No. 23-___

IN THE

Supreme Court of the United States

BLUE FLAME MEDICAL LLC,

Petitioner,

v.

CHAIN BRIDGE BANK, N.A., ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Chain Bridge Bank, N.A., wired over $456 million out of petitioner Blue Flame Medical LLC's account without authorization. The question is whether petitioner's state-law claims challenging that conduct are preempted by the U.S. Federal Reserve Bank's Regulation J, Subpart B, which governs cash-equivalent interbank payment orders over the Fedwire Funds Transfer System, commonly known as "wire transfers."

The Fourth Circuit recognized that once a bank accepts a wire transfer and credits the funds to its customer's account, that money belongs to the customer. That is the essential premise of a wire—it is immediate and irrevocable. Any dispute about the funds must be settled another way, for example, through litigation. Yet the court held that when a bank takes money out of its customer's account without authorization and gives it back to the sender, there is no remedy. Regulation J failed to address this circumstance, the court held. And based on circuit precedent interpreting commentary—not Regulation J's provisions or the enabling statute—the Fourth Circuit gave implied field-preemptive effect to the regulation, precluding any state law that might fill the gap. That understanding has been adopted in several other circuits as well. The question presented is:

> Does the Federal Reserve's Regulation J impliedly preempt the field regarding the conduct of parties to a Fedwire Funds Service wire transfer, based on commentary to the regulation and Article 4A of the Uniform Commercial Code, as the First, Fourth, Ninth, and Eleventh Circuits have held?

PARTIES TO THE PROCEEDING

1. Petitioner Blue Flame Medical LLC was the plaintiff in the district court and an appellant below.

2. Respondent Chain Bridge Bank, N.A., was a defendant and the third-party plaintiff in the district court and an appellee below.

3. Respondents John J. Brough and David M. Evinger were defendants in the district court and appellees below.

4. Respondent JPMorgan Chase Bank, N.A., was the third-party defendant and an appellant below.

CORPORATE DISCLOSURE STATEMENT

Blue Flame Medical LLC has no parent company, and no publicly held corporation owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

1. *Blue Flame Med. LLC v. Chain Bridge Bank, N.A.*, Nos. 21-2218, 21-2219, 2023 WL 2570971 (4th Cir. Mar. 20, 2023).

2. *Blue Flame Med. LLC v. Chain Bridge Bank, N.A.*, 563 F. Supp. 3d 491 (E.D. Va. 2021) (order granting motions for summary judgment).

3. *Blue Flame Med. LLC v. Chain Bridge Bank, N.A.*, No. 1:20-cv-658 (E.D. Va. Sept. 8, 2020), ECF Nos. 31, 32 (oral ruling and order granting in part motion to dismiss state-law claims on preemption).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Blue Flame Medical LLC respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is unreported but available at 2023 WL 2570971. The district court's 2021 order (Pet. App. 33a-74a) is reported at 563 F. Supp. 3d 491. The district court's 2020 oral ruling and order (Pet. App. 75a-89a) are unreported.

JURISDICTION

The Fourth Circuit issued its opinion on March 20, 2023. Pet. App. 2a. On June 14, 2023, Chief Justice Roberts extended the deadline for filing this petition through August 17, 2023. 22A1072. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Federal Reserve Act and Regulation J are reproduced in Appendix E to this petition (Pet. App. 90a-103a).

INTRODUCTION

This case asks whether a bank can take money out of a customer's account without authorization and face no consequences for doing so.

Petitioner Blue Flame Medical LLC was created in March 2020 by two former political consultants and fundraisers who left successful careers at the outset of the COVID-19 pandemic when they saw the pressing need for personal protective equipment (PPE) as a lucrative business opportunity. Hoping to create a multibillion-dollar company, they leveraged their business contacts to find suppliers that could deliver millions of N95 masks. Relying on their connections and government experience—developed over decades working with campaigns for the likes of Marco Rubio and Donald Trump and raising over a billion dollars to help finance the races of more than half the Republican members sitting in Congress today—they entered a $609 million contract with the State of California, which had an urgent need for the masks petitioner could supply.

The deal was efficient and responsive to the forces of supply and demand, built in reliance on the legal and regulatory foundation that structures modern commerce. But everything collapsed when the bank petitioner trusted with its account, respondent Chain Bridge Bank, N.A., placed its own interests above its customer's. Concerned that California's $456 million wire transfer (a 75% prepayment on the parties' $609 million contract) would impair its capital ratios, Chain Bridge withheld the funds from petitioner after accepting the wire transfer and crediting the funds to

petitioner's account, and then forged a wire transfer in petitioner's name to send the money back.

Petitioner sued, but the Fourth Circuit held the law provides petitioner no remedy. Although the court recognized that the money had been credited to petitioner and thus the initial wire could not be undone, it held that the bank's conduct returning the money to California did not technically violate federal regulations governing wire transfers over the Fedwire system. And because the bank's conduct involved a wire over the Fedwire system, any state-law claim based on that conduct is preempted, according to the court, whether it would be possible to comply with both federal and state law or not. The court's ruling thus allows banks to wire money out of their customers' accounts free of consequence any time they wish.

The Fourth Circuit seems to have reached this implausible result in part because it believed that California independently would have reneged on its agreement after completing the initial wire and then getting cold feet—a counterfactual the truth of which we will never really know. But nothing in the rule of law it applied turns on those facts, so any ordinary American who has completed a run-of-the-mill wire transfer over the Fedwire system stands without a remedy if her bank decides to take matters into its own hands and redistribute her money to serve the bank's own interests or sense of justice.

STATEMENT OF THE CASE

I. Legal Background

1. The U.S. Federal Reserve Bank created the Fedwire Funds Transfer System so that "interbank payment obligations" could be settled without "the physical delivery of cash or gold … , which was both risky and costly." Bd. of Governors of the Fed. Resrv., *Fedwire Funds Transfer System: Assessment of Compliance with the Core Principles for Systemically Important Payment Systems* (revised July 2014), https://tinyurl.com/4mbwzd4b. Today, the Fedwire Funds Service is routinely used for "time-critical payments such as the settlement of commercial payments and financial market transactions" between banks and bank customers largely because it settles each transaction on a real-time basis. *See ibid.* This is what everyone calls a "wire transfer." Such transfer "to the receiving participant over the Fedwire Funds Service is final and irrevocable when the amount of the payment order is credited to the receiving participant's account." *Ibid.*

Despite the Fedwire's benefits, major economic actors still lacked the certainty that inhered in cash transactions because, for a long time, only state law governed what happened if a wire transfer went wrong. *See* U.C.C. § 4A-102 cmt. The solution was Article 4A of the Uniform Commercial Code, which the Board of Governors of the Federal Reserve System incorporated into "Subpart B to Regulation J to make it consistent with the new Article 4A." Funds Transfers Through Fedwire, 55 Fed. Reg. 40,791-01 (Oct. 5, 1990); 12 C.F.R. § 210.25(b)(1).

Article 4A assigns the risk of loss in various circumstances, including when banks make transfers that do not follow its "precise and detailed rules" for determining whether a wire is authorized. *E.g.,* U.C.C. § 4A-204 & cmt. 1 (explaining when the "bank takes the risk of loss with respect to an unauthorized payment order"). For example, once a transferee's bank has accepted a wire, the rules firmly require the bank to give the funds to the intended recipient. *See id.* § 4A-404(a). Article 4A does not permit this requirement to be altered by agreement, *id.* § 4A-404(c), while making it virtually impossible to cancel a wire once the transferee's bank has accepted it, *see id.* § 4A-211(c)(2). Indeed, because the cash belongs to the transferee as soon as it arrives, such transfer cannot be undone even if the beneficiary's bank agrees, "except in unusual cases" involving either the consent of all affected parties or specific technical mistakes. *See id.* § 4A-211(c)(2) & cmt. 4. It is thus clear what banks must do to avoid liabilities for procedural missteps in funds transfers and what liability they face if they violate their role in the machine.

But Article 4A's provisions only govern the technical requirements banks must follow when executing wire transfers over the Fedwire system. U.C.C. § 4A-104 cmt. 3 ("The function of banks in a funds transfer under Article 4A is … essentially mechanical in nature."). Article 4A does not purport to govern, for example, intentionally tortious conduct related in some way to a wire transfer but falling outside the scope of the wire-transfer rules.

2. There is no express preemption provision in the Federal Reserve Act, nor is there any preemption provision in Regulation J.

Instead, the Federal Reserve Board explained in official commentary accompanying Regulation J that the regulation has the preemptive effect that ordinarily accompanies federal regulations, displacing state laws only to the extent they are in conflict. As the commentary explains: "[R]egulations of the Board may preempt inconsistent provisions of state law. Accordingly, subpart B of this part supersedes or preempts inconsistent provisions of state law. It does not affect state law governing funds transfers that does not conflict with the provisions of subpart B of this part …." Comment. on § 210.25, 12 C.F.R. Part 210, Subpt. B, App. A. The Board included this commentary to "provide[] background material to explain the intent of the Board … in adopting a particular provision in the subpart and to help readers interpret that provision." *Ibid.* And while its commentary "constitutes an official Board interpretation of subpart B," the comments were not subject to notice-and-comment rulemaking. *See ibid.*

Meanwhile, the Board made clear that while it was adopting Article 4A's rules, it was not adopting the U.C.C.'s commentary "in subpart B of this part" or even as part of the Board's own official commentary. Comment. on § 210.25, 12 C.F.R. Part 210, Subpt. B, App. A. That decision was significant, for unlike the Board's own commentary, which intended the federal wire rules to have only conflict-preemptive effect, the U.C.C.'s commentary has been read by courts to

contemplate much broader field preemption. The U.C.C. commentary thus state's that Article 4A's rules "are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article." U.C.C. § 4A-102 cmt.

II. Factual Background

1. When COVID-19 began spreading rapidly across the country in early 2020, supplies of PPE lagged well behind need, leaving healthcare workers and others vulnerable. Believing they could help governmental clients navigate the worldwide scramble for PPE, and sensing a tremendous business opportunity, John Thomas and Michael Gula set aside their work as political operatives to form Blue Flame Strategies in February 2020. *See* Pet. App. 34a-35a. They intended to leverage their connections to find suppliers and win government contracts, allowing them to capitalize on the moment to create a "multibillion dollar company." *See* C.A. J.A. 1520-23. In so doing, they took a big risk, leaving behind stable work in lucrative careers to pursue their goals. *See* C.A. J.A. 525-28.

Thomas and Gula incorporated petitioner Blue Flame Medical LLC on March 23, 2020. Pet. App. 35a. Even before petitioner's formal incorporation, its principals had landed an enormous opportunity. On March 20, Thomas was already discussing a deal with the State of California to deliver N95 masks and other PPE. Pet. App. 35a-36a. Two days later, Thomas made direct contact with Michael Wong, California's

Contracts Administrator, to negotiate a deal to benefit both petitioner and California. *Ibid.*

Wong and Thomas quickly reached an understanding that petitioner would "shoot for" 100 million masks (Wong's words). C.A. J.A. 1591. They negotiated an agreement where petitioner would deliver two million N95 masks by the end of the first week, six million would ship right after, and another 50 to 55 million would be delivered "within 30 days." C.A. J.A. 1686-87; *see* Pet. App. 36a-37a. California was eager to move forward on those terms. Thus, on March 25, California's Department of General Services formally agreed to purchase 100 million N95 masks for a total of $609,161,000, and to prepay 75% of the total amount. Pet. App. 36a.

During this same time, petitioner executed an agreement with a PPE supplier on March 25 to buy six million masks, which were available to ship immediately. C.A. J.A. 1557, 1767-68. Petitioner executed a substantively identical agreement that same day with another PPE supplier to provide 20 million masks "shipped in tranches as often and as soon as available," by no later than 40 days after receipt of payment. C.A. J.A. 1770-71. That supplier further estimated that for the next two months, it would ship about 40 million masks-per-month. *See ibid.*; C.A. J.A. 1733, 1737.

2. The morning of March 23, 2020, Gula visited respondent Chain Bridge Bank, N.A. and applied to open a business checking account in petitioner's name. Pet. App. 38a.

Given the transaction's time-sensitivity and importance, petitioner did everything it could to prepare Chain Bridge to receive the funds on its behalf. Gula spoke to Senior Vice President (SVP)/Branch Manager Heather Schoeppe, informing her that petitioner expected a wire transfer of roughly $450 million from California and needed notice "'the second'" the transfer "hit [the] account." *See* Pet. App. 38a-39a (citation omitted). Later that day, Gula explained to Schoeppe that the wire's purpose was to purchase 100 million masks for California and that petitioner would need to wire the money out quickly. *See* Pet. App. 39a. Taking no chances, Gula also informed Chain Bridge's Assistant Vice President (VP) Maria Cole of the wire's size, C.A. J.A. 1826, and that petitioner "definitely" needed same-day access to the incoming funds, C.A. J.A. 1806.

That afternoon, Chain Bridge's CEO John Brough and its president David Evinger called Gula. Pet. App. 40a. Gula told them, too, about petitioner's California contract, the incoming wire amount, and its need to move money out quickly to buy the PPE. *See* Pet. App. 40a-41a. Evinger and Brough assured Gula that Chain Bridge could handle the operational challenges posed by the wire's size. *See* C.A. J.A. 1912, 2337-38.

Knowing the wire would be executed on March 26, Thomas followed up with Chain Bridge Assistant VP Cole that morning, noting "a lot [was] at stake" and that he needed to know "the second that wire lands," because he had "a bunch of manufacturers held up" waiting for confirmation that petitioner had the

requisite funds. C.A. J.A. 3138 2:30-2:44. This was "the initial wire," Thomas explained, that "empowers us to go fill the other orders." C.A. J.A. 3138 4:19-4:33.

There was no pushback whatsoever. Indeed, at no point before Chain Bridge received the wire did *any* Chain Bridge employee tell Thomas or Gula that the bank had concerns about the transaction's legitimacy, or that petitioner would be unable to make the immediate outgoing transfers to its suppliers that Gula had previewed for the bank's senior executives. *See* C.A. J.A. 1534-35.

3. The morning of March 26, as expected, the California State Treasurer's Office wired $456,888,600 from its account with JPMorgan Chase Bank, N.A. to petitioner's account with Chain Bridge. Pet. App. 42a. JPMorgan contacted its California clients to verify approval for the transaction, which the State confirmed. *Ibid.* And at 11:55 AM, Chain Bridge "received the incoming wire, which was credited to Blue Flame's account." *Ibid.*

This transaction settled almost instantly. *See supra* p.4 (wires accepted by the beneficiary's bank are final and irrevocable). Thus, at 11:57 AM, Gula received an "Incoming Wire Confirmation" email containing a link to a secure message reflecting Chain Bridge's acceptance of the funds transfer. Pet. App. 42a (citation omitted). Thomas and Assistant VP Cole then discussed petitioner's need to quickly send outgoing wires to its suppliers. C.A. J.A. 1555, 1560-62. Cole confirmed that Chain Bridge could process those wires manually, and Thomas agreed to send her the wire instruction details. C.A.

J.A. 1560-62. At 12:10 PM, Cole emailed Thomas a form for the outgoing wire transfers. C.A. J.A. 2071-72. And at 12:12 PM, Cole informed Chain Bridge's operations staff that petitioner "will wire out today 2 wires totaling $22,680,000.00" and asked to confirm that the "[f]unds are available." C.A. J.A. 2074.

Minutes later, petitioner's in-house counsel emailed Cole to provide instructions for wiring $22,680,000 to its first supplier, which had agreed to ship six million N95 masks immediately upon receipt of the funds. C.A. J.A. 2085. Thomas confirmed petitioner's authorization and requested that the wire be prepared "asap." C.A. J.A. 2087. But that wire never went out, with disastrous consequences for petitioner's business with California and beyond.

Though it had given petitioner no hint of concern (and no opportunity to decide to bank elsewhere), Chain Bridge had grown worried, starting the day before, about how the transfer would affect the bank. On March 25, bank CFO Joanna Williamson told SVP Schoeppe she was worried the wire "would have a really big impact on [Chain Bridge's] capital ratios,"[1] C.A. J.A. 3144 2:26-2:30; C.A. J.A. 3071; *see* Pet. App. 39a, which would be calculated just days after the $456 million transfer, C.A. J.A. 1840.

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[1] "Capital requirements are set …. by regulatory agencies, such as the Bank for International Settlements (BIS), the Federal Deposit Insurance Corporation (FDIC), or the Federal Reserve Board" to "ensure bank and depository institution holdings are not dominated by investments that increase the risk of default." James Chen, *Capital Requirements: Definition and Examples*, Investopedia (Dec. 31, 2020), https://tinyurl.com/yckn8h3u.

That same day, bank president Evinger independently suggested "'we can't hold that money on our balance sheet,' and Gula would need to agree to an arrangement that would spread the funds out over various accounts." Pet. App. 40a (citation omitted). CEO Brough echoed Evinger's concern, adding an unrelated note of worry about the transaction's legitimacy, saying "this was 'kind of a weird transaction.'" *Ibid.* (citation omitted).

While Chain Bridge's motivations are disputed, what happened is not. At 12:25 PM on March 26, about thirty minutes after California's wire transfer had been accepted into petitioner's account, the bank placed a "hold" on the funds at Evinger's direction. Pet. App. 42a-43a. Four minutes later, bank SVP Mike Richardson emailed Williamson, Brough, Evinger, Schoeppe, and Cole, informing them that Evinger's idea to avoid the capital-ratio problem by spreading the funds out over various accounts was not going to work because the program permitting that maneuver "has a maximum limit of $125 mil[lion]." C.A. J.A. 2096-97. Richardson thus asked for "clarity around how long these funds would be on deposit." *Ibid.*

Rather than seeking clarity or notifying its customer about its concerns, Chain Bridge ceased all communication with petitioner. Brough directed Chain Bridge employees: "Do not contact the client about this wire." C.A. J.A. 2109. Accordingly, Chain Bridge employees did not answer Gula's call to the bank's main number, C.A. J.A. 2096, and Cole—despite having spoken with petitioner when the wire

landed—did not answer her cellphone when Gula called her directly, C.A. J.A. 2095. In both instances, Brough commended his employees for avoiding the bank's own customer. *Ibid.* ("Continue to hold him off."); *ibid.* ("That was the right thing to do.").

Evinger placed several calls over the next hour with multiple California state offices, which confirmed to Evinger and Brough that California had indeed originated the transfer, intended it for petitioner, and had sent the money to buy 100 million N95 masks. C.A. J.A. 1891-92, 1930. Chain Bridge's president had thus personally confirmed the wire's legitimacy with separate California offices, even though the header data on the payment order was exactly as expected. Still, Evinger and Brough took it upon themselves to tell California's officials "the account had just been opened the day previously by a lobbyist." Pet. App. 45a; *see also* C.A. J.A. 1977-78 (State Treasurer's Office official confirming that "the conversation was not about whether the wire amount was right" or "whether it was actually credited to the right account").

While Evinger and Brough were talking to California's officials, a JPMorgan employee called Chain Bridge at 12:44 PM to share his own suspicions about the wire. Pet. App. 44a. Evinger responded by noting Chain Bridge's concerns and confirmed that a hold had been placed on the funds. Pet. App. 43a-44a & n.6. Evinger later misrepresented to California's State Treasurer's Office "that the funds had not been credited to [petitioner]'s account." Pet. App. 44a n.6. Evinger and Brough knew this wasn't true. *See* C.A.

J.A. 2096-98. And the bank's systems reflected that the money had been credited to petitioner's account. *Supra* p.10.

There is no dispute in the case that the funds could not actually be recalled at that point without petitioner's consent. Evinger and Brough were even warned by the Chain Bridge employees who would eventually be tasked with returning the funds that the bank had already "credited the customer's account." Pet. App. 71a-72a ("'Normally, you want to get [an indemnity letter] from the other bank, just because, and in this case because we credited the customer's account.'" (citation omitted)). Evinger responded: "'It's okay, don't worry about it. … It is what it is.'" Pet. App. 72a (ellipses in original; citation omitted). He went to extraordinary lengths to get this wire off Chain Bridge's books anyway.

At 1:34 PM, Evinger suggested to JPMorgan's Rakesh Korpal that JPMorgan take the money back by issuing a recall. Pet. App. 46a. Korpal understood the risks involved in trying to unwind a valid Fedwire funds transfer, given that Regulation J prohibits undoing a wire transfer after the funds are accepted by the receiving bank and credited to the beneficiary, so he responded: "'I don't think you and I want to get onto the front page of the Wall Street Journal, especially if this is a legitimate transaction.'" *See ibid.* (citation omitted). But believing that the funds had not yet been credited to petitioner's account, Korpal ultimately acceded to Chain Bridge's invitation for an official communication from JPMorgan, over the Fedline platform, requesting a recall of the funds. Pet.

App. 46a-47a. JPMorgan sent that recall request at 1:45 PM. C.A. J.A. 2197-98. The message was transmitted over Fedwire at 2:05 PM. C.A. J.A. 1065.

Petitioner did not initiate, consent to, or authorize Chain Bridge to transfer these critical funds out of its account. Instead, Chain Bridge drew up its own payment order in petitioner's name. Pet. App. 64a ("that payment order was 'issued' by Chain Bridge"). Then, knowing it had not been authorized by petitioner, Chain Bridge processed the payment order it issued in petitioner's name and debited petitioner's account at 2:59 PM. C.A. J.A. 2216-17. A funds transfer of $456,888,600 from petitioner to the California State Treasurer was then completed over Fedwire at 3:21 PM, Pet. App. 48a, taking the amount off Chain Bridge's balance sheet, repairing its capital ratios, and leaving petitioner without any funds for the suppliers it had lined up.

4. After Chain Bridge executed the unauthorized wire to return California's deposit, petitioner attempted to continue negotiating with the State but was rebuffed. Pet. App. 48a-49a. Wong, the California Contracts Administrator who negotiated the original deal with Thomas, even began forwarding petitioner's correspondence to the FBI. *Ibid.* But since Thomas and Gula had not engaged in any criminal wrongdoing, nothing came of it.

U.S. Congressional Representative Katie Porter of the 45th District of California initiated her own investigations into "'potential price gouging regarding [PPE] during the COVID pandemic,' identifying [petitioner] as a 'potential costly and burdensome

middleman.'" Pet. App. 49a (citation omitted). In response to congressional inquiries, petitioner showed that it had, in fact, completed PPE orders for N95 masks under contracts with Maryland and Chicago. Pet. App. 49a-50a.

Still, the unauthorized return of petitioner's funds scuttled not only the California contract, but much of petitioner's other business as well. Deprived of cash, and with its supplier relationships severely damaged, petitioner inevitably struggled to secure product orders in the global scrum for PPE. *See* Pet. App. 49a-50a.

III. Procedural History

Petitioner filed a complaint against Chain Bridge, Evinger, and Brough in the Eastern District of Virginia. Petitioner asserted U.C.C. §§ 4A-204 and 4A-404 claims against Chain Bridge under Regulation J, and brought state-law claims against all defendants for conversion, fraud, constructive fraud, negligence, breach of contract (between the bank and petitioner), tortious interference with a contract (petitioner's contract with California), tortious interference with a business expectancy, and defamation. *See* Pet. App. 50a, 81a.

1. During an oral hearing on Chain Bridge's motion to dismiss, the district court eliminated petitioner's state-law claims for conversion, fraud, constructive fraud, negligence, and breach of contract, finding them "definitely preempted" by Regulation J. Pet. App. 81a. It did not explain its reasoning but had noted to petitioner's counsel earlier in the hearing that

"the defendant has correctly argued that there is a strong doctrine of preemption where there are state causes of action that essentially overlap or dovetail the U.C.C. claims, and that would affect several of your state causes of action." Pet. App. 80a.

On subsequent cross-motions for summary judgment, however, the district court seemed to adopt the opposite view, holding that U.C.C. § 4A-204(a) does not in fact reach Chain Bridge's conduct in wiring money out of petitioner's account without authority. Pet. App. 63a-64a. The court accepted that the funds had been credited to petitioner's account. Pet. App. 56a.[2] But the court held that § 4A-204(a) covers only third-party fraud by someone "pretending to be the bank's customer," Pet. App. 63a-64a, and not a bank's own fraudulent payment order to wire money out of its customer's account.

As to the U.C.C. § 4A-404(a) claim, the court concluded that Chain Bridge failed to give petitioner access to the funds after accepting California's wire transfer from JPMorgan and crediting petitioner's account. Pet. App. 52a-56a. But the district court granted summary judgment to Chain Bridge, anyway, holding that petitioner "cannot establish that it sustained any damage" from the violation. Pet. App. 56a. The court predicted "that even if Chain Bridge had released the disputed funds to [petitioner]

[2] The court had to reach that conclusion to hold that JPMorgan must pay for Chain Bridge's reasonable expenses and attorney's fees resulting from this litigation. Pet. App. 68a-73a. In turn, Chain Bridge had to rely on its acceptance of the funds into petitioner's account to seek indemnification. Pet. App. 69a.

on March 26, 2020, California would have ended its relationship with [petitioner]" by unilaterally cancelling the contract, "resulting in the return of the funds." Pet. App. 56a-58a. The court then dismissed petitioner's state-law claims for tortiously interfering with petitioner's contract and business expectancy with California for the same reason, and dismissed the defamation claim as well. *See* Pet. App. 65a-68a.

2. The Fourth Circuit affirmed. The court did not dispute that Chain Bridge had accepted the wire from California and credited over $456 million to petitioner's account. But the court agreed with the district court that U.C.C. § 4A-204(a) "is simply inapplicable to this situation." Pet. App. 17a n.2. "What occurred here" instead, the court reasoned, "was not a funds transfer" that implicated § 4A-204(a), "but a cancellation." *Ibid.* The court acknowledged, though, that JPMorgan's "cancellation" of the already-accepted wire was "an ineffective one" under the regulation. *Ibid. But see* U.C.C. § 4A-211 cmt. 1 ("There is no concept of wrongful cancellation or amendment of a payment order. If the conditions stated in this section are not met the attempted cancellation or amendment is not effective.").

Having held that Article 4A did not apply to the unauthorized transfer here, the Fourth Circuit proceeded to still hold that Article 4A, which Subpart B to Regulation J "expressly incorporates," preempted the state-law claims that *did* apply in this scenario. Pet. App. 17a-18a. Petitioner explained that if Article 4A does not apply to Chain Bridge's conduct, then it could not preempt petitioner's state-law claims based

on that conduct. But the Fourth Circuit gave field-preemptive effect to the regulation, holding that the "district court appropriately dismissed these claims, because they are foreclosed by the 'strong doctrine of preemption' for 'state causes of action that essentially overlap or dovetail' with the provisions of Article 4A." Pet. App. 17a-18a (quoting Pet. App. 80a).

Bound by long-settled circuit precedent, the court reasoned "that Regulation J preempts any state law cause of action premised on conduct falling within the scope of Subpart B, whether the state law conflicts with, or is duplicative of, Subpart B." Pet. App. 19a (citing *Donmar Enters., Inc. v. S. Nat'l Bank of N.C.*, 64 F.3d 944, 949-50 (4th Cir. 1995)). Having held that Regulation J did not apply to the bank's conduct, the court did not doubt that it was possible to comply with both the federal regulation and any state law forbidding a bank from converting a customer's funds and sending them to someone else. Instead, the court quoted U.C.C. commentary the Federal Reserve Board expressly declined to adopt, reasoning that "Article 4A preempts other law 'in any situation covered by [its] particular provisions.'" Pet. App. 20a (quoting U.C.C. § 4A-102 cmt.) (brackets in original). Any claims that "relate to conduct that falls within the scope of Subpart B," the court concluded, "are, therefore, preempted." *Ibid.* (citing *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 223 (4th Cir. 2002)).[3]

[3] The court also held that petitioner "could not establish that it sustained any damages from the return of [the] funds" because the court similarly predicted that "California would have canceled its contract with [petitioner]" unilaterally, "even if its funds had

This petition follows.

REASONS TO GRANT THE PETITION

The Fourth Circuit recognized that once money is wired to a bank customer's account, that money belongs to them, and no one can undo the transaction. That is the essential premise of a wire—it is immediate and irrevocable. Any dispute about the funds must be settled some other way, for example, through litigation. Yet the Fourth Circuit held that when a bank decides to take money out of its customer's account and send it elsewhere, there is no remedy. Federal banking rules governing the mechanics of wire transfers failed to address this circumstance, the court held, even while preempting any state law that might fill the gap. It would be shocking if this were true, and it is not.

First, the Fourth Circuit's decision conflicts with this Court's preemption precedents. The background "presumption" is "against pre-emption." *Wyeth v. Levine*, 555 U.S. 555, 563-64, 575 (2009). So, in general, federal law preempts state laws only to the extent they "conflict" such that it would be "impossible" to comply with both. *Id.* at 571-72. Field preemption, on the other hand, is found only in "rare cases" where "Congress legislated so comprehensively in a particular field that it left no room for supplementary state legislation." *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (quotation marks omitted).

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not been returned to JPMorgan *via* the Fedwire transfer." Pet. App. 20a-21a. The court affirmed the dismissal of petitioner's remaining state-law claims as well. Pet. App. 25a-27a.

And this Court has been especially reluctant to find *implied* field preemption. *See id.* at 808 n.* (Thomas, J., joined by Gorsuch, J., concurring); *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 638 (2012) (Kagan, J., concurring); *id.* at 640-41 (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., concurring in part and dissenting in part).

Here, though, the Fourth Circuit found implied field preemption not based on anything Congress said or any implication from the enabling statute; not based on anything the Federal Reserve Board said (it embraced only conflict preemption); but by relying on the policy preferences expressed by a private body in commentary the Board expressly declined to adopt as its own. This Court has never countenanced field preemption for a regulation based on commentary, much less anything like the U.C.C. commentary here. But this result was required by settled circuit precedent that has been adopted in the First, Ninth, and Eleventh Circuits as well.

Second, this case is a good vehicle to decide the question. The Fourth Circuit found Regulation J inapplicable to the bank's conduct underlying petitioner's state-law claims, so it would not be "a physical impossibility" to comply with both state and federal law as required to establish conflict preemption. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Thus, if this Court agrees that the regulation cannot have implied field-preemptive reach based on commentary outside its four corners, petitioner's state-law claims can proceed

on remand as they are not otherwise conflict-preempted.

Third, the issue is important, and the lower courts are unlikely to change their views without the Court's intervention. Members of this Court have already cast doubt on the preemptive effect of a regulatory policy, where that preemption is not rooted in a statute passed by Congress. *See, e.g.*, *Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (2019) (Thomas, J., joined by Gorsuch, J., concurring in the denial of certiorari). The Court should decide whether commentary that has not gone through notice-and-comment rulemaking and is not based in the enabling statute has preemptive effect beyond the default rule.

Fourth, at the very least, the Court should call for the views of the Solicitor General. The Federal Reserve Board should have a strong interest in the case, given that the Fourth Circuit reached its result based on the Board's purported intent. And the case comes at a time when trust in banks and the banking system is in rapid decline.

I. The Decision Below Conflicts With This Court's Precedents.

A. Except in very rare instances where Congress has chosen to occupy a particular field, this Court's preemption cases require "clear evidence" of an "actual conflict" with federal law.

Preemption, which is based on the Supremacy Clause, "specifies that federal law is supreme in case of a conflict with state law." *Murphy v. NCAA*, 138 S.

Ct. 1461, 1479 (2018). Because preemption is based on the Supremacy Clause, "Congress is the ultimate touchstone in every pre-emption case," and there is a default presumption that the legislature does not intend to displace "the historic police powers of the States" unless Congress made that "clear and manifest" in the statute. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks omitted).

"Absent explicit pre-emptive language," this Court recognizes "two types of implied pre-emption:" "conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility," and "field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion) (quotation marks omitted; collecting cases).

While this court has held that both federal statutes and federal regulations can have preemptive effect, the Court will not find that agency regulations preempt state law under conflict-preemption absent "clear evidence of a conflict." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000). This "clear evidence" standard requires courts to look to the agency's existing policies to assess whether it would be "impossible … to comply with both federal and state requirements." *See Wyeth*, 555 U.S. at 571. If it would not be impossible to comply with both, this Court will not find preemption. *Ibid.*; *see also Glob. Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006) (holding that agency order "does not clearly

preempt state authority" when it is, "at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation").

Implied field preemption is an even higher bar. Only in "rare cases" has this Court "found that Congress legislated so comprehensively in a particular field that it left no room for supplementary state legislation." *Kansas*, 140 S. Ct. at 804 (quotation marks omitted). And members of this Court are "skeptical of field pre-emption, at least as applied in the absence of a congressional command that a particular field be pre-empted." *Id.* at 808 n.* (Thomas, J., joined by Gorsuch, J., concurring) (quotation marks omitted); *Kurns*, 565 U.S. at 638 (Kagan, J., concurring) ("Under our more recent cases, Congress must do much more to oust all of state law from a field."), *id.* at 640-41 (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., concurring in part and dissenting in part) (this Court's "'recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it'" (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 617 (1997) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting))).

Indeed, as far as petitioner is aware, this Court has never inferred field preemption based on federal regulations alone, much less commentary outside the regulations. *Cf. Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717-18 (1985) (Court "will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field" traditionally regulated by States); *e.g.,*

Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 65 (2002) (rejecting argument that agency's "decision not to adopt a regulation" was "functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation"). Rather, this Court will not infer field preemption without the clearest indication that *Congress* intended conduct to be unregulated. *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988) ("There being no extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, pre-emption, if it is intended, must be explicitly stated.").

B. The Fourth Circuit and other courts of appeals found implied field preemption in Regulation J based on commentary.

1. The decision below held that Regulation J preempts the field regarding the conduct of parties to a transfer over the Fedwire system. Pet. App. 19a-20a.

The court was bound by, and thus relied on, well-established circuit precedent going back nearly thirty years. In 1995, the Fourth Circuit took an expansive view of preemption based not on any provision of the Federal Reserve Act or the actual text of Regulation J, or even the Board's own commentary interpreting the regulation, but based on U.C.C. commentary the Board chose not to adopt. In *Donmar Enterprises, Inc. v. Southern National Bank of North Carolina*, the Fourth Circuit began by noting that "Regulation J itself contains a preemption standard," quoting the part of the Board's official commentary that merely

states the default rule: "'[S]ubpart B of this part supersedes or pre-empts inconsistent provisions of state law. It does not affect state law governing funds transfers that does not conflict with the provisions of subpart B of this part.'" 64 F.3d at 949 (quoting Comment. on § 210.25, 12 C.F.R. Part 210, Subpt. B, App. A).

The Fourth Circuit did not stop there, though. And it did not proceed to conduct a conflict-preemption analysis. Instead, the *Donmar* court then quoted the U.C.C.'s commentary despite acknowledging that it is "not incorporated in Subpart B or [the Board's] official commentary," because the panel believed it "provides insight as to the objectives of the Federal Reserve Board in adopting Article 4A." 64 F.3d at 948-49. "It is apparent from the U.C.C. commentary," the court reasoned, "that a uniform and comprehensive national regulation of Fedwire transfers was the goal of the Board in adopting Article 4A." *Id.* at 949. Based on its understanding of the Board's "goal," the Fourth Circuit held that any claims involving conduct by parties to a transfer over the Fedwire system are preempted, whether that conduct violates the regulation or not. *Ibid.* Thus, because the court concluded that the defendant bank "complied with and therefore has no liability under Subpart B," it found that "any liability founded on state law of negligence or wrongful payment would necessarily be in conflict with the federal regulations and is pre-empted." *Ibid.* The court did not contemplate whether it would have been possible to comply with both.

And in *Eisenberg v. Wachovia Bank, N.A.*, the Fourth Circuit explained the *Donmar* decision and reaffirmed that "rules adopted from Article 4A serve as the *exclusive means* for determining the rights, duties and liabilities of all parties involved in a Fedwire funds transfer." 301 F.3d at 223 (citing Comment. on § 210.25, 12 C.F.R. Part 210, Subpt. B, App. A) (emphasis added). Again, the only language even approximating that expansive understanding of preemption is found in the U.C.C.'s unadopted commentary: "The rules that emerged represent a careful and delicate balancing of … interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article." U.C.C. § 4A-102 cmt. With this understanding, the *Eisenberg* court held that "[d]etermining if a state law is preempted by Regulation J turns on whether the challenged conduct in the state claim would be covered under Subpart B as well." 301 F.3d at 223.

Based on these circuit precedents, the decision below held that "Regulation J preempts any state law cause of action premised on conduct falling within the scope of Subpart B, whether the state law conflicts with, or is duplicative of, Subpart B." Pet. App. 19a (citing *Eisenberg*, 301 F.3d at 223; *Donmar*, 64 F.3d at 949-50). The court of appeals did not ask whether there was "clear evidence" that it would be "impossible" to comply with both state and federal requirements. *Compare Geier*, 529 U.S. at 873, 885. Instead, the court only considered whether the "challenged conduct that gives rise to [petitioner's]

state law claims here falls within the scope of Article 4A and, therefore, Subpart B." Pet. App. 19a. Because petitioner "challenge[d] Defendants' decision to return California's funds to JPMorgan *via* Fedwire," the court held that state-law claims involving that conduct are preempted. Pet. App. 19a-20a. The unadopted commentary to Article 4A, the court explained, "preempts other law 'in any situation covered by [its] particular provisions.'" Pet. App. 20a (quoting U.C.C. § 4A-102 cmt.) (brackets in original).

2. Other circuits have also taken an excessively broad view of preemption based on *Donmar* and its understanding of the commentary to hold that Regulation J preempts the field regarding "the rights and obligations of parties to funds transfers through Fedwire." *E.g.*, *Fin. Ne. Corp. v. Angelo*, 116 F.3d 483, at *1 (9th Cir. 1997) (unpublished).

Citing the Fourth Circuit's decision in *Donmar*, 64 F.3d at 949-50, the First Circuit has held that a plaintiff's negligence claims against its bank for a series of fraudulent transfers were preempted, because "the standard for the duty of care as to both sides is set forth in Article 4A and its limitation of liability." *Patco Const. Co. v. People's United Bank*, 684 F.3d 197, 216 (1st Cir. 2012).

The Ninth Circuit has also held that "Regulation J *exclusively* governs the rights and obligations of parties to funds transfers through Fedwire." *Angelo*, 116 F.3d 483, at *1 (emphasis added). Citing the Fourth Circuit's decision in *Donmar*, 64 F.3d at 949-50, the Ninth Circuit believed the matter so settled that it *summarily rejected* the plaintiff's

"negligence claims" as "preempted by Regulation J," because the claims "all ha[d] to do with the rights of the parties to the wire transfer." *Ibid.*

And the Eleventh Circuit, citing the Fourth Circuit's decision in *Donmar*, 64 F.3d at 948, has accepted "that the provisions of Regulation J exclusively appl[ied] to the fund transfer in th[at] case because it was effected by the use of Fedwire." *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1232 (11th Cir. 2000).

3. Not one of these cases considered whether it would have been "impossible" to comply with both federal and state law. *See Geier*, 529 U.S. at 873. Accordingly, none found "clear evidence of a conflict" between the state-law claims and Regulation J. *See id.* at 885; *see Wyeth*, 555 U.S. at 571.

II. This Case Is A Good Vehicle.

This case is an excellent vehicle for the Court to consider whether an agency's policy, inferred from commentary it did not adopt, can impliedly preempt a field of conduct traditionally regulated by the States—as the First, Fourth, Ninth, and Eleventh Circuits have held. *Cf.* U.C.C. § 4A-102 cmt. (state law traditionally governed wire transfers now regulated under Article 4A). Because the at-issue regulation is "simply inapplicable to this situation," Pet. App. 17a n.2, there is no plausible claim to conflict preemption. If this Court resolves the question presented in petitioner's favor, the state-law claims dismissed below can move forward on remand.

Under the proper application of this Court's preemption rulings, petitioner should have been allowed to proceed on its state-law claims challenging the defendants' conduct in taking money out of petitioner's account. Petitioner would have asserted the same state-law claims if Chain Bridge had not executed any wire-transfer order at all. Banks stealing money from client accounts is something left to state law (or at least not preempted by the wire-transfer rules). Again, conflict preemption only exists where it is "a physical impossibility" to comply with both federal and state requirements. *Paul*, 373 U.S. at 142-43. The Fourth Circuit found no such impossibility. And it could not, given its conclusion that the regulation is "simply inapplicable" here. Pet. App. 17a n.2.

The Fourth Circuit was correct that Regulation J governs a bank's responsibilities when executing wire-transfer orders. And the court correctly acknowledged that California's wire had been accepted into petitioner's account. At that point, the money was petitioner's as though it had been deposited through a cashier's check. The bank then just took it out. That Chain Bridge wired the funds out of the account doesn't make this a wire-transfer case, any more than if the bank had accomplished the same ends by issuing a $456 million cashier's check to California and debiting that amount from petitioner's account.

Properly understood, then, the wire transfers were irrelevant except as context. The actual wrong challenged in petitioner's state-law claims occurred after the initial wire transfer from California was

completed. "What occurred" afterward, when Chain Bridge wired the money out of petitioner's account, thus "was not a funds transfer" within the meaning of the regulation. Pet. App. 17a. And in holding that the wire transfer was an "ineffective" attempt at a cancellation instead, the Fourth Circuit necessarily (if inadvertently) took the bank's conduct entirely out of Regulation J's rules. *See* U.C.C. § 4A-211 cmt. 1 ("There is no concept of wrongful cancellation or amendment of a payment order. If the conditions stated in this section are not met the attempted cancellation or amendment is not effective.").

Thus, the only way to hold that petitioner's state-law claims are preempted by Regulation J was to conclude that the regulation not only created field preemption, but that the field extended beyond the subjects regulated. That kind of preemption is rare, disfavored, and requires clear proof. *Supra* pp.24-25. And although the Fourth Circuit did not ask the question, there is no evidence here of an actual conflict between petitioner's state-law claims for the defendants' unauthorized conduct because the claims hinge on actions that Regulation J does not purport to regulate. Again, Article 4A, as incorporated in Subpart B to Regulation J, merely governs the mechanics of transferring funds over the Fedwire system. *See* U.C.C. § 4A-104 cmt. 3 ("The function of banks in a funds transfer under Article 4A … is essentially mechanical in nature."). Article 4A is not concerned with what happens before and after that process. Accordingly, Article 4A itself explains that state-law remedies are necessary, for example, to go after fraudsters who *create* unauthorized payment orders or

recover monies already paid out to beneficiaries. *See id.* § 4A-211 cmt. 4.

And for the reasons above, there is little question on the merits that Regulation J does not preempt the field of conduct related to transfers over the Fedwire system. Preemption is a question for Congress. *Medtronic, Inc.*, 518 U.S. at 485. Consequently, the "proper inquiry" for purposes of determining the scope of Regulation J's preemption "is directed to the enabling statute, here the Federal Reserve Act." *AmSouth Bank v. Dale*, 386 F.3d 763, 777 (6th Cir. 2004). In this instance, Congress didn't decide the preemption question in the text of the statute. *Ibid.*

Regulation J was "promulgated pursuant to the authority granted by four different sections of the Act: § 11(i) and (j) (12 U.S.C. § 248(i) and (j)); § 13 (12 U.S.C. § 342); paragraph fourteen of § 16 (12 U.S.C. § 248(o)); and § 19(f) (12 U.S.C. § 464)." *Dale*, 386 F.3d at 777. "None of the sections provide specific authority for the Fedwire system—instead, they are general provisions—and none of them reference causes of action having to do with the Federal Reserve system, or any of the markers associated with" an expansive scope of "preemption." *Ibid.* (no "complete preemption" in Federal Reserve Act).

To be sure, this Court has recognized that Congress can delegate authority to an agency to decide whether to displace state law, and how far that should go. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). But the Federal Reserve Act did not expressly delegate the question to the Federal Reserve Board. The Board, in turn, did not expressly

preempt anything in Regulation J. The closest it came was stating in the official commentary that conflict preemption would apply. In so doing, the Board embraced what is the normal rule for implied conflict preemption by regulation—that any state law in actual conflict with the regulation would be preempted.

III. This Question Presented Is Important And This Court's Intervention Necessary.

The regime that flows from the court of appeals' decisions finding implied field preemption permits banks to wire money out of their customers' accounts free of consequence.

There is little chance that the Fourth Circuit will reconsider *Donmar*. Along with the decision below, the Fourth Circuit has reaffirmed its exceedingly broad view of preemption for decades. *See Nirav Ingredients, Inc. v. Wells Fargo Bank, N.A.*, 2022 WL 3334626, at *1 (4th Cir. Aug. 12, 2022) (unreported) ("[I]f a bank complied with the regulation, 'any liability founded on state law of negligence or wrongful payment would necessarily be in conflict with the federal regulations and is pre-empted.'" (quoting *Donmar*, 64 F.3d at 949)); *Eisenberg*, 301 F.3d at 223 ("The rules adopted from Article 4A serve as the exclusive means for determining the rights, duties and liabilities of all parties involved in a Fedwire funds transfer." (citing *Donmar*, 64 F.3d at 949)); *In re Harden*, 166 F.3d 332, at *1 (4th Cir. 1998) (unpublished) ("'Any state causes of action based on negligence or unlawful payment with respect to wire transfers governed by Subpart B

are preempted by Regulation J.'" (quoting *Donmar*, 64 F.3d at 949) (cleaned up)).

That decision has already spread to three other circuits. These precedents will continue to prevent parties like petitioner from pursuing any remedy when their banks wire away their money without approval in a manner that otherwise complies with the mechanical requirements of Regulation J. This Court's intervention is necessary to address this important issue.

Members of this Court have expressed that, "in an appropriate case, we should consider whether a federal agency's policy can pre-empt state law." *Lipschultz*, 140 S. Ct. at 7 (Thomas, J., joined by Gorsuch, J., concurring in the denial of certiorari). This is just such a case. There is no express preemption in the Federal Reserve Act or Regulation J. And there is no real claim of a conflict with the actual regulation. There is only a claim that allowing *any* state regulation in this space conflicts with perceived agency policy to leave this kind of bank malfeasance unregulated. *See* Pet. App. 20a (state claims premised on conduct that "falls within the scope of Subpart B" are "preempted"); *Donmar*, 64 F.3d at 949 ("It is apparent from the U.C.C. commentary that a uniform and comprehensive national regulation of Fedwire transfers was the goal of the Board in adopting Article 4A.").

As Justice Thomas has written, it "is doubtful whether a federal policy … is 'Law' for purposes of the Supremacy Clause." *Lipschultz*, 140 S. Ct. at 7. Under this Court's precedents, he explains, "such a policy likely is not final agency action because it does not

mark 'the consummation of the agency's decisionmaking process' or determine [a party's] 'rights or obligations.'" *Ibid.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). This must be especially so for commentary that was not adopted by the agency, from which field preemption can hardly be the implied goal of the agency, let alone Congress. *See Kansas*, 140 S. Ct. at 804 (field preemption found only in "rare cases"); *id.* at 808 n.* (Thomas, J., joined by Gorsuch, J., concurring) (expressing "skeptic[ism] of field pre-emption, at least as applied in the absence of a congressional command" (quotation marks omitted)); *Camps*, 520 U.S. at 616-17 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) ("[F]ield pre-emption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted.").

"Under [this Court's] more recent cases, Congress must do much more to oust all of state law from a field." *Kurns*, 565 U.S. at 638 (Kagan, J., concurring); *id.* at 640-41 (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., concurring in part and dissenting in part) (this Court's "'recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it'" (quoting *Camps*, 520 U.S. at 617 (Thomas, J., dissenting)).

IV. The Court Should At Least Call For The Views Of The Solicitor General.

California wired petitioner $456 million to buy goods, and that money was sent back at the request of neither party to the wire but because the receiving bank was worried about its own capital ratios. We

emphasize: Neither party to the wire asked for this—it was accomplished by two banks protecting their own interests and the assumed interest of a preferred customer (California) that didn't ask for it. This caused the collapse of a contract worth over $609 million, among other potential business opportunities, and deprived California's first responders, among other critical groups, of life-saving PPE during the peak of the pandemic.

The Fourth Circuit allowed the bank's conduct to go unchallenged purportedly based on the Federal Reserve Board's policy of preemption. And the decision allows banks to freely engage in such conduct at a time when confidence in the banking system is in steep decline. *See* Telis Demos, *Banks Are in the Grips of Investor Crisis of Confidence*, Wall St. J. (May 7, 2023), https://tinyurl.com/yc82nkuh; Stacy Cowley, Rob Copeland & Anupreeta Das, *Regional Banks Slammed by Fear of a Broader Financial Crisis*, N.Y. Times (Mar. 13, 2023), https://tinyurl.com/52mcnnaj. In the last few months alone, several banks have had to shutter their operations. *See* Fed. Deposit Ins. Co., *Failed Bank List*, https://tinyurl.com/4r4rcf6w (last visited Aug. 17, 2023) (Heartland Tri-State Bank of Kansas closed July 28, 2023; First Republic Bank of California closed May 1, 2023; Signature Bank of New York closed March 1, 2023; Silicon Valley Bank of California closed March 10, 2023). Before this recent run of four bank closures in six months, the last time a bank was forced to close was nearly three years ago. *Ibid.* Investors and banking customers alike need reassurance that banks may not act above the law for

their own interests or the interests of preferred customers and get away with it scot-free.

This Court should call for the views of the Solicitor General, given the interest the Federal Reserve Board is likely to have in the case.

CONCLUSION

The petition for certiorari should be granted.

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