
STATE FAIR ACCESS LAWS AND THEIR VULNERABILITY
TO FEDERAL PREEMPTION UNDER THE CONSUMER
FINANCIAL PREEMPTION STANDARD

James Morsch*

Money laundering is a threat to any financial system. The United States government necessarily developed a legal regime that attempts to quickly identify, remove, and punish money launderers. But what if in the pursuit of that goal, legitimate customers are left without access to financial services because banks deny their application based on general characteristics and not necessarily individual risk factors? Should banks be allowed to deny services to individuals (e.g., a person with a prior criminal record) or business entities in certain industries (e.g., cryptocurrency) because of generalized characteristics and not necessarily because of any individual indication of risk?

Some states have recently enacted “fair access” laws to address this issue known as “de-banking,” or the phenomenon of banks largely denying services to customers of similar risk profiles to avoid the perceived risk entirely. The state fair access laws seek to eliminate the de-banking phenomenon by requiring banks to make individualized risk-based determinations while also providing legal recourse to applicants or customers who suspect a bank denied or terminated services because of a general characteristic.

Some have argued that federal law should preempt state fair access laws because they conflict with banks’ ability to mitigate money laundering risk in accordance with the federal anti-money laundering laws. This Note explores the current state of the consumer financial law preemption standard and concludes that the argument for federal preemption of state fair access laws is weak.

INTRODUCTION	946
I. HISTORY OF THE FEDERAL ANTI-MONEY LAUNDERING REGIME AND POSSIBLE STATE LAW CONFLICT	952
A. What is Money Laundering, and How is it Accomplished?	953
B. The Anti-Money Laundering Statutory Framework	954
C. Current State of the AML Regime and State Anti- Discrimination Laws	956
II. THE CONSUMER FINANCIAL LAW PREEMPTION STANDARD	959
A. The History of Preemption, the National Bank Act, and the Dodd-Frank Act.....	960
B. <i>Cantero’s</i> Clarification of the Preemption Standard	963
III. APPLICATION OF THE PREEMPTION STANDARD FROM <i>CANTERO</i> TO FLA. STAT. § 655.0323.....	965

* J.D. Candidate 2026, Columbia Law School; B.S. 2016, United States Military Academy. I’d like to thank Professor Kathryn Judge for her mentorship and guidance regarding this Note. Additionally, I’d like to thank the Columbia Business Law Review Board and Staff for their input and edits.

A. Nationally Chartered Banks Fall Within the Scope of Florida Statute § 655.0323	966
B. Applying Dodd-Frank’s § 25b(b)(1) General Preemption Standard	967
1. Preemption Arguments are Unfruitful Under Dodd-Frank §§ 25b(b)(1)(A) and 25b(b)(1)(C)	968
2. The Argument for Preemption Under Dodd-Frank § 25b(b)(1)(B) and <i>Barnett Bank</i> Following <i>Cantero</i> is Weak	970
CONCLUSION	976

INTRODUCTION

“And, by the way, speaking of you—and you’ve done a fantastic job—but I hope you start opening your bank to conservatives, . . . because what you’re doing is wrong.”¹ With that relatively quick aside directed at chairman and CEO of Bank of America, Brian Moynihan,² President Donald Trump used his platform at the 2025 World Economic Forum to reinvigorate discussion concerning a phenomenon commonly known as “de-banking” or “de-risking.”³ The United States Department of State defines “de-risking” as “the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk.”⁴ Given this definition, is the President suggesting major United States financial institutions are specifically terminating or denying services to conservatives? Probably, yes. But the conversation surrounding de-

¹ Donald Trump, President, United States, Remarks by President Trump at the World Economic Forum (Jan. 23, 2025).

² *Id.* Moments earlier, Moynihan had asked President Trump about the numerous executive orders President Trump signed in the first week of his second term in office and what their effect might be on GDP growth, inflation, and the stock market. In answering that question, President Trump took a brief detour to address his concerns about the de-risking phenomenon. He also mentioned Jamie Dimon, chairman and CEO of JPMorgan Chase, and federal regulators in this aside, suggesting that federal regulators previously mandated Bank of America, JPMorgan Chase, and other major national banks to de-risk conservatives. *Id.*

³ Both terms, “de-banking” and “de-risking,” are used interchangeably in public discourse. ANDREW P. SCOTT, CONG. RSCH. SERV., IF12886, DE-BANKING/DE-RISKING: ISSUES FOR THE 119TH CONGRESS (2025) (“When a bank terminates an account because the consumer presents a risk to the bank, it is referred to as *de-risking* or *de-banking*.”). This Note will proceed using only “de-risking” for consistency purposes.

⁴ *De-risking*, U.S. DEP’T OF STATE, <https://www.state.gov/de-risking/> [<https://perma.cc/TC8T-VCUP>] (last visited Feb. 12, 2025).

risking is more nuanced than the President led listeners at the World Economic Forum and beyond to believe. Albeit for different reasons, congressional scrutiny and review of the de-risking phenomenon recently received strong bipartisan support in a committee hearing for the United States Senate Committee on Banking, Housing, and Urban Affairs.⁵ But even though Republicans and Democrats alike have expressed distaste for certain outcomes when financial institutions de-risk customers, the financial institutions and their leaders are not the only blameworthy parties. The same financial institution CEOs, chairs, and presidents that President Trump has publicly criticized for implementing de-risking practices argue that federal financial institutions and regulatory agencies are the responsible parties for causing the de-risking phenomenon.⁶

While the blame game continues between financial institutions, their regulatory agencies, and politicians, courts could soon be called on to participate in the quarrel. Recently enacted Florida law, Fla. Stat. § 655.0323 (2024), billed in the media as an anti-“woke” banking law, requires state and federally chartered financial institutions to provide “fair access” to customers.⁷ Florida passed the law to provide legal process and recourse for constituents concerned that financial institutions wrongly targeted and de-risked politically conservative

⁵ See *Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. (2025) (statement of Sen. Tim Scott, Chairman, S. Comm. on Banking, Hous., & Urb. Aff.); *Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. (2025) (statement of Sen. Elizabeth Warren, Ranking Member, S. Comm. on Banking, Hous., & Urb. Aff.) (“Banks may be taking shortcuts when it comes to assessing risks. . . . [B]ig banks are relying on black box algorithms and middle-men companies . . . without doing careful due diligence.”).

⁶ See Anita Hamilton, “*Debanking*” *Complaints Are on the Rise. What’s Behind Trump’s Claims.*, BARRON’S (Jan. 27, 2025, 5:15 PM), <https://www.barrons.com/articles/trump-debanking-bank-of-america-jpmorgan-chase-8b75453c> (on file with the Columbia Business Law Review) (“Federal regulators ‘put a lot of pressure on us, and they tell us what is high risk, and if we don’t debank someone and something goes wrong, we can pay hundreds of millions of dollars of fines,’ JPMorgan Chase CEO Jamie Dimon said in a podcast released last week on the company’s website.”). More specifically, the financial institution “regulators” Dimon speaks of are primarily the following depository regulators: the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System, and the Consumer Financial Protection Bureau (CFPB). See Marc Labonte, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 8–16 (2023).

⁷ Evan Weinberger, *U.S. Has Narrow Route to Block State Anti-Woke’ Banking Laws*, BLOOMBERG LAW (Aug. 19, 2024, 3:53 PM), <https://www.bloomberglaw.com/bloomberglawnews/banking-law/> [<https://perma.cc/M9VT-8NY3>].

customers and businesses, for example, firearms businesses, certain religious groups, and non-renewable energy companies.⁸ Following Fla. Stat. § 655.0323's enactment, select congressional representatives and Biden administration government agency officials urged the Office of the Comptroller of the Currency (OCC) to issue guidance that federal banking law preempts Fla. Stat. § 655.0323.⁹ They warned that Fla. Stat. § 655.0323 conflicted with federal anti-money laundering (AML) statutes and that banks' compliance with the Florida law exposed the whole financial system to dangerous money laundering and illicit financing risks.¹⁰

Different financial institutions likely view the fair access laws in different ways. While these institutions have for decades committed extensive resources to comply with the AML regime's effort to bar financial access to criminals and criminal enterprises,¹¹ it is also true that the same institutions deflect blame for the resulting de-risking phenomenon.¹² As a result, it is unclear whether they collectively support strict "fair access" laws like Fla. Stat. § 655.0323. Vigorous enforcement of fair access laws could effectively eliminate financial institutions' ability to control their own public reputational risk by mandating banks to serve all legally legitimate customers or otherwise face investigations, fines, and penalties.¹³

Take cryptocurrency customers and businesses, for example. On one hand, industry experts' and government officials' warnings to financial institutions about the risks of servicing cryptocurrency

⁸ See Bethan Moorcraft, *Ron DeSantis Signs Anti-woke Law to Stop Banks from Freezing Floridians' Bank Accounts Based on Their Politics*, YAHOO! FINANCE (Aug. 2, 2024), <https://finance.yahoo.com/news/ron-desantis-signs-anti-woke-100600372.html> (on file with Columbia Business Law Review).

⁹ See Weinberger, *supra* note 7.

¹⁰ See *id.*

¹¹ See Neil Katkov, *IT and Operational Spending on Financial Crime Compliance: 2024 Edition*, CELENT (Mar. 28, 2024), <https://www.celent.com/en/insights/445011014> [https://perma.cc/8HBF-R4WU] ("Financial institutions will spend US \$34.7 billion on financial crime compliance technology and US \$155.3 billion on operations in 2024.").

¹² See Hamilton, *supra* note 6.

¹³ Cf. Alan Kaplinsky et al., *Consumer Finance Monitor: State Fair Access and Debanking Laws Bring Country's Political and Cultural Divisions to the Fore*, BALLARD SPAHR LLP, (Oct. 31, 2024), <https://www.ballardspahr.com/-/jssmedia/main/podcast-transcripts/cfm0744.pdf> [https://perma.cc/2V5D-MH4D]. Brian Knight argues that financial institutions can avoid serving industries specified in Florida's fair access law, like fossil fuel and firearms businesses, by tethering the denial to a "quantitative, impartial" risk, e.g., supply chain concerns. *Id.* (quoting Fla. Stat. § 655.0323(2)(c)).

customers are well documented.¹⁴ On the other hand, federal law does not prohibit cryptocurrency's general use and trade.¹⁵ Add into the mix the OCC, Federal Deposit Insurance Corporation (FDIC), and Federal Reserve's Joint Statement on Crypto-Asset Risks to Banking Organizations in early 2023, and the government placed banks in a precarious pickle: either (1) agree with the agencies' risk guidance and blanket refuse services to cryptocurrency customers, or (2) accept customers now flagged by the federal regulatory agencies as harboring "significant safety and soundness concerns,"¹⁶ even after completing internal customer vetting in accordance with AML, Know Your Customer (KYC), and Bank Secrecy Act (BSA) compliance laws. Choosing option two suggests a bank is acting in defiance of three of the major federal financial regulatory agencies' guidance. Therefore, the likely result is that most financial institutions would choose the first option and avoid cryptocurrency assets in accordance with the agencies' guidance. It logically follows from this result that cryptocurrency customers in need of financial services would have significantly less service providers to choose from because of the agencies' guidance to banks. However, guidance can change quickly in the current political climate. Early in his second term, President Trump issued an executive order rebuking general risk-based customer analysis in favor of "individualized" and "objective" analysis,¹⁷ highlighting the ongoing debate between general versus individual de-risking policy preferences.

Given the executive branch's propensity to rapidly change its position on the de-risking issue through executive orders or

¹⁴ See generally DEP'T OF THE TREASURY, 2024 NAT'L MONEY LAUNDERING RISK ASSESSMENT 6, 8, 63-64 (2024) (describing various cases of money laundering using cryptocurrency and detailing the risks of serving similar customers in the future).

¹⁵ While there is no federal law that explicitly states the legality of cryptocurrency, there is also no federal law that makes use of cryptocurrency illegal. Cryptocurrency is regulated by multiple financial institution agencies, such as the SEC, the CFTC, and FinCen, among others. See Sneha Solanki, *Cryptocurrency laws—Legal glossary*, REUTERS, (Mar. 21, 2025), <https://legal.thomsonreuters.com/blog/cryptocurrency-laws/> [https://perma.cc/LLT3-2RY9].

¹⁶ BD. OF GOVERNORS OF THE FED. RSRV. SYS., FED. DEPOSIT INS. CORP., & OFF. OF THE COMPTROLLER OF THE CURRENCY, JOINT STATEMENT ON CRYPTO-ASSET RISKS TO BANKING ORGANIZATIONS 2 (2023). The letter highlights eight "key risks associated with crypto-assets" and notes that "[t]he agencies are supervising banking organizations that may be exposed to risks stemming from the crypto asset sector[.]" *Id.* The letter also affirmatively states "[b]anking organizations are neither prohibited nor discouraged from providing banking services to customers of any specific class or type, as permitted by law or regulation." *Id.*

¹⁷ Exec. Order No. 14,331, 90 Fed. Reg. 38925 (Aug. 7, 2025).

administrative guidance, state legislatures may continue to seek concrete resolution through their legislative process. For example, Fla. Stat. § 655.0323 effectively eliminates a bank's autonomy to deny services to industries, businesses, and customers it generally evaluates as carrying an inherently high degree of risk for the bank and mandates individual assessment of each prospective customer.¹⁸ Any general denial of services to industries or customers with like characteristics subjects the bank to investigations and penalties, unless the bank can show the denied customers posed a material business risk to the bank.¹⁹ While the contemporaneous ire that spawned this law is heavily focused on the Biden administration's alleged discrimination against conservative customers past and present,²⁰ the discussion can quickly turn on its head if a conservative administration issues risk-based avoidance guidance to financial institutions for businesses aligned with what, some may consider, are generally more liberal causes—for example, non-profits transacting with businesses in developing countries.²¹

The disagreements surrounding the de-risking phenomenon stem from varied perspectives on both the appropriate level of risk mitigation for banks and the financial institutions' autonomy to choose their customer base. Congress adopted and expanded the federal AML regulatory regime to protect against criminal enterprises' ability to use the United States financial system.²² In doing so, Congress employed financial institutions as their chief reporting mechanism,²³ and regulatory agencies ensured their compliance by issuing harsh penalties for non-compliance.²⁴ In furtherance of Congress's goal, AML

¹⁸ See FLA. STAT. § 655.0323 (2024).

¹⁹ See *id.* § 655.0323 (6).

²⁰ See *Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. 1–3 (2025) (statement of Stephen T. Gannon, Partner, Davis Wright Tremaine LLP).

²¹ See Sam Brownback & Jeremy Tedesco, *Stop the Troubling Trend of Politically Motivated Debanking*, NEWSWEEK (Mar. 17, 2023, 12:25 PM), <https://www.newsweek.com/stop-troubling-trend-politically-motivated-debanking-opinion-1787639> [<https://perma.cc/2MCR-7Z7X>]. See also *Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. 3–4 (2025) (statement of Sen. Elizabeth Warren, Ranking Member, S. Comm. on Banking, Hous., & Urb. Aff.).

²² See Fin. Crimes Enft Network, U.S. Dep't of the Treasury, *History of Anti-Money Laundering Laws*, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/9HJV-HGYT>] (last visited Feb. 14, 2025).

²³ See *infra* Part I.B.

²⁴ See Press Release, Bd. of Governors of the Fed. Rsrv. Sys., *Federal Reserve Board Fines Citigroup \$60.6 Million for Violating the Board's 2020 Enforcement Action* (Jul. 10, 2024),

regulations do not require banks to disclose to customers the specific reasons for risk-based service denials, and thus, the AML regulations establish an opaque, largely confidential reporting environment.²⁵ As criminals and illicit financiers continued to find creative ways to gain and maintain access to the United States financial system, financial institutions and regulators together sought to prevent risk by implementing formal periodic risk assessments.²⁶ While risk assessment and mitigation is undoubtedly a good practice, it resulted in the contention that government regulatory agencies assign risk too generally.²⁷ Banks are accused of applying the government's risk mitigation guidance through widespread denial of customer service without reasonable notice or explanation to consumers.²⁸ Conversely, banks themselves accuse the financial regulators of using their power to investigate and penalize banks as a bludgeon to coerce financial institutions into widespread de-risking.²⁹ As a result, consumers are left without clarity on why banks denied them service or how to correct their deficiencies to attain service, as well as with uneasy feelings of discrimination and unfairness.³⁰

Normative considerations of whether the government should legally require financial institutions to serve customers who may not present an objective material risk but could present reputational risks for a bank add nuance to the risk management discussion. On their face, it seems like fair access laws call for that outcome. Consider, for example, if a bank's leadership opposed the unquestionably legal, but also controversial, tobacco, alcohol, and pharmaceutical industries. If the bank subsequently denied service to customers aligned with these industries citing the reputational risk they pose to the bank, should the law punish the bank and demand they have a duty to bank the customers? What if the businesses also had connections to designated state sponsors of terrorism and human rights violators? While the

<https://www.federalreserve.gov/newsevents/pressreleases/enforcement20240710a.htm> [<https://perma.cc/G8DB-8M2K>]; CitiGroup, Inc., 24-017-CMP-HC (Bd. of Governors of the Fed. Rsrv. Sys., July 10, 2024) (ordering assessment of a civil money penalty).

²⁵ See *infra* Part I.C.

²⁶ See Anti-Money Laundering and Countering the Financing of Terrorism Programs, 89 Fed. Reg. 55428 (proposed July 3, 2024) (to be codified at 31 C.F.R. pts. 1010 & 1020–30).

²⁷ See *Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. 4 (2025) (statement of Stephen T. Gannon, Partner, Davis Wright Tremaine LLP).

²⁸ See *id.* at 3–6.

²⁹ See *id.*

³⁰ See *Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. 3–4 (2025) (statement of Sen. Tim Scott, Chairman, S. Comm. on Banking, Hous., & Urb. Aff.).

purpose of this Note is not to address the policy implications of the fair access laws' effect on financial institutions' management of material and reputational risk, they are an important consideration for legislators, regulators, and courts.³¹

Instead, this Note explores whether federal consumer financial law preempts state fair access laws. This Note argues that state fair access laws, like Fla. Stat. § 655.0323, are not preempted by federal law under *Cantero v. Bank of America, N.A.*³² Therefore, federal consumer financial law challenges to the state laws are unlikely to succeed. Part I of this Note briefly discusses what money laundering is, how it is accomplished, and the basics of the federal statutory framework designed to identify and prosecute money launderers. It then assesses the current efficacy of the AML regime, and further parses how the AML regime enables the de-risking phenomenon, ultimately prompting Florida to enact its fair access banking law. Part II follows the lineage of United States Supreme Court precedent leading to congressional legislation resulting in the current consumer financial law preemption standard. Part III applies the current consumer financial law preemption standard and concludes that an argument for federal consumer financial law preemption of Fla. Stat. § 655.0323 is unlikely to succeed.

I. HISTORY OF THE FEDERAL ANTI-MONEY LAUNDERING REGIME AND POSSIBLE STATE LAW CONFLICT

Nations have sought to frustrate and eliminate money laundering for decades, and the United States is no exception. Accordingly, it is helpful to understand what money laundering is and the origin and evolution of the AML statutes in the United States. The basis for the legal dispute stems from the absence of affirmative disclosure requirements which would require financial institutions to explain to customers precisely why they reject services based on risk concerns.³³ In contrast, Fla. Stat. § 655.023 contains affirmative

³¹ Additionally in the August 7, 2025 executive order, President Trump mandated federal banking regulators to “remove the use of reputation risk or equivalent concepts” from their guidance documents, thus highlighting the importance of the “reputational risk” discussion to President Trump’s second administration. Exec. Order No. 14,331, 90 Fed. Reg. 38925 (Aug. 7, 2025).

³² 602 U.S. 205 (2024).

³³ See Fin. Crimes Enf’t Network, U.S. Dep’t of the Treasury, *Answers to Frequently Asked Bank Secrecy Act (BSA) Questions*, <https://www.fincen.gov/answers-frequently-asked-bank-secrecy-act-bsa-questions> [https://perma.cc/SX6N-4G5V] (last visited Nov. 28, 2024). “Federal law (31 U.S.C. § 5318(g)(2)) prohibits the

disclosure requirements for denied service.³⁴ Several state attorneys general recently defended these laws, arguing that the state legislation mandating denial of service based on “measurable risks” protects customers from discrimination without compromising national security or reputational risk to the banks.³⁵ These state laws establish the foundational tension with the federal consumer financial law that this Note addresses.

A. *What is Money Laundering, and How is it Accomplished?*

The United States Financial Crimes and Enforcement Network (FinCEN) defines money laundering as “the process of making illegally-gained proceeds (i.e. ‘dirty money’) appear legal (i.e. ‘clean’).”³⁶ Successfully laundered dirty money enables criminal actors to use the proceeds from their illicit activity—for example, corruption, cybercrime, narcotics trafficking, and human trafficking³⁷—without fear that law enforcement will trace the money back to its criminal source.³⁸ While techniques to launder money have become more complex over time,³⁹ laundering money only requires three simple steps: placement, layering, and integration.⁴⁰ Placement occurs when individuals discretely inject their illicit cash or proceeds into the

notification of any person that is involved in the activity being reported on a [Suspicious Activity Report (SAR)] that the activity has been reported. This prohibition effectively precludes the disclosure of a SAR or the fact that a SAR has been filed. However, this prohibition does not preclude, under Federal law, a disclosure in an appropriate manner of the facts that are the basis of the SAR, so long as the disclosure is not made in a way that indicates or implies that a SAR has been filed or that the information is included on a filed SAR.” *Id.* See also 31 U.S.C. § 5318(g)(2).

³⁴ FLA. STAT. § 655.0323 (3) (2024).

³⁵ Letter from Ashley Moody, Fla. Att’y Gen., et al., to Hon. Janet Yellen, Sec. of the Treasury, (Aug. 1, 2024).

³⁶ Fin. Crimes EnFt Network, U.S. Dep’t of the Treasury, *History of Anti-Money Laundering Laws*, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/X8HZ-3ECB>] (last visited Nov. 17, 2024).

³⁷ See DEP’T OF THE TREASURY, 2024 NAT’L MONEY LAUNDERING RISK ASSESSMENT 5 (2024). The Department of the Treasury lists these, among other, illicit crimes in the “Threats” section of the report.

³⁸ See *Money Laundering* (Donna Batten ed., 2010), in 7 GALE ENCYCLOPEDIA OF AMERICAN LAW 108, 108 (3d ed. 2010).

³⁹ See Delena D. Spann, *How Does Money Laundering Work*, at 01:25-01:45 (YouTube, May 23, 2017), <https://www.youtube.com/watch?v=257wV-AbKaE> [<https://perma.cc/3EZ4-WLAW>].

⁴⁰ *Money Laundering*, *supra* note 38, at 108.

financial system.⁴¹ Layering involves transferring the money through a series of accounts, often international, to create confusion concerning the money's origin.⁴² Finally, after criminal organizations have sufficiently layered their funds so they are no longer traceable, criminals reintroduce and integrate the funds into the legal economy through asset purchases or investments.⁴³ In summary, placement introduces the dirty money into the legitimate financial system, the layering process launders it, and integration allows wrongdoers to use the now-clean money in the legal economy.

B. *The Anti-Money Laundering Statutory Framework*

Growing concern about criminal enterprises' use of financial institutions to launder their illicit profits eventually prompted Congress to act. Now after over a half-century in existence, the Bank Secrecy Act (BSA) and the Money Laundering Control Act (MLCA) remain the core foundational statutes upholding the United States AML regime.⁴⁴ Enacted in 1970, the BSA requires financial institutions to report cash transactions above \$10,000, and the places compliance responsibility on the officers and directors of financial institutions.⁴⁵ Thus, the BSA effectively employs financial institutions as the chief detection instrument for suspicious transactions.⁴⁶ However, while the BSA allowed the government to hold financial institutions responsible for noncompliance with BSA mandates, the statute did not directly target individuals committing the predicate crimes that led to the deposit and withdrawal of funds from financial institutions.⁴⁷ Congress sought to fill this gap in 1986 by enacting the MLCA as part of the Anti-Drug Abuse Act⁴⁸ which criminalized money laundering "distinct

⁴¹ *Id.* For example, simple placement occurs when a criminal deposits dirty money into a bank account. Larger, more sophisticated criminal enterprises use "front" operations to help place large volumes of dirty money into the financial system.

⁴² *Id.* See also Fin. Crimes Enft Network, *supra* note 36.

⁴³ See Henry Ogbedi & Youngbee Dale, *Analysis of Businesses at Risk of Money Laundering and Organized Crimes: Case Study of Chinatown in the U.S.*, in CORRUPTION, BRIBERY, AND MONEY LAUNDERING 109, 110 (Kamil Hakan Dogan ed., 2024).

⁴⁴ See Lucinda A. Low et al., *Country Report, the US Anti-Money Laundering System*, in A COMPARATIVE GUIDE TO ANTI-MONEY LAUNDERING: A CRITICAL ANALYSIS OF SYSTEMS IN SINGAPORE, SWITZERLAND, THE UK AND THE USA 3, 346 (Mark Pieth & Gemma Aiolfi eds., 2004).

⁴⁵ Charles W. Blau & H. Lowell Brown, U.S. MONEY LAUNDERING § 1.02 (Matthew Bender 2024).

⁴⁶ See Low et al., *supra* note 44, at 347–48.

⁴⁷ See Blau & Brown, *supra* note 45.

⁴⁸ *Id.* See also 18 U.S.C.A. § 1956 (West), which establishes the transactional money laundering offenses, and 18 U.S.C.A. § 1957(b) (West), which prohibits knowingly or attempting to engage in monetary transactions using illicit funds.

from the underlying offense that generated the money to be laundered.”⁴⁹ Additional legislation in the following twenty years has expanded the scope of the American AML regime,⁵⁰ but the BSA and MLCA remain the foundational statutory vehicles for deterring and prosecuting money launderers in the United States.⁵¹

As the legal framework suggests, combatting money laundering is a collaborative effort between financial institutions and the government. The BSA defines “financial institution” broadly,⁵² and the government continues to expand this definition as new technology decentralizes the ability to make financial transactions.⁵³ The result is an ever-expanding universe of financial institutions who are obligated to comply with BSA mandates. Unsurprisingly, the steady expansion of parties obligated to comply with AML statutes required the parallel development of a robust government partner to process the proffered information and enforce the law.⁵⁴ In addition to local law enforcement, numerous federal government entities monitor financial institutions’ compliance with AML statutes and take action on legally viable Suspicious Activity Reports (SAR).⁵⁵ Together, the BSA’s mandate to financial institutions to report suspicious activity coupled with the government’s use of the reports to open investigations and prosecute money laundering under the MLCA form the foundation for AML enforcement in the United States.

⁴⁹ United States v. Edgmon, 952 F.2d 1206, 1213 (10th Cir. 1991).

⁵⁰ See Fin. Crimes EnFt Network, *supra* note 36. Legislation that FinCEN lists as contributing to the AML regime includes: the Anti-Drug Abuse Act of 1988, the Annunzio-Wylie Anti-Money Laundering Act (1992), the Money Laundering Suppression Act (1994), the Money Laundering and Financial Crimes Strategy Act (1998), the USA PATRIOT Act (2001), and the Intelligence Reform & Terrorism Prevention Act of 2004. *Id.*

⁵¹ See Low et al., *supra* note 44, at 346.

⁵² See *id.*; 31 U.S.C. § 5312(a)(2); 31 C.F.R. § 1010.100(t).

⁵³ See FIN. CRIMES ENF’T NETWORK, U.S. DEP’T OF THE TREASURY, FACT SHEET: FINCEN ISSUES FINAL RULE TO COMBAT ILLICIT FINANCE AND NATIONAL SECURITY THREATS IN THE INVESTMENT ADVISER SECTOR (2024).

⁵⁴ See Fin. Crimes EnFt Network, U.S. Dep’t of the Treasury, *Related Government Agencies/Press Contacts*, <https://www.fincen.gov/related-government-agenciespress-contacts> [<https://perma.cc/4U7N-DC9W>] (last visited Nov. 17, 2024).

⁵⁵ See *id.* The following are the government agencies FinCEN lists as contributors to safeguarding the financial system: Department of the Treasury, Federal Bureau of Investigation, Internal Revenue Service, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Board of Governors of the Federal Reserve System, Securities and Exchange Commission, Federal Deposit Insurance Corporation, Federal Trade Commission, Office of the Comptroller Currency, National Credit Union Administration, and the Bureau of the Fiscal Service. *Id.*

C. *Current State of the AML Regime and State Anti-Discrimination Laws*

As the statutory framework implies, a perfect AML enforcement regime relies on every financial institution's ability to correctly identify all placement activities or layering activities, followed by the government's ability to successfully prosecute each case. That said, it is hardly a perfect world, and these general assumptions face significant challenges. The digitization of the global economy provides more avenues for individuals to place illicit money in the financial system, and technological advances have simplified layering, thus straining law enforcement's capacity to track complex webs of digital transactions.⁵⁶ The United States is one of many nations committed to an international effort to find solutions to these evolving challenges.⁵⁷ However, national ambitions crumble without widespread compliance from financial institutions, whether intrinsically motivated by ethical concerns or extrinsically motivated by compliance statutes, like the BSA.

Despite Congress's best efforts, the sheer volume of transactions and criminal ingenuity in avoiding detection has led to an estimated \$800 billion to \$2 trillion of money laundered globally in 2023.⁵⁸ Compare that staggering figure to the \$61 billion the United States and Canadian financial institutions collectively spend annually to implement financial crime compliancy programs,⁵⁹ and it is understandable why critics question whether governments are winning the war against money laundering.⁶⁰

With an already exorbitant cost and questionable results, recent state laws may have a substantial impact on the effectiveness of the

⁵⁶ See Kamil Haken Dogan, Preface, *in* CORRUPTION, BRIBERY, AND MONEY LAUNDERING, *supra* note 43, at xiii.

⁵⁷ See *The FATF*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/en/the-fatf/what-we-do.html> (on file with Columbia Business Law Review) (last visited Nov. 26, 2024); *United States*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/en/countries/detail/United-States.html> (on file with Columbia Business Law Review) (last visited Dec. 21, 2025).

⁵⁸ *Money Laundering*, UNITED NATIONS OFF. ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/money-laundering/overview.html> [<https://perma.cc/SXY5-TUEQ>] (last visited Nov. 26, 2024).

⁵⁹ *Study Reveals Annual Cost of Financial Crime Compliance Totals \$61 Billion in the United States and Canada*, LEXISNEXIS RISK SOLUTIONS (Feb. 21, 2024), <https://risk.lexisnexis.com/about-us/press-room/press-release/20240221-true-cost-of-compliance-us-ca> [<https://perma.cc/RSB2-LKUB>].

⁶⁰ *The War Against Money-Laundering Is Being Lost*, THE ECONOMIST (Apr. 17, 2021), <https://www.economist.com/finance-and-economics/2021/04/12/the-war-against-money-laundering-is-being-lost> (on file with Columbia Business Law Review).

AML regime. Led by Florida's state government, several states have passed, or are considering passing, legislation that requires a financial institution to produce detailed reports explaining why it denied its services to a customer.⁶¹ These states seek expanded disclosure requirements based on concerns that financial institutions are unfairly denying services to certain classes of consumers, namely industries generally or recently supported by conservatives (e.g., the fossil fuel and firearms industries).⁶² The alleged discriminatory behavior implicates the AML statutory scheme because the AML statutes provide an implicit safe harbor from scrutiny of a financial institution's risk-based decision to refuse service to a customer.⁶³ Put differently, a financial institution that flags and denies service to a customer because of money laundering or terrorist financing risk concerns does not have to further explain—to courts or to the public—the reason that contributed to the customer's termination.⁶⁴

Financial institutions de-risking customers in this manner receive mixed political response depending on the context. In the national security context, some representatives showed support for federal preemption of state fair access laws.⁶⁵ In a letter to President Biden's Acting Comptroller of the Currency, Secretary of the Treasury, and Director of FinCEN, three congressional representatives

⁶¹ See Weinberger, *supra* note 7. Governor DeSantis signed Florida House Bill 989 on May 2, 2024. Tennessee passed a bill with similar provisions, Tennessee House Bill No. 2100, in 2024. Other states considering similar legislation include Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Nebraska, South Dakota, and West Virginia. *U.S. Fair Access and Anti-Debanking Laws: What to Expect Under the New Administration*, GREENBERG TRAURIG, LLP (Jan. 23, 2025), <https://www.gtlaw.com/en/insights/2025/1/us-fair-access-and-antidebanking-laws-what-to-expect-during-the-new-administration> [https://perma.cc/3YPN-RFCN].

⁶² See Weinberger, *supra* note 7.

⁶³ See Beth Moskow-Schnoll, *Just How Safe Is the SAR Safe Harbor Provision?*, BALLARD SPAHR LLP (Sept. 3, 2018), <https://www.moneylaunderingnews.com/2018/09/just-how-safe-is-the-sar-safe-harbor-provision/> [https://perma.cc/4TXJ-4MN5] (describing the outer bounds of the safe harbor protecting financial institutions from liability when reporting suspicious activity).

⁶⁴ See *The Truth About Suspicious Activity Reports*, BANK POLICY INST. (Sept. 22, 2020), <https://bpi.com/the-truth-about-suspicious-activity-reports> [https://perma.cc/Z48H-H58P].

⁶⁵ See Letter from Rep. Josh Gottheimer, et al., to Hon. Michael J. Hsu, Acting Comptroller of the Currency, Off. of the Comptroller of the Currency, Hon. Janet Yellen, Sec'y of the Treasury, & Hon. Andrea Gacki, Dir., Fin. Crimes Enf't Network (July 8, 2024), <https://d12t4t5x3vyizu.cloudfront.net/gottheimer.house.gov/uploads/2024/07/Bipartisan-Letter-to-Treasury-FinCEN-OCC-re-National-Security-Concerns-with-State-Banking-Laws.docx.pdf> [https://perma.cc/UR75-KYGA].

expressed their concern that Fla. Stat. § 655.0323 and similar state fair access laws could fracture the AML statutory scheme.⁶⁶ The letter argues that the state law's required disclosure of additional justification for risk-based denials upon request of the customer "could lead to the disclosure of confidential and sensitive information related to America's national security."⁶⁷ In a response letter, Under Secretary for Terrorism and Financial Intelligence, Brian Nelson, agreed with the congressional representatives' position that the fair access state laws "may inhibit effective anti-money laundering . . . programs" and therefore "undermin[e] efforts to promote national security."⁶⁸ Conversely, twenty state attorneys general responded to these concerns as "fearmonger[ing] and stok[ing] confusion about state laws to advance activists' extreme agendas," and further argued that the representatives' conclusion that the state laws threatened national security was unfounded.⁶⁹ Yet in the broader de-risking context, politicians on both sides of the aisle fear the outcomes of an opaque customer denial process.⁷⁰ In a recent Senate Committee on Banking, Housing, and Urban Affairs hearing, Republicans warned that de-risking unfairly targeted conservatives, while Democrats expressed concern that de-risking disproportionately affects low-income individuals, previously incarcerated individuals, and cannabis businesses.⁷¹

The political and ideological conflict sets the stage for a legal conflict without an obvious resolution. Proponents of the state laws argue that federally chartered financial institutions are subject to the state law.⁷² Opponents seeking to preserve the AML statutes' current enforcement mechanisms claim federal anti-money laundering and

⁶⁶ *See id.*

⁶⁷ *Id.*

⁶⁸ Letter from Hon. Brian E. Nelson, Under Sec'y of Terrorism and Fin. Intel., U.S. Dep't of the Treasury, to Rep. Josh Gottheimer (July 18, 2024), https://myfloridacfo.com/docs-sf/cfo-news-libraries/news-documents/2024/treasury-letter-discussing-floridas-new-fair-access-to-banking-law.pdf?sfvrsn=948b86bb_2 [<https://perma.cc/YQ55-WQVM>].

⁶⁹ Letter from Ashley Moody, Fla. Att'y Gen., et al., to Hon. Janet Yellen, Sec. of the Treasury, (Aug. 1, 2024), https://www.myfloridalegal.com/sites/default/files/2024-08/banking-treasury-response-letter_final.pdf [<https://perma.cc/672N-M5EQ>]. The letter was joined by attorneys general from the following states: Iowa, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Carolina, Texas, Utah, West Virginia, and Wyoming. *Id.*

⁷⁰ *See Investigating the Real Impacts of Debanking in America: Hearing Before the S. Comm. on Banking, Hous., & Urb. Aff.*, 119th Cong. (2025).

⁷¹ *Id.*

⁷² *See* Weinberger, *supra* note 7.

anti-terror financing laws preempts the state laws' application.⁷³ Therefore, it remains unclear whether federal law preempts the recently enacted fair access laws, like Fla. Stat. § 655.0323. The former Biden administration Acting Comptroller of the Currency considered state fair access laws as a symptom of deepening political polarization that could fracture the national banking system.⁷⁴ Given persistent national security risks and bipartisan fervor that arbitrary denial of customer service must end immediately, it seems likely that Congress and regulatory agencies will seek a resolution to the problem during the second Trump administration.

II. THE CONSUMER FINANCIAL LAW PREEMPTION STANDARD

The modern consumer financial law preemption standard is codified in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).⁷⁵ The standard traces back to a lineage of United States Supreme Court precedents beginning with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819),⁷⁶ and eventually reaching a high-water mark late in the twentieth century with the Court's decision in *Barnett Bank, N.A. v. Nelson*.⁷⁷ The decision in *Barnett Bank* provided the basis for the general consumer financial law preemption standard in Dodd-Frank.⁷⁸ Troubled by the Second Circuit's recent application of the standard, in 2024 the Supreme Court heard *Cantero v. Bank of America, N.A.*,⁷⁹ which established the guidance for proper application of the Dodd-Frank consumer financial law preemption standard.⁸⁰

⁷³ See *id.*

⁷⁴ See Hon. Michael J. Hsu, Acting Officer, Off. of the Comptroller of the Currency, Remarks Before the Exchequer Club: Size, Complexity, and Polarization in Banking (July 17, 2024), <https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-79.pdf> [<https://perma.cc/KJ8Z-DML5>].

⁷⁵ See Dale Baker, *National Bank Preemption*, AM. BANKERS ASS'N (Sept. 2025), <https://www.aba.com/-/media/documents/advocacy/what-we-stand-for/issue-backgrounders/national-bank-preemption-one-pager.pdf> [<https://perma.cc/2PYL-W269>].

⁷⁶ 17 U.S. (4 Wheat.) 316 (1819).

⁷⁷ 517 U.S. 25 (1996).

⁷⁸ See Baker, *supra* note 75.

⁷⁹ 602 U.S. 205 (2024).

⁸⁰ See *id.* at 221.

A. *The History of Preemption, the National Bank Act, and the Dodd-Frank Act*

Coincidentally, an early constitutional decision for federal preemption of state law also involved a bank.⁸¹ In *McCulloch*, the Court unanimously held Maryland's tax on the Bank of the United States unconstitutional and therefore void.⁸² The Court in *McCulloch* first affirmed the constitutionality of the Second Bank of the United States⁸³ before finding Maryland's tax on the bank unconstitutional under Article VI, Clause 2 of the U.S. Constitution, known as the Supremacy Clause.⁸⁴ Famously proclaiming "[t]hat the power to tax involves the power to destroy[.]"⁸⁵ the Court explained the Supremacy Clause voided the Maryland tax because the tax impermissibly subjected control of the national bank to state legislation.⁸⁶ Therefore, the decision in *McCulloch* established the Supremacy Clause as a bedrock legal precedent for future federal preemption arguments while acknowledging a broad national legislative power.⁸⁷

The Second Bank of the United States ultimately failed after the *McCulloch* decision.⁸⁸ As a result, the contemporary common law history of federal preemption of state consumer financial law began with the enactment of the National Bank Act of 1864 (NBA).⁸⁹ The NBA established the dual banking system as we know it today, comprised of nationally and state-chartered banks.⁹⁰ Additionally, it created the OCC, and initially "charged [the OCC] with [the] responsibility for organizing and administering a system of nationally chartered banks and a uniform national currency."⁹¹ The NBA granted

⁸¹ See MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 485 (Saul Levmore et al. eds., 5th ed. 2023).

⁸² *McCulloch*, 17 U.S. at 436.

⁸³ *Id.* at 424.

⁸⁴ *Id.* at 436.

⁸⁵ *Id.* at 431.

⁸⁶ *Id.* at 326–30.

⁸⁷ See PAULSEN ET AL., *supra* note 81, at 507.

⁸⁸ *Id.* at 506.

⁸⁹ See CONG. RSCH. SERV., R45081, BANKING LAW: AN OVERVIEW OF FEDERAL PREEMPTION IN THE DUAL BANKING SYSTEM 4–5 (2018).

⁹⁰ See *Preemption in Banking Law and Regulation*, LEXISNEXIS (Sept. 26, 2024), <https://plus.lexis.com/api/permalink/390f6ea9-4b23-4a5a-bc95-b9e9963a385e/?context=1530671> [<https://perma.cc/B7SW-CZMB>].

⁹¹ Off. of the Comptroller of the Currency, U.S. Dep't of the Treasury, *Founding of the OCC & the Nat'l Banking Sys.*, <https://www.occ.treas.gov/about/who-we-are/history/founding-occ-national-bank-system/index-founding-occ-national-banking-system.html> [<https://perma.cc/W3C2-ALMM>] (last visited Jan. 17, 2025). The following is the OCC's current description of its capacity: "The Office of the

the OCC regulatory authority over nationally chartered banks, expanded in 1933 to include authority over federal savings associations.⁹² Furthermore, the NBA permitted the OCC to take enforcement actions for violations of laws, rules, regulations, final orders, and other similar transgressions.⁹³

The introduction of national banks as a direct competitor to state banks for depositors and creditors forced further common law refinement in the consumer financial legal landscape. Post-NBA consumer finance federal preemption issues between nationally chartered and state-chartered banks proved to be more nuanced than the taxation issue decided in *McCulloch*, prompting the Court, in the wake of the NBA, to define the scope of federal preemption of state consumer financial law. In 1869, in *First National Bank v. Commonwealth*,⁹⁴ the Court announced the initial doctrine of federal preemption of state consumer financial law. Decided five years after Congress enacted the NBA, *First National Bank* established the general principle that nationally chartered banks are governed by state law, unless “the [s]tate law incapacitates [national banks] from discharging their duties to the government.”⁹⁵ Seven years later, Justice Miller, who wrote the opinion,⁹⁶ reaffirmed the initial principle in *Waite v. Dowley*.⁹⁷ In doing so, the Court clarified the federal preemption exception: nationally chartered banks were not governed by state law where the state law (i) conflicted with congressional acts, (ii) “impair[ed] or destroy[ed] the utility of [national] banks, . . . or [(iii)] interfere[d] with the purposes of [national banks]’ creation.”⁹⁸ However, it took an

Comptroller of the Currency (OCC) is an independent bureau of the U.S. Department of the Treasury. The OCC charters, regulates, and supervises all national banks, federal savings associations, and federal branches and agencies of foreign banks. We ensure that the banks we supervise operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations.” Off. of the Comptroller of the Currency, U.S. Dep’t of the Treasury, *Who We Are*, <https://www.occ.treas.gov/about/who-we-are/index-who-we-are.html> [<https://perma.cc/2WXS-BDTP>] (last visited Jan. 17, 2025).

⁹² See Off. of the Comptroller of the Currency, U.S. Dep’t of the Treasury, *Laws & Regulations Overview*, <https://www.occ.treas.gov/topics/laws-and-regulations/index-laws-and-regulations.html> [<https://perma.cc/E3MX-QSX4>] (last visited Jan. 17, 2025). The OCC’s regulations are in Title 12 of the Code of Federal Regulations, “Banks and Banking” (12 C.F.R. pts. 1-199). *Id.*

⁹³ See *id.*

⁹⁴ 76 U.S. (9 Wall.) 353 (1869).

⁹⁵ *Id.* at 362 (holding federal law did not preempt a non-discriminatory state law taxing bank shareholders).

⁹⁶ *Id.* at 358.

⁹⁷ 94 U.S. 527, 533 (1876) (“We have more than once held in this court that the national banks organized under the acts of Congress are subject to State legislation[.]”).

⁹⁸ *Id.*

additional twenty years and two more cases for the Court to definitively set the language of the federal preemption standard as it exists in the twenty-first century.

In *Davis v. Elmira Savings Bank*,⁹⁹ Justice White wrote forcefully for the Court, reminding state authorities that nationally chartered banks are “necessarily subject to the paramount authority of the United States[.]” not state authorities.¹⁰⁰ The Court further explained “that an attempt by a state to define [national banks’] duties or control the conduct of their affairs is absolutely void” when the state law expressly conflicts with the federal law, and “either frustrates the purpose of the national legislation or impairs the efficiency” of the national bank as a federal agency.¹⁰¹ With Justice White’s opinion in *Davis*, the Court had the final ingredients to complete its development of the federal preemption standard.

Again writing for the Court, in *McClellan v. Chipman*,¹⁰² Justice White cited *First National Bank* and *Davis* for their “distinct, yet harmonious” propositions containing the rule and the exception governing conflicts of federal and state consumer financial law.¹⁰³ *First National Bank* provided the proposition for the rule, with “the rule being the operation of general state laws upon the dealings and contracts of national banks.”¹⁰⁴ *Davis* gave the proposition for the exception to the rule, with “the exception being [federal preemption] of [state] laws whenever [state laws] expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.”¹⁰⁵

The Court’s consumer financial law preemption cases relied on the distinct and harmonious *McClellan* propositions until *Barnett Bank* introduced new language to the preemption standard.¹⁰⁶ While outlining the legal preemption standard and defining its scope, the Court maintained *McClellan*’s rule and exception framework, but it further qualified the exception.¹⁰⁷ In *Barnett Bank*, the Court explained that federal law preempts state consumer financial law when state law “prevent[s] or significantly interfere[s] with the national bank’s exercise

⁹⁹ 161 U.S. 275 (1896).

¹⁰⁰ *Id.* at 283.

¹⁰¹ *Id.*

¹⁰² 164 U.S. 347 (1896).

¹⁰³ *Id.* at 357.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ In general, the Court cites many different cases concerning federal preemption of state laws. However, federal preemption of state consumer financial law cases traces almost exclusively back to *McCulloch* and its progeny discussed earlier.

¹⁰⁷ See *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32–33 (1996).

of its powers...”¹⁰⁸ Congress later endorsed and adopted the *Barnett Bank* “significant interference” standard for federal preemption of state consumer financial law in Dodd-Frank.¹⁰⁹ Despite Dodd-Frank’s codification of the common law consumer financial law preemption standard, confusion over how to apply the standard prompted the Court to directly address the confusion in *Cantero*.¹¹⁰

B. *Cantero’s Clarification of the Preemption Standard*

The Court’s unanimous decision in *Cantero* provides the current framework for analyzing consumer financial law preemption questions.¹¹¹ The decision vacated and remanded the judgement of the Second Circuit Court of Appeals stating that federal law preempted New York state law.¹¹² In doing so, the Court’s decision struck a blow to advocates of broad-reaching federal preemption of state consumer financial laws.¹¹³

Cantero originated when two plaintiffs brought putative class action breach of contract lawsuits against Bank of America in the United States District Court for the Eastern District of New York.¹¹⁴ The plaintiffs obtained mortgage loans from Bank of America which contractually required the plaintiffs to make monthly deposits into an escrow account.¹¹⁵ Under New York law, escrow accounts maintained in connection with a mortgage on real estate “shall” pay interest annually on the balance in the escrow account at a rate not less than two percent annually.¹¹⁶ However, Bank of America, a nationally chartered bank, filed a motion to dismiss the case, arguing the NBA preempted New York law’s applicability to nationally chartered banks,

¹⁰⁸ *Id.* at 33.

¹⁰⁹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 25b(b)(1) (2010).

¹¹⁰ *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 206 (2024) (holding “[t]he Second Circuit failed to analyze whether New York’s interest-on-escrow law is preempted as applied to national banks in a manner consistent with Dodd-Frank and *Barnett Bank*.”).

¹¹¹ *Id.* at 209 (“This case concerns the standard for determining when state laws that regulate national banks are preempted.”).

¹¹² *Id.* at 221.

¹¹³ See *id.* at 220–21 (explaining the Second Circuit’s test “would preempt virtually all state laws that regulate national banks[.]”).

¹¹⁴ *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171, 175 (E.D.N.Y. 2019), *rev’d*, 49 F.4th 121 (2d Cir. 2022).

¹¹⁵ *Cantero*, 602 U.S. at 212.

¹¹⁶ *Id.* (citing N.Y. Gen. Oblig. Law Ann. § 5-601 (West 2022)).

thus absolving Bank of America of any obligation to pay interest on plaintiffs' escrow accounts.¹¹⁷

The district court denied Bank of America's motion to dismiss, explaining the NBA did not preempt the New York State law.¹¹⁸ However, it granted Bank of America's motion to certify the preemption question for interlocutory appeal to the Second Circuit, and in doing so, recognized the higher court could come to a different conclusion regarding the preemption issue.¹¹⁹ The Second Circuit Court of Appeals reviewed the district court's denial of Bank of America's motion to dismiss *de novo* and reversed the district court's decision.¹²⁰

In reversing the district court's decision, the Second Circuit embraced a broader understanding of federal preemptive power than under the NBA as interpreted in *Barnett Bank* and later codified in Dodd-Frank. At the outset of the Second Circuit's opinion, the court analogized the case to *McCulloch*, claiming that the state minimum-interest requirements on escrow accounts would impermissibly "exert control over [national banks.]"¹²¹ The Second Circuit outlined the doctrinal framework for its preemption decision by tracing the United States Supreme Court's ruling in *Barnett Bank* back to the Supremacy Clause.¹²² In doing so, the circuit court reasoned the proper application of preemption doctrine as decided in *Barnett Bank*, and later codified in Dodd-Frank, instructed courts to assess whether a "[state law] purports to 'control' the exercise of [a national bank's] powers."¹²³ The circuit court again cited *McCulloch* in explaining that "control is not a question of the 'degree'" to which a state law affects a national bank;¹²⁴ rather, it is a question of whether the state law "intru[des] on the banking powers granted by the federal government."¹²⁵ In other words, any interference with national banks' powers under the NBA, no matter how small, amounted to impermissible state control over national banks according to *Barnett Bank* and its preceding precedent.

The plaintiffs argued for a narrower interpretation of federal preemption power and one that required analysis of the "significant[]

¹¹⁷ See *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 128–29 (2d Cir. 2022), *vacated*, 602 U.S. 205 (2024).

¹¹⁸ See *Hymes*, 408 F. Supp. 3d at 198.

¹¹⁹ *Cantero*, 49 F.4th at 129.

¹²⁰ *Id.* at 129, 140.

¹²¹ *Id.* at 125.

¹²² See *id.* at 130.

¹²³ *Id.* at 131 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)).

¹²⁴ *Id.* (citing *McCulloch*, 17 U.S. at 430–31).

¹²⁵ *Id.*

interfere[ence]” language in *Barnett Bank* and Dodd-Frank.¹²⁶ The Second Circuit concluded plaintiffs’ argument was “meritless”¹²⁷ and “unpersuasive[,]”¹²⁸ instead arguing that “*Barnett Bank* was explicit that it was applying the ‘ordinary legal principles of [preemption],’ not announcing a new standard.”¹²⁹ The United States Supreme Court granted certiorari to hear the case, and in a unanimous opinion, decided the plaintiffs’ argument was anything *but* meritless. The Court in *Cantero* vacated the judgement of the Second Circuit Court of Appeals and remanded the case, holding that “the Court of Appeals . . . did not apply [the legal] standard in a manner consistent with Dodd-Frank and *Barnett Bank*.”¹³⁰ The opinion articulated that the correct preemption “standard asks whether a state law ‘prevents or significantly interferes with the exercise by the national bank of its powers,’”¹³¹ originally the standard preferred by the plaintiffs in the circuit court.¹³² The Court in *Cantero* went beyond clarification of the preemption standard to instruct lower courts on the application of the standard.¹³³ Consequently, the OCC, or any other party, must adhere to this standard in its construction of its legal arguments for federal consumer financial law preemption of Fla. Stat. § 655.0323.

III. APPLICATION OF THE PREEMPTION STANDARD FROM *CANTERO* TO FLA. STAT. § 655.0323

Once a court determines that a state consumer financial law captures nationally chartered banks within its scope, the Dodd-Frank Act specifies three independent justifications for federal preemption of the state law.¹³⁴ Specifically, federal law preempts state law if: (a) the state law discriminates against nationally chartered banks, (b) the state law “significantly interferes” with national banks’ powers, or (c) a federal law outside of federal financial law preempts the state law.¹³⁵ The Court in *Cantero* also instructed lower courts to use the Supreme Court precedents mentioned in *Barnett Bank* to determine if significant interference occurred.¹³⁶ After applying the federal consumer financial

¹²⁶ *See id.* at 136–37.

¹²⁷ *Id.* at 135.

¹²⁸ *Id.* at 136.

¹²⁹ *Id.* (citing *Barnett Bank*, N.A. v. Nelson, 517 U.S. 25, 37 (1996)).

¹³⁰ *Cantero v. Bank of Am.*, N.A., 602 U.S. 205, 209 (2024).

¹³¹ *Id.*

¹³² *See Cantero v. Bank of Am.*, N.A., 49 F.4th 121, 136–37 (2d Cir. 2022).

¹³³ *See Cantero*, 602 U.S. at 219–21.

¹³⁴ 12. U.S.C. § 25b(b)(1).

¹³⁵ *Id.*

¹³⁶ *See Cantero*, 602 U.S. at 214–20.

law preemption standard to Fla. Stat. § 655.0323, the argument in favor of preemption of the Florida law is, at best, a weak argument.

A. *Nationally Chartered Banks Fall Within the Scope of Florida Statute § 655.0323*

The text of both Dodd-Frank and Fla. Stat. § 655.0323 dispense of any argument that the Florida law does not capture national banks. Looking first at the entirety of the Florida regulation, the sections contained in Fla. Stat. § 655, titled “Financial Institutions Generally,” clearly fall within Dodd-Frank’s § 25b(a)(2) definition of “state consumer financial law.”¹³⁷ Next looking at the definitions of terms used throughout the Florida regulation, Fla. Stat. § 655.005 includes both nationally chartered banks and state-chartered banks in its definition of “financial institution” used throughout Fla. Stat. § 655.¹³⁸ Finally turning to the regulation at issue’s text, Fla. Stat. § 655.0323 does not attempt to distinguish or exempt federal financial institutions from any portion of the law.¹³⁹ Consequently, the resulting text of Fla. Stat. § 655.0323 does not directly or indirectly discriminate between state and national banks, and the regulation expressly applies to both state-chartered and nationally chartered banks. As a result, the preemption argument turns on its success under the Dodd-Frank § 25b(b)(1) general preemption standard as interpreted in *Cantero*.

¹³⁷ See 12 U.S.C. § 25b(a)(2). “The term ‘State consumer financial law’ means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.” *Id.* Florida Statutes Chapter 655, Section 001, “Purpose, application[,]” does not discriminate between state-chartered and nationally chartered banks. FLA. STAT. § 655.001 (2024).

¹³⁸ See FLA. STAT. § 655.005. “‘Federal financial institution’ means a federally or nationally chartered or organized financial institution.” FLA. STAT. § 655.005(h). “‘Financial institution’ means a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust entity, international trust company representative office, qualified limited service affiliate, credit union, or an agreement corporation operating pursuant to § 25 of the Federal Reserve Act, 12 U.S.C. §§ 601 et seq. or Edge Act corporation organized pursuant to § 25(a) of the Federal Reserve Act, 12 U.S.C. §§ 611 et seq.” FLA. STAT. § 655.005(i). “‘State financial institution’ means a state-chartered or state-organized financial institution.” FLA. STAT. § 655.005(w).

¹³⁹ See FLA. STAT. § 655.0323.

B. *Applying Dodd-Frank’s § 25b(b)(1) General Preemption Standard*

Dodd-Frank § 25b(b)(1) codifies the general preemption standard for state consumer financial laws.¹⁴⁰ The general preemption standard lists three subsections joined by the word “or” indicating three, independent bases in which federal law preempts a state consumer financial law.¹⁴¹ The first subsection preempts a state law that has a “discriminatory effect on national banks,” the second subsection preempts a state law that “prevents or significantly interferes with” national banks exercising their federally authorized powers, and the third subsection preempts a state law if “the [state] law is preempted by a provision of Federal law other than” the federal law that applies to banks and banking.¹⁴² Importantly, federal consumer financial law can still preempt a non-discriminatory state law even if the national banks have the ability to comply with both the state and federal law.¹⁴³

Legal arguments for federal preemption of Fla. Stat. § 655.0323 under the first and third subsections of the general preemption standard fail because Fla. Stat. § 655.0323 does not discriminate against nationally chartered banks in expressed purpose or effect and because there is no conflict preemption between the AML statutes and Fla. Stat. § 655.0323.¹⁴⁴ Therefore, Dodd-Frank §25b(b)(1) classifies Fla. Stat. § 655.0323 as a non-discriminatory state consumer financial law that national banks are able to comply with.

¹⁴⁰ 12 U.S.C. § 25b(b)(1).

¹⁴¹ *See id.*

¹⁴² *See id.* The following is the Dodd-Frank Act’s general preemption standard in its entirety: “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.” *Id.*

¹⁴³ *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 214–15 (2024).

¹⁴⁴ The scope of this Note only considers conflict preemption with respect to the federal AML laws. It does not consider other federal theories of preemption or theories that federal law voids state fair access laws including, but not limited to, financial institutions’ right to exclude customers because banks are not an expressed “public accommodation.” *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).

1. *Preemption Arguments are Unfruitful Under Dodd-Frank §§ 25b(b)(1)(A) and 25b(b)(1)(C)*

Subsection A of Dodd-Frank § 25b(b)(1) addresses state consumer financial laws that would have “discriminatory effects” against national banks compared to state banks.¹⁴⁵ The subsection prevents state legislatures from enacting legislation that gives state-chartered banks a competitive advantage over national banks.¹⁴⁶ For example, a state law mandating nationally chartered banks to charge higher interest rates than their state bank counterparts would be discriminatory and preempted because mandating a higher interest rate for federal banks could create a material competitive advantage for state banks via the self-serving legislation.¹⁴⁷ For the same reasons discussed *supra* in Part III.A, the text in Fla. Stat. § 655 dispels any legal argument that Dodd-Frank § 25b(b)(1)(A) preempts Fla. Stat. § 655.0323. The Florida statute’s text treats nationally chartered banks and state-chartered banks equally, and it does not contain exceptions or carve-outs that expressly or impliedly discriminate against national banks in purpose or effect.¹⁴⁸ Thus, the plain text in Fla. Stat. § 655.0323 renders it non-discriminatory and therefore not preempted under Dodd-Frank § 25b(b)(1)(A).

Subsection C of Dodd-Frank § 25b(b)(1) addresses state consumer financial laws that are preempted by another provision of federal law outside of Title XXII.¹⁴⁹ This section of Dodd-Frank makes possible the federal preemption of state consumer financial law beyond solely Dodd-Frank § 25b(b)(1)(B), which only applies to the NBA’s preemption of state consumer financial law.¹⁵⁰

Outside of the general preemption standard articulated in Dodd-Frank, other categories in the taxonomy of federal preemption also do not apply.¹⁵¹ First, the AML statutes do not expressly preempt Fla. Stat. § 655.0323 because they do not contain language that

¹⁴⁵ 12 U.S.C. § 25b(b)(1)(A).

¹⁴⁶ *See id.*

¹⁴⁷ Though it is debatable what the actual effect of such a law might be, the state banks being able to charge a lower interest rate than the federal banks could attract an increased number of borrowers to the state banks, which could enable the state banks to issue a higher volume of loans and, at the very least, sell those loans to earn fees. David C. Wheelock, *What Drives Consumer Interest Rates?*, FED. RSRV. BANK OF MINNEAPOLIS (June 3, 2025), <https://www.minneapolisfed.org/article/2025/what-drives-consumer-interest-rates> [<https://perma.cc/Y45T-R9RH>].

¹⁴⁸ *See supra* Part III.A.

¹⁴⁹ *See* 12 U.S.C. § 25b(b)(1)(C).

¹⁵⁰ *See* *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 213–14 (2024).

¹⁵¹ *See* JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 2 (2019).

explicitly preempts the disclosure requirement at issue in Fla. Stat. § 655.0323.¹⁵² The other broad category of federal preemption, implied preemption, contains two subcategories: field preemption and conflict preemption.¹⁵³ As the Court noted in *Cantero*, “Dodd-Frank [§ 25b(b)(4)] ruled out field preemption,” making clear that the NBA’s grant of power to national banks does not and cannot blanket-preempt any state consumer financial law.¹⁵⁴

With field preemption ruled out, conflict preemption remains. A federal law conflict-preempts a state law if it is impossible for a regulated party to comply with both (“impossibility preemption”), “or when state law poses an ‘obstacle’ to the accomplishment of the ‘full purposes and objectives’ of Congress” (“obstacle preemption”).¹⁵⁵ In this case, impossibility preemption does not exist because it is possible for national banks to comply with both federal law and Fla. Stat. § 655.0323.¹⁵⁶ The second subcategory of conflict preemption, obstacle preemption, invites plausible legal arguments in favor of preemption. Florida Statutes § 655.0323’s requirement that, upon request, financial institutions must disclose information related to their decisions to “deny, cancel, suspend, or terminate services” to customers¹⁵⁷ is considered by some to be an obstacle to the purposes and objectives of the federal AML regime.¹⁵⁸ However, the Court rarely rules in favor of obstacle preemption, instead preferring Congressional action to cure obstacle preemption cases through legislation rather than the courts effectuating express preemption through adjudication.¹⁵⁹

¹⁵² The following disclosure requirement in Fla. Stat. § 655.0323 is the chief concern for those in support of preemption: “Within 90 days after receiving notice from [Florida’s Office of Financial Regulation], the financial institution must file with the office a complaint response report containing such information as the commission requires by rule, unless precluded by law.” FLA. STAT. § 655.0323(5)(b). *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 530-3 (1977) (for an example of “explicit congressional intent to pre-empt state law”); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

¹⁵³ SYKES & VANATKO, *supra* note 151, at 2.

¹⁵⁴ *Cantero*, 602 U.S. at 213.

¹⁵⁵ SYKES & VANATKO, *supra* note 151, at 2 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁵⁶ *Id.* The authors cite to the Court’s example in *Florida Lime & Avocado Growers v. Paul* to demonstrate an impossibility preemption scenario: “[T]he Court has explained that a hypothetical federal law forbidding the sale of avocados with more than 7% oil content would preempt a state law forbidding the sale of avocados with less than 8% oil content, because avocado sellers could not sell their products and comply with both laws.” *Id.* at 24 (citing *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142–43 (1963)).

¹⁵⁷ FLA. STAT. § 0655.0323.

¹⁵⁸ *See* Letter from Rep. Josh Gottheimer, et al. *supra* note 65.

¹⁵⁹ *See* SYKES & VANATKO, *supra* note 151, at 25–26.

Therefore, the OCC should not expect courts to effectuate their obstacle preemption argument through adjudication.

With favorable results to preempt Fla. Stat. § 655.0323 being speculative at best under Dodd-Frank § 25b(b)(1)(C) and unworkable under Dodd-Frank § 25b(b)(1)(A), the remaining path to preemption runs through Dodd-Frank § 25b(b)(1)(B).

2. *The Argument for Preemption Under Dodd-Frank § 25b(b)(1)(B) and Barnett Bank Following Cantero is Weak*

Although Congress codified the United States Supreme Court's *Barnett Bank* decision in Dodd-Frank,¹⁶⁰ it took until 2024 for the Court to clearly articulate how to apply Dodd-Frank's "prevents or significantly interferes" federal preemption standard in accordance with the *Barnett Bank* decision.¹⁶¹ The Court in *Cantero* acknowledged that the ruling in *Barnett Bank* "did not draw a bright line" in its instruction of when a non-discriminatory state law "prevents or significantly interferes" with national banks' powers under the NBA.¹⁶² Instead, the Court explained that Dodd-Frank § 25b(b)(1)(B) requires courts to evaluate the decision in *Barnett Bank* along with the preceding holdings mentioned in *Barnett Bank* to come to a conclusion on the preemption question.¹⁶³ While *Cantero* acknowledges the legal murkiness of the general preemption standard under Dodd-Frank § 25b(b)(1)(B), application of the standard to Fla. Stat. § 655.0323 reveals that potential litigants do not have a strong legal case for preemption.

The rule the Court in *Cantero* established for determining preemption under Dodd-Frank § 25b(b)(1)(B) asks lower courts to analyze prior United States Supreme Court precedents from, and including, *Barnett Bank* to determine whether a non-discriminatory state consumer financial law "significantly interfere[s] with the national bank's exercise of its power."¹⁶⁴ Before the Court in *Cantero* re-introduced the precedents included by the Court in *Barnett Bank*, it took an important step to frame the legal extent of a national bank's "power" as articulated in *Barnett Bank*.¹⁶⁵ Given Fla. Stat. § 655.0323's classification discussed *supra* in Part III.B, federal preemption of Fla. Stat. § 655.0323 turns on the extent to which the NBA grants power

¹⁶⁰ *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 213–14 (2024).

¹⁶¹ *See id.* at 214.

¹⁶² *Id.* at 221.

¹⁶³ *See id.* at 219–21.

¹⁶⁴ *Id.* at 215.

¹⁶⁵ *See id.* at 214–15.

to national banks in connection with the AML statutory regime. Only after a determination of the extent to which the NBA grants power to national banks will a court in review analogize and differentiate between the prior United States Supreme Court rulings mentioned in *Cantero* to find whether the state law “significantly interferes” with national banks’ power.¹⁶⁶

Congressional grants of “power” in the national banking context come in the form of “enumerated and incidental ‘powers,’” as *Barnett Bank* acknowledges and *Cantero* affirms.¹⁶⁷ First, Congress granted express enumerated powers to national banks in the NBA and succeeding acts.¹⁶⁸ The law then recognized the existence of incidental powers national banks necessarily possess to perform their expressed enumerated powers.¹⁶⁹ The Court in *Anderson National Bank v. Lueckett*, 321 U.S. 233 (1944), explained an example of power incident to the enumerated powers in the NBA.¹⁷⁰ In *Anderson*, the Court noted that a bank’s obligation to pay depositors withdrawing their property is “an inseparable incident power of a national bank’s privilege of receiving deposits[.]”¹⁷¹ In other words, a bank’s enumerated power of “receiving deposits”¹⁷² is accompanied by its incident power to pay withdrawals upon a customer’s request. The Court in *Cantero* cited *Barnett Bank* to explain that the enumerated and incidental powers in the NBA are broad grants of power to national banks that ordinarily preempt contrary state law, but only when the state law “significantly interferes with the bank’s exercise of its powers.”¹⁷³

After a finding on the extent of power granted to national banks, the Court conducts an evaluation of prior precedent to determine whether the state law significantly interferes with that power. *Cantero* notes the Court in *Barnett Bank* marshalled four cases into its opinion, including *Barnett Bank*, to exemplify when state law significantly interferes with national banks’ powers.¹⁷⁴ Beginning with the “paradigmatic example of significant interference,” the Court in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), found a New York law preventing banks from using “saving” or “savings” in advertisements interfered with national banks’

¹⁶⁶ *Id.* at 215.

¹⁶⁷ *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996); *Cantero*, 602 U.S. at 215.

¹⁶⁸ 12 U.S.C. § 24.

¹⁶⁹ *See id.* (“Seventh. To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking[.]”).

¹⁷⁰ *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233 (1944).

¹⁷¹ *Id.* at 248.

¹⁷² 12 U.S.C. § 24.

¹⁷³ *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 215 (2024).

¹⁷⁴ *Id.* at 220.

enumerated power to receive deposits because it prevented banks from effectively advertising account services.¹⁷⁵ Similarly in *Barnett Bank*, the Court held in favor of preemption of a Florida law prohibiting national banks from selling insurance in small towns because it significantly limited national banks' power to sell insurance.¹⁷⁶ In the third preemption case mentioned in *Cantero*, *Fidelity Federal Savings & Loans Association v. de la Cuesta*, 458 U.S. 141 (1982), federal law preempted a California law that forbid federal financial institutions from enforcing optional due-on-sale clauses because the state law "deprived the [federal lender] of the 'flexibility' given it."¹⁷⁷ In the fourth and final preemption case mentioned in *Cantero*, *First National Bank of San Jose v. California*, 262 U.S. 366 (1923), federal law preempted a California state law permitting the state to claim the property of accounts dormant for twenty or more years without proof the account was abandoned.¹⁷⁸ The Court in *First National Bank of San Jose* recognized this escheatment law might cause consumers to "hesitate" to use national banks in California, thus undermining the national banks by "directly impair[ing] [national banks'] efficiency" to accept deposits.¹⁷⁹

The four *Barnett Bank* cases illustrate state law interference with the core functions of banks: the ability to accept deposits,¹⁸⁰ lending,¹⁸¹ and facilitating transactions.¹⁸² Noticeably absent in the *Barnett Bank* decisions in favor of federal preemption is any quantitative analysis by the Court of how much or how little a national bank is affected by the state law.¹⁸³ This absence suggests that a quantitative measure of a national bank's loss of business in dollars or customers is immaterial to the significant interference standard. Instead, *Cantero's* interpretation of *Barnett Bank* and Dodd-Frank § 25b(b)(1)(B) considers state law intrusions or restrictions on national banks' discharge of their congressionally granted powers, however slight, a significant interference warranting preemption of the state law at issue.

After discussing decisions favoring preemption, the Court in *Cantero* highlighted *Barnett Bank's* non-preemption caselaw to

¹⁷⁵ *Id.* at 216. See *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 374 (1954).

¹⁷⁶ *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 34–35 (1996).

¹⁷⁷ *Fidelity Fed. Sav. & Loans Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982).

¹⁷⁸ *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923).

¹⁷⁹ *Id.* at 369–70.

¹⁸⁰ See *Franklin Nat'l Bank*, 347 U.S. at 374, 376; *First Nat'l Bank of San Jose*, 262 U.S. at 370.

¹⁸¹ See *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 155.

¹⁸² See *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 27–28, 35 (1996).

¹⁸³ See *id.* at 33–34. The opinion makes clear that state law must not "impair significantly . . . the national bank's exercise of its powers[.]" but there is no mention of applying that standard using quantitative measures. *Id.* at 33.

distinguish between what constitutes significant interference with national banks' power and what qualifies as an allowable state limitation on those powers. The Court began with *Anderson*, which held that federal law did not preempt a nondiscriminatory Kentucky statute allowing the state to claim the property of national bank accounts "only on proof of abandonment in fact," rather than simply because the accounts were dormant.¹⁸⁴ The Court in *Anderson* clearly differentiated the Kentucky law from the California statute in *First National Bank of San Jose*, noting that Kentucky's requirement of proof of abandonment before escheatment would not deter customers from banking with national banks.¹⁸⁵ The law required "nothing more than the performance of a duty . . . and not a denial of [a national bank's] privileges as a federal instrumentality."¹⁸⁶ The second case mentioned in *Cantero*, *First National Bank*, upheld a Kentucky law that "taxed the shareholders of all banks (including national banks) on their shares of bank stock."¹⁸⁷ The Court found that this state law governed banks' daily operations but did not hinder or interfere with their congressionally granted powers.¹⁸⁸ In the final non-preemption case discussed in *Cantero*, *McClellan*, the Court reasoned similarly to *First National Bank*, concluding that Massachusetts contract law "restrained" the business conduct of both nationally chartered and state-chartered banks, but it did not "frustrat[e] the lawful purpose of Congress, or impai[r] the efficiency of the banks to discharge the duties imposed upon them."¹⁸⁹

Overall, the nondiscriminatory state laws in the *Barnett Bank* cases that favored non-preemption shared a common characteristic: they limited or governed banks' day-to-day operations without infringing upon their power to carry out core banking functions. National banks remained free to perform their essential functions, but those functions were subject to the general contract, property, and tax laws, of the states in which they operated.

Proponents of federal preemption of Fla. Stat. § 655.0323 face an uphill battle given *Cantero's* analytical framework. With no legal path to preemption existing under Dodd-Frank § 25b(b)(1)(A) or (C), the remaining avenue requires successfully analogizing Fla. Stat. § 655.0323 to one of the four cited preemption cases in *Cantero*. To accomplish this, proponents of preemption must identify an enumerated or incidental power granted by Congress to nationally

¹⁸⁴ *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233, 251–52 (1944).

¹⁸⁵ *See id.* at 247–50.

¹⁸⁶ *Id.* at 252.

¹⁸⁷ *See Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 218–19 (2024).

¹⁸⁸ *Id.* at 218–19.

¹⁸⁹ *McClellan v. Chipman*, 164 U.S. 347, 359 (1896).

chartered banks and demonstrate that the power was “akin to the interference” found in *Franklin*, *Fidelity*, *First National Bank of San Jose*, and *Barnett Bank*.¹⁹⁰

A successful argument for federal consumer financial law preemption relies on framing national banks’ powers as broad powers. However, this approach has become increasingly difficult, if not impossible, after the Court’s rebuke of the Second Circuit’s ruling in *Cantero*.¹⁹¹ The goal in preempting Fla. Stat. § 655.0323 is to prevent national banks from having to comply with state disclosure requirements concerning customer challenges to denied, terminated, or suspended services. Proponents of preemption may attempt to connect customer management to the bank’s core functions enumerated in 12 U.S.C. § 24, such as “receiving deposits,” by arguing that an “incidental power ... necessary to carry on the business of banking”¹⁹² includes the power to de-risk its customer bases in accordance with federal AML statutes. After all, litigants might try to advance a *Fidelity* argument in favor of preemption by claiming that Florida’s additional disclosure requirements deprive national banks of the flexibility needed to comply with AML statutes. Similarly, they might pursue a *First National Bank of San Jose* argument by asserting that Fla. Stat. § 655.0323 undermines and directly impairs the national banks’ ability to implement the AML statutory regime. Yet, these arguments misappropriate the reasoning in those cases and ultimately miss the forest for the trees. Attempts to analogize the disclosure requirements mandated by Fla. Stat. § 655.0323 to the state laws preempted in *Fidelity* and *First National Bank of San Jose* fail because the laws those cases significantly interfered with national banks’ powers to make loans and attract savings account customers.¹⁹³ By contrast, Fla. Stat. § 655.0323 does not interfere with national banks’ ability to attract customers or conduct their business; it merely imposes a disclosure obligation when customers challenge a bank’s decision to deny, suspend, or terminate an account.¹⁹⁴

Unfortunately for proponents of preemption, Fla. Stat. § 655.0323 more closely resembles the three non-preemption cases discussed in *Cantero* than the preemption cases. Similar to the impact of the state laws on national banks in those cases, Fla. Stat. § 655.0323’s disclosure requirement upon request is a general law that compels additional compliance but does not frustrate the bank’s ability to

¹⁹⁰ See *Cantero*, 602 U.S. at 220.

¹⁹¹ See *supra* Part II.B.

¹⁹² 12 U.S.C. § 24.

¹⁹³ See *Fidelity Fed. Sav. & Loans Ass’n v. de la Cuesta*, 458 U.S. 141, 155 (1982); *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923).

¹⁹⁴ See FLA. STAT. § 655.0323 (2024).

exercise their enumerated and incidental powers. While some might argue that the law frustrates the efficacy of the federal AML regime,¹⁹⁵ a weakly supported claim that a non-discriminatory state consumer financial law frustrates federal laws outside of the NBA does not trigger preemption under Dodd-Frank § 25b(b)(1)(B) as interpreted in *Cantero*.

The desired outcome for proponents of federal preemption of state fair access laws is also illogical when viewed through the lens of banks' business operations. Before the enactment of Fla. Stat. § 655.0323, financial institutions' AML compliance programs already required them to collect information from customers and, consistent with the AML statutes, deny, suspend, or terminate accounts with customers based on a review of the collected information.¹⁹⁶ Through this process, over 800 national banks¹⁹⁷ serviced millions of national and international customers in various services authorized by Congress under 12 U.S.C. § 24. Arguing that the enumerated and incidental powers that enable national banks to conduct their business are suddenly significantly interfered with by a modest state disclosure requirement is untenable, especially when the banks likely already maintain the very information subject to disclosure requests. While other avenues may exist for the OCC to effectively preempt Fla. Stat. § 655.0323,¹⁹⁸ pursuing preemption under Dodd-Frank § 25b(b)(1)(B) is not feasible.

¹⁹⁵ See Letter from Rep. Josh Gottheimer, et al., *supra* note 65.

¹⁹⁶ See FED. RESRV., "KNOW YOUR CUSTOMER," BANK SECRECY ACT MANUAL (1997), https://www.federalreserve.gov/boarddocs/supmanual/bsa/bsa_p5.pdf [<https://perma.cc/R5DZ-PBLD>].

¹⁹⁷ OFF. OF THE COMPTROLLER OF THE CURRENCY, NATIONAL BANKS ACTIVE AS OF 12/31/2024 (2024), <https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/national-by-name.pdf> (on file with Columbia Business Law Review).

¹⁹⁸ *E.g.*, the OCC could use its rulemaking authority to preempt Fla. Stat. § 655.0323, but states would likely challenge a preemptive rule, ultimately leading to judicial review. As the Court noted in *Fidelity*, "Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgements are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153–54 (citing *United States v. Shimer*, 367 U.S. 374, 381–82 (1961)). Furthermore, the OCC could argue the state fair access laws inappropriately impose a duty to bank where federal law dictates none exists because financial institutions are not "public accommodations." See Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).

CONCLUSION

The internal mechanics of financial institutions' AML compliance programs remain largely opaque to customers. Advocates for the federal regime argue that this opacity deters money launderers and reduces their ability to evade detection. However, skepticism toward this system is growing. An increasing number of politically conservative states, led by Florida, have enacted fair access laws to ensure that customer service denials are nonprejudicial. These laws, like Fla. Stat. § 655.0323, give customers an opportunity to request information from banks to help them identify the reason for the banks' decision to deny services. Some members of Congress have urged the OCC to preempt Fla. Stat. § 655.0323 and similar laws, citing national security concerns. Yet, the OCC's legal basis for doing so under Dodd-Frank, and in the light of *Cantero*, is weak and likely futile.

As *Cantero* explains, federal law preempts Fla. Stat. § 655.0323 only if it "significantly interferes" with the power of nationally chartered financial institutions. Determining whether such significant interference exists depends on whether the case aligns with the preemption precedents set in *Barnett Bank*. Those cases found preemption only when a state law significantly impaired a banks' ability to effectuate its core grants of power or powers incident to its function. Florida Statutes § 655.0323's addition of a disclosure requirement upon the request of a customer hardly interferes with a national banks' expressed powers to accept deposits, lend to customers, or even comply with the AML statutes. It is therefore imprudent to argue state laws like Fla. Stat. § 655.0323 significantly interfere with national banks' powers. The OCC may pursue express preemption of Fla. Stat. § 655.0323 and similar laws through its rulemaking power, but any arguments to preempt the state laws under Dodd-Frank are likely futile.