No. 22-349

IN THE
Supreme Court of the United States

FLAGSTAR BANK, N.A.,

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

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REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

Effective December 1, 2022, as part of a corporate merger with New York Community Bank, petitioner converted from a federally chartered savings bank into a federally chartered national bank and changed its name from Flagstar Bank, FSB to Flagstar Bank, N.A. Flagstar Bank, N.A. is wholly owned by New York Community Bancorp, Inc., a publicly traded entity. According to schedules filed with the Securities and Exchange Commission, BlackRock, Inc., and The Vanguard Group are holders of 10% or more of the stock of New York Community Bancorp., Inc. and are therefore indirect holders of an equity interest of 10% or more in Flagstar Bank, N.A.

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INTRODUCTION

The courts of appeals have reached diametrically opposed positions on the validity of materially identical state laws. The federal government's primary banking regulator has repeatedly recognized that the issue is of vital importance to the national banking system. The issue recurs frequently, reaching three federal courts of appeals within the past year alone. And respondents do not contest that the question will, at some point, demand this Court's review.

Yet respondents argue not yet and not here. While they do not seriously dispute the circuit conflict, they say it warrants further percolation. Or, they urge, it would be better addressed by granting the other pending petition once it is fully briefed. They are wrong on both counts.

The question presented does not lend itself to shades of gray on which percolation could add value. Either state interest-on-escrow laws are preempted under the codified *Barnett Bank* standard, 12 U.S.C. § 25b(b)(1)(B), or they are not. Respondents do not argue otherwise. Further percolation will only entrench division on that binary question, to the detriment of the national banking system: Congress codified the preemption standard precisely to ensure that system's uniformity and freedom from intrusive state regulation.

None of the purported vehicle problems that respondents offer, or vaguely adopt from the *Cantero* petition, are real. Congress expressly applied the same preemption standard to national banks and savings

associations. Respondents concede Flagstar preserved the argument that state interest-on-escrow laws are preempted under that standard. The fact that it made additional alternative arguments below, unsuccessfully attempting to distinguish the Ninth Circuit's *Lusnak* decision, in no way impedes this Court from holding that *Lusnak* was simply wrong. In any event, Flagstar is now a national bank subject to a permanent injunction to comply with California's law. The preemption question could not be more cleanly presented. And this petition is the only vehicle for the Court to decide it in the current Term.

The Court should grant the petition, without delay.

ARGUMENT

I. The Decision Below Implicates a Clear Conflict on a Foundational Question of NBA Preemption.

The decision below implicates a square and acknowledged conflict on a question that the primary federal banking regulator has repeatedly described as "a matter of foundational consequence . . . to the federal banking system," 2021 OCC Amicus Br., *Cantero v. Bank of America, N.A.*, 2021 WL 2477066, at *3 (2d Cir. June 15, 2021)—whether the National Bank Act (NBA) expressly preempts state interest-on-escrow laws as applied to federally chartered banks. And more broadly, the Ninth Circuit's decision employs an approach to NBA preemption inconsistent with the approach of at least three other circuits and the California Supreme Court. *See* Pet.15-23. Respondents offer

no persuasive reason to ignore those conflicts or delay their resolution.

A. Respondents acknowledge (Opp.10) that the Second and Ninth Circuits "approach NBA preemption from quite different perspectives," but claim that the conflict between *Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022), and *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), is somehow "overstated." That assertion is hard to understand. Respondents do not dispute that the cases involved materially identical state laws requiring national banks to pay 2% interest on mortgage escrow accounts. One circuit held such laws are preempted; the other held they are not. Petitioner and respondents agree that one circuit misapplied the codified *Barnett Bank* standard, while the other correctly applied it. That is a conflict.

The disagreement, moreover, extends not just to the bottom line but to the analysis. As respondents themselves explain, the Ninth Circuit thought that TILA's Section 1639d(g)(3) reflected Congress's "express approval of IOE laws" across the board, Opp.11, whereas the Second Circuit held that the Ninth Circuit's reasoning was "incorrect" and that the TILA amendment could not be used "to determine the correct preemption standard" for escrow accounts not required by that statute, *Cantero*, 49 F.4th at 137-39. Likewise, the Second Circuit expressly rejected *Lusnak*'s view that NBA preemption depends on asking whether a state law's "degree of interference" with

national banking powers is "punitively high." *Id.* at 132 (quoting *Lusnak*, 883 F.3d at 1195 n.7).[1]

The conflict was also acknowledged by the Second Circuit itself. As that court recognized in *Cantero*, the district court decision there "closely tracked the reasoning of the Ninth Circuit," 49 F.4th at 129, in *Lusnak*. And the Second Circuit, like respondents here, identified no daylight between the district court's reasoning and the Ninth Circuit's as it repeatedly refuted that reasoning and *Lusnak* itself. *See id.* (noting that Bank of America did not "try to distinguish [*Lusnak*] and argue[d] instead that it was wrongly decided").

Indeed, everyone except respondents recognize the stark division between the Second and Ninth Circuits. The *Cantero* plaintiffs have now also petitioned for review of this "circuit split on an issue of 'foundational importance' to the national financial system." *Cantero* Pet.11, No. 22-529 (Dec. 5, 2022). And legal commentators too have already begun to weigh in on the "split among the circuits." M. Flumenbaum & B. Karp, *Federal Preemption of State Banking Laws*, http://bit.ly/3j5Woi6 (Oct. 25, 2022).

B. Respondents also contend (Opp.9) that this Court should wait for more circuits to weigh in before granting review. Their arguments are unpersuasive.

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[1] Contrary to respondents' assertion (Opp.10), the *Cantero* concurrence "join[ed] in full [the] Court's well-reasoned opinion" on preemption. 49 F.4th at 140 (Pérez, J., concurring).

The Second and Ninth Circuits have staked out opposite positions on an up-or-down question. Any future decisions on the preemption of state interest-on-escrow laws as to loans of the type at issue will simply choose between those two clearly delineated sides of the debate. Further percolation will not eliminate the need for this Court's review, especially because the Ninth Circuit has twice declined to change its position. Meanwhile, disunity will continue to splinter what should be a nationally uniform federal banking system.

Exactly those concerns led this Court to grant review of an NBA preemption question in *Watters v. Wachovia Bank, N.A.*, based on a contested allegation of a 1-1 split. *See* Pet.22, No. 05-1342 (Apr. 18, 2006); Opp.5-9, No. 05-1342 (May 19, 2006). The circuit split here is no less important and far more stark—indeed, it is widely acknowledged. Under circumstances like these, this Court often deems a 1-1 circuit split sufficient reason to grant review on an important federal question.[2]

And here, the split is not just 1-1. The Ninth Circuit's approach to NBA preemption conflicts more broadly with the approach taken by the First, Sixth, and Eighth Circuits and the California Supreme Court. *See* Pet.19-23. Those decisions demonstrate that the Second Circuit's approach to the question pre-

[2] *See, e.g.*, *Cedar Point Nursery v. Hassid*, No. 20-107 (2020); *Clark v. Rameker*, No. 13-299 (2013); *PPL Corp. v. Comm'r of Internal Revenue*, No. 12-43 (2012).

sented is not novel. It merely follows from the approach those other courts and this one have long applied in this area.

Respondents dismiss (Opp.13) the decisions of other circuits and the California Supreme Court because they applied NBA preemption pre-Dodd-Frank. That is no distinction: Dodd-Frank simply codified the preemption standard this Court articulated decades earlier in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996). Pet.7; *see Cantero*, 49 F.4th at 136 (Dodd-Frank "codified a preexisting, judicially articulated rule"). Judicial interpretations of that standard before Dodd-Frank apply with full force under Dodd-Frank. And that body of law forbids applying state interest-on-escrow laws to national banks. *See Conti v. Citizens Bank, N.A.*, No. 21-cv-296, 2022 WL 4535251, at *4 (D.R.I. Sept. 28, 2022) (relying on existing First Circuit NBA precedent).

The lines are drawn. No further percolation is necessary or warranted. The Court should not defer review in hopes that another petition emerges raising the same important issue as cleanly as presented here.

II. This Case Is an Ideal Vehicle.

This case is an excellent vehicle for the Court to decide the question presented—and the only vehicle that would permit its resolution this Term. Whether the NBA preempts California's interest-on-escrow law is the only ground on which to affirm or reverse the $9 million judgment and the injunction ordering Flagstar, a national bank, to pay interest under that state law going forward. And no other issues would impair

the Court's ability to review the final judgment in this case. Pet.36-37.

A. It makes no difference that Flagstar was a federally chartered savings bank until recently, when it converted to a federally chartered national bank as part of a long-planned merger. *Cf. Cantero* Pet.17; *see* p. i, *supra*. Congress expressly subjected both types of institutions to the same preemption standard. The *Cantero* petitioners' contrary view rests on a misstatement of the law and a misreading of the class definition. They assert (at 17-19) that some class members' claims would implicate the Home Owners' Loan Act (HOLA) preemption standard that pre-dated Dodd-Frank for federal savings associations.[3] That is flat wrong, as well as irrelevant—class certification is not at issue and the class members' claims rise and fall with their representatives'.

The certified class is limited to persons whose loans are subject to Dodd-Frank's preemption standard, not HOLA's. Contrary to what the *Cantero* petitioners suggest, the class includes only those whose loans Flagstar serviced "on or after August 22, 2014 through September 30, 2019," Pet.11.n.1—well after the relevant effective date of July 21, 2011. The damages at issue reflect 2% interest on escrow balances during that class period—not before. Pet.App.38. Under Dodd-Frank's plain terms, throughout that entire class period, the same *Barnett Bank* standard applied to preemption determinations for mortgages serviced by any federally chartered institution. *See* 12 U.S.C.

[3] The term "[f]ederal savings association" includes "federal savings bank[s]." 12 U.S.C. § 1462(3).

§ 25b(a)(1), (b)(1)(B) (applying the same preemption standard to "any bank organized under the laws of the United States"); 12 U.S.C. § 1465(a) ("Any determination by a court . . . regarding the relation of State law to a provision of this chapter [governing federal savings banks] or any regulation . . . prescribed under this chapter shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.").

And to avoid any HOLA complications, the class "exclud[es]" any persons whose loans originated on or before July 21, 2010. Pet.11.n.1. Dodd-Frank's savings provision preserves HOLA field preemption only for federal savings association "contract[s] entered into on or before" that date. 12 U.S.C. § 5553; *see McShannock v. JP Morgan Chase Bank, NA*, 976 F.3d 881, 885 n.3 (9th Cir. 2020). The class thus includes only (1) people for whom HOLA field preemption was not preserved and, thus, (2) whose claims would be governed by Dodd-Frank's uniform preemption standard for all federally chartered banks.[4]

But there is more. Although respondents never mention it, the final judgment includes a permanent injunction requiring Flagstar to pay interest on California mortgage escrow accounts. Pet.App.70-71. The propriety of that injunction plainly turns on today's

[4] The class also includes only persons who "did *not* receive interest on the amounts held by [Flagstar] in their escrow accounts." Pet.11.n.1 (emphasis added). Respondents' discussion (Opp.5-6) of accounts Flagstar subserviced for third parties and paid interest on is thus irrelevant to this case.

law. And respondents acknowledge (Opp.1) that Flagstar is now a national bank, governed by the NBA. Despite respondents' posturing, there is no hint in their opposition that the particular type of federal charter affects the preemption standard or the relief awarded. It does not.

B. Nor does it matter that Flagstar unsuccessfully argued that *Lusnak* could be distinguished—in the district court, on Flagstar's status as a federal savings association, and in the court of appeals, on an evidentiary record of significant interference. *Cf.* Opp.3,6-9; *Cantero* Pet.17-19. Both the district court and Ninth Circuit rejected those arguments (as respondents urged), confirming that *Lusnak*'s erroneous view of NBA preemption is "unqualified" and applies equally to savings associations and national banks. Pet.App.3-4.

As respondents acknowledge (Opp.8), Flagstar preserved its argument that *Lusnak* was wrongly decided in both courts below. And Flagstar is not renewing any of its alternative arguments here, because this Court is not bound by *Lusnak*. Rather, Flagstar contends that *Lusnak* was wrongly decided for all federally chartered institutions on any record. There is nothing inconsistent or noteworthy about advancing alternative theories in service of the same argument, nor any reason to conclude that Flagstar would be somehow estopped from continuing to advance one of its alternative theories here. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (requiring "success in a prior proceeding" and inconsistent positions for judicial estoppel).

C. The *Cantero* petitioners' efforts to distinguish this case based on TILA's Section 1639d are equally misguided. Plaintiffs in both *Cantero* and here sued under state law, not under TILA. Yet both sets of plaintiffs argue that Section 1639d(g)(3) demonstrates Congress's intent that federally chartered banks follow state interest-on-escrow laws for *all* mortgages—whether or not Section 1639d(g)(3) covers them. Opp.10-11; *Cantero* Pet.23-24. *Lusnak* agreed; *Cantero* disagreed. So, unless the plaintiffs in one case or the other abandon the argument, the Court will need to grapple with the effect, if any, of TILA's Section 1639d(g)(3) on NBA preemption.

The *Cantero* petitioners nevertheless argue (at 20) that their case is different because "there is no dispute" that Section 1639d(g)(3) does not apply to the named plaintiffs there. That is an odd assertion, as both sets of plaintiffs argue that, for preemption purposes, it does not matter whether Section 1639d(g)(3) applies. In any event, the argument fails on its own terms. As the petition noted (Pet.30), respondents here have *also* never argued that their loans are covered by Section 1639d(g)(3). And before this Court, *they still do not*.

Although the *Cantero* petitioners incorrectly suggest (at 20) that respondents here "argue[d] and present[ed] evidence below" that they were subject to Section 1639d(g)(3), the pleading they cite shows the opposite. In the cited brief, the subclass representatives argued that Flagstar "required them to establish [a]n escrow account as a condition of the[ir] loan" under TILA's Section 1639d(f)(2), not (g)(3). Opp. to MSJ 11,

No. 18-cv-5131 (Dec. 30, 2019). Section 1639d(f)(2) applies to mortgages "*not* covered by" Section 1639d(g)(3), and authorizes lenders to establish escrow accounts for those loans "at [their] discretion." 15 U.S.C. § 1639d(f)(2) (emphasis added); *see* Pet.9.

The possibility that some unnamed class members have loans subject to Section 1639d(g)(3) similarly makes no difference. The same is true of the proposed classes in *Cantero*. *See* Cantero Am. Compl. ¶ 38, No. 18-cv-04157 (E.D.N.Y. Aug. 7, 2018); Hymes Compl. ¶ 21, No. 18-cv-2352 (E.D.N.Y. Apr. 20, 2018). At most, that possibility could have created typicality or adequacy issues for class certification. But no one is challenging class certification in this Court.

D. Finally, the unpublished nature of the decision below is immaterial. *Cf.* Opp.12-13. This Court frequently grants review of unpublished decisions applying binding circuit precedent, as here. *See, e.g.*, *Thompson v. Clark*, No. 20-659 (2021); *Nieves v. Bartlett*, No. 17-1174 (2018); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, No. 16-712 (2017). Respondents claim that the *Cantero* petition is a better vehicle because it arises from the Second Circuit's published decision. But this Court is perfectly capable of considering the views of the Second and Ninth Circuits articulated in the published decisions in *Cantero* and *Lusnak* regardless of the vehicle. Because the *Cantero* petition will not even be fully briefed when the Court considers this petition, however, only by granting review in this case can the Court resolve the conflict this Term.

III. The Decision Below Is Wrong.

Given the sharp conflict between the Second and Ninth Circuit's decisions, review would be warranted here irrespective of the merits. But the decision below is also wrong. Pet.24-33. Respondents offer no meaningful defense of the Ninth Circuit's decision—apparently content to await this Court's review of the merits. Opp.14. And the few "[b]rief[]" points they do make are misguided. A few brief points in response.

A. Respondents discourage preemption "based on a freewheeling judicial inquiry into . . . federal objectives." Opp.14-15 (citation omitted). But this case presents a question of express preemption, not implied obstacle preemption. The question is whether California's interest-on-escrow law runs afoul of the preemption standard in 12 U.S.C. § 25b(b)(1)(B). In asking the Court to enforce that statutory standard, Flagstar advances no "grievance" with the "'dual banking system.'" Opp.15 (quoting *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 23 (2007)). It merely invokes Congress's express endorsement of this Court's recognition that, on the federal side of that dual system, "the States can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters*, 550 U.S. at 11.

B. Respondents' observation (Opp.15) that national banks have begrudgingly complied with California's interest-on-escrow law is not actually an argument on the merits at all. It is also unremarkable—national banks had little choice but to comply with

California law post-*Lusnak*. The result is a patchwork of inconsistent laws, even as litigation continues in other States. *See* Pet.34-35. Respondents say that at least no new State has passed a law exacerbating the problem since *Lusnak*, but the fact that the problem could get worse is no reason to defer review.

C. Finally, respondents' aspersions (Opp.16) on the OCC's view that state interest-on-escrow laws impermissibly interfere with national banking powers rest on nothing more than a truism that agencies may not exceed their statutory authority. But even after Dodd-Frank, the OCC is authorized to make preemption determinations under the NBA. 12 U.S.C. § 25b(b)(1)(B). And courts are required to afford those determinations some measure of deference based on their thoroughness, reasoning, and consistency. *Id.* § 25b(b)(5)(A). Not every court has found the OCC's views persuasive. That is why we are here. But that fact alone is insufficient—legally and practically—to dismiss those views out of hand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 20, 2022