

No. 1: 01CV02356 EGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., and
NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Plaintiffs,

v.

JOHN D. HAWKE, Jr., Comptroller of the Currency, and
THE OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Defendants,

Emmet G. Sullivan
Judge Presiding

**MEMORANDUM OF POINTS AND AUTHORITIES ON BEHALF
OF AMICUS CURIAE NATIONAL ASSOCIATION OF
INSURANCE COMMISSIONERS IN SUPPORT OF
PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT**

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**MEMORANDUM OF POINTS AND AUTHORITIES ON BEHALF
OF AMICUS CURIAE NATIONAL ASSOCIATION OF
INSURANCE COMMISSIONERS IN SUPPORT OF
PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7.1, the National Association of Insurance Commissioners (NAIC) moves for leave to file this Memorandum in support of plaintiffs Independent Insurance Agents of America and National Association of Professional Insurance Agents in urging the court to affirm the preemption threshold codified by Congress with respect to state laws relating to insurance sales, solicitation, and cross-marketing activities by national banks.

INTRODUCTION

This matter involves a complaint filed by the Independent Insurance Agents of America and the National Association of Professional Insurance Agents challenging the authority of the Office of the Comptroller of the Currency (OCC) to issue an opinion letter regarding the preemption of state law. In a September 24, 2001 letter to the West Virginia Bankers Association (Preemption Letter),¹ the OCC opined whether federal law preempted certain provisions of the West Virginia Insurance Sales Consumer Protection Act, W. Va. Code §§ 33-11-1 et seq. (2000). In its Preemption Letter, the OCC asserted that federal law preempts four provisions of the West Virginia law, preempts in part one additional provision, and does not preempt three other sections.

The practical effect of the Preemption Letter reaches beyond the issue of whether certain provisions of West Virginia law would survive a preemption challenge under federal law. The OCC's Preemption Letter serves notice to every other state that its laws may be subject to preemption through the employment of a standard that contravenes the plain language of the federal statute upon which it is purportedly based as well as the United States Supreme Court

¹ Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency (OCC), to Sandra Murphy, Esq. on behalf of West Virginia Bankers Association (Sept. 24, 2001).

opinion Congress intended to codify. This threat casts doubt upon the ability of state regulators and legislators to protect their residents regarding consumer protection aspects of insurance regulation. Due to the implications of the continuing effect of the Preemption Letter for consumers, regulators, insurers, and national banks, it is in the public interest to clarify the standard for preemption of state laws relating to insurance sales, solicitation, and cross-marketing activities by national banks.

INTEREST OF THE AMICUS CURIAE

The NAIC is comprised of the chief insurance regulators in the 50 states, the District of Columbia, and four United States territories. Each member is committed to the protection of insurance consumers within his or her jurisdiction. The NAIC acts to support regulators in achieving fundamental objectives relating to insurance regulation, of which consumer protection is paramount. Although it appears today as amicus curiae for plaintiffs, the NAIC wishes to note that it does not take a position regarding the underlying dispute concerning the West Virginia statutes. The NAIC's interest in this litigation is limited to the standard applied by this Court in determining whether certain provisions of West Virginia law are preempted. The NAIC believes that this Court's use of the OCC's weak standard for preemption of state insurance laws would set a dangerous precedent and contravene the intent of Congress in enacting section 104(d)(2)(A)² of the Gramm-Leach-Bliley Act (GLBA).³ Because of this weak standard's potential for erosion of the power of state insurance regulators to protect insurance consumers, the NAIC asks to appear before this Court.

² 15 U.S.C. § 6701(d)(2)(A) (Supp. 2001). For familiarity of reference, when referring to a section of the Gramm-Leach-Bliley Act (GLBA), this Memorandum refers to sections of GLBA by their section numbers within that legislation as opposed to where codified within the United States Code.

³ Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

As detailed below, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997) ensures that the business of insurance shall be regulated by the states, unless Congress specifically provides otherwise. That the business of insurance remains within the preserve of state regulation is a fundamental principle of “functional regulation.” The concept of functional regulation derives from GLBA. GLBA removed previously existing barriers among the businesses of insurance, banking, and securities. While permitting insurance companies, depository institutions,⁴ and securities firms to conduct business in these other areas, GLBA also indicated that current regulatory structures are largely preserved. Specifically regarding insurance regulation, GLBA re-affirmed the applicability of the McCarran-Ferguson Act subject to certain preemption rules, one of which is at issue presently.

State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks are addressed by section 104(d)(2)(A), which provides for their preemption in limited circumstances. The NAIC possesses a vested interest in the meaning that courts ascribe to the section 104(d)(2)(A) preemption standard because it relates directly to the regulatory power of state insurance officials. This interest is only heightened when a federal agency attempts to establish a flawed legal standard for preempting state laws through the device of an opinion letter. As the NAIC will explain in this Memorandum, Congress codified a high “prevent or significantly interfere” standard for preemption of state laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. The NAIC further asserts that the OCC has aggressively abrogated this standard by arguing in its Preemption Letter and its Motion for Summary Judgment that: “State statutes having only a small effect on the national bank’s exercise of that power [to sell insurance] may still apply” (Preemption Letter at 6); “Federal law preempts . . . State laws that condition or confine the exercise by a national bank of

⁴ This brief may refer to “depository institutions” and “national banks” interchangeably.

its express or incidental powers” (*id.*); and any of “a variety of formulations” can be used “interchangeably” and are just as valid as “prevent or significantly interfere” (Mot. Summ. J. at 15-16). While the NAIC takes no position in this Memorandum as to the validity of the West Virginia laws in question, each of the NAIC’s members, who are the state insurance commissioners empowered by Congress and the states to regulate the business of insurance, possesses a significant interest in arguing that this Court definitively and affirmatively apply the proper standard, “prevent or significantly interfere,” and reject the OCC’s attempt to administratively change the standard set by Congress. Thus, the possibility that this Court and/or others may set a preemption threshold lower than what the NAIC understands Congress to have codified is within the interest of state insurance regulators. Further, the OCC recently issued another related preemption letter (Massachusetts Preemption Letter)⁵ concerning three provisions of a Massachusetts law governing bank insurance sales activities. Thus, the OCC is attempting to develop a preemption record that may greatly impact state insurance regulation. Thus, NAIC believes it has an interest in asking this Court to affirmatively and definitively arrest this pattern.⁶ By advancing a preemption threshold lower than what Congress intended, the OCC threatens state insurance regulators’ reliance on their authority under state statutes as well as the plain meaning of section 104(d)(2)(A) directly impacting the ability of the states to protect the insurance-consuming public. To avoid this outcome, the NAIC supports plaintiffs in urging that this Court clarify the preemption standard concerning state laws relating to insurance sales, solicitation, and cross-marketing activities by national banks.

⁵ Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, to Kevin F. Kiley, Executive Vice President, Massachusetts Bankers Association, Inc. (Mar. 18, 2002).

⁶ The NAIC is aware of at least one additional preemption request concerning Rhode Island law.

ARGUMENT

The OCC's Preemption Letter erroneously states the legal standard for preemption of state laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. Congress codified the "prevent or significantly interfere" standard of the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) at section 104(d)(2)(A) of GLBA. If affirmed by this Court, the OCC's standard would set a dangerous precedent under which the OCC could preempt state laws in a manner wholly unintended by Congress and undermine the functional regulation framework established by Congress in GLBA.

I. GLBA ESTABLISHED A FRAMEWORK OF FUNCTIONAL REGULATION OF FINANCIAL SERVICES ACTIVITIES, UNDER WHICH STATES CONTINUE TO REGULATE THE BUSINESS OF INSURANCE

To appreciate fully the extent to which the OCC's preemption standard contravenes Congressional intent, it is important to understand the regulatory framework enshrined within GLBA. The central regulatory principle is "functional regulation." In short, functional regulation means that bank regulators will regulate banking activities, securities regulators will regulate securities-related activities, and insurance regulators will regulate insurance activities. Section 301⁷ explicitly states that "[t]he insurance activities of *any person (including a national bank . . .)* shall be functionally regulated by the States, subject to section 104" (emphasis added). Section 104,⁸ "Operation of State Law," establishes a strong presumption in favor of state insurance regulation, both in its structure and its content. In ensuring that the insurance

⁷ 15 U.S.C. § 6711 (Supp. 2001).

⁸ 15 U.S.C. § 6701 (Supp. 2001).

activities of *any* entity were regulated by states, section 104(a)⁹ re-affirms the principles of the McCarran-Ferguson Act. Section 104(a) clearly states, “The Act entitled ‘An Act to express the intent of Congress with reference to the regulation of the business of insurance’ and approved March 9, 1945 (15 U.S.C. 1011 et seq.) (commonly referred to as the ‘McCarran-Ferguson Act’) remains the law of the United States.”

To understand the significance of the continued validity and viability of the McCarran-Ferguson Act, it is important to consider just what it provides regarding state regulation of insurance activities. First, “Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” 15 U.S.C. § 1011 (1997). Further, “[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.” 15 U.S.C. § 1012(a) (1997).

With respect to the federal aspect of this regulatory equation, both the McCarran-Ferguson Act and GLBA attach conditions upon state authority. Nevertheless, while state insurance regulation may not be absolute, it is indisputable that Congress intended to preserve strong state-based regulatory structures. For instance, in McCarran-Ferguson, Congress declares that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance” 15 U.S.C. § 1012(b) (1997). While Congress can take away what it has granted, Congress made clear that it did not do so when it enacted GLBA, but rather expressly preserved the state regulation of the business of insurance. In fact, section 104(a) explicitly reiterates the McCarran-Ferguson Act’s establishment of state

⁹ 15 U.S.C. § 6701(a) (Supp. 2001).

regulation in the absence of specific Congressional direction to the contrary. Thus, the provisions of GLBA relating to preemption of state laws concerning the insurance activities of national banks must be read against the clear Congressional intent, as expressed in McCarran-Ferguson and GLBA, that insurance activities be regulated at the state level regardless of who is conducting the business of insurance.

II. THE RULE ESTABLISHED BY CONGRESS CONCERNING PREEMPTION OF STATE LAWS RELATING TO INSURANCE SALES, SOLICITATION, AND CROSS-MARKETING ACTIVITIES BY NATIONAL BANKS IS “PREVENT OR SIGNIFICANTLY INTERFERE.”

A. In enacting GLBA, Congress codified “prevent or significantly interfere” as the preemption standard.

Courts examine the preemptive effect of state law upon national bank activities using ordinary preemption principles, under which a court’s “sole task is to ascertain the intent of Congress.” *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 280 (1987). That intent is clear in this case. By enacting GLBA, Congress codified an explicit preemption standard derived from the Supreme Court’s decision in *Barnett Bank*, and explained exactly what that standard meant in plain language. Consistent with the language of *Barnett Bank*, Congress set the preemption standard with respect to certain state laws at “prevent or significantly interfere.”

Section 104(d)(2)(A) states:

In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the *United States in Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

Following ordinary preemption principles, *Barnett Bank* sought to answer a “question [that] is basically one of congressional intent,” which is whether “Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.” *See* 517 U.S. at 30, 34. The Supreme Court immediately rephrased this as “prevent or significantly interfere.” *Id.* at 34. As demonstrated below, several federal courts between *Barnett Bank* and GLBA followed this standard, and Congress adopted it at section 104(d)(2)(A). Thus, in accordance with the *Barnett Bank* decision, state laws will be preempted only where they “prevent or significantly interfere” with insurance sales, solicitation, and cross-marketing activities of national banks.¹⁰

Where Congress codifies a standard, courts must respect the unambiguous statutory language. In interpreting statutes, courts “begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Further, “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Id.* Section 104(d)(2)(A) expresses a clear formulation through the words “prevent or significantly interfere.” Thus, the statutory language is unambiguous, and the preemption standard may be established by looking no further than the words “prevent or significantly interfere.”

¹⁰ Section 104(d)(2)(B) indicates that “notwithstanding subparagraph (A),” there are 13 categories of restrictions, or “safe harbors,” pertaining to national bank sales of insurance that are preserved, provided they are “no more burdensome or restrictive” than as provided in section 104(d)(2)(B). 15 U.S.C. § 6701(d)(2)(B) (Supp. 2001). The permissible restrictions that states may impose include prohibitions against rejection of insurance policies solely because the policy was not written by the depository institution or its affiliate; requirements that customers be informed in writing that the sale of an insurance policy is neither a deposit nor insured by the Federal Deposit Insurance Corporation; and requirements that separate books and records be maintained with respect to insurance transactions. *See, e.g.*, 15 U.S.C. § 6701(d)(2)(B)(i)-(xiii) (Supp. 2001).

The reference to the *Barnett Bank* decision in GLBA reinforces, rather than alters, the plain language of “prevent or significantly interfere.” Although the OCC appears to assume that the plain language of “prevent or significantly interfere” is somehow modified by the reference to *Barnett Bank* through the phrase “in accordance with,” this reference does not override the “prevent or significantly interfere” preemption standard declared by Congress. *See* Preemption Letter at 8. The structure of section 104(d)(2)(A) establishes this fact. The dominant part of section 104(d)(2)(A) is the clause stating that “no State may . . . prevent or significantly interfere with” a national bank’s ability to engage in any insurance sales, solicitation, or cross-marketing activities. The “in accordance with” clause is subordinate to this principal clause. The principal “prevent or significantly interfere” clause sets the standard, and the subordinate clause indicates Congress’ belief (and resulting statutory intent) that such clause is to read and should be understood to be “in accordance” with the *Barnett Bank* decision, which first stated the “prevent or significantly interfere” standard. *Barnett Bank* should not be read to ignore its seminal result as codified, which was to give birth to the “prevent or significantly interfere” standard. The OCC, however, inverts the proper reading of the section 104(d)(2)(A) preemption rule, making the “prevent or significantly interfere” clause subordinate to the “in accordance with” clause. Under this interpretation, “prevent or significantly interfere” has no more weight than any of a dozen or so synonyms. *See* Mot. Summ. J. at 15-17.

The OCC argues that the reference to *Barnett Bank* indicates that preemption questions under section 104(d)(2)(A) will be resolved according to a variety of standards supposedly utilized in *Barnett Bank*. *See* Preemption Letter at 8; Mot. Summ. J. at 11. This conclusion, as applied, completely ignores the explicit use of “prevent or significantly interfere” in section 104(d)(2)(A). In fact, it is difficult to ascertain clearly what meaning, if any, the OCC assigns to

“prevent or significantly interfere.” In the West Virginia Preemption Letter, the OCC states that “[s]ection 104(d)(2)(A) establishes the ‘prevent or significantly interfere’ standard,” set forth in *Barnett Bank*, but suggests that state laws that merely “condition or confine” national bank insurance activities will be preempted. *See* Preemption Letter at 6, 9. It is a truism that any form of regulation “conditions or confines.” In the Massachusetts Preemption Letter, it becomes more apparent that the OCC reads *Barnett Bank* for the proposition that state laws will be preempted where they “stand as an obstacle” to the achievement of Congressional objectives. Massachusetts Preemption Letter at 5-6. Both formulations ignore the explicit codified language of “prevent or significantly interfere.” This is the standard that should govern because this is the standard which Congress explicitly intended to control.

In choosing to tie *Barnett Bank* to “prevent or significantly interfere” within section 104(d)(2)(A), Congress declares its legislative intent to codify the words “prevent or significantly interfere” as well as its interpretation that *Barnett Bank* means “prevent or significantly interfere.” To the extent that there may be gleaned any ambiguity concerning “prevent or significantly interfere,” Congress settles the matter. By choosing to enact these four words in the manner in which it references the decision that spawned them, Congress indicates not only its understanding/interpretation of what *Barnett Bank* means, but, most importantly, its clear intent of what preemption standard applies regarding state laws governing the insurance sales, solicitation, and cross-marketing activities of national banks. Only by applying the “prevent or significantly interfere” standard, when faced with cases that apply the Supremacy Clause to GLBA cases, will courts properly maintain Congress’ clearly expressed intent.

- B. The “prevent of significantly interfere” standard is consistent with, and required by, “the standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank*.”**
- 1. The preemption standards of *Barnett Bank*, properly understood, direct courts to determine the intent of Congress with respect to the preemption of state laws in GLBA, which clearly establishes a difficult-to-overcome presumption in favor of state law under the “prevent or significantly interfere” test.**

Barnett Bank, like all Supremacy Clause cases, seeks to resolve only one issue. “This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law.” *Barnett Bank*, 517 U.S. at 30 (citations omitted). In *Barnett Bank*, this was a fairly laborious task, because “the Federal Statute” in “question,” the National Bank Act, does not *specifically* address the issue of how to resolve a perceived conflict between that statute and a state law; rather, it merely “*suggests* a broad, not a limited, permission” to sell insurance. *Id.* at 32 (emphasis added).

In *Barnett Bank*, the Supreme Court applied Supremacy Clause standards to a state law found to conflict with Congress’ intent in passing the National Bank Act. The Supreme Court clearly stated that this analysis and the significant degree of statutory interpretation therein were driven by the lack of an “explicit statement that the exercise of that power is subject to state law”; the absence of an “expressly conditioned . . . grant of ‘power’ upon a grant of state permission”; and its finding of “no indication that Congress [so] intended . . . as it has done *by express language* in several other instances.” *Id.* at 34 (citations omitted).

The question in the present case, just as in *Barnett Bank* and in future cases challenging state bank sales law, is thus whether “Congress, in enacting the Federal Statute, intend[ed] to

exercise its constitutionally delegated authority to set aside the laws of a State.” *Id.* at 30. In *Barnett Bank*, the “Federal Statute” was the National Bank Act, which, as discussed above and as recognized by *Barnett Bank*, lacked specific guidance for courts about Congress’ preemptive intent. By contrast, in enacting GLBA (and section 104(d)(2)(A) specifically), Congress made clear the degree to which it “intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State.” Unlike the National Bank Act, in which vagueness required a full and thorough judicial interpretation of Congress’ preemptive intent, GLBA specifically resolves this issue with a simple standard: Does the state law in question “prevent or significantly interfere” with the ability of a national bank to engage in the enumerated insurance activities?

The OCC seeks to recast the standard through a misunderstanding of *Barnett Bank*’s reference to the case of *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), which asked whether state law may “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *See Barnett Bank*, 517 U.S. at 31; Mot. Summ. J. at 15 (“If any one formulation for preemption could be said to be the exclusive *Barnett* standard, therefore, it would be the ‘stand as an obstacle’ formulation”). The *Hines* “stand as an obstacle” test should not be used by the courts as a means of diluting the “prevent or significantly interfere” preemption rule established by GLBA. Rather, the *Hines* formula is simply a restatement of a court’s sole mission in applying the Supremacy Clause—the evaluation of Congressional intent.

Lacking clear statutory guidance in the National Bank Act about Congress’ preemptive intent, the *Barnett Bank* Court interpreted that intent and found the state law in question to be an “obstacle” to Congress’ purposes and objectives as concerned preemption. By contrast, section 104(d)(2)(A) gives very direct and clear direction to courts as they determine the “full purposes and objectives of Congress” with respect to the desired level of preemption. Unlike the National

Bank Act in *Barnett Bank*, Congress’ “full purposes and objectives” are clearly spelled out with respect to the relationship between federal and state law by section 104(d)(2)(A) and other sections of GLBA. These purposes and objectives include: the explicit reaffirmation of the McCarran-Ferguson Act, which establishes state supremacy in insurance regulation; the codification of the concept of “functional regulation” of the financial services marketplace, with insurance activities regulated exclusively by state insurance commissioners applying state laws; and, to effectuate this regime, a high presumption in favor of the validity of state regulation under the “prevent or significantly interfere” preemption standard.

Thus, the “preemption standards set forth in . . . *Barnett Bank*” as required by section 104(d)(2)(A) became clear. The courts are to ascertain Congress’ intent with respect to preemption by evaluating the “purposes and objectives” of Congress in passing the statute. Congress understood *Barnett Bank* to have established a “prevent or significantly interfere” standard, and it explicitly codified this standard, thus giving a clarity to Supremacy Clause analyses of GLBA cases that was otherwise unclear in National Bank Act cases before *Barnett Bank*. Understood in this context, *Hines* should not be viewed as a tool for abrogating the plain language of GLBA, as the OCC asserts. Rather, *Hines* simply illustrates that courts interpreting GLBA should apply Congress’s specific “purpose and objective” to erect a high bar for those wishing to preempt the dominant power of the states as the functional regulator of insurance. Here, that purpose and objective as clearly expressed in GLBA is “prevent or significantly interfere.”

2. “Prevent or significantly interfere” is the rule in *Barnett Bank*.

In advancing *Hines* as the preemption standard from *Barnett Bank*, the OCC reads “prevent or significantly interfere” out of section 104(d)(2)(A), the controlling federal statute in this case. The rule, however, *is* “prevent or significantly interfere.” In *Barnett Bank*, the Supreme Court reviewed the development of preemption law under the National Bank Act and articulated a standard that encompassed and consolidated a number of prior formulations. That the Supreme Court consolidated the prior formulations into one simple, clear standard, and established this standard as a high bar for preemption, becomes clear in reading the key portion of *Barnett Bank*.

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to *forbid, or to impair significantly*, the exercise of a power that Congress explicitly granted. To say this is not to deprive states of the power to regulate national banks, where (unlike here) doing so does not *prevent or significantly interfere* with the national bank’s exercise of its powers.

Barnett Bank, 517 U.S. at 33 (emphasis added, citations omitted). It is noteworthy that the Supreme Court uses virtually exact synonyms in stating the preemption standard two times in this passage: “forbid, or to impair significantly” and “prevent or significantly interfere.” These phrases distinctly and clearly are the bases of a high preemption standard. Each contains a word that means complete proscription of an activity; and each contains an alternative phrase in which a word meaning “impede” is modified by “significantly.” The meaning of this high standard is clearly established by this repetition.

The OCC argues that “prevent or significantly interfere” is just another bump on the road in the development of preemption law. The OCC states that “*Barnett* . . . used a variety of formulations interchangeably, including the ‘prevent or significantly interfere’ formulation

Supremacy Clause principles animating conflict preemption can be articulated in a wide variety of formulations” Mot. Summ. J. at 15-16. This is contrary to the thrust of the paragraph excerpted above, where the Supreme Court, speaking in sweeping terms about what the previous cases meant, articulated the “prevent or significantly interfere” standard. That the Court would accept a case for review and would clarify a disputed area of the law by establishing a simple, clear standard is, of course, a key function of a court of final jurisdiction.

3. “Prevent or significantly interfere” was widely understood to be the rule in *Barnett Bank* before Congress definitively codified this standard in GLBA.

A review of the language in preemption cases both before and after *Barnett Bank* makes clear that *Barnett Bank* was not just another case, nor was “prevent or significantly interfere” just another formulation of the preemption standard. A Westlaw search for the phrase “prevent or significantly interfere” uncovered no cases relevant either to preemption of state law or state regulation of national banks’ insurance activities before the *Barnett Bank* decision. The lower courts recognized that *Barnett Bank* was a seminal case, because a post-*Barnett Bank* Westlaw search shows that courts applying the Supremacy Clause in preemption cases used the “prevent or significantly interfere” standard at least seven times. *See, e.g., Valley Nat’l Bank v. Lavecchia*, 59 F. Supp.2d 432, 436 (D.N.J. 1999) (“The *Barnett* court held that Section 92 is not subject to limitation by a state statute that would prevent or significantly interfere with the national bank’s exercise of its powers.”); *New York Bankers Ass’n, Inc. v. Levin*, 999 F. Supp. 716, 718 (W.D.N.Y. 1998) (“The [*Barnett Bank*] Court held that although a State may regulate national banks doing business within a State’s jurisdiction, a state may not ‘prevent or significantly interfere with the national bank’s exercise of its [federally conferred] powers.’”).

Furthermore, a review of the scholarly literature also shows that “prevent or significantly interfere”—not a “wide variety of formulations”—was commonly understood to be the rule established in *Barnett Bank*. See, e.g., Jeffrey H. Thomas, *Barnett Bank Brings the Business of Insurance to the Attention of Congress*, 20 U. Ark. Little Rock L.J. 129, 140 (1997) (“Accordingly, national banks may sell insurance pursuant to Section 92 subject to Comptroller regulation and state regulation as long as the state regulation ‘does not prevent or significantly interfere with the national bank’s exercise of its powers.’” (footnote omitted)); Linda Birkin Tigges, *Functional Regulation of Bank Insurance Activities: The Time Has Come*, 2 N.C. Banking Inst. 455, 466 (1998) (“The OCC acknowledges that the Court in *Barnett* indicated that their decision did not ‘deprive [s]tates 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.’” (footnote omitted)). Even OCC attorneys, in discussing *Barnett Bank* in a scholarly work, recognized that “it seems clear from *Barnett* and the related cases that state law should not apply where the law significantly qualifies the exercise of a national bank’s powers” Julie L. Williams, Stuart E. Feldstein & Karen E. McSweeney, *After Barnett: The Intersection of National Bank Insurance Powers and State Regulation*, 1 N.C. Banking Inst. 13, 28 (1997). The essential word “significantly” modifies the regulatory term “qualifies,” just as “significantly” modifies “interfere” in *Barnett Bank* and GLBA. The phrasings mean the same thing.

Thus, when Congress established that the preemption standard would be “prevent or significantly interfere,” it was perfectly consistent for it to add the words “[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank*” as further illustration of the standard. Since the standard of *Barnett Bank* was commonly understood to be “prevent or significantly interfere,” the “in accordance with”

language surely was intended to refer to a standard that was widely recognized, rather than codify a standard of an “interchangeabl[e] . . . variety of formulations” of which “prevent or significantly interfere” is merely a Congressional afterthought.

C. The statutory context of “prevent or significantly interfere” indicates its particular meaning with respect to preemption of certain statutes.

Another consideration with respect to the language of section 104(d)(2)(A) is the use of similar but different language in nearby sections relating to state laws and national bank sales of insurance. Section 104(c)(1)¹¹ states that except as otherwise provided, no state may “prevent or restrict” affiliations concerning depository institutions and affiliates. Section 104(d)(1)¹² provides that (with exceptions, including with respect to sales, solicitation, and cross-marketing activities) states may not “prevent or restrict” a depository institution or its affiliates from engaging in permissible activities. Despite using the phrase “prevent or restrict” in these sections, Congress chooses to state “prevent or significantly interfere” in section 104(d)(2)(A). Surely, the Congressional decision to qualify the word “interfere” with the word “significantly” meant something. “[W]here Congress includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *Independent Bankers Ass’n of America v. Farm Credit Administration*, 164 F.3d 661, 667 (D.C. Cir. 1999) (quoting *Russello*, 464 U.S. at 23.).

Thus, there is significance in Congress’ choice to use “prevent or significantly interfere” when it could as readily have chosen “prevent or restrict.” By directly tying the “prevent or

¹¹ 15 U.S.C. § 6701(c)(1) (Supp. 2001).

¹² 15 U.S.C. § 6701(d)(1) (Supp. 2001).

significantly interfere” standard to certain types of state laws, Congress intended to single out these laws for heightened protection, and to place particular emphasis on the principle that only “significant” interference would place the types of laws mentioned in section 104(d)(2)(A) at risk of preemption.

III. IN ITS PREEMPTION LETTERS AND MOTION FOR SUMMARY JUDGMENT, THE OCC FUNDAMENTALLY MISSTATES THE PREEMPTION STANDARD PRONOUNCED IN *BARNETT BANK* AND CODIFIED IN GLBA

A. The OCC’s preemption analysis ignores the significance of the “prevent or significantly interfere” terminology, in effect striking those words from the preemption analysis.

The OCC’s discussions of preemption issues illustrate its discarding of the “prevent or significantly interfere” standard. As indicated by its Motion for Summary Judgment, the OCC continues to advance an interpretation of *Barnett Bank* that is inconsistent with its codification in GLBA. Commenting on plaintiffs’ complaint, the OCC states that plaintiffs’ position “is grounded in their mistaken view that *Barnett*, instead of reflecting ‘ordinary principles’ of conflict preemption, instead applied a ‘high threshold’ for preemption of state restrictions on national banks’ sale of insurance.” Mot. Summ. J. at 13. In the West Virginia Preemption Letter, the OCC concludes that any “State laws that condition or confine the exercise by a national bank of its express or incidental powers” are preempted. Preemption Letter at 6. In the Motion for Summary Judgment and the Massachusetts Preemption Letter, the OCC asserts that “stand as an obstacle” is the relevant preemption threshold. Mot. Summ. J. at 15; Massachusetts Preemption Letter at 5-6. Further, the OCC erroneously argues that “[t]he variety of language that the Supreme Court used in *Barnett* to describe the conflicts analysis that governed the result there shows that the analysis cannot be encapsulated by any one phrase.” Massachusetts

Preemption Letter at 7-8. Curiously, this strained *Barnett Bank* analysis led the OCC to conclude that “stand as an obstacle” is just such a phrase. This line of reasoning, however, wholly ignores that *Barnett Bank* and GLBA, in fact, encapsulated the preemption standard into one phrase—“prevent or significantly interfere.”

Through *Hines*, the OCC argues it is able to circumvent the “prevent or significantly interfere” rule of GLBA. This argument, essentially, is (a) that GLBA’s rule is “the legal standards for preemption set forth in . . . Barnett Bank;” and that (b) *Barnett Bank*’s standard for preemption is the “stands as an obstacle” standard. Thus, the OCC fashions preemption standards in its Preemption Letters and its Motion for Summary Judgment that plainly conflict with the plain language of the high standard of “prevent or significantly interfere.” These standards include the OCC’s insistence that “State statutes having only a small effect on the national bank’s exercise of that power may still apply,” and that “Federal law preempts . . . State laws that condition or confine the exercise by a national bank of its express or incidental powers.” Preemption Letter at 6. These low bars for preemption are buttressed by citing to cases which use words like “hamper,” and “interfere with or impair national banks’ efficiency”—thus, the OCC argues, “defeat[ing] any suggestion that [“prevent or significantly interfere”] constitutes the exclusive standard for preemption.” Mot. Summ. J. at 17.

The OCC’s argument misstates and twists the “legal standards for preemption” in *Barnett Bank* cited by GLBA in order to achieve the intended result—the emasculation of the high standard for preemption specifically called for by Congress in section 104(d)(2)(A). The OCC misconstrues Congress’ clear intent to establish a high standard comes when it suggests that the four words that Congress specifically used in the plain language of GLBA, “prevent or significantly interfere,” are “interchangeabl[e]” with a “variety of formulations” of the proper

preemption standard. Under the OCC construct, Congress’ “constitutionally delegated authority to set aside the laws of a State” is merely just another in a “variety of formulations” that an administrative agency may pick and choose from at its convenience and expect courts to ratify.

The effect of the OCC’s interpretation of the *Barnett Bank* decision as cited in GLBA is to incorporate a muddled view of the history of preemption analysis that preceded and postdated *Barnett Bank*. This analysis ignores the fundamental step in *Barnett Bank* where the Supreme Court examined the controlling federal statute for intent, an intent that, unlike the National Bank Act, is spelled out clearly in GLBA. The OCC’s purpose is to direct the court into the haze of synonyms on pages 13-15 of the OCC’s Motion for Summary Judgment. However, not only do these synonyms directly conflict with the intent of Congress in GLBA, they furthermore are not even the rule that the Supreme Court established for National Bank Act cases in *Barnett Bank*. These phrases are not synonyms of “prevent or significantly interfere.” Moreover, Congress’ words are the law, not the OCC’s; the OCC’s analysis must fall as inconsistent with the law.

In discussing section 104(d)(2)(A), the OCC asserts that “[t]he text of section 104 makes clear that its ‘prevent or significantly interfere’ standard is the same standard that was applied by the Supreme Court in the *Barnett Bank* case. The standard itself expressly incorporates *Barnett*.” Preemption Letter at 8. The OCC, however, sees this as justification for not incorporating “prevent or significantly interfere” into its analysis. Curiously, the Preemption Letter cites to section 104(d)(2)(C)(iii)¹³ for the proposition that nothing shall be construed to limit the applicability of *Barnett Bank*. Yet, the OCC’s analysis limits the significance of the “prevent or significantly interfere” standard actually codified at section 104(d)(2)(A). If both section 104(d)(2)(A) and *Barnett Bank* matter to the analysis—and they do—then so must the legislative and judicial intent behind the words “prevent or significantly interfere.”

¹³ 15 U.S.C. § 6701(d)(2)(C)(iii) (Supp. 2001).

Still, the OCC seems to assume that the codification of *Barnett Bank* was more so about general preemption jurisprudence than about a preemption standard specific to state regulation of certain national bank insurance activities. The OCC states that “*Barnett* makes clear that it did not intend to employ only a single formulation for preemption, but used a variety of formulations interchangeably, including the ‘prevent or significantly interfere’ formulation recited in the GLBA.” Mot. Summ. J. at 15-16. First, the Supreme Court did not use a “variety of formulations interchangeably;” rather, it chose one and cited to others to illustrate the common thread that the bar for preemption was very high under any of these formulations. Second, this statement flies in the face of GLBA. Congress adopted the words “prevent or significantly interfere” to set the standard. Of all of the purported variety of interchangeable formulations, Congress chose one. By doing so, Congress made sense out of the morass of preemption formulations and codified one specific standard to apply to national bank insurance sales, solicitation, and cross-marketing activities. By ignoring Congressional action, the OCC brings only confusion to a situation Congress sought to clarify. Surely, the Congressional standard must prevail.

Further, the OCC argues that “[a]ny notion that *Barnett* established any sort of heightened threshold for conflict preemption is further undercut by Supreme Court jurisprudence following *Barnett*.” Mot. Summ. J. at 19. This reasoning is undercut by several points. First, the cases cited for this proposition have nothing to do with national bank insurance sales, solicitation, and cross-marketing activities, or any other aspect of financial services regulation.¹⁴

¹⁴ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), concerned the preemption of a state law found to infringe unconstitutionally upon the foreign affairs power of the federal government. *United States v. Locke*, 529 U.S. 89 (2000), noted the comprehensive federal regulation of maritime affairs and preempted state regulations where it was found that the federal scheme left no room for state activity. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), preempted state tort law that conflicted with the objectives of a federal regulation relating to passive restraints in automobiles.

Second, none of these cases involved an explicit Congressional preemption standard. Thus, the OCC continues to ignore the preemption “prevent or significantly interfere” standard codified in section 104(d)(2)(A) as applied to the specific matters of national bank insurance sales, solicitation, and cross-marketing activities.

B. The OCC’s heavy reliance on a Senate Report that misstates the law in *Barnett Bank* is further evidence that the OCC has applied the wrong standard in its interpretation of GLBA.

1. The passage in the GLBA Senate Report relied on by the OCC to undermine the high standard for preemption required by the plain language of GLBA is based on a clearly erroneous reading of *Barnett Bank*.

The OCC relies heavily on the Senate Report¹⁵ accompanying GLBA both in its Preemption Letter and its Motion for Summary Judgment. Central to the arguments in both these documents is the following passage, which appears word for word in both.

The Senate Report accompanying the GLBA, in commenting on a provision prescribing the ‘prevent or significantly interfere’ standard, using language that was almost identical to the language of section 104(d)(2) as ultimately enacted, confirms this view. The Senate Report states that:

There is an extensive body of case law related to the preemption of State law. For example, in *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996), the U.S. Supreme Court noted that Federal courts have preempted State laws that “prevent or significantly interfere” with a national bank’s exercise of its powers; that “unlawfully encroach” on the rights and privileges of national banks; that “destroy or hamper” national banks’ functions; or that “interfere with or impair” national banks’ efficiency in performing authorized functions.

¹⁵ See S. Rep. No. 106-44 (1999).

Preemption Letter at 9, Mot. Summ. J. at 12 (quoting S. Rep. No. 106.44 at 13). The flaws in this passage are so central and material to the legal issues raised by this case that they must be rebutted at length.

First, the language in the Senate Report is not “almost identical” to the language of section 104(d)(2) as ultimately enacted. Nothing of the sort is true. The Senate Report does recite the full citation to *Barnett Bank*, just as section 104(d)(2)(A) does. Here, the similarities end. Simply put, section 104(d)(2)(A) gives precisely one formulation of the preemption standard: “prevent or significantly interfere.” The Senate Report gives at least four. Thus, the OCC’s implication that the Senate Report should be viewed as a document which precisely tracks the language of GLBA should be swiftly rejected.

Of greater concern are the subtle but extraordinarily important legal mistakes made by the drafter of the Senate Report. The Report says that in *Barnett Bank*, the Supreme Court “noted that Federal courts have preempted State laws that ‘prevent or significantly interfere’ with a national bank’s exercise of its powers,” and then goes on to list three other formulations that the *Barnett Bank* also allegedly “noted” that “Federal courts have preempted.” See S. Rep. No. 106-44 at 13. This statement completely misrepresents the actions of the *Barnett Bank* Court. The Senate Report states, or at least unmistakably implies, that *Barnett Bank* recited four different, equally important standards which had previously been employed by federal courts. *Barnett Bank*, however, did not “note[] that Federal courts have preempted State laws that ‘prevent or significantly interfere’ with a national bank’s exercise of its powers”; instead, it articulated that standard for the first time as a new, defining bar for preemption. By lumping “prevent or significantly interfere” in with at least three other standards which were mentioned in *Barnett Bank*, the Senate Report misstates the seminal importance of *Barnett Bank* and “prevent

or significantly interfere.” The OCC seeks to capitalize on this error in building its legal arguments around this piece of legislative history in order to abrogate the “prevent or significantly interfere” standard established by Congress in the plain language of section 104(a)(2)(A).

Moreover, the Senate Report errs in its references to the three other standards it claims have been used by courts to preempt state law. *Barnett Bank* did not “note[] that Federal courts have preempted State laws that . . . ‘unlawfully encroach’ on the rights and privileges of national banks; that ‘destroy or hamper’ national banks’ functions; or that ‘interfere with or impair’ national banks’ efficiency in performing authorized functions.” See S. Rep. No. 106-44 at 13. Rather, the cases from which those phrases are quoted by *Barnett Bank* are cases where courts upheld rather than preempted state laws. See *Anderson Nat. Bank v. Lueckett*, 321 U.S. 233, 247-252 (1944); *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); and *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869). In fact, *Barnett Bank* explicitly noted that these were cases, which it quoted in a string citation that followed the articulation of the “prevent or significantly interfere” standard, where state laws were not preempted. See *Barnett Bank*, 517 U.S. at 34 (“[W]here (unlike here) doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.”).

The language in these string citation cases quoted by *Barnett Bank* string cite was used to demonstrate what the state laws in question did not do, as opposed to what standard was being applied. The preemption standards in these cases, in fact, are not the language quoted in the *Barnett Bank* string citation. The actual preemption standards all set a high bar for setting aside a state law. *Anderson* concerned a Kentucky statute that required banks to turn over to the state inactive or unclaimed deposits, as specified by state law. *Anderson*, 321 U.S. at 236. The

Supreme Court noted that it “has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks’ functions.” *Id.* at 248 (citations omitted). The Court upheld that statute, finding that “we can perceive no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks.” *Id.* at 252. This language indicates a high standard for preemption of state law. In *Anderson*, the infringement was not found to rise to the level it did in *Barnett Bank*, because it did not impose an “undue burden” or rise to the level of an “unlawful encroachment.”

The other two cases also illustrate this high standard for preemption of state laws concerning national bank powers. In *McClellan*, the Supreme Court upheld the application of a Massachusetts statute that forbade certain property transfers in the event of an insolvency. The national bank argued that the Massachusetts statute was in conflict with federal statutes. The Supreme Court indicated that

there is no express conflict . . . [n]or is there anything in the statutes of the state of Massachusetts . . . which in any way impairs the efficiency of national banks, or frustrates the purposes for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate [under certain conditions and limitations].

Id. at 358. Further, the Court noted that “in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of congress.” *Id.* Thus, the Supreme Court acknowledges that state regulatory authority necessarily restrains in some manner, but noted a high preemption standard for violating federal law. Section 104(d)(2)(A), a federal law, deliberately sets a similarly high threshold before the law is “violated”—“prevent or significantly interfere.”

In *National Bank v. Commonwealth*, Kentucky sued a national bank that refused its demand for payment of taxes pursuant to state law. In upholding the Kentucky law, the Supreme Court discussed state limitations upon the powers of federal instrumentalities. The *Barnett Bank* string cite language quotes the *National Bank* Court's use of the language "interfere with, or impair." *Barnett Bank*, 517 U.S. at 33-34. The *National Bank* Court directed more specific preemption language toward state regulation of bank activities, stating that "[i]t is only when State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank*, 76 U.S. (9 Wall.) at 362.

If the string citation cases illustrate anything, it is that the Supreme Court deliberately ties the words "prevent or significantly interfere" to cases signifying that a high level of interference is required before the Supreme Court will preempt state law, both by the language they used and by their conclusion that none of the challenged state laws was preempted. *Barnett Bank* recognized the distinction between cases where state laws were upheld and where they were preempted, but the Senate Report did not catch these nuances.

Thus, the crucial passage of the Senate Report quoted at length by the OCC does not contain language "almost identical" to GLBA as enacted, and it is based on a bad reading of *Barnett Bank*, which misstates and misrepresents the essence of that case. The OCC, by relying heavily on this misstatement of the law, builds its argument for a low preemption standard on bad law. For this Court to apply a standard other than "prevent or significantly interfere" based on the demonstrably erroneous musings of a Senate Report purporting to recite the holding of a Supreme Court case would be a perversion of the law, particularly when that Report stands in clear conflict to the plain language of the statute in question.

2. The Senate Report is not persuasive legislative authority.

Not only is the passage of the Senate Report which the OCC relies on based on a blatantly erroneous statement of the legal standard established by a seminal Supreme Court case, it is not controlling authority based on a proper understanding of GLBA's legislative history. In fact, the part of the Senate Report that analyzes the actual text of the bill on a section-by-section basis contains no reference to the *Barnett Bank* string citation. Instead, the Report in relevant part states, rather succinctly and correctly, the preemption rule stated in *Barnett Bank*—that “prevent or significantly interfere” provides the controlling language:

Section 104(d)(2)(A) then establishes the general preemption rule that applies to state regulation of insurance sales, solicitation or cross-marketing activities. In accordance with the legal standards for preemption set forth in the decision of the Supreme Court [in *Barnett Bank*], no State may prevent or significantly interfere with the ability of an insured depository institution, or a subsidiary or affiliate thereof, to engage in insurance sales, solicitation and cross-marketing activities.

S. Rep. No. 106-44 at 22. Because “inconsistent history certainly cannot override plain language,” the incorrect explanation of *Barnett Bank* on page 13 of the Senate Report must be set aside. *Qi-Zhou v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995). If page 13 of the Senate Report is allowed to provide the definitive interpretation of section 104(d)(2)(A), it will lead to the absurd result whereby a complete misstatement of the *Barnett Bank* decision controls its meaning as case law and as codified.

Additional legislative history supports the conclusion that page 13 is an incorrect summary of Congressional intent. The United States Senator who authored Section 104(d)(2)(A), Senator Bryan, took issue with the language on page 13 of the Senate Report. He noted that “one of the principles of the proposed legislation is to ensure that the activities of everyone who engages in the business of insurance should be functionally regulated by the

States. After all, the States are the sole repository of regulatory expertise in this area.” 145 Cong. Rec. S6046 (daily ed. May 26, 1999) (statement of Sen. Bryan). With respect to the *Barnett Bank* language, Sen. Bryan stated that “[t]he Committee Print disregarded the Supreme Court’s holding in [*Barnett Bank*], regarding the standard for preempting State regulation of insurance sales activity.” *Id.*

Additional remarks make clear that Sen. Bryan was referring to the *Barnett Bank* string citation erroneously summarized on page 13 of the Senate Report. “The ‘prevent or significantly interfere’ language was taken directly from the Supreme Court’s *Barnett* decision and is intended to codify that decision.” *Id.* Sen. Sarbanes later asked Sen. Bryan “whether the gloss put on the ‘prevent or significantly interfere’ language standard in the Committee Report is in keeping with his amendment.” *Id.* Sen. Bryan clarified the matter by answering that the Committee Report “attempts to clarify the core preemption standard in a way that is contrary to the meaning of the provision.” *Id.* Referencing the language concerning impairment of national banks’ efficiency, Sen. Bryan stated that the

paraphrase . . . is correct [sic] and harmful. It is incorrect because it implies that it applies to any authorized function. . . . [It] is harmful because it could dramatically expand the scope of the preemption provision. It could do so if read to prohibit the application of any State law that impairs a national bank’s or its affiliate’s or subsidiary’s efficiency in selling insurance. The *Barnett* opinion does not support any such reading. Moreover, if this language had been suggested as an amendment to my amendment, I would not have supported it nor would the majority of my colleagues.

Id. at S6046-S6047. Sen. Bryan’s comments should remove any confusion created by the incorrect use of the *Barnett Bank* string citation.

Furthermore, Sen. Bryan’s comments should be afforded deference, and are not to be discarded. “As a statement of one of the legislation’s sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute.” *Federal Energy Admin. v. Algonquin*

SNG, Inc., 426 U.S. 548, 564 (1976) (citations omitted). In this instance, Sen. Bryan authored the provision at issue. Given his role in placing the “prevent or significantly interfere” standard in section 104(d)(2)(A), his clarifying words thus are entitled to significant deference. Another case stated that the statements of the Senate manager of a piece of legislation were to be afforded “great weight.” *Browder v. Tipton*, 630 F.2d 1149, 1151-1152 (6th Cir. 1980) (footnote omitted). Sen. Bryan’s role as author of section 104(d)(2)(A) suggests a similarly important role in the legislative process, indicating that “great weight” should be given his words when identifying the meaning of “prevent or significantly interfere.”

Other cases illustrate the lack of interpretive deference afforded legislators remotely involved in the process. One court discarded a letter from the chair of a House Subcommittee, finding that the letter was sent after the legislative session concluded, was not part of the legislative record, and represented only the views of the sending Congressman. *Sutherland v. Egger*, 865 F.2d 56, 58 n.3 (3d Cir. 1989). This legislative role differs significantly from that of Sen. Bryan. Sen. Bryan’s remarks were placed in the Congressional Record, and represent the author’s views, not just those of a remotely involved legislator. In another instance, the Supreme Court did “not attach substantial weight” to a statement placed into the Congressional Record after passage of an act, which “Congress did not have before it in passing” the act. *Clarke v. Security Industry Ass’n*, 479 U.S. 388, 407 (1987).¹⁶

In this case, Sen. Bryan’s remarks were made after the Senate passed its version of financial services modernization legislation in the spring of 1999, but months before the final

¹⁶ There are other situations where remarks by legislators have been held not to be controlling, but in fact situations differing from Sen. Bryan’s remarks. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (Remarks of sponsor “not controlling” when reports from both houses and statements by other legislators refute his statement.); *Kelly v. Kelly*, 841 F.2d 908, 912 fn 3 (9th Cir. 1988) (“Stray comments” unsupported by text or committee reports cannot be attributed to the full legislative body.) Sen. Bryan’s comments fall into neither category. The full legislative history, including Sen. Sarbanes’ statements, supports his interpretation of section 104(d)(2)(A); only page 13 of the Senate Report, an erroneous interpretation of the *Barnett Bank* string citation which Sen. Bryan attempted to correct, can be said to conflict with Sen. Bryan’s statement.

version of GLBA passed both houses of Congress in October 1999 following a Conference Committee. Therefore, all legislators had access to Sen. Bryan's remarks and his understanding of the words he authored, and there is no indication of contrary comment in the Congressional Record. In fact, the Conference Report¹⁷ is consistent with Sen. Bryan's remarks, and contains no reference to the *Barnett Bank* string citation erroneously described in the Senate Report. The Conference Report states succinctly the interpretive rule: "With respect to insurance sales, solicitations, and cross-marketing, State may not prevent or significantly interfere with the activities of depository institutions or their affiliates, as set forth in *Barnett Bank*" H.R. Conf. Rep. No. 106-434 at 5, *reprinted in* 1999 U.S.C.C.A.N. at 251.

The authoritative relationship between the Senate Report and the Conference Report indicates that any conflict, in this instance, should be resolved in favor of the unambiguous Conference Report. "The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body." *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991). The reason for looking to a Conference Report has been expressed as "when choosing between inconsistent pieces of legislative history, two houses are better than one." *Id.* In this case, the Conference Report clearly provides the interpretive rule that the Senate Report misstates in one place and attempts to correct in another. Page 13 of the Senate Report provides the only legislative history that would call into question the high preemption threshold established by "prevent or significantly interfere." "Given the clear language of the statute, selected and arguably ambiguous snippets of the legislative history are insufficient to undermine that language." *Independent Bankers Ass'n.*, 164 F.3d at 668 (D.C. Cir. 1999) (citation omitted). Thus, the overwhelming conclusion is that the standard for preemption of state law affecting insurance

¹⁷ H.R. Conf. Rep. No. 106-434, *reprinted in* 1999 U.S.C.C.A.N. 245.

sales, solicitation, and cross-marketing activities of national banks is “prevent or significantly interfere,” and that this is a difficult standard for anyone challenging such a law to meet.

IV. THE OCC’S PREEMPTION LETTER IS NOT ENTITLED TO DEFERENCE UNDER STANDARDS TYPICALLY ASSOCIATED WITH MATTERS WITHIN AN AGENCY’S EXPERTISE

The OCC argues that “both the GLBA and provisions of the National Bank Act specifically contemplate that the OCC will issue opinions as to the preemptive effect of federal law upon potentially conflicting state laws.” Mot. Summ. J. at 8. Even assuming that this assertion correctly stated the law, the OCC’s Preemption Letter is not entitled to deference; there is no indication that Congress intended to grant the OCC sweeping preemption authority with regard to the types of state insurance statutes at issue.

To the contrary, functional regulation as established by GLBA contemplates that the various functional regulators stand on equal footing, not that the OCC is more equal than others. The OCC argues that because section 304¹⁸ of GLBA specifies procedures for resolving conflicts between state and federal regulators, it contemplates that the OCC will opine on state law. More important, section 304 provides that conflicts between functional regulators, including those concerning the preemption of state laws relating to insurance sales and solicitation activities, shall be heard by the relevant court “without unequal deference.” Section 304(a), (e).¹⁹ While the present case is not a direct adversarial proceeding between state and federal regulators, section 304 specifies Congressional intent as to the standing of the OCC. Although state regulators are not parties to the present action, there is no need to ignore the clear Congressional

¹⁸ 15 U.S.C. § 6714 (Supp. 2001).

¹⁹ 15 U.S.C. § 6714(a), (e) (Supp. 2001).

intent with respect to the lack of deference given to the OCC in disputes concerning the preemptive effect of state insurance law.

The OCC argues that its “interpretations of the federal statutes that shape the insurance powers exercised by national banks . . . are entitled to deference under the *Chevron* standard, and are thus to be upheld as long as they are reasonable.” Mot. Summ. J. at 23. This conclusory statement lacks persuasion where, as here, the OCC’s interpretation is not only unreasonable, but where Congress ensured that state insurance regulatory authority rested on equal footing with the OCC. This is not a case, like *Barnett Bank*, where there existed a federal statute that specifically permitted the type of activity prohibited by the state law at issue. Here, the federal statute contemplates that certain bank powers will be subject to state law.

Additionally, GLBA is not a statute for the OCC to administer; thus, its determinations are not required deference. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984), is the seminal federal case on deference to agency interpretations of federal statutes. The standard of agency review concerned “an agency’s construction of the statute it administers” *Id.* at 842. The Supreme Court noted that “[w]e have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” *Id.* at 844. Additionally, this is not a case where Congress has given a federal agency “a unique role in determining the scope of [a statute’s] preemptive effect.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-496 (1996). GLBA specifically ensures that state insurance regulators have a continuing key role to play in the regulation of all actors in the business of insurance. The authority ascribed by the OCC to itself to opine on state insurance laws appears to remove state insurance regulators from the regulatory process. In no way is state regulatory authority conditioned upon the OCC’s approval of actions by state

insurance regulators. In fact, GLBA ensures that state regulators are the equals of the OCC. While there is a preemption standard stated in GLBA, it is for the courts to apply, not the OCC.

CONCLUSION

For the foregoing reasons, the court should affirm the “prevent or significantly interfere” standard established by Congress in GLBA.

Respectfully submitted this 3rd day of April, 2002.

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was served upon the following person(s) via U.S. Mail, with first class postage prepaid, on this 3rd day of April, 2002:

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