No. 22-349

In the Supreme Court of the United States

FLAGSTAR BANK, FSB, Petitioner,

v.

WILLIAM KIVETT, *ET AL.*, Respondents.

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

BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Bank Policy Institute ("BPI"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), the Chamber of Commerce of the United States of America ("Chamber"), and the Mortgage Bankers Association ("MBA"; collectively, "*Amici*") respectfully submit this brief as *Amici* in support of the petition of Petitioner, Flagstar Bank, FSB, for a writ of *certiorari*.[1]

BPI. BPI is a nonpartisan public policy, research, and advocacy group that represents the nation's leading national and State chartered banks and their customers. BPI's member banks employ nearly two million Americans, make 68% of the nation's loans and nearly half of the nation's small business loans, and serve as an engine for financial innovation and economic growth.

ABA. Established in 1875, the ABA is the united voice of America's $17 trillion banking industry, which is comprised of small, regional, and large national and State banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.

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[1] Pursuant to Rule 37.6 of this Court, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties received timely notice of the intent to file this brief under Rule 37.2(a), and all parties have consented to the filing.

CBA. Founded in 1919, the CBA is the trade association for today's leaders in retail banking—*i.e.*, banking services geared toward consumers and small businesses. The national and State bank members include the nation's largest financial institutions, as well as many regional banks, which operate in all fifty States, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

Chamber. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

MBA. The MBA represents over 2,200 member companies in the real estate finance industry, including in the residential, commercial, and multi-family arenas.

This Petition concerns an issue that is critical to the U.S. financial system, and therefore to *Amici*'s members. In contravention of this Court's precedent and more than a century of regulatory interpretation, and in indisputable conflict with a subsequent ruling of the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Ninth Circuit held in *Kivett* v. *Flagstar Bank, FSB*, 2022 WL 1553266 (9th Cir. May 17, 2022), that a State may regulate the prices of a national bank's products and services. Specifically, the Ninth Circuit held that the National

Bank Act of 1864 does not preempt California from requiring national banks to pay a certain minimum rate of interest on mortgage escrow accounts. In reaching this decision, the Ninth Circuit erred by (i) misconstruing the standard for NBA preemption set forth by this Court in *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996), and (ii) erroneously finding that the Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), expressed a congressional intent to eliminate federal preemption of State laws governing mortgage escrow accounts held by national banks.

The Ninth Circuit's decision (i) exposes national banks to substantial and non-uniform State requirements in the conduct of mortgage lending, a fundamental banking power, (ii) significantly interferes with national banks' ability to conduct their business in a safe and sound manner under a national regulatory system, and (iii) sets a dangerous precedent that could empower not only California, but other States as well, to regulate the prices and terms of other national bank products and services. The Ninth Circuit decision also creates uncertainty around the validity of numerous State laws in other Circuits governing mortgage lending, given the Second Circuit decision in *Cantero* v. *Bank of America, N.A.*, 49 F.4th 121 (2d Cir. Sept. 15, 2022), which is directly contrary to the Ninth Circuit's decision.

Amici respectfully request that this Court grant the Petition and reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

In its decision below, the Ninth Circuit overrode a bedrock rule of law: the National Bank Act of 1864 ("NBA") preempts States from regulating the terms of national banks' products and services. Contrary to this Court's clear line of precedents, *see*, *e.g.*, *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 376, 379 (1954), and rulemaking by the Office of the Comptroller of the Currency ("OCC"), 12 C.F.R. § 34.4(a), the Ninth Circuit held that California Civil Code Section 2954.8, which requires lenders to pay at least 2% annual interest on all mortgage escrow accounts, is not preempted by the NBA. This holding relied on the Ninth Circuit's earlier decision in *Lusnak* v. *Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). But the Ninth Circuit's decisions in these cases failed to analyze key precedents of this Court, overlooked the history and goals of the NBA, and disregarded the critical importance of allowing national banks to set terms and conditions of their products and services without the application of conflicting State regulations.

Unsurprisingly then, a recent decision by the Second Circuit—which considered whether the NBA preempts a New York law mandating the same 2% interest payments on mortgage escrow accounts as in the California law—expressly rejected the Ninth Circuit's holding in *Lusnak*. Rather, the Second Circuit held that such State laws are preempted under the "ordinary legal principles of preemption." *Cantero*, 49 F.4th at 130.

The Second Circuit is right and the Ninth Circuit is wrong. Congress enacted the NBA in 1864 so that federal law—rather than "the hazard of unfriendly legislation by the States"—governs national banks. *Tiffany* v. *Nat'l Bank of Missouri*, 85 U.S. 409, 413 (1873); *see also Easton* v. *Iowa*, 188 U.S. 220, 231-32 (1903) ("[W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation."). At the foundation of the national banking system, Congress established that national banks would operate under the "paramount authority" of the federal government, *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896), and be supervised by the OCC, *see* Act of June 3, 1864, § 8, 13 Stat. 99, 101 (1864).

Soon after Congress enacted the NBA, this Court began defining the broad scope of NBA preemption, holding consistently that State attempts to "control" the powers of national banks are impermissible, "except in so far [sic] as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). For well over a century, decisions of this Court and various federal courts of appeals have recognized that States "may not curtail or hinder a national bank's efficient exercise" of its powers "under the NBA," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007). Thus, for example, "[i]n the years since the NBA's enactment," this Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

Under *Barnett*, this Court set out a standard preempting any State regulation that "prevent[s] or significantly interfere[s] with [a] national bank's exercise of its powers." 517 U.S. at 33 (1996). *Barnett*'s threshold turns on whether State regulation exerts "control" over a national bank's exercise of its powers granted by the federal government, and not on the magnitude of that control. *Cantero*, 49 F.4th at 131 (citing *McCulloch* v. *Maryland*, 17 U.S. 316, 431 (1819)). The standard was informed by this Court's prior decisions in cases such as *Franklin*, in which this Court held that a State law limiting how a national bank could advertise its products—something far less impactful than a State law regulating a national bank's pricing of its products—was preempted. 347 U.S. at 374.[2] In 2012, this Court's *Barnett* standard was codified into law through the Dodd-Frank Act. Dodd-Frank Act § 1044, 12 U.S.C. § 25b(b)(1)(B) (2012). This Court has not spoken on NBA preemption since then.

California Civil Code Section 2954.8 is a perfect example of the type of State interference with national bank powers that the NBA has always preempted. Mortgage escrow accounts are crucial tools that lenders use to facilitate the vast majority of home loans across the United States. In these accounts, borrowers keep sufficient funds to make their tax and insurance payments on the property. These payments are needed to ensure that (i) lenders do not lose all or

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[2] In *Lusnak*, the Ninth Circuit did not even mention *Franklin*, but rather relied on *Wyeth* v. *Levine*, 555 U.S. 555 (2009), a non-NBA preemption case where there was no federal law expressly preempting the State law. *See* 883 F.3d at 1191-93.

part of the value of their security interest in a foreclosed-upon property due to various governmental entities' claims for taxes, and (ii) lenders do not incur unreimbursed loss in the value of the collateral property in case of damage to the property. The benefits of mortgage escrow accounts also redound to homeowners by providing a convenient method for paying property taxes and insurance. Borrowers also benefit from these accounts because, without them, lenders would face substantially increased risks on mortgage lending. Lenders could be forced either (i) to require higher down payments and higher mortgage interest rates, or (ii) simply not to loan to certain borrowers with riskier credit profiles.

Recognizing the importance of mortgage escrow accounts to national banks' core lending powers, in 2004, the OCC issued a final rule stating that "[a] national bank may make real estate loans . . . without regard to state law limitations concerning . . . [e]scrow accounts." 12 C.F.R. § 34.4(a). As the OCC clarified, the rule did not create "any new powers for national banks or any expansion of their existing powers" but rather was "intend[ed] only to ensure the soundness and efficiency of national banks' operations by making clear the standards under which they do business." OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004).

By misunderstanding clear precedent and ignoring OCC rules, the Ninth Circuit concluded that the California law did not "significantly interfere" with mortgage escrow accounts because 2% is not a "punitively high" amount. *Lusnak*, 883 F.3d at 1194-

95, n.7. But even if the amount of interest were relevant to the preemption analysis, the Ninth Circuit's factual determination was based on no evidence in the record (and certainly no inherent judicial expertise on the issue). Indeed, 2% is several times the average rate of interest that banks have recently paid on money held in commercial accounts.

Moreover, by permitting State control over national banks' management of a critical banking service, the Ninth Circuit's holding would also subject national banks to differing escrow rate requirements from different States (many of which already have mortgage escrow interest rate requirements), thus defeating the NBA's purpose of instituting a uniform national regulatory structure over national banks' core powers.

Under this Court's Rule 10(a) and (c), review is warranted to resolve the circuit split and reaffirm the scope of NBA preemption.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE EXPRESS SPLIT BETWEEN THE SECOND AND NINTH CIRCUITS.

In *Lusnak* and *Kivett*, the Ninth Circuit sought to apply its version of the "significant interference" test to determine whether the California statute is preempted. The Ninth Circuit looked to the *magnitude* of the statute's interference with national bank powers to determine whether the statute was preempted. Although the *Lusnak* court acknowledged that a State law setting "punitively high rates . . . may

prevent or significantly interfere with a bank's ability to engage in the business of banking," the court held, without any factual support, that a 2% interest rate presents only "minor" interference and thus is not preempted. *Lusnak*, 888 F.3d at 1194-95, n.7. The Ninth Circuit did not offer any guidance as to what mandated rate might constitute significant interference.

In reaching this conclusion, the Ninth Circuit also relied on an amendment to the Truth in Lending Act ("TILA") in the Dodd-Frank Act, which added requirements that (i) for certain categories of mortgages, lenders must establish an escrow account, and (ii) for these mortgages, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in . . . [an] escrow account that is subject to [Section 1639d]." 15 U.S.C. § 1639d(a), (g)(3). Despite acknowledging that the plaintiff's mortgage escrow account in *Lusnak* was "not a federally mandated account 'subject to [the TILA amendment],'" 883 F.3d at 1197, the Ninth Circuit nevertheless found that the TILA amendment was evidence of Congress's intention, both in enacting the TILA amendment *and* retrospectively, that State laws requiring interest on mortgage escrow accounts should "apply" to *all* mortgage lenders, including national banks. *Id.* at 1194-95. The Ninth Circuit thus interpreted the TILA amendment as implicitly declaring that such State regulation "would not necessarily prevent or significantly interfere with a national bank's operations," and thus would not be preempted by the NBA. *Id.*

The Second Circuit's decision in *Cantero* expressly addressed and rejected the analysis in *Lusnak* and *Kivett* in nearly every respect. Explicitly disagreeing with the Ninth Circuit's approach, the Second Circuit instead found that "[i]t is the *nature* of an invasion into a national bank's operations—not the *magnitude* of its effects—that determines whether a state law purports to exercise control over a federally granted banking power [and the powers incidental thereto] and is thus preempted." *Cantero*, 49 F.4th at 131 (emphasis added). Applying this Court's precedents, the Second Circuit noted that, "[t]o determine whether the NBA conflicts with a state law, we ask whether enforcement of the law at issue would exert control over a banking power—and thus, if taken to its extreme, threaten to 'destroy' the grant made by the federal government." *Id.* at 132 (internal citations omitted). Turning to the interest rates on mortgage escrow accounts at issue in *Cantero*, the Second Circuit held that NY GOL Section 5-601 is preempted by the NBA because, "[b]y requiring a bank to pay its customers in order to exercise [its power to create and fund escrow accounts], the law would exert control over banks' exercise of that power," and, "if taken to a greater degree, . . . could infringe on national banks' power to use mortgage escrow accounts altogether." *Id.* at 134.[3]

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[3] Applying *Skidmore* deference, *i.e.*, deference to agency interpretation "only to the extent that th[e] interpretation[] ha[s] the power to persuade," *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000) (internal quotation marks omitted), the Ninth Circuit rejected the OCC's rule that State laws governing mortgage escrow accounts held by national banks are preempted. *Lusnak*, 883 F.3d at 1192-93. The Second Circuit did not need to

The Second Circuit also held that the TILA amendment had "no relevance" to the case because none of the plaintiffs' mortgage escrow accounts was subject to the statute. *Cantero*, 49 F.4th at 137. The Second Circuit reasoned that the plain text of the TILA amendment more likely suggested Congress's intent to "carve out an exception from its general rule" of NBA preemption for only those mortgages that are subject to the statute after its enactment, than to "expressly impos[e] a burden on some mortgage loans in order to impliedly impose a burden on all of them." *Id.* at 138-39. Indeed, "[i]t does not make sense to read [the TILA amendment] as effecting a sub silentio sea change." *Id.* at 139.

Because national banks seek to operate under uniform rules and procedures across the country, the irreconcilable difference between the law of the Second Circuit (covering three States) and the Ninth (covering nine States) creates differential regulatory regimes and uncertainty for national banks that seek to offer banking products and services in States in both Circuits, as well as all other States, as to which State laws are preempted. Indeed, if the Ninth Circuit's decisions remain in force, the NBA's goal of creating for national banks a "uniform and universal operation through the entire territorial limits of the country" will be severely compromised. *Talbott* v. *Bd. of Comm'rs of Silver Bow Cty.*, 139 U.S. 438, 443 (1891).

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reach the issue, basing its holding on "the ordinary legal principles of pre-emption" upheld in *Barnett*. *Cantero*, 49 F.4th at 130, 139 n. 13.

II. REVIEW IS WARRANTED TO CORRECT THE NINTH CIRCUIT'S DECISIONS.

In holding that California Civil Code Section 2954.8(a) is not preempted by the NBA because it does not "significantly interfere" with national bank powers, the Ninth Circuit disregarded precedents of this Court and improperly rejected an OCC rulemaking finding that laws regulating mortgage escrow accounts significantly interfere with national banks' powers. *See Kivett*, 2022 WL 1553266, at *1. The Ninth Circuit also demonstrated a fundamental misunderstanding of mortgage escrow accounts and the economics of mortgage loan pricing, thus undermining the Ninth Circuit's factual determination—even under its erroneous legal interpretation—that the California law at issue here does not significantly interfere with national banks' powers.[4]

A. The Ninth Circuit's Decision Wrongly Empowers States to "Significantly Interfere" with National Banks' Powers.

The Ninth Circuit's conclusion that California Civil Code Section 2954.8(a) does not "prevent or significantly interfere" with national bank powers

[4] The OCC has confirmed through its rulemaking power that the NBA protects national banks' power to use escrow accounts in connection with real estate lending and to do so "without regard to state law limitations concerning [such accounts]." 12 C.F.R. § 34.4(a). *Amici* do not address the Ninth Circuit's holding in *Lusnak* that the OCC's interpretation of *Barnett* is not entitled to deference, because California Civil Code Section 2954.8 should be preempted under the clear language of *Barnett*.

under the preemption standard of *Barnett* is based on a misreading of this Court's precedent and a misunderstanding of the purposes of preemption under the NBA. *See Kivett*, 2022 WL 1553266, at *1. Thus, the *Kivett* court's conclusion that Section 2954.8(a) is not preempted is erroneous for at least the following two reasons.

First, the Ninth Circuit fundamentally misunderstood this Court's "significant interference" doctrine. The Ninth Circuit did not dispute that creating and maintaining mortgage escrow accounts is a power of national banks that is entitled to the NBA's preemptive protection. Nor could it. From the NBA's inception, a national bank's powers have extended not only to core banking functions—such as "mak[ing], arrang[ing], purchas[ing] or sell[ing] loans or extensions of credit secured by liens on interests in real estate," 12 U.S.C. § 371(a)—but also to "all such incidental powers as shall be necessary to carry on the business of banking," Act of June 3, 1864, § 8, 13 Stat. at 101 (codified as amended at 12 U.S.C. § 24(Seventh)). *See NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 264 (1995) (recognizing that national banks are granted "incidental powers" under the NBA that are "necessary to carry on the business of banking").[5]

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[5] This Court has also recognized that States may not "significantly burden" the exercise of "any other power, incidental or enumerated under the NBA." *Watters*, 550 U.S. at 13. Although the use of mortgage escrow accounts in lending is a core power of national banks, even if it were not, it would certainly be a power incidental to lending and, therefore, protected under the NBA preemption provision.

Rather, the Ninth Circuit erred by seeking to establish the novel standard that a national bank's core powers could be regulated by a State if the regulation were not punitive. *See Lusnak*, 883 F.3d at 1195 n.7. This approach is fundamentally inconsistent with decisions of this Court, and of lower courts applying this Court's NBA precedents, holding that State efforts to regulate the terms of national banks' powers, including products and services, are preempted under the NBA, regardless of magnitude, much less limiting preemption to State laws that create a penalty. *See*, *e.g.*, *Franklin*, 347 U.S. at 378-79; *First Nat'l Bank of San Jose* v. *Cal.*, 262 U.S. 366, 369-70 (1923) (holding that a State law escheating dormant deposits in a national bank was preempted. "Plainly no state may prohibit national banks from accepting deposits, or directly impair their efficiency in that regard."); *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (State statute regulating national banks' ability to charge non-account holder check cashing fees); *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525 (1st Cir. 2007) (gift card expiration dates and fees); *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (account service fees).[6]

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[6] *See also Powell* v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D. W. Va. 2016) (payments ordering and late fees); *Pereira* v. *Regions Bank*, 918 F. Supp. 2d 1275 (M.D. Fla. 2013), *aff'd*, 752 F.3d 1354 (11th Cir. 2014) (check cashing fees and settlement); *NNDJ, Inc.* v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-account holder official check cashing fees); *Metrobank* v. *Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (non-account holder ATM fees).

Under the Ninth Circuit's approach that looks at the magnitude, rather than the character, of interference with national banks' powers to determine whether a State law is preempted, federal courts would be placed in the impossible position of evaluating whether certain rates that States sought to impose on national banks crossed the line from insignificant to significant interferences with national bank powers. Although a 2% interest rate such as California's—which is six times higher than the long-run average of .34% paid by FDIC-insured U.S. depository institutions on certificates of deposit over an 11-year period before April 2021[7]—seems to clearly constitute significant interference (and even a "penalty"), what if the requisite rate were only twice the prevailing average rate? This is not the type of analysis that Congress intended when it enacted the NBA, or for which the judiciary is remotely well-equipped.

Under a proper legal analysis, California's attempt to regulate a national bank's pricing for a product that is key to that bank's core banking powers is exactly the type of law the NBA was designed to preempt. It is presumably beyond question that a State law that sought to establish a minimum rate of interest on all deposit accounts—regardless of the magnitude of the minimum rate being prescribed—

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[7] *See*, *e.g.*, Fed. Deposit Ins. Corp., *National Rate on Non-Jumbo Deposits (less than $100,000): 12 Month CD*, available at https://fred.stlouisfed.org/series/CD12NRNJ (showing average national rate paid on 12-month non-jumbo certificates of deposit (less than $100,000) from 2010 to March 29, 2021 as 0.34%) (last accessed Oct. 25, 2022).

would be preempted by the NBA. A State law that sets a minimum rate of interest on mortgage escrow deposit accounts should not be viewed any differently for purposes of the preemption analysis. In this respect, the Ninth Circuit's decision badly misconstrues the meaning of "significantly interfere" under *Barnett*.

Second, even if the Ninth Circuit were correct in using a "magnitude" analysis, the Ninth Circuit failed to recognize the significant negative consequences that State interference with national banks' ability to utilize mortgage escrow accounts could have on the national banking system. Modern-day mortgage escrow accounts arose from the experience of the Great Depression, when homes were foreclosed upon due to homeowners' "inability to pay property taxes." U.S. General Accounting Office, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Because a tax lien could be senior to a mortgage lien, a bank stood to lose all or part of the value of its security interest in a foreclosed-upon property because any proceeds from the sale could go first to paying back taxes. *See* Bruce E. Foote, Cong. Research Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). Moreover, if insurance premiums were not paid and a catastrophic loss occurred, the resultant loss of insurance coverage could seriously jeopardize the value of the collateral. GAO Study at 5. Mortgage escrow accounts allowed lenders to reduce this risk by ensuring "that tax, insurance, and other obligations [were] met[,] and thus enabl[ing] them to protect their investments." *Id.* In doing so, national banks were (and are) able to

(i) make mortgage loans to borrowers with riskier credit profiles, (ii) help borrowers manage their money to stay current with their tax and insurance payments, and (iii) manage their own credit risks. *See id*.

Today, mortgage escrow accounts remain crucial to the home mortgage system: in 2016 alone, nearly six million mortgage originations—approximately 79% of the total—"included an escrow account for taxes or homeowner insurance." *See* FHFA & CFPB, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 1, 27, 30 (2018). If the use of these accounts were undermined by subjecting them to costly, State-law rate-setting mandates, it would cost national banks more to mitigate the credit risks associated with mortgage lending, with negative consequences to borrowers—*e.g.*, reduced availability of credit and higher interest rates. *See* Nathan B. Anderson & Jane K. Dokko, Fed. Reserve Board, *Liquidity Problems and Early Payment Default Among Subprime Mortgages* 2 (2010) (describing how "liquidity constraints" among subprime mortgage borrowers, due in part to the absence of escrow accounts, "contributed to the largest financial crisis since the Great Depression"). Moreover, such State regulation could have the deleterious effect of impairing many Americans' access to mortgage loans—particularly lower-income borrowers whose mortgages bear a higher risk, who may already have limited opportunities for credit and may not be able to afford higher mortgage rates that national banks may have to charge due to state laws requiring interest payments on mortgage escrow accounts.

B. The Ninth Circuit's Decision Risks Turning the National Banking System into a Patchwork, Fifty-State, Banking System.

The Ninth Circuit's decisions also invite significant interference with national bank powers by subjecting national banks to a patchwork of States' mortgage escrow interest rates and, potentially, numerous other State laws. This Court's decisions have "made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11. Yet, the Ninth Circuit's decision would do the very opposite by exposing banks to differing mortgage escrow laws as to pricing and other terms, as each of the fifty States may choose to assert them.

For example, other States have established different rates for mortgage escrow accounts that, if applied to national banks, would force national banks to pay different rates to borrowers depending on their State of residence. *See*, *e.g.*, Conn. Gen. Stat. § 49-2a ("not less than the deposit index"); Minn. Stat. § 47.20, subd. 9 (3% minimum interest rate); Wis. Stat. § 138.051(5) (5.25% minimum interest rate).[8] Subjecting national banks to a "death-by-a-thousand-cuts regime of mortgage-escrow regulation" would thus "undermine the NBA." *Cantero*, 49 F.4th at 133-34. As the OCC recognized, "[t]he application of multiple, often unpredictable, different state or local

[8] *See also* Or. Rev. Stat. § 86.245(2) ("at a rate not less than the discount rate"); Vt. St. tit. 8, § 10404(b) ("regular savings account" rate).

restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with [national banks'] ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure." OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. at 1908.

III. REVIEW IS WARRANTED TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS HOLDING THAT THE TILA AMENDMENT OVERRIDES NBA PREEMPTION.

The Ninth Circuit also held that the TILA amendment expressed congressional intent to eliminate NBA preemption as to all State laws concerning mortgage escrow account rates. But this reading of the TILA amendment ignores basic tenets of the law of preemption and statutory interpretation.

As *Barnett* makes clear, a finding of implicit congressional override of NBA preemption is strongly disfavored. 517 U.S. at 34 ("[W]here Congress has not *expressly* conditioned the grant of [a national bank] 'power' upon a grant of state permission," courts will ordinarily find that "no such condition applies." (emphasis added)). The history of the NBA "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32.

The Ninth Circuit erred by holding that the amendment to TILA—which made no "express"

mention of national banks or preemption—nonetheless demonstrated Congress's intent to allow States to force national banks to pay certain interest rates on mortgage escrow accounts. *Kivett*, 2022 WL 1553266, at *1 (citing *Lusnak*, 883 F.3d at 1194-96). Even beyond the lack of a clear expression of intent to eliminate NBA preemption, the language of the statute and basic principles of statutory interpretation preclude that result. The amendment to TILA reads as follows:

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

15 U.S.C. § 1639d(g)(3) (emphases added). The Ninth Circuit's holding cannot be reconciled with this language for several reasons.

First, "applicable" means "capable of being applied" or "having relevance." Webster's Third New International Dictionary (2002). For the reasons discussed above, the law that is "applicable" to national banks' use of mortgage escrow accounts is the NBA and other *federal* laws and regulations, not State laws. Section 1639d applies to a wide array of lender types; thus, the word "applicable" accounts for the fact that State escrow account laws apply to non-national bank lenders (*i.e.*, non-bank lenders and State bank lenders). And under current federal law, a national

bank has the flexibility to decide whether to pay interest or not, and the rate of interest, on any escrow account. Indeed, Congress's use of the disjunctive "or" in the phrase "State or Federal law" reinforces the understanding that State law does not always apply.

Second, and relatedly, the *Lusnak* court's interpretation of "applicable" as referring "to state escrow interest laws where they exist," 883 F.3d at 1195, violates a cardinal rule of statutory interpretation by rendering the term "applicable" superfluous. *See Corley* v. *United States*, 556 U.S. 303, 314 (2009).

In *Lusnak*, the Ninth Circuit asserted that Congress included the term "applicable" in the TILA amendment "because not every state has escrow laws." *Lusnak*, 883 F.3d at 1195. But Section 1639d(g)(3) separately addresses that point by requiring payment only "[i]f prescribed by" a relevant law. The Ninth Circuit's reading thus deprives "applicable" of any independent meaning in the statute.

Third, there is no reason to think that, by referring to "applicable State or Federal law," Congress intended to override the preemptive protection of the NBA and subject national banks to State, rather than federal, law as to mortgage escrow accounts. "We think it quite unlikely that Congress would use a means so indirect . . . to upset the settled division of authority [between federal and State law]." *United States* v. *Locke*, 529 U.S. 89, 106 (2000). Indeed, Congress knew very well when drafting the Dodd-Frank Act how to expressly address and limit the scope of preemption when it wanted to do so. *See*,

e.g., Dodd-Frank Act, § 5136C, 124 Stat. at 2016-17 (codified at 12 U.S.C. § 25b(h)(2)) (providing that State law is not preempted as to subsidiaries of national banks that are not themselves national banks).

Fourth, in a footnote in *Lusnak*, the Ninth Circuit tacitly acknowledged its strained reading of the TILA amendment when it noted that:

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

883 F.3d at 1195 n.7. Put differently, under *Lusnak*, the TILA amendment is a reverse preemption provision that can become a reverse-reverse preemption provision if States seek to impose "punitively high rates" on mortgage escrow accounts. But this new, novel standard ("punitively" high) has no basis in the statute or precedent. Nothing in the amendment can be read as affording courts the *ad hoc* power to determine when preemption applies based on

the magnitude, or penalty nature, of the interest on mortgage escrow accounts required by State law.

Moreover, it is inconceivable that Congress intended for federal courts to be in the business of deciding, on an ongoing basis—and, presumably, depending on the then-prevailing levels of market interest rates—when a statutory rate is "punitively high" and when it is not. *See infra* Part II.A.

But even if this Court were persuaded that the TILA amendment is clear evidence of Congress's intent to eliminate the ordinary principles of NBA preemption as to mortgage escrow accounts, *at most*, the statute could only reasonably be interpreted to require that national banks pay State-mandated interest on mortgage escrow accounts that are subject to Section 1639d, and no others.[9] The amendment clearly states that "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest . . . on the amount held in any . . . escrow account *that is subject to this section*." 15 U.S.C. § 1639d(g)(3) (emphasis added). As the Second Circuit noted, "it is much more harmonious to read the NBA together with [the TILA amendment] as a decision by Congress to carve out an exception from its general rule, rather than expressly imposing a burden on some mortgage loans in order to impliedly impose a burden on all of them." *Cantero*, 49 F.4th at 138 (internal quotation marks omitted).

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[9] Section 1639d does not apply to the mortgages at issue here. *See* Petition at 30; *see also id.* at 8 (describing the types of mortgages that are subject to Section 1639d).

CONCLUSION

The Petition presents an important federal question with broad consequences: whether national banks are subject to State laws establishing rates, terms, and conditions on national bank products and services. The answer the Ninth Circuit reached is in fundamental conflict with the Second Circuit, is inconsistent with this Court's precedent, and undermines the national banking system. Moreover, the Ninth Circuit's decision resolves this question in a way that creates risk to the safety and soundness of the national banking system and the availability of credit. Accordingly, this Court should grant the Petition and reverse, reaffirming the basic principle that States cannot regulate the terms of a national bank's products or services.

Respectfully submitted.

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