

In The
United States Court of Appeals
For The Fourth Circuit

**JANE L. CLINE, in her capacity as
Insurance Commissioner of the State of West Virginia;
STATE OF WEST VIRGINIA,**

Petitioners,

v.

**JOHN D. HAWKE, in his capacity as
Comptroller of the Currency of the United States of America;
THE OFFICE OF THE COMPTROLLER OF
THE CURRENCY, as an agency of
the United States of America,**

Respondents,

**ON PETITION FOR REVIEW FROM
THE UNITED STATES DEPARTMENT OF TREASURY**

**BRIEF OF *AMICUS CURIAE*
THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
IN SUPPORT OF PETITIONERS AND
SUPPORTING VACATING OF DISTRICT COURT'S LETTER OPINION**

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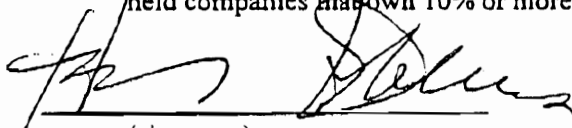
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No. 02-2100

**UNITED STATES COURT OF APPEALS
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JANE L. CLINE, in her capacity as Commissioner of Insurance of the State of West Virginia, and THE STATE OF WEST VIRGINIA,
Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,
Respondents

**AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF
INSURANCE COMMISSIONERS IN SUPPORT OF PETITIONERS
SUPPORTING VACATING LETTER OPINION**

Pursuant to Federal Rule of Appellate Procedure 29, the National Association of Insurance Commissioners (NAIC) submits this Brief in support of petitioner, the Commissioner of Insurance of the State of West Virginia, in urging the Court to vacate, annul, or set aside the September 24, 2001 determination of the Office of the Comptroller of the Currency (OCC).

INTRODUCTION

This matter involves a petition challenging the authority of the 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 that federal law preempts certain provisions of the West Virginia Insurance Sales Consumer Protection Act.² 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 Preemption Letter, as well as another OCC preemption opinion relative to Massachusetts law, 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 opinion Congress intended to codify. This threat casts doubt upon the ability of State regulators and

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).

² See W. Va. Code §§ 33-11-1 et seq. (2000).

legislators to protect their residents regarding consumer protection aspects of insurance regulation. Due to the implications of the Preemption Letter's effect for consumers, regulators, insurers, and national banks, it is in the public interest to affirm the Congressional standard for preemption of State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks.³

INTEREST OF THE AMICUS CURIAE

The NAIC is comprised of the chief insurance regulators of the 50 States, the District of Columbia, and four United States territories. Members are committed to protecting insurance consumers within their jurisdiction. NAIC acts to support regulators in achieving fundamental objectives relating to insurance regulation, of which consumer protection is paramount. NAIC's interest in this litigation concerns the standard applied by this Court in determining whether certain provisions of West Virginia law are preempted. NAIC believes the Court's use of the OCC's low threshold for preemption of State insurance laws would set a dangerous precedent and contravene the intent of

³ The West Virginia opinion letter is currently the subject of litigation between two agents' trade associations and the OCC in the United States District Court for the District of Columbia. *Independent Ins. Agents of America v. Hawke*, No. 1:01CV02356 (D.D.C. filed Nov. 13, 2001). The NAIC notes that it filed a substantially similar amicus brief in support of plaintiffs in that case.

Congress in enacting Section 104(d)(2)(A)⁴ of the Gramm-Leach-Bliley Act (GLBA).⁵ Because of this low threshold's potential for erosion of power of State insurance regulators to protect insurance consumers, NAIC asks to appear in accordance with its mission set forth in its Motion for Leave.

As detailed below, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997), ensures that States shall regulate the business of insurance, unless Congress specifically provides otherwise. That the business of insurance remains within the preserve of State regulation is a fundamental principle of "functional regulation," under which all insurance activities are regulated by State insurance commissioners whether carried out by insurers or banks. The concept of functional regulation is codified in GLBA. GLBA removed previously existing barriers among the businesses of insurance, banking, and securities, but also provided for the preservation of current regulatory structures. 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.

⁴ 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 Brief refers to sections of GLBA by their section numbers within that legislation as opposed to where codified within the United States Code.

⁵ Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

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 Brief, Congress codified a high “prevent or significantly interfere” threshold for preemption of State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. The NAIC possesses a significant interest in arguing that this Court definitively and affirmatively apply the proper, high standard, and reject the OCC’s attempt to administratively change the standard set by Congress. 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, as stated previously, the OCC issued another preemption letter concerning provisions of Massachusetts law governing bank insurance sales

activities.⁶ The OCC is thus developing a preemption record that may greatly impact State insurance regulation. The NAIC believes it has an interest in asking this Court to arrest this pattern.⁷ 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 petitioners in urging that this Court vacate the Preemption Letter and affirm the preemption standard established by Congress.

⁶ The Massachusetts preemption letter is currently the subject of litigation in the United States Court of Appeals for the First Circuit. *Bowler v. Hawke*, No. 02-1738 (1st Cir. argued Aug. 2, 2002). The NAIC notes that it filed a substantially similar amicus brief in support of the petitioners in that case.

⁷ The NAIC is aware of at least three additional preemption requests concerning Louisiana, Puerto Rico, and 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 landmark "prevent or significantly interfere" standard articulated by the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). If accepted by this Court, the OCC's standard, under which virtually any interference by a State law results in preemption, would set a dangerous precedent under which the OCC could preempt State laws in a manner wholly contrary to Congress' intent in establishing the functional regulation framework 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 codified 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 301⁸

⁸ 15 U.S.C. § 6711 (Supp. 2001).

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 104,⁹ “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 activities of *any* entity are regulated by States, Section 104 begins by explicitly re-affirming the McCarran-Ferguson Act, clearly stating that it “remains the law of the United States.”¹⁰

To understand the significance of the continued validity of the McCarran-Ferguson Act, it is important to consider what it provides regarding State regulation of insurance activities. First, Congress “declare[d] 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).

⁹ 15 U.S.C. § 6701 (Supp. 2001).

¹⁰ See 15 U.S.C. 6701(a) (Supp. 2001).

State insurance regulation is a Congressional delegation. McCarran-Ferguson states 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). In GLBA, Congress expressly preserved and reiterated State regulation of the business of insurance. Section 104(a) explicitly reiterates the McCarran-Ferguson Act’s endorsement of State 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 longstanding Congressional policy 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” with respect to preemption. *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*, and explained exactly what that standard meant in plain language. Consistent with *Barnett*, 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.

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, in the absence of an ambiguity, the preemption standard is established without looking any further than the words "prevent or significantly interfere."

The reference to *Barnett* 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* 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; J.A. at 65. 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 be read and understood to be “in accordance” with the *Barnett* decision. *Barnett* 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, would invert 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.

The OCC argues that the reference to *Barnett* indicates that preemption questions under Section 104(d)(2)(A) will be resolved according to a variety of standards supposedly utilized in *Barnett*. Preemption Letter at 8; J.A. at 65. 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 what meaning, if any, the OCC assigns to “prevent or significantly interfere.” In the Preemption Letter, the OCC states that “Section 104(d)(2)(A) establishes the ‘prevent or significantly interfere’ standard” set forth in *Barnett*, but suggests that State laws that merely “condition or confine” national bank insurance activities will be preempted. *See* Preemption Letter at 6, 9; J.A. at 64, 67. It is a truism that any form of regulation “conditions or confines.” The OCC cannot choose a formulation differing from Congress’ clear direction. This Court, whose “sole task is to ascertain the intent of Congress,” should not sanction a formulation differing from the explicit codified language of “prevent or significantly interfere.”

In choosing to tie *Barnett* 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* means “prevent or significantly interfere.” Of all of the supposed variety of preemption standards discussed in *Barnett*, Congress codified one to apply to the laws at issue here. To the extent that there may be 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 of what *Barnett* means, but, most importantly, its clear intent of what preemption standard applies regarding State laws governing certain bank insurance activities. Only by applying the “prevent or significantly interfere” standard will courts properly maintain Congress’ clearly expressed intent.

B. The “prevent or significantly interfere” standard is consistent with, and required by, “the legal standards for preemption set forth in . . . Barnett.”

1. The preemption standards of *Barnett*, 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, like all Supremacy Clause cases, sought 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*, 517 U.S. at 30 (citations omitted).

In *Barnett*, this was a fairly laborious task, because “the Federal Statute” in question, the National Bank Act, did not *specifically* address resolution of a perceived conflict between that statute and a State law. Lacking clear

Congressional intent regarding the preemptive effect of federal law, the Supreme Court engaged in a detailed analysis of preemption jurisprudence. The Court noted that federal statutes sometimes reveal an explicit Congressional intent regarding preemption (as with GLBA), but more often (unlike GLBA), they do not. *Id.* at 31. The latter situation, where federal preemption may be implicit, requires a court to uncover Congressional intent from such factors as the structure of the statute, the pervasiveness of the federal scheme, irreconcilable conflicts between State and federal law, and whether State law “stand[s] as an obstacle to the . . . full purposes and objectives of Congress.” *Id.* (citations omitted).

In the course of its preemption analysis, the Supreme Court also articulated a legal preemption standard specific to activities by national banks: prevent or significantly interfere. This key portion of *Barnett* plainly establishes a high bar for preemption:

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, 517 U.S. at 33 (emphasis added, citations omitted). Whereas the discussion of other legal standards for preemption related to cases where Congress left a statutory ambiguity about its preemptive effect, Section 104(d)(2)(A) creates

no such ambiguity. Congress stated a clear “prevent or significantly interfere” standard, removing the need to sift through an analytical morass created by a lack of clarity “unlike here” in *Barnett*.

Returning to the basic preemption question in the present case, courts ask whether Congress intended “to set aside the laws of a State.” 517 U.S. at 30. Section 104(d)(2)(A) makes clear the degree to which Congress intended to preempt State law. Unlike in *Barnett*, where statutory vagueness necessitated a lengthy 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?

Notwithstanding Congress’ clarity, the OCC seeks to recast the standard through a misapplication of *Barnett*’s discussion of *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), a case which asked whether a State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” See *Barnett*, 517 U.S. at 31; Preemption Letter at 6; J.A. at 64. This misapplication ignores the context in which the Supreme Court analyzed *Hines* in the course of its preemption analysis in *Barnett*. Understood properly, the *Hines* “stands as an obstacle” test should not be used to dilute the “prevent or significantly interfere” preemption rule established by GLBA for bank insurance sales activities. Rather,

the *Hines* formula applies to situations where a court analyzes whether the inconsistency between a State law and a federal law's preemptive intent is such that the State law must give way. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hines*, 312 U.S. at 67. Lacking clear statutory guidance about Congress' preemptive intent, *Barnett* interpreted that intent and found the State law in question to be an "obstacle" to Congress' "purposes and objectives" concerning 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. Congress' "full purposes and objectives" regarding preemption 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 "full purposes and objectives" include: the explicit reaffirmation of the McCarran-Ferguson Act; the codification of the concept of "functional regulation"; and, to effectuate functional regulation, a high presumption in favor of State regulation under the "prevent or significantly interfere" preemption standard.

Thus, the "legal standards for preemption set forth in . . . *Barnett* " as required by Section 104(d)(2)(A) become clear. The courts are to ascertain Congress' intent with respect to preemption by evaluating the "*full* purposes and objectives" of Congress in passing the statute (emphasis added). Through its

application of the “stands as an obstacle” test, the only “purpose and objective” the OCC appears to validate is the right of banks to sell insurance. Through *Barnett* and GLBA, the relevant test, however, is not whether State law “stands as an obstacle” to the bank’s ability to sell insurance; rather, it is whether the State law “stands as an obstacle” to Congress’ intent with respect to preemption or preservation of State law. This intent is explicitly expressed in GLBA—State regulation prevails unless it is so burdensome that it “prevents or significantly interferes” with a bank’s ability to sell insurance. Congress understood *Barnett* to have established a “prevent or significantly interfere” standard with respect to State regulation of bank insurance sales activities, and it explicitly codified this standard. Understood in this context, *Barnett*’s “legal standards” for preemption become clear and its discussion of *Hines* should not be viewed as a tool for abrogating the plain language of GLBA. *Hines* simply illustrates that courts interpreting GLBA should apply Congress’ specific “purposes and objectives,” including its high “prevent or significantly interfere” threshold for those wishing to preempt the dominant power of the States as the functional regulator of insurance. Given the extensive analysis of preemption standards, the Supreme Court could have articulated any number of phrasings with respect to State regulation of bank insurance activities. Yet, the Supreme Court chose one. Despite its earlier discussion of several unique standards, the Supreme Court chose “prevent or

significantly interfere,” which is the standard Congress codified. From the Supreme Court’s discussion encompassing “prevent or significantly interfere,” there can be no doubt that it serves as the foundation of a high preemption threshold.

In the passage articulating “prevent or significantly interfere,” the Supreme Court uses virtually exact synonyms in stating the preemption standard: “forbid, or to impair significantly” and “prevent or significantly interfere.” These phrases clearly craft the basis of a high preemption threshold. 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.” Repetition clearly establishes this high standard.

Thus, the language in Section 104(d)(2)(C)(iii),¹¹ which states that “[n]othing shall be construed . . . to limit the applicability of” *Barnett*, only buttresses the argument that *Barnett* and GLBA stand for “prevent or significantly interfere.” Only a preemption standard that ignores “prevent or significantly interfere” in deference to lesser standards not directly on point “limits” the applicability of *Barnett*. By selectively ignoring the “prevent or significantly interfere” standard – the preemption standard specifically enacted by Congress for

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

State laws related to national bank insurance sales practices – the OCC “limits the applicability” of *Barnett*. In light of *Barnett*’s use of “prevent or significantly interfere” and Congress’ codification of this standard (as opposed to any of other purportedly similar standards), the only logical conclusion is that the preemption standard to be gleaned from *Barnett* is the one that Congress codified: prevent or significantly interfere.

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

A review of the language in preemption cases both before and after *Barnett* makes clear that *Barnett* 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 bank insurance activities before *Barnett*. The lower courts recognized that *Barnett* was a seminal case; a post-*Barnett* 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*] 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” was commonly understood to be the rule established in *Barnett*. 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* 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). Thus, when Congress established “prevent or significantly interfere” as the preemption standard, it was perfectly consistent to add the words “[i]n accordance with the legal standards for preemption set forth in . . . Barnett” as further illustration of the standard. Because the *Barnett* standard 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.

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 bank insurance activities. Section 104(c)(1)¹² states that except as otherwise provided, no State may “prevent or restrict” affiliations concerning banks and affiliates. Section 104(d)(1)¹³ provides that (with exceptions, including sales, solicitation, and cross-marketing activities) States may not “prevent or restrict” a

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

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

bank or its affiliates from engaging in permissible activities. Despite using the phrase “prevent or restrict” in these sections, Congress stated “prevent or significantly interfere” in Section 104(d)(2)(A). Surely, use of the phrase “significantly interfere” meant something. “[W]here Congress includes particular language in one section of a statute but omits it 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 significantly interfere” standard to certain types of laws, Congress intended to single out these laws for heightened protection against preemption, 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. THE LEGISLATIVE HISTORY, PROPERLY UNDERSTOOD, ILLUMINATES CONGRESSIONAL INTENT TO CODIFY A HIGH “PREVENT OR SIGNIFICANTLY INTERFERE” PREEMPTION STANDARD

A. The GLBA Senate Report is based on a clearly erroneous reading of *Barnett*, which conflicts with the plain language of GLBA.

The Senate Report¹⁴ accompanying GLBA contains an erroneous description of *Barnett*. The OCC depends upon this Senate Report to support its construction of Section 104(d)(2)(A), contending that the two are “almost identical.” Preemption Letter at 9; J.A. at 66. Before a clear interpretive error of a key Supreme Court case becomes part of judicial precedent, this Court should clarify the meaning of the legislative history to Section 104(d)(2)(A). 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.

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.

¹⁴ S. Rep. No. 106-44 (1999).

First, the language in the Senate Report is not “almost identical” to the language of Section 104(d)(2)(A) as ultimately enacted. Nothing of the sort is true. The Senate Report recites the full citation to *Barnett*, 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, any suggestion that the Senate Report should be viewed as a document precisely tracking with the language of GLBA should be swiftly rejected.

Of greater concern are the subtle but essential legal mistakes made by the Senate Report’s drafter. The Report states that in *Barnett*, 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 lists three other formulations under which federal courts purportedly preempted State laws. *See* S. Rep. No. 106-44 at 13. This statement completely misrepresents the *Barnett* decision. The Senate Report states, or at least unmistakably implies, that *Barnett* recited four different, equally important standards that previously had been employed by federal courts. *Barnett*, 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 mentioned in *Barnett*, the Senate Report dilutes the meaning of “prevent or significantly interfere.” The OCC seeks to capitalize on this error in building legal arguments around this piece of legislative history in order to abrogate Congress’ intent by treating “prevent or significantly interfere” as of no particular importance, but rather just another interchangeable, equally preferable standard in a variety of formulations.

Moreover, the Senate Report errs in its references to the three other standards it claims were used by courts to preempt State law. *Barnett* 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 (emphasis added). Rather, the cases from which *Barnett* quotes those phrases are cases where courts *upheld*, rather than *preempted*, State laws. See *Anderson Nat. Bank v. Lockett*, 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* 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*, 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 was used to demonstrate what the State laws in question did not do, as opposed to what standard was being applied. The actual preemption standards in those cases all set a high bar for setting aside a State law. *See Anderson*, 321 U.S. at 252 (The infringement was not found to rise to an impermissible level, because it did not rise to the level of an “unlawful encroachment.”); *McClellan*, 164 U.S. at 358 (“[A]ny limitation by a state on the making of contracts is a restraint upon the power of a national bank . . . but the question which we determine is whether it is such a regulation as violates the act of congress.”); *National Bank*, 76 U.S. (9 Wall.) at 362 (“It is only when State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.”).

If the string citation cases illustrate anything, it is that the Supreme Court deliberately tied 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. *Barnett* recognized the distinction between cases where State laws were upheld and where they were preempted, but the Senate Report ignores these nuances.

Thus, the Senate Report is based on an inaccurate reading of *Barnett*. It would be a subversion of the law for any court to apply a standard other than “prevent or significantly interfere” based on the demonstrably erroneous musings of a Senate Report, particularly when that Report stands in clear conflict to the plain language of the statute in question and the Supreme Court opinion it purportedly explains.

B. The Senate Report is not persuasive legislative authority.

Not only is the above-quoted passage of the Senate Report based on a demonstrably erroneous statement of the legal standard established by *Barnett*, a proper understanding of GLBA’s legislative history indicates it is not controlling authority. In fact, the part of the Senate Report that analyzes the actual text of the bill section-by-section contains no reference to the *Barnett* string citation. Instead, the Report in relevant part states, rather succinctly and correctly, the preemption rule stated in *Barnett*—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*], 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* 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* decision controls its meaning as codified and as case law.

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 Richard Bryan, took issue with page 13 of the Senate Report. With respect to the *Barnett* language, Sen. Bryan stated that “[t]he Committee Print disregarded the Supreme Court’s holding in [*Barnett*], regarding the standard for preempting State regulation of insurance sales activity.” 145 Cong. Rec. S6046 (daily ed. May 26, 1999) (statement of Sen. Bryan).

Sen. Bryan made clear he was referring to the *Barnett* string citation erroneously summarized on page 13. “The ‘prevent or significantly interfere’ language was taken directly from the Supreme Court’s *Barnett* decision and is intended to codify that decision.” *Id.* He further noted that the 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* string citation.

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). Given his role as author of Section 104(d)(2)(A), Sen. Bryan’s clarifying words 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 suggests a similarly important role in the legislative process,

indicating that “great weight” should be given to his clarification of “prevent or significantly interfere.”¹⁵

Sen. Bryan’s remarks were made months before the final 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 Report¹⁶ is consistent with Sen. Bryan’s remarks, and contains no reference to the *Barnett* string citation erroneously described in the Senate Report. The Conference Report

¹⁵ 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 Clarke v. Security Industry Ass’n*, 479 U.S. 388, 407 (1987) (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.); *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.); *Sutherland v. Egger*, 865 F.2d 56, 58 n.3 (3d Cir. 1989) (Court discarded letter from the chair of House Subcommittee, where letter was sent after the legislative session concluded, was not part of the legislative record, and represented only the views of the sending Congressman.); *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 none of these categories. The full legislative history supports Sen. Bryan’s interpretation of Section 104(d)(2)(A); only page 13 of the Senate Report, an erroneous interpretation of the *Barnett* string citation which Sen. Bryan attempted to correct, can be said to conflict with Sen. Bryan’s statements.

¹⁶ H.R. Conf. Rep. No. 106-434, *reprinted in* 1999 U.S.C.C.A.N. 245.

states succinctly the interpretive rule: “With respect to insurance sales, solicitations, and cross-marketing, States may not prevent or significantly interfere with the activities of depository institutions or their affiliates, as set forth in *Barnett*” H.R. Conf. Rep. No. 106-434 at 5, *reprinted in* 1999 U.S.C.C.A.N. at 251. Again, as noted above,¹⁷ the rule “prevent or significantly interfere” is in the main clause of the sentence; the subordinate clause (“as set forth in *Barnett*”) explains that Congress believed that *Barnett*’s rule is “prevent or significantly interfere,” and sought to codify that rule.

The relationship between the Senate Report and the Conference Report indicates that any conflict 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 the Conference Report is that “when choosing between inconsistent pieces of legislative history, two houses are better than one.” *Id.* In this case, the Conference Report clearly articulates the interpretive rule the Senate Report misstates. “Given the clear language of the statute, selected and arguably ambiguous snippets of the legislative history are

¹⁷ See *supra* pp. 10-11.

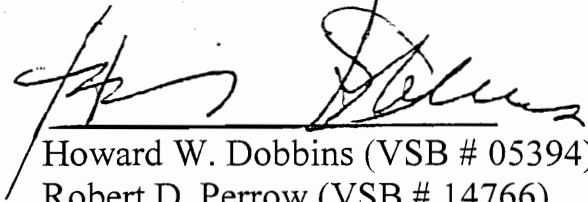
insufficient to undermine that language.” *Independent Bankers*, 164 F.3d at 668 (citation omitted). Thus, the overwhelming conclusion is that the standard for preemption of State laws affecting insurance sales, solicitation, and cross-marketing activities of national banks is “prevent or significantly interfere,” and that this is a difficult standard for anyone challenging such a law to meet.

CONCLUSION

For the foregoing reasons, the court should vacate, annul, or set aside the September 24, 2001 Preemption Letter and affirm the “prevent or significantly interfere” standard established by Congress in GLBA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief of *Amicus Curiae* has been prepared using:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of October 2002, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand-delivery, the required number of copies of this Brief of *Amicus Curiae*, and further certify that I served, via UPS Ground Transportation, the required number of copies of said Brief upon:

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