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

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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.

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INTRODUCTION

The government acknowledges that this petition has all the hallmarks of certworthiness: a conflict in the courts of appeals on an important and recurring federal question, an incorrect decision below, and no obstacle to the Court's review. The government expressly rejects respondents' theory on the merits; candidly disavows all of respondents' and the *Cantero* petitioners' implausible vehicle arguments; and recommends that, if the Court grants certiorari, it do so in this case, not in *Cantero*. With that much, we agree.

Yet instead of urging this Court to resolve the conflict and correct the error below, the government asks the Court to deny certiorari, leave the conflict unresolved and the incorrect decision below in place, and await further percolation. Specifically, the Department of Justice unveils its own brand-new theory of National Bank Act preemption and urges the Court to wait for some lower court to adopt it.

The problem is, there is no reason to think that will happen, certainly not anytime soon. For one, the government's brief explicitly (and strikingly) rejects the longstanding view of the government's primary banking regulator, the Office of the Comptroller of the Currency. It even calls into question the OCC's *current* preemption regulations. And the OCC conspicuously does not sign the government's brief—only DOJ does. In the lower courts—where the OCC has independent litigating authority—there is thus no reason to expect it to suddenly reverse course and begin presenting DOJ's new theory. In any event, the only vehicle DOJ

identifies for further consideration is pending in a circuit that has already adopted the OCC's (and our) current approach.

What's more, although percolation is likely to provide no benefit, denying certiorari is certain to cause harm. Flagstar, a national bank, is subject to a final judgment imposing millions in damages and a permanent injunction—which will take effect immediately should the Court deny review—requiring it to pay interest on escrow accounts in the country's most populous state. And any national bank that does business nationwide is subject to divergent rules, thanks to the Ninth Circuit decision that the government says is wrong.

In short, the government provides every reason to conclude that the question presented requires review, no reason to believe that the Court will benefit from any further percolation, and no justification to leave Flagstar subject to an erroneous judgment and permanent injunction based on a hope that some lower court might engage with a theory advanced for the first—and perhaps only—time in a cert.-stage amicus.

The Court should grant this petition and resolve the question presented now.

ARGUMENT

A. The Government Recognizes the Square Circuit Conflict.

Unlike respondents, the government forthrightly acknowledges the conflict between the Ninth and Second Circuits on the question presented: "The decisions

in *Cantero* and *Flagstar* conflict over whether the NBA preempts States' 2% interest-on-escrow laws." U.S.Br.20. Its efforts to downplay the significance of that conflict are unpersuasive.

1. Although the government describes the split as shallow, it knows full well that the Court frequently grants review to resolve 1-1 circuit conflicts on important questions of federal law. *See Bittner v. United States*, No. 21-1195 (2022); Pet.5-6 & n.2. Less than three weeks before the government filed its brief in this case, it urged the Court to resolve a conflict between the Fifth and Eleventh Circuits about the constitutionality of just two state laws—without a hint of concern about the purported shallowness of that conflict. *See* U.S. Br., *Moody v. NetChoice, LLC*, No. 22-277 (filed Aug. 14, 2023).

The government's objection is particularly unwarranted in the context of NBA preemption, the whole purpose of which is to ensure a nationally uniform federal bank system. An acknowledged conflict between the country's largest circuit and the circuit encompassing the nation's banking capital plainly implicates just that. Given this issue's importance, this Court has not hesitated to grant review of 1-1 circuit conflicts on NBA preemption questions. *See Watters v. Wachovia Bank, N.A.*, No. 05-1342. The Court should do the same here.

2. In any event, the Ninth Circuit's decisions below and in *Lusnak* conflict not only with the Second Circuit's *Cantero* decision but with decisions by the First, Sixth, and Eighth Circuits, as well as the California Supreme Court. *See* Pet.19-23. Those courts all

analyze NBA preemption in the same way—by looking not at the degree of interference but at whether a state law tries to control or condition the exercise of a national banking power on compliance with that law. *Id.*

The government dismisses this broader conflict on the ground that those other courts have not yet applied their approach to interest-on-escrow laws specifically. *See* U.S.Br.20 n.4. But as the government's brief makes clear, the conflict (and question presented) is not limited to the application of an agreed-upon standard to a particular type of state banking regulation. It concerns the preemption standard itself. The Ninth Circuit's approach (as well as DOJ's) is out of step with each of those courts.

Moreover, contrary to the government's assertion, U.S.Br.20 n.4, it is clear how those courts would resolve the validity of state interest-on-escrow laws. As the government recognizes, a district court in the First Circuit recently applied that circuit's NBA-preemption precedents to find that Rhode Island's interest-on-escrow law is preempted because it attempts to "'limit[]'" national banks' power to "establish escrow accounts." *Conti v. Citizens Bank, N.A.*, No. 21-cv-296, 2022 WL 4535251, at *4 (D.R.I. Sept. 28, 2022) (quoting *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 533 (1st Cir. 2007)). There is no reason to expect a different result in the other circuits that apply the same approach.

B. The Government's Disavowal of the OCC's Longstanding View Highlights the Importance of the Question Presented.

The government acknowledges that "the scope of NBA preemption of 'State consumer financial laws' is important." U.S.Br.20. Its attempts to undermine that importance are unpersuasive. To the contrary, the divisions within the government itself confirm the need for an authoritative and speedy resolution by this Court.

1. The government substantially understates the implications of the disagreement over the NBA preemption standard. Not only have a dozen-plus states enacted interest-on-escrow laws, but the preemption standard governs the validity of any "State consumer financial law"—meaning it touches a panoply of state laws. *See, e.g.*, *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) (garnishment); *Ayotte*, 488 F.3d at 527 (gift cards); *Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844, 850 (8th Cir. 1999) (advertisements); *Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376, 380 (Cal. 2012) (consumer disclosures).

2. Moreover, the OCC has repeatedly expressed the view that preemption of state interest-on-escrow laws specifically "is a matter of foundational consequence" to the national banking system.[1] DOJ now

[1] OCC 2021 Amicus, 2021 WL 2477066, at *7; OCC 2020 Amicus, 2020 WL 1817064; OCC 2018 Amicus, 2018 WL 3702582, at *5.

opines that that preemption question is "less significant," but its actions belie its assertion. The issue was apparently sufficiently important for DOJ to abandon the OCC's well-informed view. And although DOJ implies it is disavowing only a single amicus brief in *Cantero*, it is actually rejecting a view expressed for years, across multiple presidential administrations, *see, e.g.*, OCC 2020 Amicus; OCC 2018 Amicus, and reflected in the OCC's current regulations.

While DOJ might believe that the OCC's regulations were not promulgated "pursuant to Section 25b's standards," U.S.Br.9 n.2, the OCC disagrees. The OCC explained after the Section's enactment that "because . . . the Dodd-Frank Act preserves the *Barnett* conflict preemption standard, precedents consistent with that analysis—which may include regulations adopted consistent with such a conflict preemption justification—are also preserved." 76 Fed. Reg. 43,549, 43,556 (July 21, 2011). The OCC then "re-reviewed" all of its preemption regulations to ensure they were consistent with Section 25b's standard "based on [its] experience with the potential impact of such laws on national bank powers and operations." *Id.* at 43,557.

Little wonder the OCC has chosen not to sign the government's brief in this case—whereas it previously has co-signed the Solicitor General's briefs addressing

the NBA, including at the cert. stage.[2] The brief summarily abandons the OCC's expert view on these issues and lobs criticisms at the OCC's preemption determinations that are simply wrong. That disagreement only underscores the importance of this Court's intervention.

C. The Government Agrees That the Decision Below Is Incorrect.

The government agrees that the Ninth Circuit's resolution of the question presented is erroneous in multiple respects. It contends that in *Lusnak* and the decision below, the Ninth Circuit "failed" to apply the preemption standard that "Section 25b(b)(1)(B) requires." U.S.Br.19. And it agrees with Flagstar—and disagrees with respondents—that the Ninth Circuit "erred in treating [TILA's] Section 1639d as determinative of the preemption question here." *Id.* at 20. Any divergence over how the Ninth Circuit *should have* approached the merits does not counsel against further review.

1. According to the government, our arguments are too "categorical" and give insufficient attention to Section 25b(b)(1)(B)'s text, structure, and history. U.S.Br.13; *see id.* at 9-18. But the government's textual exegesis of Section 25b is misguided. Although courts disagree over the proper understanding of Section 25b's preemption standard, they unanimously agree that Section 25b(b)(1)(B) only codifies the "legal

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[2] *See, e.g.*, U.S. Br., *Midland Funding, LLC v. Madden*, No. 15-610 (2016); U.S. Br., *Cuomo v. The Clearing House Ass'n*, No. 08-453 (2009); U.S. Br., *Watters*, *supra* (2006).

standard for preemption" articulated in *Barnett Bank*.[3] It is therefore a mistake to parse a phrase borrowed from this Court's decision—"prevents or significantly interferes"—word by word, as though it were a newly minted statutory standard, rather than an express adoption of this Court's test. *See* U.S.Br.10-11. And it is a mistake to understand *Barnett Bank*'s standard based exclusively on previous decisions that the *Barnett Bank* Court *distinguished*. *See id.* at 11-12.

As for the rest of the government's merits analysis, a full rebuttal can await the merits. Suffice it to say that, until this brief, the government articulated a significantly different view of this Court's precedents and the regulatory history.

2. More importantly, however, the government's current disagreement with Flagstar's preemption approach provides no defense of the Ninth Circuit's actual judgment and thus no reason to deny certiorari. *See Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions."). Despite its extended criticism of Flagstar's and the Second Circuit's reasoning, the government stops short of arguing that California's interest-on-escrow law survives preemption under its new standard. To the contrary, it seemingly *endorses* Flagstar's alternative argument for preemption that we

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[3] *See, e.g.*, *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 136 (2d Cir. 2022) ("[S]ubparagraph (B) did not change the preexisting legal standard, but rather explicitly codified it."); *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1188 (9th Cir. 2018) ("[W]ith respect to NBA preemption, [Dodd-Frank] merely codified the existing standard established in *Barnett Bank*.").

advanced below. And the government faults that court for refusing to consider the record Flagstar compiled showing how the California statute interferes with Flagstar's operations. *See* U.S.Br.19. The government's merits argument is thus a powerful reason to *grant* review, not deny it.

D. The Government Acknowledges That This Petition Is a Suitable Vehicle for Resolving the Conflict.

Finally, the government agrees with Flagstar that there is no obstacle to the Court's resolution of the question presented in our case. *See* U.S.Br.23. Although the government gestures towards a purported vehicle "flaw[]," it acknowledges that nothing would "prevent the Court from answering the question presented." *Id.* Instead, the government rightly explains that "the Court could clarify . . . the proper understanding of the Dodd-Frank provisions that govern NBA preemption" and "remand for consideration of [any] ancillary questions." *Id.* It thus rejects the *Cantero* petitioners' strained efforts to attack our case as a vehicle and, in fact, correctly concludes that our petition is the *superior* one for addressing the question presented. *Id.*

In light of that conclusion, the Court can comfortably disregard any other quibbles about our vehicle. But to be clear, those quibbles lack any merit. The government suggests that our case is an imperfect vehicle because "*a* court may need to resolve" an "antecedent question" about "what preemption standard applies to individuals whose mortgages [were] originated" by a federally chartered savings bank between

July 21, 2010 (the cutoff for preserving Home Owners' Loan Act field preemption) and July 21, 2011 (Section 25b's effective date). U.S.Br.23 (emphasis added). But as the government acknowledges, *this* Court would not need to resolve that question before reaching the question presented because both the named plaintiffs' mortgages were originated *after* Section 25b's effective date.

And, in fact, there is no reason to think that *any* court would ever need to resolve what preemption standard applies to unnamed class members whose loans originated in that one-year period (while Flagstar was still a federally chartered savings bank). Respondents have always agreed that the named plaintiffs can represent the entire class, and Flagstar has never argued that the class should exclude mortgages originated before Section 25b's effective date or that those mortgages should be treated differently. Supp.Br.8. Respondents cannot change course now. Nor is it plausible that they would, given that the alternative to *Barnett Bank* preemption is HOLA field preemption—a standard more favorable to federally chartered banking institutions. *See* U.S.Br.22.[4] Thus,

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[4] And, for what it is worth, Flagstar's decision not to challenge the class's inclusion of mortgages originated pre-2011 was also well-founded. Contrary to the *Cantero* petitioners' suggestion, Dodd-Frank's unified *Barnett Bank* standard plainly applies to any preemption determination made after the Act's 2011 effective date, unless the mortgage was originated on or before July 21, *2010*. Dodd-Frank instructs that "[a]ny" preemption determination concerning a national bank or federal savings association "shall be made" under that standard. 12 U.S.C. § 1465(a). The *only* exception is the "[p]reservation" of pre-Dodd-Frank

not only is the purported flaw no barrier to this Court's resolution of the question presented, but it is no barrier to any court's resolution of this case.

E. No Further Percolation Is Warranted.

The government's brief makes clear that this petition is both worthy of and suitable for this Court's review. Nevertheless, the government asks the Court to wait for further percolation to "allow additional lower courts to consider the question presented and engage with the arguments raised in [its] brief." U.S.Br.20. No such further percolation is warranted or even likely to occur anytime soon—if at all.

At least five courts of appeals and a state supreme court have already staked out a position on NBA preemption that either expressly or implicitly resolves the question presented. The OCC is on the majority side of the conflict—and has been for many years. *See* p. 6, *supra*; *see also* 76 Fed. Reg. at 43,557 (concluding that state interest-on-escrow laws "would meaningfully interfere with fundamental and substantial elements of the business of national banks"). The largest circuit in the country has weighed in multiple times on the other side. The conflict is entrenched and unlikely to further evolve in ways that would assist this Court's review.

DOJ suggests that its newly proposed view of NBA preemption might somehow alter this course despite

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standards governing the "applicability of State law under Federal banking law to any contract entered into on or before July 21, 2010." 12 U.S.C. § 5553. There is no further exception for loans originated after that date but before Section 25b's effective date.

disavowing the OCC's position and lacking its concurrence. But if DOJ wants the circuits—especially those with entrenched views on this subject—to start applying its novel analytical framework, it will need to convince this Court to adopt that framework. Particularly given the factual record in this case, which was resolved at summary judgment rather than on the pleadings, DOJ is free to press its new approach to this Court on the merits.

Without a decision by this Court, however, DOJ is not in a position to present its idiosyncratic view to lower courts. The OCC has independent litigating authority in those courts, 12 U.S.C. § 93(d); continues to state in its regulations 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)(6); and is unlikely to adopt DOJ's view that that regulation misinterprets the statute.

Further, even if the OCC reversed course, it would not make a difference in the short term. The only other potential vehicle that the government identifies—the First Circuit appeal in *Conti v. Citizens Bank, N.A.*, No. 22-1770 (1st Cir. filed Oct. 14, 2022), which is stayed pending this Court's decision on certiorari—is unlikely to add anything new to the debate. As the district court recognized in that case, 2022 WL 4535251, at *4, the First Circuit has already made its view on NBA preemption clear, holding that a state law that "limits" a national bank's power is preempted. *SPGGC*, 488 F.3d at 531, 533. There is no reason to conclude the First Circuit, or any of the other circuits, will depart from its precedents based on

an amicus brief filed elsewhere and not even signed by the responsible agency.

And until this Court resolves the conflict, according to DOJ, every lower court in the country is applying an incorrect standard of NBA preemption. That is, according to the federal government, no court is correctly determining how states may regulate the national banking system, which Congress designed to be both uniform and independent of intrusive state regulation. Instead, national banks that, like Flagstar, operate across the 50 states cannot know which state laws they must comply with and are left to be governed by the lower courts' disparate views. That is not an argument for further percolation. It is an untenable situation that warrants this Court's immediate attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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