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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SUPPLEMENTAL BRIEF FOR PETITIONER

Kathryn M. Barber
Brian D. Schmalzbach
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219

William M. Jay
Thomas M. Hefferon
GOODWIN PROCTER LLP
1900 N Street N.W.
Washington, DC 20036

Jonathan Y. Ellis
Counsel of Record
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

Counsel for Petitioner

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that the corporate disclosure statement included in its December 20, 2022 reply brief remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

ARGUMENT

Pursuant to this Court's Rule 15.8, petitioner Flagstar Bank, N.A. submits this supplemental brief to address points that the reply brief in *Cantero v. Bank of America, N.A.*, No. 22-529, raised about this petition after it was fully briefed. In that brief, the *Cantero* petitioners continue to characterize the record in our case in ways that the actual respondents to this petition tellingly have neither advanced nor embraced. *See Cantero* Reply 3-6. The Court should not be misled. This petition presents an ideal vehicle for the Court to resolve the important question of National Bank Act preemption that has split the circuits. Bank of America, the respondent in *Cantero*, agrees. The *Cantero* petitioners' arguments to the contrary are unavailing.

1. First, there exists no antecedent question in this case about TILA's Section 1639d, and certainly none that presents a barrier to the Court's resolution of the question presented. Section 1639d's relevance to this petition and to the *Cantero* petition is exactly the same. None of the plaintiffs sued under Section 1639d, or any other provision of TILA. Rather, the plaintiffs in both cases assert that TILA's Section 1639d shows that Congress did not intend to preempt state interest-on-escrow laws for *any* mortgages, not even mortgages serviced by federally chartered banks that are not covered by Section 1639d(g)(3). *See, e.g.*, *Cantero* Pet. 23-24 (arguing that "Congress's amendment to section 1639d of the Truth in Lending Act makes clear 'Congress's view that creditors . . . can comply with state escrow interest laws without any

significant interference with their banking powers." (quoting *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1196 (9th Cir. 2018)). The Ninth Circuit adopted that reasoning in *Lusnak* and in the decision below. *See, e.g.*, Reply 3-4. The Second Circuit rejected it in *Cantero*. *See Cantero v. Bank of America, N.A.*, 49 F.4th 121, 138-39 (2d Cir. 2022). And neither set of plaintiffs has abandoned the argument in this Court. *See* Opp.11; *Cantero* Pet. i (citing Section 1639d(g)(3) in the question presented). Whether the Court grants this petition, *Cantero*, or both, the plaintiffs will be able to argue that TILA's Section 1639d is relevant to the preemption question.

The *Cantero* petitioners assert that our case also presents an "analytically distinct" issue under TILA because Section 1639d(g)(3) directly applies to the named plaintiffs' loans in our case, but not theirs. *Cantero* Reply 4. That assertion is incorrect. Again, respondents in our case have not asserted a claim under TILA; nor has any of the named plaintiffs ever claimed that their escrow accounts were mandated by TILA, such that Section 1639d(g)(3) would directly apply. The *Cantero* petitioners' argument to the contrary rests on a misreading of the summary judgment briefing from *one* set of the named plaintiffs (the Bravos) in our case. Let us explain.

TILA's Section 1639d requires creditors to create mortgage escrow accounts for certain higher-priced mortgage loans. Subsection (a) imposes the requirement. 15 U.S.C. § 1639d(a). Subsection (b) defines the mortgage loans to which the requirement applies. *Id.* § 1639d(b). And subsection (g) establishes certain

rules for the "[a]dministration of [such] mandatory escrow . . . accounts." *Id.* § 1639d(g) (boldface omitted). Those requirements—including Section 1639d(g)(3)'s requirement to pay interest on those accounts "[i]f prescribed by applicable State or Federal law"—apply only to the escrow accounts mandated by Section 1639d(a)-(b). *See id.* § 1639d(g)(3) (requiring interest "on the amount held in any . . . escrow account that is subject to this section").

Section 1639d(f) goes on to "[c]larif[y]" that when Section 1639d's mandatory provisions do not apply, nothing precludes lenders, servicers, and borrowers from voluntarily agreeing to create escrow accounts "on terms mutually agreeable to the parties to the loan" or "at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower." 15 U.S.C. § 1639d(f)(1)-(2) (boldface omitted). As we explained in our reply brief, the Bravos' summary judgment briefing makes clear that their escrow account was one required by the contract with their lender—*not* mandated by Section 1639d(a)-(b). *See* Reply 10-11. Section 1639d(g)(3) thus does not regulate their account.

The *Cantero* petitioners assert that the Bravos' citation to Section 1639d(f)(2) was only a "stray citation," and that the Bravos were really arguing (or perhaps meant to argue) that their escrow account was a mandatory account to which Section 1639(g)(3) applies "because their loan closed on or about December 1, 2017." *Cantero* Reply 5 n.1. The Bravos themselves have made no such representation (in this Court or below), and the *Cantero* plaintiffs' reading of their motion is implausible, as the full passage makes clear.

What the Bravos actually said was that Section 1639d(g)(3) "applies broadly to escrow accounts created after January 21, 2013," and "[i]t applies, for example, to the Bravos' escrow account because their loan closed on or about December 1, 2017 *and Flagstar required them to establish the escrow account as a condition of the loan*." Opp. to Mot. for Summ. J. at 6-7, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. Dec. 30, 2019), ECF No. 134 (emphasis added) (citing *Lusnak*, 883 F.3d at 1197 and 15 U.S.C. § 1639d(f)(2)).

The summary judgment briefing thus makes express (with argument and citation) that the Bravos' escrow account was *not* among those mandated by TILA's Section 1639d(a)-(b). The Bravos' citation to Section 1639(g)(3) simply (though perhaps somewhat inartfully) reflects the same argument that plaintiffs in both petitions make: that Section 1639d(g)(3) is evidence of Congress's intent to subject all mortgage escrow accounts, mandatory or not, to state interest-on-escrow laws. Again, the party before the Court who actually made that argument has not disagreed.

But even if the Bravos were trying to argue that an escrow account permitted by Section 1639d(f)(2) is directly subject to TILA's Section 1639d(g)(3), that argument is both wrong and waived. It is wrong because, as the *Cantero* petitioners acknowledge, Section 1639d(g)(3) only applies to escrow accounts that are mandated by Section 1639d(a)-(b), not to any escrow account voluntarily established after the provision's

effective date. *Cantero* Reply 4.[1] And it is waived because respondents neither raised the issue nor rebutted in their brief in opposition our argument that their accounts were not subject to Section 1639d(g)(3). *See* Sup. Ct. R. 15.2.

2. Second, the *Cantero* petitioners are badly mistaken in asserting that this case does not directly implicate the question presented. Regardless of any disputes about class definitions and effective dates, the *Cantero* petitioners do not and cannot dispute that the final judgment in this case permanently enjoins petitioner Flagstar Bank, N.A., a national bank, to pay interest on California mortgage escrow accounts in accordance with that State's interest-on-escrow law. Whether that state law is preempted under Dodd-Frank's preemption standard, which indisputably applies to such national banks, is the *only* question that petitioner has presented to this Court. If this Court reverses the Ninth Circuit, that injunction cannot survive.

The *Cantero* petitioners ignore that fact and instead attempt to manufacture a supposed "threshold" dispute about whether the *Barnett Bank* standard has governed all class members at all times. *See Cantero* Reply 5-6. There is no dispute on that issue, nor is it a "threshold" question that this Court would need to consider.

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[1] Indeed, if a post-2013 loan agreement requiring an escrow account were enough to make that loan subject to TILA's Section 1639d(g)(3), then the *Cantero* petitioners' escrow account for their 2016 loan would also be subject to Section 1639d(g)(3).

a. The same preemption standard—the only one at issue—governs all class members. Dodd-Frank broadly applies its *Barnett Bank* preemption standard to all federally chartered banks, beginning July 21, 2011. *See* Reply 7-8. The Act defines a "national bank" to include "any bank organized under the laws of the United States," and preempts any state consumer financial law that "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(a)(1), (b)(1)(B); *see id.* § 1465(a) (providing that preemption determinations for federal savings associations "shall be made in accordance with the laws and legal standards applicable to national banks"). Dodd-Frank thus made the *Barnett Bank* preemption standard apply to national banks and savings associations alike.

Dodd-Frank sets out only one exception to the broad scope of its newly unified preemption standard: for "contract[s] entered into" with a federal savings association "on or before July 21, 2010." 12 U.S.C. § 5553. For all other mortgage loans, Dodd-Frank provides that its codified preemption standard would "become effective on the designated transfer date"—later set as July 21, 2011. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1048, 124 Stat. 2018, 1376 (2010); Designated Transfer Date, 75 Fed. Reg. 57,252, 57,253 (Sept. 20, 2010).

The class definition in this case mirrors this structure. It includes all persons whose mortgage loans were serviced by petitioner from August 22, 2014 through September 30, 2019—during which time Dodd-Frank's preemption standard applied to all fed-

erally chartered institutions. And (though the *Cantero* petitioners ignore this fact in their reply) the class expressly "exclud[es] any persons 'whose mortgage loans originated on or before July 21, 2010'"—that is, any persons subject to the limited exception Dodd-Frank carved out from its otherwise universal preemption standard. Pet. 1 n.1. All class members, then, had loans from a federally chartered institution that was subject to Dodd-Frank's unified preemption standard during the 2014-2019 class period.

The *Cantero* petitioners resist this conclusion because they contend (at 6) that whether the Dodd-Frank standard applies turns not on whether interest on escrow was allegedly due after Dodd-Frank's "designated transfer date," but on whether the mortgage was *originated* after that date. They are wrong. Section 5553 makes clear that origination matters only for the limited group of pre-2010 loans that Dodd-Frank and the class definition expressly exclude. Except for that group, Dodd-Frank's unified standard has applied to all federally chartered institutions since it became effective in 2011 (well before the class period). There is no provision of law permanently grandfathering loans that originated in the one-year period between July 21, 2010, and July 21, 2011, and the *Cantero* petitioners cite none.[2]

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[2] The *Cantero* petitioners cite the *dissent* in *McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881 (9th Cir. 2020), but neither the dissent nor the panel opinion recognizes any grandfathering for loans originated in 2011. The *McShannock* panel applied HOLA field preemption because the plaintiffs had obtained their mortgages from a federal savings association before July 21,

b. In any event, this invented dispute about what law should govern the loans of a few unnamed class members is not a threshold question at all. Even if it really were true that the damages claims of unnamed class members whose loans were originated between July 21, 2010, and July 21, 2011, should have been governed by the HOLA preemption standard, that would pose no obstacle to this Court's review. No one disputes that the Dodd-Frank standard applies to the named plaintiffs, whose loans originated in 2012 and 2017. Pet. App. 32, 34. The petition presents and argues only a question concerning the application of that standard. And the claims of the class rise or fall with the class representatives. Reply 7. No one challenges the class definition or whether the named plaintiffs' claims are typical of the class's. Nor would this Court have to raise any such question for itself in deciding this case on the law that *everyone agrees* applies to the named plaintiffs.

* * * * *

With briefing now complete here and in *Cantero,* there is no serious dispute that these cases present a vitally important question of National Bank Act preemption that has divided the circuits and warrants this Court's review. Despite the *Cantero* petitioners'

2010. *Id.* at 885 & n.3. The dissent simply argued (citing *Lusnak*) that the majority's decision would "have no going-forward effect" because TILA's Section 1639d(g)(3) would require paying interest on escrow for loans originated after its effective date. *Id.* at 901 (Gwin, J., dissenting). And footnote 3 of the Second Circuit's decision in *Cantero* says nothing about HOLA preemption at all.

misplaced efforts, this petition presents an ideal vehicle to resolve that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan Y. Ellis
Counsel of Record
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

Kathryn M. Barber
Brian D. Schmalzbach
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219

William M. Jay
Thomas M. Hefferon
GOODWIN PROCTER LLP
1900 N Street N.W.
Washington, DC 20036

Counsel for Petitioner

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