No. 22-349

IN THE

Supreme Court of the United States

FLAGSTAR BANK, FSB,

Petitioner,

V.

WILLIAM KIVETT, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the courts below, petitioner Flagstar Bank, FSB (Flagstar) argued that banking preemption law should be applied on a case-by-case basis and distinguish between large corporate banks, such as Bank of America, and smaller institutions like itself with respect to the "significant interference" standard for preemption under the National Bank Act (NBA). In an unpublished memorandum, the Ninth Circuit Court of Appeals affirmed the district court's rejection of these arguments, relying, in part, on its prior decision in *Lusnak v. Bank of Am., N.A.,* 883 F.3d 1185 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018). Several months after the memorandum issued, the Second Circuit Court of Appeals decided *Cantero v. Bank of Am., N.A.*, 49 F.4th 121 (2d Cir. 2022). Flagstar now petitions this Court for review of the unpublished memorandum to address a 1/1 circuit split between *Lusnak* and *Cantero,* arising only after finality in the Ninth Circuit.

Given this record, the question presented is better stated as follows:

Should the Court grant certiorari to review an unpublished memorandum decision to consider a subsequent circuit split?

RULE 29.6 STATEMENT

Respondents are individuals William Kivett and Bernard and Lisa Bravo and the certified classes they represent (collectively, "Plaintiffs"). Respondents do not include any nongovernmental corporations.

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INTRODUCTION

Flagstar, until days ago a federal savings association rather than a national bank, has dropped its arguments below regarding the case-specific nature of NBA conflict preemption and whether State interest-on-escrow (IOE) laws interfere significantly with its particular banking operations. Seeking to benefit from the fortuity of a recent decision, Flagstar grounds its petition on the different outcome reached just months ago in *Cantero v. Bank of Am., N.A.*, 49 F.4th 121 (2d Cir. 2022), which nullified New York's IOE statute on preemption grounds.

A petition for certiorari is now pending in *Cantero*.[1] If the Court is inclined to address NBA preemption in the near future, then *Cantero* is the superior vehicle for the reasons those petitioners have explained and others discussed below. Confirming the inadequacy of this case for review, Flagstar recently notified the Court that it is now a national bank. Flagstar fails to explain, however, why the record made in the lower courts—where Flagstar was a thrift, not a national bank—may be disregarded at this late stage.[2]

More fundamentally, it is not plain either petition should be granted. The 1/1 division could not be more shallow or nascent. And more appellate decisions are expected. The Court is likely to have an opportunity to take up NBA preemption of State IOE laws from a

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[1] *Cantero v. Bank of Am., N.A.*, No. 22-529 (petition docketed Dec. 8, 2022).

[2] Letter to Hon. Scott S. Harris, Clerk of the Court (Dec. 8, 2022).

pending First Circuit appeal.[3] As with most issues, circuit law should be allowed to unfold before this Court considers stepping in.

Even if this case were a candidate for certiorari, Flagstar seeks to obscure a record supporting the conclusion that the NBA does not invalidate California Civil Code § 2954.8. After insisting that a factual record be made on summary judgment, Flagstar could prove ***no*** interference with its banking operations, much less the significant interference required for NBA preemption.

To the contrary, Flagstar's arguments emphasizing adverse practical consequences for the lending industry, the record showed here, are refuted by real-world experience. Flagstar does not mention that it complies with State IOE laws for the vast majority of the loans it services. Approximately 80% of Flagstar's loans are owned by other entities but subserviced by Flagstar. For this large category, Flagstar began routinely complying with IOE laws in 2017—one year before the Ninth Circuit decision that Flagstar now claims to challenge in *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018).

The record further demonstrated that every other bank subject to the § 2954.8 IOE mandate updated its practices as needed after *Lusnak* to follow California's statute. The industry did not revolt and there never was any showing of intrusion that might warrant preemption. Banks' ease of compliance, including

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[3] *Conti v. Citizens Bank, N.A.*, No. 22-1770 (appeal docketed Oct. 14, 2022) (reviewing order in *Conti v. Citizens Bank, N.A.*, 2022 WL 4535251 (D.R.I. Sept. 28, 2022)).

Flagstar as to most of its loans, debunks the notion that IOE laws disrupt mortgage lending.

California's Legislature did not run afoul of the NBA by mandating payment of interest to protect consumers. When buying a home, purchasers should not be compelled by an imbalance of bargaining power to give interest-free loans to banks.

STATEMENT OF THE CASE

A. Flagstar Argued Below That *It* Was Entitled to Preemption, Despite *Lusnak*, Based On Evidence Of Interference With *Its* Banking Operations Because Preemption is Decided Case-By-Case.

Unlike *Cantero* and *Lusnak*, Flagstar did not bring a motion to dismiss on preemption grounds. Rather, this case was decided below on cross-motions for summary judgment. Pet.App. 26. Flagstar argued that it was entitled to preemption in this particular case, despite *Lusnak,* because NBA conflict preemption should be determined case-by-case based on evidence of State IOE law interference with its banking operations. *Id.*; C.A.9 Opening Brief of Appellant Flagstar Bank, FSB (AOB) at 24-27 (Dkt. No. 19).

Flagstar's proof consisted of declarations, by its director of loan administration (Sean Mansell) and assistant treasurer (Courtney Chang), who speculated on possible interference, without identifying any actually occurring. C.A.9 Excerpts of Record (ER) 136-207, 226-39 (Dkt. Nos. 20-1 to 20-5); C.A.9 Supplemental Excerpts of Record (SER) 132-42 (Dkt. No. 31). They also testified that Flagstar was already paying IOE in compliance with ***all*** applicable State laws, including § 2954.8, with respect to ***80%*** of its loans

serviced. ER-57-60. Yet, neither witness could identify any interference, much less significant interference, with Flagstar's operations resulting from its existing compliance with IOE laws. SER-39, 50, 71-88, 132-142; *see also* SER-91-92, 201-07, 226-39.

Specifically, for example, Flagstar's witnesses testified that they had no reason to believe that further compliance with California's IOE law would cause Flagstar to cease using mortgage escrow accounts, result in any impact to Flagstar's loan origination or servicing businesses, or cause any costs that would interfere with Flagstar's ability to service loans. SER-91-92.

Plaintiffs' proof against 'significant interference' included unchallenged evidence that compliance with California's IOE law was pervasive prior to *Lusnak*, among both bank and non-bank mortgage servicers alike. SER-94-96. And after *Lusnak*, such compliance became the *de facto* universal norm. *Id.* The evidence showed, for example, that Wells Fargo and JPMorgan Chase have complied with § 2954.8 for years, at least with respect to loans originated after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). SER-99. Following *Lusnak*, Bank of America and Citimortgage both became compliant with California's statute and settled their liabilities for prior non-compliance. SER-98-99. Additionally, a huge number of mortgages are serviced by non-bank entities who have no claim to preemption in the first instance. SER-96.

In Flagstar' case, moreover, it subservices most of its mortgages on behalf of non-bank MSR owners, who have no claim to preemption. For the bulk of its loans, Flagstar sells the primary beneficial interest in the

loan to investors, such as Fannie Mae, while initially retaining the loan's MSR. SER-13-15, 20-21, 58-59. Flagstar then sells the vast majority of its MSR assets to other third-party investors, such as hedge funds, simultaneously acquiring the contractual right to subservice this category of loans. SER-21-22, 70. Of Flagstar's 1.1 million loans serviced nation-wide, Flagstar "subservices" about 80% on behalf of the third-party MSR holders. On these mortgages—again, the bulk of its business—Flagstar pays IOE and then charges that expense to the MSR holders. SER-61-62.

Flagstar "services" the other 20% as the MSR holder itself. SER-23-24, 59-60. On these mortgages, Flagstar does not pay IOE. SER-61. With respect to the 80% of loans where Flagstar pays IOE, it began complying with State IOE laws in January 2017, well before *Lusnak* issued, because the third-party MSR holders, as non-banks, had no colorable basis to assert preemption. Pet.App. 30-31, 36; *see also* SER-63, 153.

B. Regardless of *Lusnak* or *Cantero*, Flagstar Never Had Any Legitimate Claim to Preemption of California IOE Law with Respect to the Class Loans That It Sub-Serviced For Non-Bank MSR Holders.

Flagstar's business model makes this case very different from the straightforward NBA preemption scenarios covered by *Lusnak* and *Cantero*. As detailed above, Flagstar sells the vast majority of both its loan assets and its MSR assets to non-bank investors. Thus, for the vast majority of the mortgage loans covered by the certified class, Flagstar's only relationship to the loan was working as the "sub-servicer" pursuant to a contract with a third-party, non-bank MSR holder, such as a hedge fund. In light of these

undisputed facts, even assuming the NBA would preempt State IOE laws, the non-bank MSR holders, on the record made below, would have no legitimate basis to assert any preemption defense.

This issue, and evidence related to it, were not fully developed, however, because the holding of *Lusnak* made these specifics irrelevant. But, again, it is undisputed that Flagstar began paying IOE in 2017—well before *Lusnak*—on the loans that it was subservicing for non-bank MSR holders. Why no preemption defense as to the bulk of loans in its portfolio? Flagstar knew (and knows) that the defense was untenable where the owner of the MSR was not a bank.

Flagstar has paid IOE on those loans, yet now fails to distinguish this category of loans from the other 20% in its portfolio. Petition for Writ of Certiorari (Pet.) at 24. Apart from Flagstar's inconsistent positions, this aspect of the record further undermines the suitability of this case as a vehicle. As to a substantial portion of the class loans and judgment, Flagstar owes IOE to the certified class ***regardless*** of the outcome of any *Lusnak/Cantero* split.

C. The District Court and Ninth Circuit Rejected Flagstar's Attempts to Evade Compliance with State Law.

In light of this record, Plaintiffs argued below that there was no evidence that compliance with § 2954.8 would significantly interfere with Flagstar's banking operations and that, regardless, *Lusnak* controlled. C.A.9 Answering Brief of Plaintiffs-Appellants at 20-32 (Dkt. No. 30). Flagstar, on the other hand, argued

to the district court and Ninth Circuit that *Lusnak* was distinguishable from this case because:

- *Lusnak* involved a "facial preemption challenge" decided "on the pleadings" without "any factual record" (AOB at 1, 4, 12; *see also id.* at 20).
- *Lusnak* involved a "large" bank (Bank of America) rather than a "smaller" federal thrift (AOB at 4, 12, 21, 27).
- *Lusnak* was not a "blanket ban on preemption" or a "one-size-fits-all ruling" (AOB at 24).
- "*Lusnak*'s holding is limited (as many appellate opinions are) to the record at issue in that case" (C.A.9 Reply Brief of Appellant Flagstar Bank, FSB at 4) (Dkt. No. 38).

The district court and Ninth Circuit rejected this line of argument. In March 2020, the district court held that "*Lusnak* applies to the claim in this case, and that exceptions proposed by Flagstar are not persuasive, including the 'small bank vs. large bank' distinction. Therefore, the motion for summary judgement is DENIED to the foregoing, and plaintiff's motion is GRANTED." Pet.App. 26. The case was headed for trial on damages when the COVID crisis intervened. Eventually, the amount of damages was established through a subsequent motion for summary judgment, and judgment entered against Flagstar in March 2021. Pet.App. 71-74.

In May 2022, the Ninth Circuit affirmed the district court's judgment in a short unpublished memorandum rejecting Flagstar's theories. "Though Flagstar argues that *Lusnak*'s holding applies only to

'large corporate banks,' *Lusnak*'s language is unqualified." Pet.App. 3. "Flagstar's argument that *Lusnak*'s procedural posture limits its authority in this case is similarly unavailing." Pet.App. 4. "Relatedly, Flagstar argues that Dodd-Frank mandated preemption determinations be 'case-by-case' and based on 'substantial evidence.' But as the *Lusnak* court reasoned, '[t]hese [regulations] have no bearing here where the preemption determination is made by this court and not the OCC.'" *Id.*

Although Flagstar alternatively requested that the Ninth Circuit simply overrule *Lusnak*, Flagstar offered no intervening higher authority that could support such a request. There still is none, leaving Flagstar to cling to *Cantero* as the only conceivable basis for certiorari.

D. Flagstar Now Argues That the NBA Preempts State IOE Laws *Per Se* Despite the Absence of Evidence of Interference With Banking Operations.

To align its arguments with those in *Cantero*, Flagstar attempts a remarkable pivot—in addition to its recent conversion to a national bank.

Seizing on the putative circuit split arising from the *Cantero* decision, Flagstar has done a turnabout to argue now that the NBA preempts State IOE laws *per se* even where, as here, a developed evidentiary record shows the absence of any significant interference with banking operations. Flagstar's discussion of the present controversy focuses almost entirely on *Lusnak* as opposed to the actual extended evidentiary proceedings that happened in this case at Flagstar's insistence. Pet. at 9-14. In stark contrast to its

position below, Flagstar's petition rests on the premise that *Lusnak*, if "left intact … will disrupt the uniform national banking system that Congress sought to create." Pet. at 15. Flagstar should not be allowed to benefit from its inconsistent positions.[4]

REASONS FOR DENYING THE PETITION

I. Certiorari Should Be Denied on Multiple Independent Grounds.

This Court usually does not rush to address the first hint of disagreement between two circuits. A fresh division, even involving issues of abstract importance and multiple circuits, rarely suffices. *See, e.g., Glenhaven Healthcare LLC v. Saldana*, No. 22-192, 2022 WL 17085186 (Nov. 21, 2022) (denying certiorari on nursing homes' immunity for COVID-related tort claims). This case is no exception. The preemption arguments raised here and in *Cantero* are "complex and would benefit from further percolation in the lower courts prior to this Court granting review." *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., statement respecting denial of certiorari).

Even if Flagstar's petition were not premature, certiorari should be denied for additional reasons.

A. Flagstar Overstates the Discord Between *Cantero* and *Lusnak*.

Flagstar argues that the Second Circuit's recent decision in *Cantero* "directly conflicts" with *Lusnak*,

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[4] *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (judicial estoppel bars "parties from deliberately changing positions according to the exigencies of the moment").

thereby presenting a "square, acknowledged conflict." Pet. at 2. But the clash that Flagstar claims is overstated.

The two decisions approach NBA preemption from quite different perspectives. Departing from the language adopted by Congress, the Second Circuit crafted a new preemption touchstone turning on "control" of bank operations. *Cantero*, 49 F.4th at 125. The Second Circuit anchored its dubious interpretation to the "power to destroy" catchphrase in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 320, 4 L. Ed. 579 (1819). *Id.*

Flagstar proposes that the Second Circuit's nontextual standard be adopted as the law of the land. Pet. at 26. *Cantero*'s logic is so untenable, however, that one judge wrote separately seeking to bolster it. Suggesting yet another standard, the concurrence reasoned: "Because the state law at issue here ***conditions*** the exercise of an incidental power on the payment of monies to escrow accountholders—it is preempted." 49 F.4th at 142 (Perez, J., concurring) (emphasis added).

The Second Circuit made an unsustainable error. Both the *Cantero* majority and the concurrence did not adhere to the standard from *Barnett Bank, N. A. v. Nelson*, 517 U.S. 25, 33 (1996), which Congress codified. State law is preempted not where it "controls" banking powers but, rather, where it "significantly interferes" with those powers. 12 U.S.C. § 25b(b)(1)(B).

By contrast, faithful to the Dodd-Frank amendments, the Ninth Circuit observed that after the 2008 financial crisis, "Congress aimed to undo broad preemption determinations, which it believed planted

the seeds for long-term trouble in the national banking system." *Lusnak*, 883 F.3d at 1189. In light of Dodd-Frank's express approval of IOE laws, and the lack of significant interference with banking operations, the NBA did not preempt § 2954.8. *Id.* at 1194-95 (citing 15 U.S.C. § 1639d(g)(3)).

This is not a "square" conflict. As Flagstar admits, the Dodd-Frank amendments to the Truth in Lending Act, at issue in *Lusnak*, were "irrelevant" to the Second Circuit's analysis. Pet. at 18; *see Cantero*, 49 F.4th at 137 n.11 ("Section 1639d has no relevance to this appeal.").

This is also not an "acknowledged" conflict. Flagstar cites passages in *Cantero* ostensibly "disagreeing with *Lusnak*." Pet. at 19. But this is Flagstar's paraphrasing, not anything stated in the *Cantero* opinion. When circuits disagree to the point warranting certiorari, it is manifest. *See, e.g., Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017); *Warger v. Shauers*, 574 U.S. 40, 44 (2014); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 522 (2007). Even then, this alone does not suffice to get in the door. *See, e.g., Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 773 (9th Cir. 2018) ("We are not convinced by the Seventh Circuit's reasoning."), *cert. denied sub nom. Robinson v. Dep't of Educ.*, 140 S. Ct. 1440 (2020).

There is tension between *Cantero* and *Lusnak* because one held an IOE law preempted, while the other did not. Contrary to Flagstar's description, however, this is not a "clean and clear" conflict, Pet. at 19, compelling certiorari after just two circuit decisions. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (Stevens, J., respecting denial of certiorari) (explaining

denial was due to "absence of a direct conflict among the Circuits").

B. If Certiorari is Granted on Any Issue of NBA Preemption, *Cantero* Is the Case to Accept, Not This One.

Flagstar says this case as an "ideal vehicle" to consider NBA preemption of State IOE laws. Pet. at 2, 36. For a host of reasons, it is not.

Given the concurrent timing of their petition, the *Cantero* petitioners have already addressed at length the comparative considerations bearing on whether to accept this case or theirs, if either. To avoid duplication, Plaintiffs will not repeat those arguments here. Among them, on the record made in the lower courts, Flagstar was not a national bank at all relevant times during this litigation. This contrasts with Bank of America in both *Lusnak* and *Cantero*; and the loans in this case straddle the effective dates of applicable Dodd-Frank amendments—some before, some after.[5]

In addition to these complex antecedent issues, there is a stark contrast between this case and *Cantero* in the opinions below. The Ninth Circuit issued a terse memorandum disposition affirming summary judgment for Plaintiffs. Pet.App. 1. This is such a thin basis for review on certiorari that Flagstar needlessly includes the *Lusnak* slip opinion in its appendix, as though Plaintiffs' case is just a continuation. Pet.App. 77. Again, *Lusnak* is no longer recent. For nearly five years, the mortgage industry in California has co-existed with *Lusnak* without significant interference.

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[5] *See Cantero* Pet. at 2-3, 16-21.

Although the Second Circuit's analysis is flawed, a published opinion, with a concurrence, provides a more solid platform for review than the Ninth Circuit's short memorandum. This is another vehicle consideration favoring review in *Cantero*, if certiorari is not denied in both cases.

The respective dispositions here and in *Cantero* also make that case a better candidate. Akin to declaring a statute unconstitutional, the Second Circuit is the first court nationally to invalidate a State IOE law. "Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022). Having enacted N.Y. G.O.L. § 5-601 through their elected representatives, the citizens of New York possess a sovereign interest in the laws of their State being upheld. "When the Federal Government asserts authority over a State's most fundamental political processes"—as through preemption of State law—"it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden v. Maine*, 527 U.S. 706, 751 (1999).

C. There is No Conflict with Decisions Not Addressing Preemption of State IOE Laws.

Flagstar cites a handful of cases finding ***other*** types of State laws preempted. Pet. at 19-23. In framing a viable question for certiorari, however, belt and suspenders provide no assistance.

The Ninth Circuit's unpublished memorandum does not conflict with *SPGGC, LLC v. Ayotte*, 488 F.3d

525 (1st Cir. 2007), involving gift cards, because the Dodd-Frank amendments were not implicated. The same follows for the other cited cases.[6] As one court explained in distinguishing this line of decisions: "Dodd-Frank changed the landscape of banking regulation and, in doing so, indicated that state statutes requiring payment of interest on escrow accounts are a viable means of consumer protection within the dual regime of federal and state regulation." *Clark v. Bank of Am., N.A.*, 2020 WL 902457, at *8 (D. Md. Feb. 24, 2020) (holding Maryland's IOE statute was not preempted).

II. *Lusnak* Was Correctly Decided.

The inquiry now, before reaching merits arguments, is simply whether the Court should accept this case. Flagstar nonetheless spills a lot of ink contending that *Lusnak* was erroneous. Briefly, *Lusnak* correctly concluded that § 2954.8 is not preempted.

Flagstar's expansive view of conflict preemption of State IOE laws, grounded on speculative concerns proven false in this very case, is out of step with the Court's recent preemption jurisprudence. "The preemption of state laws represents a serious intrusion into state sovereignty." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019) (lead opinion of Gorsuch, J.) (citation and internal quotation marks omitted). The Court therefore has emphasized that "preemption cannot be based on a freewheeling

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[6] *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (garnishment statute); *Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844 (8th Cir. 1999) (restrictions on ATM machines); *Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376 (Cal. 2012) (mandatory disclosures on convenience checks).

judicial inquiry into whether a state statute is in tension with federal objectives." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (internal quotation marks omitted).

Especially in light of the record here, Flagstar offers nothing more than policy-driven objections to *Lusnak*. Flagstar's complaint that banks, in the IOE context, face a "patchwork of state laws" is a grievance with dual regulation itself. Pet. at 19. In 1864, Congress established the "competitive mix of state and national banks known as the dual banking system." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 23 (2007). States "have enforced their banking-related laws against national banks for at least 85 years." *Cuomo v. Clearing House Ass'n LLC*, 557 U.S. 519, 534 (2009). Banks, in fact, are "governed in their daily course of business far more by the laws of the State than of the nation." *Watters*, 550 U.S. at 24.

These principles are bedrock. Their unremarkable application to § 2954.8 to uphold the statute, rather than nullifying it, aligns with the record that Flagstar demanded be developed below. Industry practice, including Flagstar's compliance in part, fortifies the conclusion that *Lusnak* was correct. *See Clark*, 2020 WL 902457, at *7 (observing that Bank of America "changed its policies and practices in 2019, to begin paying interest for all residential mortgage escrow accounts in California" and rejecting argument that "complying with state escrow interest laws would be financially ruinous").

Likewise, nearly five years after *Lusnak*, States have not rushed to impose new requirements on banks. Neither Flagstar nor its *amici curiae* point to anything suggesting a slippery slope of *ultra vires*

State regulation after *Lusnak*. It is all just musing to avoid paying interest to buyers who must open escrow accounts to purchase a home.

Flagstar extolls the views of the Office of the Comptroller of the Currency (OCC). Pet. at 8, 13, 17. For present purposes, Plaintiffs invite the Court's attention to the analysis of multiple courts concluding that the OCC has strayed impermissibly from the intent and directives of Congress. *See, e.g., Lusnak*, 883 F.3d at 1191-94; *Clark*, 2020 WL 902457, at *4-5.

If anything, *Lusnak* carries even greater force on this point today. As emphasized in recent decisions, federal regulators are cabined by their statutory authority.[7] Flagstar overlooks that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference does not show preemption." *Garcia*, 140 S. Ct. at 801 (internal quotation marks omitted).

CONCLUSION

The petition for writ of certiorari should be denied.

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[7] *W. Va. v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021).

Respectfully submitted,

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