Nos. 22-349 and 22-529

In the Supreme Court of the United States

FLAGSTAR BANK, N.A., PETITIONER

v.

WILLIAM KIVETT, ET AL.

ALEX CANTERO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

BANK OF AMERICA, N.A.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SECOND CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 25b(b)(1)(B) of Title 12 provides that "State consumer financial laws are preempted" as applied to national banks "only if," *inter alia*, such a law "prevents or significantly interferes with the exercise by the national bank of its powers," "in accordance with" this Court's decision in *Barnett Bank of Marion County, N. A.* v. *Nelson*, 517 U.S. 25 (1996). 12 U.S.C. 25b(b)(1)(B). The state laws at issue in these cases require banks to pay at least 2% interest annually on escrow accounts associated with certain residential mortgages. See Cal. Civ. Code § 2954.8(a) (West 2012); N.Y. Gen. Oblig. Law § 5-601 (McKinney 2022). The question presented is as follows:

Whether state-law requirements that national banks pay 2% annual interest on residential-mortgage escrow accounts "significantly interfere[] with the exercise" of national banks' powers and therefore are preempted under Section 25b(b)(1)(B). 12 U.S.C. 25b(b)(1)(B).

TABLE OF CONTENTS

Page

Interest of the United States 1

Statement:

- A. Statutory background 1
- B. The present controversies 4
  - 1. *Flagstar* 4
  - 2. *Cantero* 6

Discussion 8

- A. Section 25b's "significantly interferes with" standard requires a practical, case-by-case inquiry, which neither the Second nor the Ninth Circuit conducted 9
  - 1. Section 25b requires a practical inquiry into the degree to which a state law impedes the exercise of national banks' powers 10
  - 2. Neither the Second nor the Ninth Circuit applied the correct preemption standard 13
- B. This Court's review is not warranted 20
  - 1. Further percolation would aid any eventual consideration by this Court 20
  - 2. Both *Cantero* and *Flagstar* are flawed vehicles for this Court's resolution of the question presented 21

Conclusion 24

TABLE OF AUTHORITIES

Cases:

Anderson Nat'l Bank v. *Luckett*,
321 U.S. 233 (1944) 11-13

Barnett Bank of Marion Cnty., N. A. v. *Nelson*,
517 U.S. 25 (1996) 2, 10-12, 16

Biestek v. *Berryhill*, 139 S. Ct. 1148 (2019) 12

Cases—Continued: Page

Cuomo v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009) ... 17

DeBoer v. *Mellon Mortg. Co.*, 64 F.3d 1171 (8th Cir. 1995), cert. denied, 517 U.S. 1156 (1996) ... 4

Flagg v. *Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178 (2d Cir.), cert. denied, 546 U.S. 817 (2005) ... 22

Franklin Nat'l Bank of Franklin Square v. *New York*, 347 U.S. 373 (1954) ... 16, 17

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) ... 18

International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) ... 18

Lusnak v. *Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir.), cert. denied, 139 S. Ct. 567 (2018) ... 4, 6, 18, 19

McClellan v. *Chipman*, 164 U.S. 347 (1896) ... 12

McShannock v. *JP Morgan Chase Bank NA*, 976 F.3d 881 (9th Cir. 2020) ... 22

Statutes and regulation:

Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, Tit. X, 124 Stat. 1955:

- § 1044(a), 124 Stat. 2015 ... 2
- 12 U.S.C. 25b ... 2, 3, 7-14, 16, 20-23
- 12 U.S.C. 25b(a)(1) ... 22
- 12 U.S.C. 25b(a)(2) ... 2, 10, 14, 15, 17
- 12 U.S.C. 25b(b) ... 10
- 12 U.S.C. 25b(b)(1) ... 3, 10, 14, 15, 17
- 12 U.S.C. 25b(b)(1)(B) ... 3, 8-11, 13, 16, 17, 19, 21
- 12 U.S.C. 25b(b)(3) ... 13
- 12 U.S.C. 25b(b)(3)(A) ... 3, 9, 12
- 12 U.S.C. 25b(c) ... 3, 9, 12

Statutes and regulation—Continued: Page

12 U.S.C. 25b(d) 9
12 U.S.C. 5553 22
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 2
Federal Reserve Act, 12 U.S.C. 221 *et seq.* 16
Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.* 22
12 U.S.C. 1465(a) 22
National Bank Act, 12 U.S.C. 1 *et seq.* 1
12 U.S.C. 24 2
12 U.S.C. 24 (Seventh) 2
12 U.S.C. 371(a) 2
Truth in Lending Act, 15 U.S.C. 1601 *et seq.* 3
15 U.S.C. 1639d 3, 4, 19, 20
15 U.S.C. 1639d(a) 4
15 U.S.C. 1639d(b) 4
15 U.S.C. 1639d(g)(3) 4, 19
12 C.F.R. 34.4(a)(6) 9

Miscellaneous:

The American Heritage Dictionary of the English Language (4th ed. 2006) 10, 11
69 Fed. Reg. 1904 (Jan. 13, 2004) 16
75 Fed. Reg. 57,252 (Sept. 20, 2010) 22
OCC Interpretive Ltr. No. 1041 (Sept. 28, 2005) 2
S. Rep. No. 176, 111th Cong., 2d Sess. (2010) 16

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

A. Statutory Background

The National Bank Act (NBA), 12 U.S.C. 1 *et seq.*, grants national banks certain enumerated powers,

12 U.S.C. 24, and "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 (Seventh). One of the enumerated powers is the authority to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. 371(a). A related incidental power is the authority to provide escrow services for mortgage loans. See OCC Interpretive Ltr. No. 1041 (Sept. 28, 2005).

These cases concern the scope of the NBA's preemptive effect on certain state laws. In *Barnett Bank of Marion County, N. A.* v. *Nelson*, 517 U.S. 25 (1996), this Court explained that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. The Court emphasized, however, that States have "power to regulate national banks, where * * * doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Ibid.*

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, Congress clarified the standard for NBA preemption of "State consumer financial laws," Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, Tit. X, § 1044(a), 124 Stat. 2015. As relevant here, Section 25b of Title 12 defines "State consumer financial law" to mean a state law "that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. 25b(a)(2). Section 25b specifies that "State consumer financial laws are preempted, only if":

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of [this Court] in [*Barnett Bank*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers * * * or

(C) the State consumer financial law is preempted by [other applicable federal law].

12 U.S.C. 25b(b)(1).

Section 25b also addresses the role of the Office of the Comptroller of the Currency (OCC) in making preemption determinations about state consumer financial laws. It authorizes the OCC to make "preemption determination[s]" only "on a case-by-case basis" after considering "the impact of a particular State consumer financial law on any national bank." 12 U.S.C. 25b(b)(1)(B) and (3)(A). Section 25b further provides that no OCC "regulation or order * * * prescribed under [Section 25b(b)(1)(B)], shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, [a] provision of [a] State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision." 12 U.S.C. 25b(c).

Dodd-Frank also amended the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, by adding a new provision addressing mortgage escrow accounts, 15 U.S.C. 1639d. Under Section 1639d, "creditor[s]" (a term that encom-

passes but is not limited to national banks) must establish escrow accounts in connection with certain home mortgages, including some higher-priced mortgages. 15 U.S.C. 1639d(a); see 15 U.S.C. 1639d(b). Section 1639d further provides that, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any * * * escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. 1639d(g)(3).

B. The Present Controversies

These cases present the question whether the NBA (as amended by Dodd-Frank) preempts certain state laws that require banks to pay interest on mortgage escrow account balances. To ensure timely payment of property taxes and insurance premiums, many mortgage lenders require borrowers to regularly deposit money into escrow accounts. "These accounts often carry a significant positive balance." *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185, 1188 (9th Cir.), cert. denied, 139 S. Ct. 567 (2018). To prevent lenders from effectively "receiv[ing] an interest-free loan from the customer," *DeBoer* v. *Mellon Mortg. Co.*, 64 F.3d 1171, 1173 (8th Cir. 1995), cert. denied, 517 U.S. 1156 (1996), 13 States have required lenders (including national banks) to pay a minimum interest rate on mortgage escrow balances, *Lusnak*, 883 F.3d at 1195. California and New York are among those States; both require lenders to pay at least 2% annual interest on such balances. *Flagstar* Pet. App. 2; *Cantero* Pet. App. 9a.

***1.* Flagstar**

Until December 1, 2022, petitioner Flagstar Bank was a federally chartered savings bank that originated,

purchased, sold, and serviced home mortgage loans. *Flagstar* Pet. App. 30.[1] In 2012, respondent William Kivett obtained from Flagstar a mortgage on a California home. *Id*. at 32. Flagstar serviced that mortgage until 2015. *Ibid.* In 2017, respondents Bernard and Lisa Bravo obtained a mortgage on a California home from a different lender, and Flagstar acquired that mortgage's servicing rights. *Id.* at 34. Flagstar continues to service the Bravos' mortgage. *Ibid.* Respondents' mortgages required them to deposit money into escrow accounts. *Id.* at 30-32, 34. Notwithstanding California's interest-on-escrow law, Flagstar paid no interest to respondents on their escrow balances. *Ibid.*

Respondents are named plaintiffs in a certified class action against Flagstar in the United States District Court for the Northern District of California. *Flagstar* Pet. App. 2. The certified class includes all persons who, between August 22, 2014, and September 30, 2019, had home mortgages serviced by Flagstar in California with associated escrow accounts and did not receive interest on their account balances. *Id.* at 5, 35. The class excludes all persons whose mortgages originated on or before July 21, 2010. *Id.* at 35. Respondents allege that Flagstar violated California law by failing to pay 2% annual interest on class members' escrow balances. *Id.* at 32.

After certifying the class, the district court granted summary judgment to respondents. *Flagstar* Pet. App. 26-27; see *id.* at 28-72. The court rejected Flagstar's argument that the NBA preempts California's interest-on-escrow law, deeming the Ninth Circuit's decision in *Lusnak* controlling. *Id.* at 26. In *Lusnak*, the Ninth

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[1] On December 1, 2022, Flagstar converted into a federally chartered national bank. *Flagstar*, Letter (Dec. 8, 2022) (regarding amendment to corporate disclosure statement).

Circuit held that California's interest-on-escrow law "is not preempted because it does not prevent or significantly interfere with [national banks'] exercise of [their] powers." 883 F.3d at 1194. Accordingly, the district court entered judgment for approximately $9 million in favor of the class, *Flagstar* Pet. App. 73, and ordered Flagstar to pay interest to class members (like the Bravos) whose mortgages Flagstar continues to service, *id.* at 69-72.

The Ninth Circuit affirmed in part and vacated and remanded in part. *Flagstar* Pet. App. 1-5. The court held that "Flagstar could not succeed in arguing that [California's interest-on-escrow law] was preempted." *Id.* at 3. "[G]iven [the] decision in *Lusnak*," the court explained, "[n]o factual review of Flagstar's record on summary judgment [i]s necessary to determine whether [California's law] prevented or significantly interfered with Flagstar's banking operations." *Id.* at 3-4. The court vacated and remanded, however, for modification of the judgment amount and class definition, because the district court had "incorrectly tolled the statute of limitations." *Id.* at 5. The district court has since modified the judgment accordingly. *Flagstar* D. Ct. Doc. 227 (June 3, 2022).

The Ninth Circuit denied Flagstar's petition for rehearing en banc. *Flagstar* Pet. App. 75-76.

***2.* Cantero**

Respondent Bank of America is a federally chartered national bank. In August 2010 and May 2016 respectively, petitioner Alex Cantero and petitioners Saul Hymes and Ilana Harwayne-Gidansky obtained mortgages on New York homes from Bank of America. *Cantero* Pet. App. 9a-10a. Petitioners' mortgages required them to deposit money into escrow accounts. *Ibid.* Notwithstanding New York's interest-on-escrow law, Bank

of America paid no interest to petitioners on their escrow balances. *Id.* at 10a-11a.

Petitioners filed two putative class actions against Bank of America in the United States District Court for the Eastern District of New York, asserting that Bank of America had breached its obligation to pay interest in accordance with New York law. *Cantero* Pet. App. 11a. Bank of America moved to dismiss both actions on the ground that the NBA preempted New York's interest-on-escrow law. *Ibid.*

The district court denied Bank of America's motions to dismiss in relevant part. *Cantero* Pet. App. 70a-123a. The court concluded that the NBA does not preempt New York's interest-on-escrow law because that law "does not 'significantly interfere' with national banks' power to administer mortgage escrow accounts." *Id.* at 111a. The court explained that, while New York's law "requires the Bank to pay interest on the comparatively small sums deposited in mortgage escrow accounts," it "does not bar the creation of [those] accounts, or subject them to state visitorial control, or otherwise limit the terms of their use." *Ibid.* The court emphasized that certain national banks "already compl[y] with" state interest-on-escrow laws, suggesting that such laws will not cause national banks to "lose significant business." *Id.* at 112a.

On interlocutory appeal, the Second Circuit reversed. *Cantero* Pet. App. 1a-50a. At the outset, the court noted the parties' agreement that Dodd-Frank's preemption provision, Section 25b, "took effect after Cantero's mortgage was executed, but before the *Hymes* Plaintiffs' was." *Id.* at 10a. The court therefore decided the preemption question in Cantero's case without considering Section 25b. *Id.* at 14a. Instead, the court applied what it perceived to be "ordinary legal principles

of pre-emption," *ibid.* (citation omitted), and found New York's interest-on-escrow law preempted because it "would exert control over banks' exercise of th[e] power" to "create and fund escrow accounts," *id.* at 23a.

Turning to the Hymes plaintiffs' case, the Second Circuit recognized that Section 25b applied, but the court viewed that provision as merely "codif[ying]" the "preexisting legal standard." *Cantero* Pet. App. 26a. The court held that Section 25b's "significantly interferes with" standard, 12 U.S.C. 25b(b)(1)(B), does not require an assessment of the "'degree'" to which a challenged state law impedes national banks' exercise of their powers. *Cantero* Pet. App. 27a (citation omitted). The court disclaimed any holding "that all 'State consumer financial laws' are preempted," explaining that "states are generally free to impose restrictions on the transactions engaged in by national banks, in common with those of other corporations doing business within the state." *Id.* at 28a n.10 (citation omitted).

DISCUSSION

To determine whether a "State consumer financial law * * * significantly interferes with the exercise" of national banks' powers, 12 U.S.C. 25b(b)(1)(B), a court must make a practical assessment of the degree to which the state law will impede the exercise of those powers. In the decisions below, neither court of appeals undertook the necessary assessment. The Second Circuit's analysis was especially flawed because it logically implies that substantially all "State consumer financial laws" will be preempted, in contravention of Section 25b's text, structure, and history.

This Court's review is nonetheless unwarranted at this time. Any eventual consideration by this Court of

the question presented would benefit from further percolation in the lower courts. And both *Cantero* and *Flagstar* are flawed vehicles for addressing the question presented. Accordingly, the Court should deny the petitions. If the Court concludes that the question presented warrants immediate review, however, *Flagstar* provides a better vehicle than *Cantero*.

A. Section 25b's "Significantly Interferes With" Standard Requires A Practical, Case-By-Case Inquiry, Which Neither The Second Nor The Ninth Circuit Conducted

The statutory text and structure show that, to determine whether a "State consumer financial law * * * significantly interferes with the exercise" of national banks' powers, 12 U.S.C. 25b(b)(1)(B), a court must assess the law's likely practical effect on national banks' ability to exercise those powers. Neither the Second nor the Ninth Circuit undertook that inquiry.[2]

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[2] In the Second Circuit, the OCC filed an amicus brief in support of Bank of America urging a different and broader view of NBA preemption than the one the government advocates here. See *Cantero*, OCC C.A. Amicus Br. 6-10. After the Court invited the Solicitor General to express the views of the United States in these cases, the Solicitor General considered the question presented and concluded that the interpretation of Section 25b(b)(1)(B) set forth in this brief better reflects the text, structure, and history of the statute. In addition, an OCC regulation provides that national banks may make real-estate loans "without regard to state law limitations concerning * * * [e]scrow accounts." 12 C.F.R. 34.4(a)(6). But the OCC did not promulgate that regulation pursuant to Section 25b's standards and procedures for OCC preemption determinations "concerning the impact of a particular State consumer financial law." 12 U.S.C. 25b(b)(3)(A); see 12 U.S.C. 25b(b)(1)(B), (c), and (d). Accordingly, the OCC's regulation is not a "preemption determination" applicable to the California and New York laws at issue here. 12 U.S.C. 25b(b)(1)(B).

1. Section 25b requires a practical inquiry into the degree to which a state law impedes the exercise of national banks' powers

Congress prescribed a specific standard for determining when "State consumer financial laws are preempted" as applied to national banks. 12 U.S.C. 25b(b)(1); see 12 U.S.C. 25b(b) ("Preemption standard") (emphasis omitted). As relevant here, a "State consumer financial law" is preempted when it "prevents or significantly interferes with the exercise by the national bank of its powers," "in accordance with the legal standard for preemption in [*Barnett Bank of Marion County, N. A.* v. *Nelson*, 517 U.S. 25 (1996)]." 12 U.S.C. 25b(b)(1)(B).

All parties to these cases correctly agree that the California and New York interest-on-escrow laws are "State consumer financial law[s]" as Dodd-Frank defines that term. 12 U.S.C. 25b(a)(2); see *Cantero* Pet. App. 11a; *Flagstar* Pet. 26-28. Those laws "directly and specifically regulate[] the manner, content, [and] terms and conditions of a[] financial transaction"—*i.e.*, the use of a mortgage escrow account—between a national bank and a "consumer." 12 U.S.C. 25b(a)(2). The disputed question is whether the laws "significantly interfere[] with," 12 U.S.C. 25b(b)(1)(B), national banks' provision of mortgage loans and administration of associated escrow accounts.

The "significantly interferes with" standard requires a practical assessment of the *degree* to which a particular state consumer financial law impedes the exercise of national banks' powers. "[S]ignificant" commonly means "[h]aving or likely to have a major effect" or "[f]airly large in amount or quantity." *The American Heritage Dictionary of the English Language* 1619 (4th

ed. 2006) (emphasis omitted). And "interfere" commonly means "[t]o be or create a hindrance or obstacle." *Id.* at 913 (emphasis omitted).

As a matter of ordinary meaning, a state law "significantly interferes with" a national bank's exercise of its powers when the law hinders the exercise of those powers to a fairly large degree. Conversely, a state law does not "significantly interfere with" a national bank's exercise of its powers when the law hinders the exercise of those powers to only a minimal degree. As further confirmation that the provision focuses on practical effects, the phrase "significantly interferes with" is paired with "prevents * * * the exercise by the national bank of its powers," 12 U.S.C. 25b(b)(1)(B), which suggests the creation of an impediment that renders particular action infeasible.

Section 25b's reference to "the legal standard for preemption in [*Barnett Bank*]," 12 U.S.C. 25b(b)(1)(B), also supports that practical understanding of the phrase "significantly interferes with." In the course of its opinion, the *Barnett Bank* Court used various formulations to describe the applicable preemption standard. Section 25b(b)(1)(B)'s standard is drawn from the Court's statement, with accompanying case-law citations, that States may "regulate national banks, where * * * doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33.

As support for that rule, the *Barnett Bank* Court cited its prior holding in *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), that the NBA did not preempt a state law requiring banks to "turn over to the state[] deposits which have remained inactive and unclaimed for specified periods," *id.* at 236. See *Barnett*

Bank, 517 U.S. at 33. In so holding, the *Anderson National Bank* Court explained that the state law did not "impose an undue burden on the performance of the banks' functions" because it did not "deter [depositors] from placing their funds in national banks" or amount to an "unusual alteration of depositors' accounts." 321 U.S. at 248, 251-252. Thus, in the lead precedent that *Barnett Bank* cited to illustrate the "significantly interferes with" standard, the Court undertook a practical inquiry into the degree to which a state law interfered with national banks' performance of their functions.[3]

Section 25b's treatment of OCC preemption determinations confirms the point. Under Dodd-Frank, the OCC must make such determinations on a "case-by-case-basis" in view of "the impact of a particular State consumer financial law on any national bank that is subject to that law." 12 U.S.C. 25b(b)(3)(A). Those determinations may be enforced only if "substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of [the state-law] provision in accordance with [*Barnett Bank*]." 12 U.S.C. 25b(c). "The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency *fact-finding*." *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (emphasis added; citation omitted). Its use in this context indicates that Congress expected the OCC to make preemption determinations based on factual

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[3] The Court in *Barnett Bank* also cited *McClellan* v. *Chipman*, 164 U.S. 347 (1896), which similarly found no preemption of a state law that did not "impair[] the efficiency of national banks," even though the law imposed certain restrictions on national banks' power to make real-estate transactions, *id.* at 358. See *Barnett Bank*, 517 U.S. at 33.

findings that a "particular State consumer financial law" has a significant "impact" on national banks' functions. 12 U.S.C. 25b(b)(3). And nothing in the statute suggests that Congress intended *courts* to take a different approach when resolving preemption questions in cases within their jurisdiction.

2. Neither the Second nor the Ninth Circuit applied the correct preemption standard

Section 25b(b)(1)(B) requires a practical assessment of the degree to which the California and New York interest-on-escrow laws will impair national banks' ability to make mortgage loans and to administer associated escrow accounts. For example, a court would ask whether those laws are sufficiently burdensome to "deter" national banks from using mortgage escrow accounts. *Anderson Nat'l Bank*, 321 U.S. at 252. And it would ask whether the laws amount to an "unusual alteration" of the relationship "'between national banks and their customers.'" *Id.* at 250-251 (citation omitted). Other similar inquiries may also be relevant to determining the degree to which the state laws interfere with national banks' exercise of their powers. See, *e.g.*, *Flagstar* Br. in Opp. 3-5.

Neither the Second nor the Ninth Circuit applied the correct approach. The Second Circuit's analysis was particularly flawed because, despite the court's disclaimer, its analysis logically implies that substantially all "State consumer financial laws" will be preempted, in contravention of Section 25b's text, structure, and history.

a. *Cantero*: The Second Circuit adopted a categorical approach to preemption, which Flagstar and Bank of America (together, "the Banks") embrace. See *Flagstar* Pet. 24-28, 31; *Cantero* Br. in Opp. 15. The court

stated that the relevant "question is not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its powers." *Cantero* Pet. App. 17a (citation omitted). The court therefore declined to assess the New York law's "degree of interference" with national banks' exercise of their powers. *Id.* at 16a (citation omitted). It refused to ask, for instance, "whether this particular rate of 2% is so high that it undermines the use of [mortgage escrow] accounts." *Id.* at 23a. The court thus would have found the New York law preempted whether the interest rate it imposed was .01% or 10%, simply because the law "exert[s] control over banks' exercise" of the "power to create and fund escrow accounts." *Ibid.*

The Second Circuit's approach runs counter to the ordinary meaning of the term "significantly interferes with"; it does not account for *Barnett Bank*'s reliance on *Anderson National Bank*; and it is inconsistent with Congress's evident expectation that OCC preemption determinations will rest on practical, degree-of-interference assessments. In addition, that approach would effectively negate Congress's effort to limit the circumstances under which the application of "State consumer financial laws" to national banks will be preempted. Section 25b defines the term "State consumer financial law" to mean a state law "that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction" between a national bank and "a consumer." 12 U.S.C. 25b(a)(2). Section 25b further provides that "State consumer financial laws are preempted, *only if*" one of three enumerated circumstances exists. 12 U.S.C. 25b(b)(1) (emphasis added).

Under the view of the Second Circuit and the Banks, however, substantially *all* "State consumer financial

laws" will be preempted. As noted, the Second Circuit held that the NBA preempts any state law that "exert[s] control over a banking power." *Cantero* Pet. App. 18a; accord *Flagstar* Pet. 24. But under Dodd-Frank, *every* "State consumer financial law" is by definition a law that "directly and specifically regulates the manner, content, or terms and conditions of" national banks' "financial transaction[s]" with "consumers." 12 U.S.C. 25b(a)(2). Such laws will necessarily exert some control over national banks' exercise of their enumerated or incidental powers.

Bank of America suggests (*Cantero* Br. in Opp. 15) that national banks must comply only with generally applicable state "contract, property, tort, and criminal law[s]"—not with state laws that are directed at banks as such. And while the Second Circuit disclaimed any holding that "all 'State consumer financial laws' are preempted," the only examples it gave of non-preempted state laws were "restrictions on the transactions engaged in by national banks, *in common with those of other corporations doing business within the state*." *Cantero* Pet. App. 28a n.10 (emphasis added; citation omitted). Such laws of general applicability will very rarely if ever fall within Section 25b(a)(2)'s definition of "State consumer financial law." 12 U.S.C. 25b(a)(2). Section 25b(b)(1)'s carefully crafted preemption standards for "State consumer financial laws," 12 U.S.C. 25b(b)(1), would serve no useful purpose if the defining characteristics of those laws caused them to be preempted.

The Second Circuit's analysis is also at odds with Dodd-Frank's history. In 2004, the OCC issued a regulation adopting the view that "state laws that obstruct,

impair, or condition a national bank's ability to fully exercise its Federally authorized * * * powers do not apply to national banks." 69 Fed. Reg. 1904, 1911 (Jan. 13, 2004). In response to the 2008 financial crisis, Congress sought "to clarify the preemption standard relating to State consumer financial laws as applied to national banks" by "undoing broader standards * * * issued by the OCC in 2004." S. Rep. No. 176, 111th Cong., 2d Sess. 175 (2010). To that end, Dodd-Frank provides that preemption of "State consumer financial laws" will be governed by Section 25b(b)(1)(B)'s "prevents or significantly interferes with" standard, 12 U.S.C. 25b(b)(1)(B)—a narrower standard than the one reflected in the OCC's 2004 regulation and applied by the Second Circuit here.

Contrary to the assertions of the Second Circuit (*Cantero* Pet. App. 20a) and the Banks (*Flagstar* Pet. 24-26), neither *Barnett Bank* nor *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954), supports their view of preemption under Section 25b. In *Barnett Bank*, the Court held that "a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." 517 U.S. at 27. A state law that prohibits national banks from engaging in conduct that the NBA expressly authorizes creates an obvious and substantial practical impediment to national banks' exercise of their powers.

In *Franklin National Bank*, the Court held that the NBA and the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, preempted a state statute that forbade national banks from using the word "saving" or "savings" in advertisements for their services. 347 U.S. at 374; see *id.* at 377-378. Federal law expressly authorized national banks

to receive "savings deposits," *id.* at 375-376 (citations omitted), and the Court viewed the "incidental powers granted to national banks" as including the power to advertise their "authorized business," *id.* at 377. But the Court did not hold that the State was categorically barred from regulating the content of national banks' advertising. Rather, the Court explained that the word "savings" was one that "aptly describes, in a national sense, the type of business carried on by these national banks." *Id.* at 378. The Court concluded that national banks "do accept and pay interest on time deposits of people's savings, and they must be deemed to have the right to advertise that fact *by using the commonly understood description which Congress has specifically selected*." *Ibid.* (emphasis added). That reasoning is consistent with a mode of preemption analysis that takes into account the degree to which particular state laws would impede national banks' performance of their functions.

The Second Circuit and the Banks also maintain that a categorical preemption standard is necessary to "avoid" the "instability" that comes from requiring national banks to comply with a "patchwork of state laws." *Flagstar* Pet. 35; see *Cantero* Pet. App. 21a-22a. But even before Dodd-Frank, States "ha[d] enforced their banking-related laws against national banks for at least 85 years." *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009). And in Section 25b(b)(1), Congress signaled its approval of that tradition by expressly authorizing States to enforce certain "consumer financial laws" against national banks. 12 U.S.C. 25b(b)(1). To be sure, in assessing whether a challenged state law "significantly interferes with," 12 U.S.C. 25b(b)(1)(B), a national bank's exercise of its powers, a court might

take into account the degree of interference that would result if other States enacted similar laws. That possibility, however, provides no sound reason to treat anticipated practical effects as irrelevant.

Finally, the Second Circuit and the Banks assert that a practical degree-of-interference inquiry "is unworkable." *Flagstar* Pet. 31; see *Cantero* Pet. App. 23a n.8. But in resolving disputes concerning the preemptive effects of a wide range of federal statutes, courts routinely conduct practical, effects-based inquiries. See, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881 (2000); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-495 (1987). There is no reason to suppose that such inquiries will be less workable here.

b. *Flagstar*: In the Ninth Circuit, Flagstar contended that the "preemption inquiry" turns on whether California's interest-on-escrow law "*in fact* significantly interferes with Flagstar's national banking operations." *Flagstar* C.A. Br. 24. Flagstar argued that California's law causes such interference because it "harms Flagstar's ability to originate mortgage loans and set pricing and risk terms" and "impairs Flagstar's ability to service new or existing loans for which it holds mortgage servicing rights." *Id.* at 27-28; see *id.* at 28-31. The Ninth Circuit held that *Lusnak* v. *Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir.), cert. denied, 139 S. Ct. 567 (2018), precluded Flagstar from successfully "arguing that [California's interest-on-escrow law] was preempted by the NBA." *Flagstar* Pet. App. 3. The court concluded that "[n]o factual review of Flagstar's record on summary judgment was necessary to determine whether [California's law] prevented or significantly interfered with Flagstar's banking operations." *Id.* at 4.

In *Lusnak*, the Ninth Circuit determined that Congress had already "expresse[d its] view that" 2% interest-on-escrow laws do not "significantly interfere with a national bank's operations." 883 F.3d at 1194-1195; see *id.* at 1197. The court explained that Section 1639d(g)(3)—which (as noted above) requires creditors to comply with state interest-on-escrow laws for a specified class of covered mortgage escrow accounts—reflects Congress's recognition that national banks "can comply with state escrow interest laws without any significant interference with their banking powers." *Id.* at 1196. The court concluded on that basis that the preemption issue was "purely legal" and "not depend[ent] on resolution of any factual disputes over the effect of California law on the bank's business." *Id.* at 1194 n.6. In a footnote, the *Lusnak* court suggested that "a state law setting punitively high rates banks must pay on escrow balances may prevent or significantly interfere with a bank's ability to engage in the business of banking." *Id.* at 1195 n.7. But the court did not explain how that suggestion was consistent with the rest of its analysis, which treated the California law's likely practical effect as irrelevant to the preemption inquiry.

The Ninth Circuit in *Flagstar* and *Lusnak* thus failed to make the practical, degree-of-interference assessment that Section 25b(b)(1)(B) requires. Instead, the court elided that analysis by relying on Section 1639d(g)(3). But at most, Section 1639d(g)(3) shows that Congress intended national banks to comply with state interest-on-escrow laws when administering the types of mortgage escrow accounts covered by Section 1639d. It does not follow that national banks must also comply with state interest-on-escrow laws when they administer other mortgage escrow accounts. Contra

Cantero Pet. 23-24. The Ninth Circuit therefore erred in treating Section 1639d as determinative of the preemption question here.

B. This Court's Review Is Not Warranted

Although the Second and Ninth Circuits have disagreed over whether the NBA preempts States' 2% interest-on-escrow laws, neither decision warrants this Court's review. The Court would benefit from further lower-court consideration of the issue, and both *Cantero* and *Flagstar* are flawed vehicles for resolving the current conflict.

1. Further percolation would aid any eventual consideration by this Court

The decisions in *Cantero* and *Flagstar* conflict over whether the NBA preempts States' 2% interest-on-escrow laws. But that shallow conflict does not warrant the Court's review at this time.[4] Neither the Second nor the Ninth Circuit applied the correct preemption standard to the interest-on-escrow laws at issue. The Court therefore should allow additional lower courts to consider the question presented and engage with the arguments raised in this brief. Such further percolation could occur soon, as the issue here is currently pending in the First Circuit. See *Conti* v. *Citizens Bank, N.A.*, No. 22-1770 (1st Cir. Filed Nov. 14, 2022).

Although the scope of NBA preemption of "State consumer financial laws" is important, the narrower question whether the NBA preempts state interest-on-

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[4] Flagstar also asserts (Pet. 19-21) a broader circuit conflict, but the additional cases it cites do not involve the application of Section 25b to interest-on-escrow laws. It is therefore unclear how other circuits would resolve the question presented here.

escrow laws is less significant. Only 13 States have enacted such laws. See *Cantero* Pet. App. 21a-22a & n.7. Some of those laws have been in place for decades, *Cantero* Pet. 6-7, and certain national banks already comply with such laws nationwide, *Cantero* Pet. App. 112a. There is consequently no pressing need for this Court to resolve the question presented now.

2. Both* Cantero *and* Flagstar *are flawed vehicles for this Court's resolution of the question presented

a. *Cantero*: *Cantero* is a poor vehicle for considering the question presented because the case has been litigated on the premise that Section 25b(b)(1)(B)—the statutory provision at the heart of this case—does not apply to one of the petitioners. As explained above, *Cantero* involves two sets of petitioners: Cantero and the Hymes plaintiffs. The parties "agree" that Section 25b(b)(1)(B)'s "preemption standard[] * * * took effect after Cantero's mortgage was executed." *Cantero* Pet. App. 10a. The Second Circuit accordingly "resolve[d] *Cantero*" based solely on what it perceived to be "ordinary preemption rules," without applying Section 25b(b)(1)(B). *Id.* at 25a. The court considered Section 25b(b)(1)(B) only when addressing "[t]he mortgage loan in *Hymes*," which "was executed after [Section 25b's] effective date." *Ibid.*

Presumably because Cantero conceded below that Section 25b does not apply to his mortgage, the certiorari petition in that case does not emphasize Section 25b's text, structure, and history. See Pet. 21-25. Indeed, the petition scarcely mentions the Dodd-Frank provisions (see pp. 10-13, *supra*) that, in our view, refute the Second Circuit's reasoning. Rather, the petition primarily argues (*Cantero* Pet. 22) that the Second Circuit's decision is inconsistent with this Court's pre-

Dodd-Frank NBA-preemption jurisprudence. But those separate NBA-preemption issues are not the subject of a circuit conflict. And since the New York and California interest-on-escrow laws at issue in *Cantero* and *Flagstar* are "State consumer financial laws" within the meaning of Section 25b(a)(2), the Court could not clarify the proper preemption analysis going forward without closely analyzing Section 25b. *Cantero* is therefore a poor vehicle in which to consider the question presented.

b. *Flagstar*: *Flagstar* is also a flawed vehicle for resolution of the question presented. Until December 2022, Flagstar was not a national bank but a federal savings bank. And for decades, the application of state law to federal savings banks was governed not by the NBA, but by a different preemption standard established by the Home Owners' Loan Act (HOLA), 12 U.S.C. 1461 *et seq*. Indeed, both the Second and Ninth Circuits have held that HOLA preempts state interest-on-escrow laws as applied to federal savings banks. See *McShannock* v. *JP Morgan Chase Bank NA*, 976 F.3d 881, 893-894 (9th Cir. 2020); *Flagg* v. *Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 181-185 (2d Cir.), cert. denied, 546 U.S. 817 (2005).

Dodd-Frank changed that longstanding regime by subjecting state regulation of federal savings banks to the same preemption standard as state regulation of national banks. See 12 U.S.C. 25b(a)(1), 1465(a). That change did not become effective, however, until July 21, 2011. See 75 Fed. Reg. 57,252 (Sept. 20, 2010). Meanwhile, a different Dodd-Frank provision preserves the preexisting HOLA preemption standard for "contract[s] entered into on or before July 21, 2010." 12 U.S.C. 5553.

In *Flagstar*, the certified class is defined to exclude all persons whose mortgages originated before July 21, 2010. Pet. App. 35. But the class definition does not exclude individuals whose mortgages originated between July 21, 2010, and Section 25b's effective date of July 21, 2011. Flagstar and the *Cantero* petitioners disagree over what preemption standard applies to individuals whose mortgages originated during that interval. See *Flagstar* Supp. Br. 7; *Cantero* Pet. 18. And a court may need to resolve that antecedent question before deciding whether Flagstar is required to pay interest on such individuals' escrow accounts.

c. If this Court concludes that its immediate resolution of the question presented is warranted, it should grant the petition for a writ of certiorari in *Flagstar* and hold the petition in *Cantero*. In *Flagstar*, the Court could clarify, with respect to the named-plaintiff respondents, the proper understanding of the Dodd-Frank provisions that govern NBA preemption of "State consumer financial laws." The Court could then remand for consideration of ancillary questions concerning the proper class definition and other class members' claims. See *Flagstar* Reply Br. 7, 11; *Flagstar* Supp. Br. 8.

Respondents' own mortgages originated after Section 25b's effective date. And Flagstar is now a national bank under a current injunction to make interest payments under California law. For those reasons, the vehicle issues in *Flagstar* would not appear to prevent the Court from answering the question presented as applied to the named-plaintiff respondents.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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