.8(a).

C. Lusnak's Claims For Relief

We turn now to Lusnak's two claims for relief. Using the UCL as a procedural vehicle, Lusnak alleges that Bank of America violated both state law, Cal. Civ. Code § 2954.8(a), and federal law, 15 U.S.C. § 1639d(g)(3), by failing to pay interest on his escrow account funds. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1130 (9th Cir. 2014) ("In prohibiting 'any unlawful' business practice, the UCL 'borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.'"). Lusnak also brings a state-law breach of contract claim, alleging that Bank of America's failure to pay interest violated his mortgage agreement.

Bank of America—failing to distinguish between Lusnak's state and federal theories—argues that his UCL claim cannot proceed because his escrow account was created before section 1639d's effective date of January 21, 2013. 124 Stat. at 2136. We agree that Lusnak cannot rely on section 1639d in prosecuting

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13cv1707 L(BLM), 2014 WL 3014906 (S.D. Cal. Jul. 3, 2014); *Wis. League of Fin. Insts., Ltd. v. Galecki*, 707 F. Supp. 401 (W.D. Wis. 1989). As in *Flagg*, the court in *Hayes* based its holding on the OTS's field preemption over the regulation of federal savings associations. 2014 WL 3014906 at *5. And *Galecki* concerned the regulatory authority of the Federal Home Loan Bank Board, which was "*preemptive of any state law purporting to address the subject of the operations of a Federal [savings] association.*" 707 F. Supp. at 404 (quoting 12 C.F.R. § 545.2).

his UCL claim. Section 1639d mandates that creditors establish escrow accounts in connection with certain mortgages. *See* 15 U.S.C. § 1639d(a)–(b). Specifically, section 1639d(a) states that "a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer . . . *shall establish, before the consummation of such transaction*, an escrow or impound account . . . *as provided in, and in accordance with, this section*." 15 U.S.C. § 1639d(a) (emphasis added). The use of prospective language, specifically "shall establish, before the consummation of such transaction," indicates that Congress intended the detailed requirements in section 1639d to apply to accounts established pursuant to that section after it took effect in 2013.

Moreover, section 1639d(g)(3) requires creditors to pay interest under "applicable" state law on funds in federally mandated escrow accounts that are "subject to this section." 15 U.S.C. § 1639d(g)(3). Lusnak's escrow account was not a federally mandated account "subject to" section 1639d at the time it was created because it was established before that section took effect in 2013. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.").

However, these conclusions do not preclude Lusnak from obtaining relief under the UCL. Because California Civil Code § 2954.8(a) is not preempted, Bank of America was required to follow that law, and Lusnak may proceed on his UCL claim on the theory that Bank of America violated the UCL by failing to comply with section 2954.8(a). The parties argue over when exactly Bank of America's obligation to comply with section 2954.8(a) might have begun. Given that the *Barnett Bank* standard applied both pre- and post-Dodd Frank, the preemption analysis is the same in both time periods. Therefore, because section 2954.8(a) was not preempted when Bank of America assumed control over Lusnak's pre-existing escrow account, Bank of America's obligation to pay interest on any funds in Lusnak's escrow account was triggered from that point forward.

Lusnak may also proceed on his breach of contract claim. Lusnak's mortgage documents require Bank of America to pay escrow interest if "Applicable Law requires interest to be paid on the Funds." The mortgage defines "Applicable Law" as "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." Accordingly, on the allegations in the complaint, a jury could find that the "Applicable Law" provision of the contract also requires that Bank of America pay interest on funds in Lusnak's escrow account.

IV. Conclusion

For the reasons set forth above, we REVERSE and REMAND the case for further proceedings consistent with this Opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-1855-GHK (AJWx)

Date October 29, 2014

Title *Donald M. Lusnak v. Bank of America, N.A.*

Presiding: The Honorable GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE

Proceedings: (In Chambers) Order re: Defendant's Motion to Dismiss [Dkt. 26]

This matter is before us on Defendant Bank of America, N.A.'s ("Defendant") Motion to Dismiss ("Motion"). We have considered the papers filed in support of and in opposition to this Motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows:

I. Factual Background

On March 12, 2014, Plaintiff Donald Lusnak ("Plaintiff") filed this consumer fraud class action against Bank of America, N.A. ("Defendant") based on Defendant's alleged per se violation of California Civil Code Section 2954.8, which requires financial institutions that "receive[] money in advance for payment of taxes and assessments on . . . property, for insurance, or for other purposes relating to the property" to pay the borrower interest of at least 2 percent per year. Cal. Civ. Code § 2954.8(a). Plaintiff seeks to represent a class of "mortgage loan customers of Bank of America (or its subsidiaries), whose mortgage loan is for a one-to-four family residence located in California, and who paid Bank of America money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and did not receive interest on the amount held by Bank of America." (FAC at ¶ 21.) Plaintiff's First Amended Complaint ("FAC") [1] alleges the following underlying facts:

Plaintiff purchased a home in 2008 and entered into a mortgage agreement with Countrywide Financial, which later merged with Defendant. (*Id.* at ¶ 15.) In 2009, "Plaintiff entered into a refinance agreement with Countrywide (which by that time had been acquired by [Defendant]), pursuant to which Plaintiff's original 2008 loan agreement with Countrywide was extinguished and a new loan was issued with a new applicable interest rate and other revised terms." (Opp'n at 5; *see also* Supp. RJN, Ex. E.[2]) In 2011, Defendant provided Plaintiff with a loan modification. (FAC at ¶ 15.) From 2008 to present, Plaintiff "has been required to make $250 in monthly payments to

[1] On June 25, 2014, we vacated the hearing on Defendant's first Motion to Dismiss and approved the Parties' Stipulation to grant Plaintiff leave to file a FAC, [Dkt. 21], because a FAC "could potentially streamline the litigation and further judicial economy by voluntarily eliminating challenged causes of action." (*See* June 20, 2014 Stipulation, at 2, Dkt. 19.) Plaintiff filed his FAC on June 27, 2014. [Dkt. 22.]

[2] On September 12, 2014, Defendant filed a Supplemental Request for Judicial Notice asking us to also take notice of this 2009 loan agreement. [*See* Dkt. 31.] Plaintiff apparently does not disagree inasmuch as he states that "[t]he FAC inadvertently did not include reference to the 2009 agreement." (Opp'n at 5.) Defendant's Supplemental Request is GRANTED.

[Defendant] . . . for the pre-payment of property tax and insurance on the property" and never received interest on these prepaid funds. (*Id.* at ¶¶ 15-16.) Plaintiff's loan agreements with Defendant expressly provide that Defendant "would comply with applicable state and federal law." (*Id.* at ¶ 38.)

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). This law allegedly made "explicit that Congress['s] intent was [to] permit states to enact and enforce laws that require mortgage lenders to pay interest on impound accounts." (*Id.* at ¶ 8.) Wells Fargo Bank, N.A., Defendant's "chief competitor and the largest mortgage originator in the U.S." pays interest on borrowers' escrow accounts. (*Id.* at ¶ 2.)

Based on these alleged facts, Plaintiff's FAC asserts two claims: (1) violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code Section 17200, and (2) breach of contract. On July 31, 2014, Defendant filed this Motion, arguing that both of Plaintiff's claims rely on Section 2954.8, which is preempted by the National Bank Act ("NBA"). Plaintiff opposes this Motion.

Along with their submissions, both Parties request that we take judicial notice of several mortgage-related documents. Although review under Rule 12(b)(6) is generally limited to the contents of the complaint, we may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Thus, "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the . . . document forms the basis of the plaintiff's claim." *Id.* This "incorporation by reference doctrine" has been extended "to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). We GRANT Defendant's Request as to Exhibit A, Plaintiff's 2008 mortgage agreement, as it is a public record and is generally appropriate for judicial notice, and Plaintiff does not object. We also GRANT Defendant's Request as to Exhibits B through D because these documents help form the basis of Plaintiff's Complaint, and Plaintiff does not challenge them. We DENY Plaintiff's Request for Judicial Notice of the closing documents for his 2009 loan refinance agreement. [Dkt. 29.] Plaintiff asks us to take notice of these documents only as evidence of his 2009 agreement. (*See* Opp'n at 5.) As we take notice of his 2009 mortgage agreement, these closing documents are superfluous and need not be considered.

II. Motion to Dismiss

A. Legal Standard

To survive dismissal for failure to state a claim, a complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Although we must accept the allegations of the complaint as true and construe them in the light most favorable to the plaintiff, we need not accept as true legal conclusions "cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

B. Discussion

Plaintiff's UCL and breach of contract claims are both premised upon Defendant's alleged violations of California Civil Code § 2954.8 and 15 U.S.C. § 1639d.[3] (*See* FAC at ¶ 32 (Defendant committed "per se violations" of both laws); ¶ 38 ("Defendant failed to perform the express terms . . . that stated Defendant would comply with applicable state and federal law . . . .").) Defendant claims that since Section 2954.8 and Section 1639d do not apply to its transaction with Plaintiff, Plaintiff's FAC must be dismissed. Accordingly, we analyze the applicability of each statute in turn.

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[3] Plaintiff's FAC also cites 12 U.S.C. § 5551 and Housing and Urban Development ("HUD") Handbook as evidence that Defendant is violating federal law. (*See* FAC at ¶ 9.) But, as Defendant notes, Plaintiff failed to respond to Defendant's arguments on these subjects and thus, seems to have abandoned his related claims. *See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[F]ailure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.").

1. California Civil Code § 2954.8

Defendant argues that we should dismiss Plaintiff's FAC because "Plaintiff's attempt to force Bank of America to comply with Section 2954.8 is preempted by the National Bank Act." (Mot. at 1.) The relevant portion of Section 2954.8 is as follows:

> (a) Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state . . . and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. . . .

Plaintiff's argument that Section 2954.8 is not preempted primarily hinges on his assertion that Dodd-Frank "created a new statutory framework governing the standards applicable to determining whether state consumer financial laws are preempted by the NBA and other federal banking laws." (Opp'n at 7.) The Parties agree that, in light of Plaintiff's 2011 loan modification agreement, Dodd-Frank supplies the relevant preemption standard here. (*See* Opp'n at 8; Reply at 4.) But, the Parties dispute the extent to which Dodd-Frank changed the NBA preemption standard that existed before 2010. (*See* Mot. at 13-14, Opp'n at 7.)[4]

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[4] Plaintiff also seems to waver on this point. At times, Plaintiff alleges that Dodd-Frank "changed the landscape" and "created a new statutory framework" for NBA preemption. (*See* FAC ¶ 5; Opp'n at 7.) But, Plaintiff also argues that under "pre-Dodd-

a. Dodd-Frank's Impact on the NBA Preemption Analysis

"The NBA was enacted to establish a national banking system and to protect banks from intrusive state regulation." *Robinson v. Bank of Am., N.A.*, 2011 WL 5870541, at *2 (C.D. Cal. Oct. 19, 2011). Before the passage of Dodd-Frank, courts typically found that the usual presumption against preemption of state laws by federal law did not apply to national banks. *See, e.g.*, *Bank of Am. v. City & Cnty. of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) ("[B]ecause there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable."); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005) ("[T]he usual presumption against federal preemption of state law is inapplicable to federal banking regulation."). Courts frequently struck down state laws that in any way encroached upon national banks' banking activities or authority. *See, e.g.*, *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) ("[T]he level of 'interference' that gives rise to preemption under the NBA is not very high.").

Section 1044 of Dodd-Frank, codified at 12 U.S.C. § 25b, clarified the relevant NBA preemption standard:

> State consumer financial laws are preempted, only if—
>
> (A) application of a State consumer financial law would have a discriminatory effect on

Frank preemption standards . . . the result would be the same because . . . the focus of an NBA conflict preemption analysis [prior to Dodd-Frank] was [also] on congressional intent." (Opp'n at 17.)

> national banks, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.[5]
>
> 12 U.S.C. § 25b(b)(1)

To the extent that Plaintiff asserts that Dodd-Frank significantly changed the relevant NBA preemption standard, he is mistaken.[6] (*See* Opp'n at 7.) Dodd-Frank only made significant changes in the Home Owners' Loan Act ("HOLA") preemption analysis, stating that HOLA no longer occupies the entire field of lending regulation. *See Settle v. World Sav. Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 4215, at *13 (C.D. Cal.

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[5] "[T]itle 62 of the Revised Statutes" includes the majority of the NBA.

[6] The only case Plaintiff cites for this proposition, *Ascher v. Grand Bank for Sav., FSB*, 2014 U.S. Dist. LEXIS 33763 (N.D. Ill. Mar. 14, 2014), does not specifically reference the NBA, and instead, focuses on Home Owners' Loan Act ("HOLA") preemption before and after Dodd-Frank.

Jan. 11, 2012) ("The Dodd-Frank Act provides that HOLA does not occupy the field in any area of state law and that preemption is governed by the standards applicable to national banks."). But, with regards to the NBA, Dodd-Frank simply affirmed that *Barnett Bank* is the appropriate standard for courts and the Office of the Comptroller of the Currency ("OCC")[7] to apply to NBA preemption decisions. *See* S. Rep. No. 111-176, at 175 (2010) (emphasis added) ("Section 1044 amends the National Bank Act to clarify the preemption standard relating to State consumer financial laws as applied to national banks . . . ."); *see also U.S. Bank Nat. Ass'n v. Schipper*, 812 F. Supp. 2d 963, 968 n.1 (S.D. Iowa 2011) (finding Dodd-Frank did not "raise[] the standard for NBA preemption"); *Cline v. Bank of Am.*, N.A., 823 F. Supp. 2d 387, 396 (S.D. W.Va. 2011) ("The recent [Dodd-Frank] amendments are better understood as clarifications of the law as opposed to substantive changes thereof.").

Dodd-Frank also helped clarify the level of deference we should give OCC regulations regarding NBA preemption. Congress made clear that courts need not use *Chevron* deference for OCC decisions regarding NBA preemption. *See* 12 U.S.C. § 25b(b)(5) ("A court reviewing [OCC] determinations . . . regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the

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[7] The OCC is "the agency charged by Congress with supervision of the NBA [and] oversees the operations of national banks and their interactions with customers." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). "To carry out this responsibility, the OCC has the power to promulgate regulations and to use its rulemaking authority to define the 'incidental powers' of national banks beyond those specifically enumerated in the [NBA]." *Martinez v. Wells Fargo Home Mortg.*, 598 F.3d 549, 555 (9th Cir. 2010).

validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision."); *see also* 12 U.S.C. § 25b(b)(5) ("No [OCC] regulation or order . . . prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with" *Barnett Bank*). But, even this directive does not seem entirely new, as courts do not typically wholly rely on agency preemption determinations when deciding whether a state law is preempted. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (deciding to perform "its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption"); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 744 (1996) (assuming (without deciding) that the "question of whether a statute is pre-emptive . . . must always be decided de novo by the courts").

The biggest change Dodd-Frank made to the NBA preemption analysis involved new directives for the OCC's NBA preemption determinations. In part, Section 25b was Congress' attempt to undo "broader [preemption] standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175; *see also* H.R. Rep. No. 111-517 (2010) (Section 25b "revises the standard the OCC will use to preempt state consumer protection laws"). All future OCC NBA preemption determinations must now be made on a "case-by-case basis" and according to the guidelines Section 25b sets out. 12 U.S.C. § 25b(b)(1)(B); *see also* 12 U.S.C. § 25b(b)(3)(A) (defining "case-by-case basis" as only "concerning the impact of a particular State consumer financial law" or "the law of any other State with substantively equivalent terms").

b. Preemption of Section 2954.8(a)[8] Under *Barnett Bank*

As a preliminary matter, it is clear that Section 2954.8 is not preempted under Section 25b(b)(1)(A) as having a "discriminatory effect on national banks." Section 2954.8 applies to "[e]very financial institution," state-chartered and national banks alike. *See* Cal. Civ. Code. § 2954.8(a). Defendant also does not argue that the law is preempted by anything other than the NBA or its related regulations. Thus, Section 25b(b)(1)(C), which permits preemption by federal laws besides the NBA, is inapplicable here. The relevant question is whether Section 2954.8 is preempted under the legal standard set out by the Supreme Court in *Barnett Bank*. *See* 12 U.S.C. § 25b(b)(1)(B).

Barnett Bank requires us to determine whether the federal and state statutes here are in "irreconcilable

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[8] Section 2954.8(b) prohibits financial institutions from charging escrow account fees that would cause a borrower to receive less than 2 percent interest. Cal. Civ. Code. § 2954.8(b). Defendant claims that Section 2954.8(b) is also preempted because it impedes national banks' power under 12 C.F.R. § 7.4002(a) to charge "non-interest charges and fees." (Mot. at 10.) But, Plaintiff insists that his claims are not derived from Section 2954.8(b). (Opp'n at 16.) Even though Plaintiff included language from Section 2954.8(b) in the FAC (*see* FAC at ¶ 1) and accused Defendant of violating the entire statute, not just Section 2954.8(a) (*see* FAC at ¶ 32), we take Plaintiff at his word that he has abandoned any possible claim under Section 2954.8(b).

conflict." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996). This can occur when complying with both laws is a "physical impossibility"[9] or the state law "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks removed). The preemption question "is basically one of congressional intent." *Id.* at 30; *Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011) ("Regardless of the name attached to the type of preemption, the dispositive issue in any federal preemption question remains congressional intent."). As Congressional intent is not always explicit, we must assume that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33. In this context, "[l]egislative grants of both enumerated and incidental 'powers' to national banks historically have been interpreted as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32. But, "[t]o say this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* at 33.

[9] Plaintiff argues that Wells Fargo's alleged payment of interest on its escrow accounts demonstrates that complying with both state and federal law is not impossible here. (Opp'n at 11.) This may be true. But, the relevant question here is whether allowing California to *force* a national bank to pay interest on escrow accounts would significantly interfere with any of its banking powers under *Barnett Bank*.

Here, we must ask: would imposing this escrow account interest payment requirement on national banks "prevent or significantly interfere" with national bank powers explicitly granted by Congress?

i. Whether Escrow Accounts are Part of a National Bank's Lending Power[10]

12 U.S.C. § 371 gives banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 24 (Seventh) allows national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking" including "by loaning money on personal security." A bank's "incidental powers" are activities that are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 960 (9th Cir. 2005).

The OCC has issued several informal opinions that national banks' "incidental powers" include providing and servicing escrow accounts for collecting real estate taxes and insurance. As a preliminary matter, the OCC has "discretion to authorize activities beyond those specifically enumerated" in 12 U.S.C. § 24 (Seventh) and OCC regulations that interpret the NBA have the same force of law as the statute itself.[11]

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[10] Plaintiff does not challenge Defendant's arguments that maintaining and servicing escrow accounts are incidental national bank powers. Instead, Plaintiff argues that Section 2954.8(a) does not significantly interfere with this (or any other) national bank power.

[11] Dodd-Frank's impact on OCC regulations is limited to the OCC's preemption determinations and does not apply to OCC regulations clarifying the meaning of the NBA's provisions. *See*

NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) (finding that regulations interpreting federal banking laws are "subject to judicial review only to determine whether [the OCC] has exceeded [its] statutory authority or acted arbitrarily"). But, we can defer to informal OCC interpretations, like the letters Defendant relies on here, only "to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Bank of Am.*, 309 F.3d at 563 (internal quotation marks omitted) (finding that if OCC informal position is "reasonable" it is "entitled to great weight").

Here, we are persuaded by the OCC's reasoning regarding escrow services. In deciding that "national banks are authorized to provide . . . escrow services to their loan or title policy customers as activities that are part of or incidental to the business of banking," the OCC reviewed judicial precedent and found that "three general principles" should guide whether activities fall within the "business of banking." OCC, Corporate Decision No. 99-06, 1999 WL 74103, at *1-2 (Jan. 29, 1999). The OCC asks: "(1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the

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12 U.S.C. § 25b(b)(5)(B) (beyond review of OCC preemption decisions, "nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation" of the NBA); *see also* 12 U.S.C. § 25b(b)(1)(b); *Smiley*, 517 U.S. at 743-44 (distinguishing regulations that interpret the substantive meaning of statutes from those that opine on statutes' preemptive effects).

bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks?" *Id.* In the case of escrow services, "[n]ational banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time." OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998). Escrow services are "also of benefit to the borrowers as [they] relieve [borrowers] of the tasks of paying such regular tax and insurance obligations in a lump sum." *Id.* These OCC letters persuade us that escrow accounts are logically related to the provision of real estate loans and are often a necessary and beneficial part of national banks' services in this arena. Thus, national banks are empowered to offer and service escrow accounts.

Further, other courts have concluded that bank services and activities with more attenuated connections to banks' lending powers can still be classified as "incidental powers." For example, some courts have held that account fee disclosures are part of a bank's deposit-taking powers. *See, e.g.*, *Robinson v. Bank of Am., NA*, 525 Fed. Appx. 580, 582 (9th Cir. 2013). Other courts consider credit card disclosures and offers to be part of a bank's lending activities. *See, e.g.*, *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1034 (9th Cir. 2008); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Cal. 2002). Only services with no logical connection to national banks' enumerated powers, like "operating a general travel agency," have not qualified. *See, e.g.*, *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972). These cases help affirm the reasonableness of the OCC's interpretation that escrow accounts fall within the scope of a national bank's powers.

ii. Whether Section 2954.8(a) Significantly Impairs This Power

As escrow services qualify as a national banking power, the next inquiry under *Barnett Bank* is whether Section 2954.8(a) significantly interferes with this power.[12] Defendant argues it does because under Section 2954.8(a), Defendant could offer escrow accounts only if it paid "at least 2 percent interest on . . . escrow account balance[s]." (Mot. at 10.) Defendant further argues that Plaintiff's "Complaint seeks to impose state-law conditions on the circumstances under which banks may extend mortgage credit." (Mot. at 12.) This is because banks treat an escrow account as a "term of credit" and may begin to refuse loans without the security such accounts provide. (*Id.*)[13]

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[12] The only case law about preemption of state laws regarding escrow accounts analyzes the issue under pre-Dodd-Frank HOLA field preemption, which is not analogous. *See, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178 (2d Cir. 2005) (internal quotation marks removed) (concluding that having "occupie[d] the entire field of lending regulation for federal savings associations" state laws that required lenders to pay interest on escrow accounts were preempted); *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417, 425 (1st Cir. 1979) (same).

[13] To support its preemption arguments, Defendant also points to 12 C.F.R. § 34.4, the OCC's regulation announcing the categories of state laws preempted by the NBA. Specifically, 12 C.F.R. § 34.4(a)(6) states that national banks need not follow "state law limitations concerning . . . [e]scrow accounts, impound accounts, and similar accounts [and] terms of credit." Plaintiff argues that we cannot defer to this regulation because: (1) it does not involve a case-by-case evaluation of state laws and (2) under Dodd-Frank, we need not defer to the OCC's preemption decisions. But, even without relying on Section 34.4, we conclude that Section 2954.8(a) is preempted as applied here.

We find that Section 2954.8(a) constitutes a significant interference. Requiring Defendant to pay all of its borrowers 2 percent interest would allow a state to impose "costly operational and administrative burdens on national banks' lending activities" and would jeopardize a helpful (and free) service that Defendant provides its real estate borrowers. *See Am. Bankers Ass'n*, 239 F. Supp. 2d at 1016 (finding costly California credit card disclosure requirements are preempted as to national banks)[14]; *see also Schipper*, 812 F. Supp. 2d at 973 (finding state law preempted under *Barnett Bank* partly because it required national banks to reimburse certain fees to state banks). Further, Section 2954.8(a)'s rigid 2 percent requirement does not take changing prevailing interest rates into account. Thus, it would interfere with a national bank's ability to make loans given evolving and potentially fluid market conditions. The NBA was passed to "protect banks from intrusive state regulation." *Robinson*, 2011 WL 5870541, at *2. Forcing Defendant to comply with Section 2954.8(a) is contrary to that intent. Finally, as Defendant points out, holding otherwise might subject Defendant to different interest rate requirements in the 49 other states in which it operates. (Reply at 5.) "Diverse and duplicative superintendence of national banks' engagement

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[14] Plaintiff claims that we cannot use pre-Dodd-Frank cases to inform our preemption analysis. (*See* Opp'n at 15.) We do not agree. As discussed above, Dodd-Frank merely clarified that *Barnett Bank* is the appropriate standard. Thus, where courts have looked beyond OCC regulations and "ruled consistently with *Barnett Bank*, the end result after the Dodd-Frank Act will not change." *See* Debra Lee Hovatter, *Preemption Analysis Under the National Bank Act: Then and Now*, 67 Consumer Fin. L.Q. Rep. 5, 11 (2013).

in the business of banking" is exactly what "the NBA was designed to prevent." *Watters*, 550 U.S. at 13-14.

Plaintiff's FAC is not an attempt to subject a national bank to a state law of general applicability, which would be permissible. *See id.* at 11 ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA."). In other words, Section 2954.8 does not require of Defendant what it would of all businesses—"to refrain from fraudulent, unfair, or illegal behavior." *See Martinez v. Wells Fargo Home Mortg.*, 598 F.3d 549, 555 (9th Cir. 2010); *Cabrera v. Countrywide Home Loans, Inc.*, 2013 U.S. Dist. LEXIS 47801, at *21-23 (N.D. Cal. Apr. 2, 2013) (unfair foreclosure claim). Instead, Plaintiff seeks to directly impede Defendant's authority under the NBA to provide and service its escrow accounts as it sees fit.

iii. Impact of Section 1639d on Preemption Analysis

Plaintiff claims that "Congress's enactment of 15 U.S.C. § 1639d(g)(3) . . . expressly signaled that, as of that time, Congress viewed the application of Cal. Civ. Code § 2954.8(a) and similar state laws to national banks as being consistent with national banks' powers." (Opp'n at 12.) We disagree. Section 1639d of the Truth in Lending Act ("TILA") requires "creditors" [15] "in connection with the consummation of a consumer

[15] TILA's definition of the term "creditor" is broad enough to include national banks like Defendant. *See* 15 U.S.C. § 1602 (g) (a "creditor" "both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit . . . and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable . . .").

credit transaction secured by a first lien on the principal dwelling of the consumer" to establish escrow accounts for the payment of taxes and insurance in certain specified circumstances. 15 U.S.C. § 1639d. Section 1639d(g)(3) provides rules for the administration of these "mandatory escrow or impound accounts," including the payment of interest. 15 U.S.C. § 1639d(g)(3). Specifically, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." *Id.* In situations where a mandatory escrow account is not required, Section 1639d clarifies that parties may still voluntarily agree to establish escrow accounts "on terms mutually agreeable to the parties to the loan." 15 U.S.C. § 1639d(f)(1).

It is unlikely that Congress would be so subtle in requiring national banks to comply with state laws that would otherwise significantly interfere with their banking powers. *See Barnett Bank*, 517 U.S. at 34; *United States v. Locke*, 529 U.S. 89, 106-07 (2000) ("We think it quite unlikely that Congress would use a means so indirect . . . to upset the settled division of authority" between federal and state governments). The statute in question must "contain language from which it can be reasonably inferred that Congress intended to disrupt other federal laws including the National Bank[] Act by an implicit reservation of the power to administratively regulate banks to the states." *Bank of Am.*, 309 F.3d at 565 n.9.

This is not the case here. While Section 1639d does impose additional federal requirements on "creditors" (including national banks like Defendant), it contains no language from which we can "reasonably infer" that Congress intended to limit NBA preemption.[16] First, the context in which Congress passed Section 1639d demonstrates that it should have no impact on preemption under the NBA. "Congress is presumed to be familiar with the background of existing law when it legislates." *Abebe v. Gonzales*, 493 F.3d 1092, 1101 (9th Cir. 2007); *see also Cannon v. University of Chicago*, 441 U.S. 677, 699 (U.S. 1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . important precedents . . . and that it expected its enactment to be interpreted in conformity with them."). Here, where Congress wanted to make changes to existing NBA preemption standards, it did so explicitly by eliminating HOLA field preemption and clarifying the appropriate standard for OCC and federal court preemption review going forward. *See* 12 U.S.C. § 25b. Section 1639d does not mention national banks, the NBA, or preemption. Further, Section 1639d is located in a

[16] Defendant argues that "[t]wo Ninth Circuit decisions illustrate the difficulty Plaintiff faces in showing how provisions codified in Title 15 of the Unites States Code contain the necessary 'explicit statement' of Congress's intent to subject a national banking power to state law restrictions." (Reply at 8.) But, these cases are insufficiently analogous to inform our decision here. Granted, both cases held that savings clauses in specific Titles of the United States Code cannot trump preemption under the federal banking laws. *See Silvas v. E*Trade Mortgage*, 514 F.3d 1001, 1007 (9th Cir. 2008); *Bank of Am.*, 309 F.3d at 565. But, this was because the savings clauses involved explicitly limited their anti-preemptive effect to the subchapter in question. *See id.* Here, Plaintiff is effectively arguing that Section 1639d is a savings clause because it allegedly carves out a preemption exception for state laws requiring interest charges on escrow accounts. As 1639d includes no similar subchapter limitation, the cases Defendant cites are largely unhelpful.

different Title of the United States Code and as part of a different statutory scheme. Thus, it lacks sufficient logical connection to the NBA to demonstrate Congressional intent to change the NBA's preemptive scope in this arena.

Further, Section 1639d's plain language does not support Plaintiff's interpretation. Under Section 1639d(g)(3)'s terms creditors must pay interest on the accounts under this section only "if" required by "applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). There is no "applicable" state law because Section 2954.8(a) is preempted by the NBA, and therefore is not capable of being applied to national banks. *See Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) (defining "'applicable' as 'capable of being applied: having relevance' or 'fit, suitable, or right to be applied: appropriate'"). Congress's use of conditional terms such as "if" and "applicable" demonstrates that Section 1639d was not meant, in and of itself, to override established rules of preemption in a different statutory scheme. If anything, Congress recognized that such laws might not always "apply" to certain creditors under certain circumstances and made no affirmative changes to when this would occur. The inclusion of such conditional language also means that Congress did not need to explicitly "exclude national banks from this requirement" as Plaintiff suggests. (Opp'n at 12.) Accordingly, 1639d does not alter our preemption analysis.

2. Plaintiff's Section 1639d Claims

Plaintiff also claims that Defendant has committed per se violations of 15 U.S.C. § 1639d(g)(3). (Opp'n at 18.) But, Section 1639d does not apply to Defendant in this case. First, as discussed above, Section 1639d requires Defendant to make interest payments only if required by "applicable" state law, which is not the case here, as Section 2954.8(a) is preempted. *See Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 448 (1st Cir. 1995) ("ERISA preemption . . . would dictate the applicable law."); *Atl. Richfield Co. v. Brown*, 1985 WL 3316, at *7 (N.D. Ill. Oct. 21, 1985) ("Because of . . . preemption, only the [federal law] is applicable law."). Second, this provision applies only to "an escrow . . . account subject to this section." 15 U.S.C. § 1639d(g)(2). Section 1639d requires the establishment of escrow accounts for certain types of loans made after January 21, 2013, the statute's effective date.[17] 15 U.S.C. § 1639d(a) ("a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer . . . shall establish, before the consummation of such transaction, an escrow or impound account . . . ."). As Plaintiff's account was established prior to Section 1639d's effective date, and Congress has expressed no intent that Section 1639d shall apply retroactively, his account is not subject to the requirements of this section. Thus, Plaintiff cannot state a claim under Section 1639d.

3. Impact of Preemption on Plaintiff's UCL and Contract Claims

As discussed above, Defendant has not violated state or federal law in not paying interest on Plaintiff's

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[17] *See* Pub. L. 110-203, § 1400(c)(3) (providing that any section of Title XIV of Dodd-Frank for which no regulations have been issued shall take effect "on the date that is 18 months after the designated transfer date"); Bureau of Consumer Financial Protection, *Escrow Requirements Under the Truth in Lending Act (Regulation Z)*, Fed. Reg. 4726-01 (Jan. 22, 2013) ("The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013 . . . .").

escrow accounts. Since Plaintiff's UCL claim is premised on these alleged violations, it must be dismissed.

Plaintiff's breach of contract claim also hinges on his allegations that Defendant violated "applicable law." (*See* FAC at ¶ 10 (agreement provides it would pay interest on escrow accounts if "Applicable Law requires interest to be paid").) The Parties' 2009 agreement defines "Applicable Law" as "all *controlling* applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." (Supp. RJN, Ex. E, at § J (emphasis added).) Neither Section 2954.8 nor Section 1639d is controlling on Plaintiff's loan agreements. Defendant has complied with "applicable law" in not paying interest on Plaintiff's escrow account. Accordingly, Plaintiff's breach of contract claim must also be dismissed.

III. Conclusion

Based on the foregoing, we DISMISS Plaintiff's FAC with prejudice.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 14-1855-GHL (AJWx)

DONALD M. LUSNAK,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

JUDGMENT

Pursuant to the Court's October 29, 2014 Order, IT IS HEREBY ADJUDGED that Plaintiff's First Amended Complaint is DISMISSED with prejudice. Plaintiff shall take nothing by this Complaint.

IT IS SO ORDERED.

DATED: October 29, 2014

/s/ George H. King
GEORGE H. KING
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 16, 2018]

No. 14-56755
D.C. No. 2:14-cv-01855-GHK-AJW

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

U.S. District Court for the Central District of California, Los Angeles

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ORDER

Before: BERZON, CHRISTEN, and NGUYEN, Circuit Judges.

The panel voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX D

12 U.S.C. § 24

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power–

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. * * *

12 U.S.C. § 25b(b)

(b) Preemption standard

(1) In general

State consumer financial laws are preempted, only if–

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance*

Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

(2) Savings clause

Title 62 of the Revised Statutes and section 371 of this title do not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).

* * *

12 U.S.C. § 371(a)

(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828*(o)* of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

15 U.S.C. § 1639d(g)(3)

(g) Administration of mandatory escrow or impound accounts

* * *

(3) Applicability of payment of interest

If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law.

* * *

12 C.F.R. § 34.4

(a) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1]

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j–3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996):

(1) Contracts;

(2) Torts;

(3) Criminal law;[2]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

(9) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), or that is made applicable by Federal law.

California Civil Code § 2954.8

(a) Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier.

(b) No financial institution subject to the provisions of this section shall impose any fee or charge in connection with the maintenance or disbursement of money received in advance for the payment of taxes and assessments on real property securing loans made by such financial institution, or for the payment of insurance, or for other purposes relating to such real property, that will result in an interest rate of less than 2 percent per annum being paid on the moneys so received.

(c) For the purposes of this section, "financial institution" means a bank, savings and loan association or credit union chartered under the laws of this state or the United States, or any other person or organization making loans upon the security of real property containing only a one- to four-family residence.

* * *