No. 22–529

In the Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, and ILANA HARWAYNE-GIDANSKY,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

BANK OF AMERICA, N.A.,
Respondent.

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

REPLY IN SUPPORT OF CERTIORARI

HASSAN ZAVAREEI
ANNA C. HAAC
TYCKO & ZAVAREEI LLP
1828 L Street NW, Suite 100
Washington, DC 20036
(202) 973-0900

JONATHAN M. STREISFELD
KOPELOWITZ OSTROW
FERGUSON WEISELBERG
GILBERT
1 West Las Olas Boulevard
Ft. Lauderdale, FL 33301
(954) 525-4100

DEEPAK GUPTA
JONATHAN E. TAYLOR
Counsel of Record
MATTHEW W.H. WESSLER
GREGORY A. BECK
GUPTA WESSLER PLLC
2001 K Street NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

(counsel continued on inside cover)

March 8, 2023

Counsel for Petitioners

TODD S. GARBER
FINKELSTEIN, BANKINSHIP,
FREI-PEARSON & GARBER,
LLP
1 North Broadway, Suite 900
White Plains, NY 10601
(914) 298-3283

MARK C. RIFKIN
MATTHEW M. GUINEY
WOLF HALDENSTEIN
ADLER FREEMAN
& HERZ LLP
270 Madison Avenue
New York, NY 10016
(212) 545-4600

TABLE OF CONTENTS

Table of authorities ii

Reply brief for the petitioner 1

Conclusion 6

TABLE OF AUTHORITIES

Cases

Barnett Bank of Marion County, N.A. v. Nelson,
517 U.S. 25 (1996) 3

Clark v. Bank of America, N.A.,
561 F. Supp. 3d 542 (D. Md. 2021) 2

Conti v. Citizens Bank, NA,
2022 WL 4535251 (D.R.I. Sept. 28, 2022) 2

Grutter v. Bollinger,
539 U.S. 306 (2003) 2

Lusnak v. Bank of America, N.A.,
883 F.3d 1185 (9th Cir. 2018) 1

McShannock v. J.P. Morgan Chase Bank NA,
976 F.3d 881 (9th Cir. 2020) 6

Statutes

5 U.S.C. § 1639d(g)(3) 4

12 U.S.C. § 25b 6

12 U.S.C. §1461 5

REPLY BRIEF FOR THE PETITIONER

This petition presents an acknowledged circuit split on the question whether the National Bank Act preempts state laws requiring national banks to pay interest on mortgage-escrow accounts. Bank of America barely disputes that this question calls for this Court's review. The Second Circuit's holding, it admits (at 1), "conflicts with the Ninth Circuit's decision in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018)." Although it tries to diminish that circuit split as a "shallow" one, it ultimately agrees that the split is "important to national banks," leaving them uncertain of the interest rates they must pay. BIO 14, 16. Indeed, the banking industry's chief regulator has called the issue "a matter of foundational consequence … to the federal banking system." Amicus Br. of OCC at 3, *Cantero v. Bank of Am.*, 49 F.4th 121 (2d Cir. June 15, 2021) (No. 21-400).

This case is the only suitable vehicle for deciding this important question. Unlike *Flagstar Bank, FSB v. Kivett,* No. 22-349, this case presents the question narrowly, on indistinguishable facts, and without the risk of frustration by extraneous issues. This Court should grant certiorari here to resolve the circuit split and restore the certainty on which the national banking system depends.

1. There is no doubt that there is a circuit split. The decisions in this case and *Lusnak* are diametrically opposed. Both cases involve materially identical state laws requiring banks to pay 2% interest on mortgage-escrow accounts. But while the Second Circuit held that such laws are preempted by the National Bank Act, the Ninth Circuit held that they are not. Bank of America acknowledges (at 2) that these decisions have "created a circuit split." And the Second Circuit agrees. App. 29a.

Bank of America offers just one reason why the question presented may be unworthy of review: that this Court previously denied its petition for certiorari in *Lusnak*. The petitioners here, it argues (at 1–2), must "show that a question that did not warrant this Court's review four years ago warrants it now." That showing is easy to make: When the Ninth Circuit decided *Lusnak*, there was no circuit split on the question presented. With the Second Circuit's decision below, now there is. Review would thus serve a core purpose of this Court's certiorari powers: "to resolve the disagreement among the Courts of Appeals on a question of national importance." *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

Unable to deny the split, Bank of America downplays it as "shallow." Bank of America acknowledges, however (at 16), that the issue is likely to be "heavily litigated." Already, lower-court decisions have begun joining different sides of the split, broadening the uncertainty. *Compare Clark v. Bank of Am., N.A.*, 561 F. Supp. 3d 542, 562 (D. Md. 2021) (following the Ninth Circuit), *with Conti v. Citizens Bank, NA*, 2022 WL 4535251, at *4 (D.R.I. Sept. 28, 2022) (following the Second Circuit). Absent this Court's guidance, that trend will only continue. As the district court noted here, "defining the precise contours" of the *Barnett Bank* standard under this Court's "limited sample of cases is inherently difficult." App. 62a.

Although Bank of America suggests that this Court "may prefer to wait until the First Circuit decides the issue in *Conti*," BIO 16, the First Circuit can only choose one side of the split—it cannot resolve the split. And there is nothing to support Bank of America's speculation that the Ninth Circuit may eventually choose to "reconsider" its position. *Id.* The court has twice denied en banc review on the issue, and its application of that circuit precedent in

an unpublished decision in *Flagstar Bank* signals that the court now considers the issue to be settled.

Further percolation will thus only entrench the circuit split, further undermining the certainty and uniformity on which the banking system depends. As Bank of America notes (at 14), banks "need to know when they are governed by state laws and when they are exclusively regulated by federal law." For that reason, this Court in *Barnett Bank of Marion County, N.A. v. Nelson* granted certiorari to resolve similar "uncertainty among lower courts about the pre-emptive effect of" the National Bank Act resulting from a 1-1 split between the Sixth and Eleventh Circuits. 517 U.S. 25, 30 (1996). It should do the same here.

2. There is similarly no doubt about the importance of this case to the national banking system. Bank of America (at 14) "agrees with petitioners that the question whether federal law preempts state interest-on-escrow laws is an important question." It does not dispute, for example, that the issue has "enormous stakes for the national economy" and "directly affect[s] the pocketbooks of ordinary borrowers." Pet. 14–15. The parties here are far from alone in these views. The Chamber of Commerce and leading industry groups have called the issue "critical to the U.S. financial system." Amicus Br. of Bank Policy Inst., et al. at 2, *Flagstar Bank, FSB v. Kivett*, No. 22-349 (Nov. 23 2022). And the OCC likewise considers the question to be "of foundational consequence." Br. of OCC at 3, *Cantero* (2d Cir.). Even standing alone, these significant, national effects demonstrate the need for this Court's review.

3. Bank of America's only remaining argument (at 16–17) is that the petition in *Flagstar Bank* is a "better vehicle" because it "presents a broader preemption question that affects more mortgage escrow accounts than

the narrower ruling" here. But, as our petition explains (at 16–21), the Second Circuit's "narrower ruling" is precisely what makes *this* case the better vehicle. *Flagstar Bank*'s "broader" rationale may affect more borrowers, but it does so at the cost of raising substantial antecedent issues that, if the Court were to grant certiorari, could impede intelligent resolution of the question presented.

For one thing, *Flagstar Bank* applies *Lusnak*'s holding to cover named plaintiffs and class members whose loans are subject to 5 U.S.C. § 1639d(g)(3)—a provision of the Dodd-Frank Act. And as both the majority and concurring opinions recognized below, loans covered by section 1639d(g)(3) present an analytically distinct question—one that (as the concurrence notes) could lead to a different result than the question presented. App. 29a n.11, 35a–36a. That distinct question—which the Second Circuit expressly left unresolved—has not been squarely decided by any court of appeals. Much less is it the subject of a circuit split worthy of this Court's intervention.

Flagstar disputes this, arguing in in support of its own petition that we are "incorrect[]" to claim that the named plaintiffs' loans in that case are subject to section 1639d(g)(3). Reply Br. at 10, *Flagstar Bank, FSB v. Kivett*, No. 22-349 (Dec. 20, 2022). But it is Flagstar that is incorrect. Flagstar never disputed below that the named plaintiffs' loans are subject to that statutory provision because they originated in December 2017—years after section 1639d(g)(3)'s effective date. Nor does Flagstar dispute the "possibility that some unnamed class members" also "have loans subject to Section 1639d(g)(3)." *Id.* at 11. Even Bank of America disagrees with Flagstar's position. Unlike the decision below, Bank of America writes, the Ninth Circuit's holding in *Flagstar Bank* covers "*all* mortgage escrow accounts, regardless of

whether they qualify as mandatory accounts under the Dodd-Frank Act." BIO 16–17 (emphasis added).[1]

Flagstar Bank is a flawed vehicle for a second reason: The case does not directly implicate the question presented. Flagstar's petition (at i) asks this Court to decide "[w]hether the National Bank Act preempts" state escrow-interest laws. But as our petition explains (at 2–3), the National Bank Act was never at issue in that case because Flagstar, at all relevant times, was not a national bank governed by the Act. Flagstar's assertion that it later *became* a national bank (after the court of appeals issued its decision) is beside the point. When the case was before the district court and the court of appeals—and more to the point, when Flagstar failed to make the interest payments during the applicable damages period—there is no dispute that Flagstar was, in its own words, "a federal savings association" that was "organized and regulated under HOLA"—not the National Bank Act. Mot. to Stay at 9, *Smith v. Flagstar Bank FSB*, No. 18-cv-05131 (N.D. Cal. Apr. 16, 2021), ECF No. 202; *see* 12 U.S.C. § 1461.

Bank of America has no answer to this point. And Flagstar tries to avoid it: Its petition never mentions the issue. Only after being forced to confront the problem in

---

[1] Flagstar's argument to the contrary seizes on a stray citation by the *Flagstar* plaintiffs in their district-court briefing to 15 U.S.C. § 1639(f)(2)—a separate TILA provision that governs *voluntary* mortgage-escrow accounts rather than mandatory ones. *Flagstar Bank* Reply at 10–11. Earlier in the same paragraph, however, the plaintiffs cited section 1639(g)(3), quoted its mandatory language, and argued that "*[t]his* provision of TILA … applies" to the named plaintiffs' "escrow account because their loan closed on or about December 1, 2017." Opp. to Mot. for Summ. J. at 10–11, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. Dec. 30, 2019), ECF No. 134 (emphasis added). Flagstar ignores this language.

its reply brief does Flagstar respond that the argument is "flat wrong." *Flagstar Bank* Reply at 7. The class, it argues, "includes only those whose loans Flagstar serviced on or after August 22, 2014," which is "well after" Dodd-Frank subjected federally chartered savings associations to the same preemption standard as national banks. *See* 12 U.S.C. § 25b(a)(1), (b)(1)(B).

But again, Flagstar is the one that is wrong. It is true that the class definition in that case is limited (for statute-of-limitations purposes) to mortgages serviced after August 22, 2014. But whether a mortgage is governed by Dodd-Frank does not turn on when the mortgage was last *serviced*, but on when it *originated*. App. 10a n.3; *see McShannock v. J.P. Morgan Chase Bank NA*, 976 F.3d 881, 901 (9th Cir. 2020). And nothing in the class definition excludes mortgages that originated before Dodd-Frank's effective date of July 21, 2011. As a consequence, HOLA preemption is—as the district court recognized—necessarily "a threshold issue" in that case. *Flagstar Bank* App. 9.

This case poses no such problems. Unlike Flagstar, Bank of America has always been subject to the National Bank Act. And it agrees (at 8–9) "that Section 1639d is not implicated in this case because petitioners' mortgages were not 'mandatory' under the Dodd-Frank Act." The Second Circuit's "narrower ruling" thus presents a clean circuit split on the question presented and is the only appropriate vehicle for this Court to resolve that question.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DEEPAK GUPTA
JONATHAN E. TAYLOR
Counsel of Record
MATTHEW W.H. WESSLER
GREGORY A. BECK
GUPTA WESSLER PLLC
2001 K Street NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

HASSAN ZAVAREEI
ANNA C. HAAC
TYCKO & ZAVAREEI LLP
1828 L Street NW, Suite 100
Washington, DC 20036
(202) 973-0900

JONATHAN M. STREISFELD
KOPELOWITZ OSTROW FERGUSON
WEISELBERG GILBERT
1 West Las Olas Boulevard
Ft. Lauderdale, FL 33301
(954) 525-4100

TODD S. GARBER
FINKELSTEIN, BANKINSHIP,
FREI-PEARSON & GARBER, LLP
1 North Broadway, Suite 900
White Plains, NY 10601
(914) 298-3283

MARK C. RIFKIN
MATTHEW M. GUINEY
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
(212) 545-4600

March 8, 2023

Counsel for Petitioners