No. 25-1313

IN THE

Supreme Court of the United States

ALEX CANTERO, ET AL., individually and on behalf of all others similarly situated,

Petitioners,

v.

BANK OF AMERICA, N.A.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the National Bank Act preempt the application of state interest-on-escrow laws to national banks?

RULE 29.6 STATEMENT

Bank of America, N.A. is wholly owned by BAC North America Holding Company (BACNAH). BACNAH is a direct, wholly owned subsidiary of NB Holdings Corporation (NB Holdings). NB Holdings is a direct, wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange under the ticker symbol "BAC." Bank of America Corporation has no parent company and no publicly held corporation owns more than 10% of Bank of America Corporation's shares.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes, Regulations, and Rule:

Other Authorities:

INTRODUCTION

Two short years ago, the Court granted review in this case, instructed lower courts how to decide questions of national bank preemption, and vacated and remanded to the Second Circuit to examine the New York state law at issue under the proper inquiry. *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 221 (2024). It specifically directed lower courts to conduct the same "nuanced comparative analysis" employed in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), to ascertain whether a state law "prevents or significantly interferes with the national bank's exercise of its powers." 602 U.S. at 220-21. That analysis requires "a practical assessment of" both the "nature" and "degree" of the interferences, and ultimately asks whether they are more "akin" to those imposed by state laws previously held preempted, or more "akin" to those imposed by laws that survived. *Id.* at 219-20.

The Second Circuit followed those instructions to the letter on remand. It acknowledged that the *Barnett Bank* standard controls, focused on both the "nature" and "degree" of the interferences imposed by New York's interest-on-escrow law, and carefully discussed the relevant preemption precedents. It then properly applied a "nuanced comparative analysis," deciding in the end that both the "nature" and "degree" of the New York law's interferences "resemble[] other preempted state laws' interference[s]." Since the court found those cases more "akin" to this one, it did as this Court instructed and decided that New York's law is preempted.

Nothing about the Second Circuit's execution of this Court's instructions merits further review.

Petitioners principally contend that the Second Circuit just repackaged the "control" test it used before this Court's decision, but that is simply incorrect. The court's analysis on remand expressly considered the "degree" and "severity" of state-law interference, precisely what its "control" test forwent. While petitioners also attack the Second Circuit's reading of a few prior preemption cases, and its view of the federal statutory scheme, those arguments each lack merit and do not warrant the Court's review.

Nor is review of the question presented necessary to resolve a circuit conflict. Two circuits have reached differing outcomes on how to apply this Court's "nuanced comparative analysis" to state interest-on-escrow laws: the decision below to New York's, and the First Circuit to Rhode Island's in *Conti v. Citizens Bank*, *N.A.*, 157 F.4th 10 (1st Cir. 2025), petition for cert. pending on reh'g, No. 25-1004. The relevant Ninth Circuit case did not even conduct such an analysis—it just followed pre-*Cantero* circuit precedent. *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640, 647-49 (9th Cir. 2025), petition for cert. pending, No. 25-1350. And interest-on-escrow laws are on the books in several other States not governed by circuit precedent. Taking up the issue again after just two years would be premature.

That is particularly true given recent shifts in the legal landscape. In May 2026, the Office of the Comptroller of the Currency (OCC) issued a new preemption determination and relevant new regulations. OCC has expressly codified national banks' mortgage-escrow powers, including whether and to what extent to pay interest. And OCC's preemption determination expressly concludes, following the relevant procedural steps, that New York's interest-on-escrow law and materially similar laws significantly interfere with national bank powers and are preempted. No court has yet addressed what effect those agency determinations have on the courts' own preemption analyses. Granting review now would require this Court to address those questions on a blank slate, without the benefit of lower-court consideration. And even if this Court could disregard OCC's actions in cases arising beforehand, there would be no reason to grant certiorari to do that. A 1-1 split about how to analyze preemption in the "post-*Cantero* but pre-OCC" period is not certworthy.

If the Court nevertheless concludes that the question presented warrants review now, it should not use this case as the vehicle. Petitioners call this case "battle-tested," but that ignores that it already has been before the Court once and did not generate a definitive answer to the ultimate question whether New York's law is preempted as applied to national banks. If anything, that counsels against review in this case, particularly where there are two other vehicles that are just as viable. As noted, neither this case nor any other pending case has addressed OCC's 2026 actions. Under these circumstances, this case is not superior to any of the other pending vehicles. Indeed, the only vehicle objection that petitioners here have identified (in the *Flagstar* case) has now been authoritatively disavowed by the plaintiff-respondents in that case.

The Second Circuit faithfully applied this Court's instructions and reached the correct result. Any split is shallow, and no lower court has yet had the chance to take into account OCC's recent actions. The petition should be denied.

STATEMENT

I. Statutory and Regulatory Background

A. The National Bank Act

1. Congress enacted the National Bank Act more than 150 years ago, "establishing the system of national banking still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10 (2007). Under that system, "privately owned banks" can choose "to obtain a charter from the Federal Government." *Cantero*, 602 U.S. at 210. Such federally chartered national banks have long been considered "National favorites" as compared to their state-chartered counterparts. *Tiffany v. National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874).

Under the NBA, for example, national banks are given federally sanctioned "enumerated and incidental powers" that state banks are not. *Cantero*, 602 U.S. at 210 (citing 12 U.S.C. § 24). As relevant here, national banks' express powers include the ability to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate"—in other words, to make mortgage loans. 12 U.S.C. § 371(a). The NBA also authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24.

At the same time the NBA granted national banks broad express and incidental powers, it also subjected them to intense federal regulation. The NBA granted the Comptroller of the Currency the authority to charter and supervise the then-new system of national banks. *See* Act of June 3, 1864, ch. 106, 13 Stat. 99. OCC's "visitorial" powers over national banks are "largely to the exclusion of other governmental entities, state or federal." *Watters*, 550 U.S. at 6-7; *see* 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law.").

Given these attributes of the NBA, this Court has long held that its "grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32.

B. The Dodd-Frank Act of 2010

One provision of the Dodd-Frank Act codified and revised the principles that govern the preemption of state laws as applied to national banks. That preemption provision applies specifically to "State consumer financial laws," meaning laws "that directly and specifically regulate[] 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), (b). As relevant here, such laws are preempted when, "in accordance with the legal standard for preemption ... in *Barnett Bank* …, the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 25b(b)(1)(B). In addition to setting out the substantive standard for preemption, the statute provides that "any preemption determination under th[at] subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law." *Id.*

Two years ago, in this same case, this Court set out how to approach the question whether state consumer financial laws "prevent or significantly interfere with" national banks' powers. It explained that courts must "make a practical assessment of the nature and degree of the interference caused by a state law." 602 U.S. at 219-20. That practical assessment does not depend on any "bright line[s]" or "categorical test[s]." *Id.* at 220-21 Rather, courts must "conduct [a] nuanced comparative analysis" that considers "the text and structure of the laws, comparison to [particular] precedents, and common sense." *Id.* at 220 & n.3.

That "nuanced comparative analysis" also entails a particularly rigorous "examina[tion] of th[e] Court's precedents." 602 U.S. at 219-21. *Barnett Bank*, the Court explained, "looked to" specific cases "where the state law was preempted, as well as several cases where the state law was not preempted," to ascertain whether the law before it significantly interfered with national bank powers. *Id.* at 215. So, "courts addressing preemption questions in this context must do as *Barnett Bank* did and likewise take account of those prior decisions of th[e] Court." *Id.* at 215-16.

Aside from *Barnett Bank*, a proper comparative analysis should consider, on the preemption side, the interferences at issue in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982); and *First National Bank of San Jose v. California*, 262 U.S. 366 (1923). Those cases "together illustrate the kinds of state laws that significantly interfere with the exercise of a national bank power and thus are preempted." 602 U.S. at 217. Courts also consider, on the non-preemption side, *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1870); and *McClellan v. Chipman*, 164 U.S. 347 (1896). "[T]he kinds of state-law interference[s]" in those cases "are not 'significant'" under the *Barnett Bank* standard. 602 U.S. at 219.

C. Mortgage Escrow Accounts

1. In connection with their express powers to make mortgage loans, "national banks ... often offer escrow accounts." 602 U.S. at 210. A portion of the borrower's monthly payment goes into an escrow account. *Id.* "[T]he bank then uses the funds in escrow to pay the borrower's insurance premium and property taxes on the borrower's behalf." *Id.*

The procedure is "designed to protect both the bank and the borrower." 602 U.S. at 210. The borrower benefits "by simplifying expenses and budgeting." *Id.* Indeed, escrow accounts "provide meaningful consumer protections" and guard against "a higher probability of foreclosure." 78 Fed. Reg. 4726, 4735, 4747 (Jan. 22, 2013). They do so, for example, by "mak[ing] it easier to budget … by paying small amounts with each mortgage payment," thereby preventing borrowers from "scrambl[ing] to pay a large property tax bill or insurance premium." Consumer Fin. Prot. Bureau, *What Is an Escrow or Impound Account?* (Sept. 11, 2024), https://perma.cc/M5TC-JV2D.

For their part, the banks benefit by limiting their lending risks. Escrow accounts help make sure that these key expenses are paid on time, "thus protecting the loan collateral (the home) against tax foreclosure or uninsured damage." 602 U.S. at 210-11. Because tax liens take priority over mortgage liens, a borrower's failure to pay property taxes results in the government collecting first. Bruce E. Foote, Cong. Rsch. Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1-2 (1998). Likewise, if homeowners fail to pay insurance premiums and disaster strikes the home, lenders may be left with no collateral to protect against the risk of borrower default. *Id.*

Ultimately, the escrow procedure allows cheaper access to credit. Secured loans offer lower interest rates than unsecured loans, all else being equal. And by protecting the collateral that secures the loan, the escrow procedure improves the loan's security and reduces the risk for both lender and borrower.

2. Mortgages issued by national banks face exhaustive federal oversight. At the threshold, OCC sets stringent, elaborate lending requirements. 12 C.F.R. § 34.62(b)(1)(i) & app. Federal law then rigorously regulates banks' use of escrow accounts under the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601 *et seq.*, as implemented by the CFPB's "Regulation X," 12 C.F.R. § 1024.17. Lenders may collect only funds "sufficient to pay such taxes, insurance premiums and other charges" plus some leeway for unexpected changes in amount. 12 U.S.C. § 2609(a)(1). They also must ensure that bills are "timely" paid, *id.* § 2605(g), and refund surplus deposits over $50, 12 C.F.R. § 1024.17(f)(2). RESPA does not say, however, that lenders must pay interest on any escrow deposits.

Congress has in the past considered imposing such a requirement, but no such proposal has ever passed. H.R. 3542, 102d Cong. (1991); H.R. 27, 103d Cong. (1993). Instead, in a separate provision of Dodd-Frank, Congress amended the Truth in Lending Act

(TILA) to require lenders to establish escrow accounts for certain mortgages with above-average interest rates. 15 U.S.C. § 1639d(b). For these accounts only, lenders "shall pay interest to the consumer" "[i]f prescribed by applicable State or Federal law." *Id.* § 1639d(g)(3). This provision does not apply to petitioners' mortgages.

3. New York and other States have sought to regulate national banks' offering and use of escrow accounts through the imposition of interest-on-escrow laws. A "result of lobbying and class action suits by consumer groups," interest-on-escrow laws require lenders like national banks to pay interest on all amounts borrowers pay into their mortgage-escrow accounts. Foote, *supra*, at 3.

The New York law at issue here, General Obligations Law (GOL) § 5-601, requires interest on any "escrow account … in connection with a mortgage" on one-to-six family homes and co-ops in New York. Lenders must pay the "higher" of 2% or any "rate prescribed by the superintendent of financial services." *Id.* The Superintendent may set a rate of his or her choosing every three months. *See* N.Y. Banking Law § 14-b. Penalties for failure to pay the prevailing rate can be as high as $250,000 per day. *Id.* § 44(4).

4. OCC has long been of the view that state interest-on-escrow laws are preempted as to national banks. It first addressed the issue via a 2004 rule preempting "state law limitations" on real-estate lending, including "[e]scrow accounts." 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004). The interest-on-escrow laws, OCC explained, "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers." *Id.*

Then in 2011, after Dodd-Frank, OCC confirmed that the state laws regarding escrow account restrictions addressed in its 2004 rule remained preempted. 76 Fed. Reg. 43549, 43557 (July 21, 2011). It reasoned that Dodd-Frank did not adopt any new or different preemption standard, but instead incorporated *Barnett Bank*. *Id.* at 43555. While OCC acknowledged that its 2004 "obstruct, impair, or condition" formulation had "created confusion and misunderstanding," it clarified that preemption stems from "the extent and nature of an impediment posed by state law to the exercise of a power granted national banks under Federal law." *Id.* at 43556. OCC also concluded that Dodd-Frank's procedural requirements for OCC preemption determinations did not retroactively repeal the 2004 rule. *Id*. at 43556 & n.40; *see* 12 U.S.C. § 25b(b)(1)(B), (b)(3).

OCC recently has spoken on interest-on-escrow laws again. In a rule effective June 18, 2026, OCC affirmed national banks' powers "to establish or maintain escrow" accounts and to set their terms and conditions—including "whether and to what extent interest is ... paid." 12 C.F.R. § 34.3(d) (2026). This "Escrow Powers Rule" is meant to "expressly codify banks' power to establish and maintain escrow accounts, and to clarify that the terms and conditions of escrow accounts, including the extent of any compensation paid to customers, are business decisions to be made by each bank." 91 Fed. Reg. 29340, 29345 (May 19, 2026).

In conjunction with the Escrow Powers Rule, OCC also made a formal determination, codified in regulation, that New York's interest-on-escrow law is preempted. 91 Fed. Reg. 29350, 29350 (May 19, 2026);

see 12 C.F.R. § 34.7(b) (2026). That "Preemption Determination" specifically addresses New York's law in detail, 91 Fed. Reg. 29350, 29354-56 (May 19, 2026), as well as laws in thirteen other jurisdictions that are "substantively equivalent" to New York's, *id.* at 29356-57. It determines that "State interest-on-escrow laws prevent or significantly interfere with a national bank's exercise of its Federally authorized powers, consistent with Dodd-Frank and relevant Supreme Court precedent." *Id.* at 29351.

II. Factual Background and Procedural History

A. Petitioners purchased homes in New York, financing their purchases with mortgage loans through Bank of America. Each mortgage loan used an escrow account. Bank of America provided petitioners notices explaining that, because it is a national bank, they "would not be paid interest on their escrow accounts" even if state law provided for it. App.196a n.19. Petitioners brought separate putative class actions in the Eastern District of New York. App.144a, 158a. They alleged claims for breach of contract, unjust enrichment, and violation of state consumer-protection law, all premised on the Bank's not paying interest on escrow amounts. App.158a

Bank of America moved to dismiss, arguing New York's interest-on-escrow law is preempted as to national banks. App.159a. The district court found no preemption and let petitioners' breach-of-contract claims proceed, but ultimately dismissed the other state-law claims. App.197a. As to preemption, the court reasoned that New York's law does not "prevent or significantly interfere with" national banks' power to offer escrow accounts, because it requires payment of "comparatively small sums" with a minimal "cost of compliance." App.185a-187a. The district court certified its decisions for interlocutory appeal, which the Second Circuit accepted. App.125a-126a.

After full briefing (including an amicus brief from OCC), the Second Circuit reversed the denial of the motions to dismiss. App.87a-88a. It "held that federal law preempts any state law that 'purports to exercise control over a federally granted banking power,' regardless of 'the magnitude of its effects.'" 602 U.S. at 213. "Because the New York interest-on-escrow law 'would exert control over' national banks' power 'to create and fund escrow accounts,' the court concluded that the law was preempted." *Id.*

Petitioners sought review by this Court, and the Court invited the views of the Solicitor General. In August 2023, the government filed a brief (which OCC did not join), urging denial of the petition because further percolation of the "shallow" conflict would be valuable. U.S. Cert.-Stage Amicus Br. 20 (Nos. 22-349 and 22-529). The then-Solicitor General took a position on the merits distinct from OCC's, urging a "practical assessment" (*id.* at 8) and noting that OCC had not made a specific "preemption determination" with respect to New York's law. *Id.* at 9 n.2.

This Court granted review and vacated the Second Circuit's decision. After a detailed discussion of the proper analysis, pp. 6-7, *supra*, the Court concluded that the Second Circuit "did not conduct" the required "nuanced comparative analysis" *Barnett Bank* employed. 602 U.S. at 220. The Court then remanded to allow the Second Circuit to do so in the first instance. *Id.* at 221.

B. On remand, the Second Circuit held in a 2-1 opinion that New York's law is preempted. App.3a. The panel majority explained that the task was to "make a 'practical assessment of the nature and degree of the interference' based on 'the text and structure of the laws, comparison to other precedents, and common sense.'" App.13a. Thus, the majority "first ask[ed] whether the state law affects 'the exercise by the national bank of its powers,'" since "laws that merely affect banks, rather than banking powers, are not typically preempted." App.15a. It concluded that New York's law does impact those powers, since "banks may offer mortgage-escrow accounts without interest under federal law, but under New York law, they may not." App.20a-21a.

Since New York's law in fact interferes with national bank powers, not just national banks, the majority then asked whether it "'prevents or significantly interferes' with those powers." App.15a. It did so by looking to both "the 'nature' of the state law's interference" and its "degree." *Id.*

Starting with "nature," the majority considered "whether New York's law involves a prohibition on an expressly- or broadly-granted power, as in *Fidelity* and *Barnett Bank*." App.21a. While it acknowledged that New York's law "does not limit an express power," but an "incidental" one, it explained that "other federal laws governing mortgage accounts suggest that Congress granted this incidental power broadly." *Id.* RESPA, for instance, "regulat[es] many other aspects of escrow accounts"—but it does not require interest. *Id.* The majority also pointed to "Congress's decision to adopt specific state interest-on-escrow requirements in TILA" as likewise suggesting a "broad" power of the type more "likely to be preempted." App.15a; App.22a. While the majority also acknowledged that "the breadth of the federal grant of power here is not express, as in *Fidelity* and *Barnett Bank*," it could not ignore the "clear implication" of the federal statutory scheme. App.22a-23a

Turning to "degree," the majority explained that this consideration "assess[es] how severely a state law interferes with a banking power." App.18a. It saw the interference posed by New York's law as "similar in degree to that of New York's advertising law in *Franklin*." App.23a. Ultimately, "[b]oth laws restrict an incidental power" (escrow-account terms here, advertising there) "that is essential to banks' exercise of an express power" (mortgage lending and accepting savings deposits). App.23a-24a. "If anything," the majority continued, "GOL § 5-601 involves a more severe limit," since it alters a "bank's pricing" structure and product terms. App.24a. It accordingly "limits banks' ability to set the terms of mortgage-escrow accounts," even though "the ability 'to effectively and efficiently set [those terms] is a core component of banks' mortgage lending powers.'" App.24a (quoting 90 Fed. Reg. 61099, 61100 (Dec. 30, 2025)).

In sum, then, the majority concluded that "New York's law affects a banking power," and so assessed "the nature and degree of its interference. App.26a "As to the nature of its interference," it determined that "it is more like that of the laws in *Barnett Bank* and *Fidelity*, which affected broad grants of federal power." *Id.* On "degree," the majority concluded that the "impact on national banks' ability to offer mortgage-escrow accounts is at least as severe as ... in *Franklin*." *Id.* It accordingly determined that New

York's law is preempted, since its "interference with federal law ... resembles other preempted state laws' interference in both 'nature and degree.'" App.26a.

The majority so held while acknowledging both Judge Pérez's dissent and the First Circuit's contrary outcome in *Conti*. App.27a. With respect to the latter, the majority disagreed with the First Circuit "for two main reasons." *Id.* As relevant here, while the First Circuit "disregarded RESPA and TILA," "federal statutes like RESPA and TILA were relevant in the Court's preemption precedents, including *Barnett Bank*, *Franklin*, and *Fidelity*." *Id.*

As for Judge Pérez's dissent, the majority explained that her approach of "divining four preemption fact patterns from the Court's precedents and then concluding that New York's law fits none of them" is not the type of nuanced comparative analysis that this Court previously explained. App.26a. "That approach offers little guidance for evaluating state laws that affect banks in ways that differ from the limited preemption caselaw." *Id.*

REASONS FOR DENYING THE WRIT

The Second Circuit's decision does not warrant further review. The panel's decision faithfully applies the methodology this Court's 2024 decision directed lower courts to use. The modest disagreement about how to apply that decision to this fact pattern does not warrant review at this time. That is particularly so given the recent actions of the key regulatory agency; rather than be the first court to consider those actions, this Court should simply let the issue continue to percolate. Petitioners are also incorrect in claiming that this case warrants review as a uniquely superior vehicle; there is nothing about this case that warrants rejecting further percolation or, for that matter, the other available vehicles.

I. The Second Circuit's decision is correct.

The Court previously directed the Second Circuit to answer the question presented using the same nuanced comparative analysis as in *Barnett Bank*. 602 U.S. at 219-20. Employing exactly that analysis on remand, the Second Circuit correctly found New York's law preempted. The application of the prescribed analysis to New York's law does not warrant review. Petitioners claim that the Second Circuit once more resorted to too lenient a preemption standard. That contention is incorrect. Their other arguments lack merit as well, as they misunderstand this Court's preemption precedents and the statutory scheme.

A. The court's decision applies the proper analysis and reaches the correct result.

As explained, this Court directed lower courts to address preemption by making a "a practical assessment of the nature and degree of the interference caused by a state law." 602 U.S. at 219-20. That requires a "nuanced comparative analysis" that considers "the text and structure of the laws, comparison to [particular] precedents, and common sense." *Id.* at 220 & n.3. That "nuanced comparative analysis" also requires close "examina[tion] of th[e] Court's precedents." *Id.* at 219-21. *Barnett Bank*, the Court explained, "looked to" specific cases "where the state law was preempted, as well as several cases where the state law was not preempted," to ascertain whether the law before it significantly interfered with national bank powers. *Id.* at 215. So, "courts addressing preemption questions in this context must do as *Barnett Bank* did and likewise take account of those prior decisions of th[e] Court." *Id.* at 215-16.

The Second Circuit articulated precisely the correct analysis here. It acknowledged that the *Barnett Bank* significant-interference standard controls. App.10a, 14a. It correctly described the "nuanced comparative analysis" as requiring consideration of both "the nature and degree of a state law's interference with national bank powers." App.14a. And it identified each of the relevant "Supreme Court's preemption cases" against which the significance of a state law's interference must be judged. *Id.*

It then properly applied that test to the state law before it. New York's interest-on-escrow law does in fact affect national banks' exercise of their federal banking powers. App.20a. While "banks may offer mortgage-escrow accounts without interest under federal law," "under New York law, they may not." App.20a-21a. The "nature" of that interference, moreover, is particularly onerous—given that it is to a banking power that the federal scheme broadly grants to national banks. That makes this case "akin" to *Barnett Bank* and *Fidelity*—two cases where state laws were held preempted. App.17a, 23a.

The "degree" of the interference also is particularly severe, since the ability to offer and set the terms of mortgage-escrow accounts is "essential" to the banks' exercise of their express lending powers. App.18a, 23a-24a. Thus, this case is similar to *Franklin*, since the interference there also operated to "restrict an incidental power" (advertising savings accounts) "essential to banks' exercise of an express power" (offering savings accounts). App.23a-24a. "[T]he impact on national banks' ability to offer mortgage-escrow accounts is" therefore "at least as severe as the interference that New York's advertising law had in *Franklin*." App.26a.

In sum, since both the "nature" and "degree" of the New York law's interference most "resembles other preempted state laws' interference[s]," like those in *Barnett Bank*, *Fidelity*, and *Franklin*, the majority correctly held that New York's law is preempted.

B. Petitioners' attacks on the court's decision fail.

Despite the Second Circuit tracking the precise methodology this Court laid down two short years ago, petitioners insist (Pet. 28-30) that the court "reimpose[d]" its previously rejected "control" test. *See* p. 12, *supra*. But it did not, either expressly or by a different name. And it faithfully interpreted this Court's precedents in applying the proper nuanced and comparative analysis. Petitioners' arguments otherwise ignore that nothing in the Court's prior opinion requires an exact, 1:1 match to the preexisting caselaw for preemption to follow. Petitioners and the dissent below would trap preemption in amber and allow state law to survive based on mere novelty rather than coherent principle. Adopting such a strong presumption against preemption would reverse the time-tested operation of the National Bank Act and undermine the national banking system.

1. The decision does not reinstate a control test.

The Second Circuit's analysis on remand looks nothing like its prior control test. That test considered *only* "the nature of an invasion into a national bank's operations," eschewing any consideration of the "magnitude of its effects." *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 131 (2d Cir. 2022); *see* 602 U.S. at 213. On remand, by contrast, the court expressly considered the "degree of interference" caused by New York's law by "assess[ing] *how severely* [it] interferes with a banking power." App.18a (emphasis in original). By expressly taking on those questions of magnitude, the Second Circuit did the opposite of readopting its control test.

Petitioners assert that the "reformulated test" preempts laws placing any "limit" on (or "interfer[ing]" with) a national bank power, that to impose a "limit" on a power is to "control" it, and that the new and old tests therefore "effectively ask the same question." Pet. 28. That caricature is inaccurate.

Just as this Court directed, the Second Circuit asked whether New York's law affects or "limits" national bank powers in ways "similar in nature" to laws previously deemed preempted. App.7a-8a; *accord* App.21a-23a. And it then proceeded to ask not just whether New York's law imposes some "interference," but whether its "degree of interference" is "similarly severe" to those imposed by other preempted state laws. App7a-8a; *accord* App.18a-19a, 23a-25a. If any "limit" on or "interfere[nce]" with national bank powers were preempted under the Second Circuit panel's analysis, the court would not have needed to proceed past step one of its inquiry, which asks "whether the state law affects 'the exercise by the national bank of its powers'" at all. App14a; *accord* App.20a. But it did.

Petitioners also quibble in part (Pet. 28-29) with the statement that "laws that prohibit a bank from exercising express or broad powers are likely to be preempted," but their partial objection also falls flat. App.15a. Petitioners apparently agree (*see* Pet. 30) with the Second Circuit panel that preemption is more likely for impacts on *express* banking powers. But they complain that the court's view of a "broad" power is capacious enough to end up preempting every state law regulating banks in any way. Pet. 29. Not so. As the panel explained, "not all state laws that limit broad grants of power are preempted" under its analysis. App.18a n.4. Whether a law impacts a "broad" power is only one aspect of the analysis.

Petitioners finally say that, by suggesting a "state law's interference is severe when it prevents a bank from efficiently exercising its powers," App.18a, the majority analysis "would again risk preempting" even laws having only "trivial" "real-world effects," Pet. 29-30. As the majority explained, however, laws impacting the efficient exercise of bank powers only in "particular and exceptional circumstances" are not typically viewed as "impair[ing] the efficiency of national banks." App.25a n.7 (quoting *McClellan*, 164 U.S. at 358)); *accord* App.19a. Nothing in the panel's decision suggests it would find preemption from "trivial" interferences of the type petitioners envision, impairing efficiency only occasionally. Here, too, "a state law's impact on a national bank's efficiency" merely "informs the degree of the state law's interference with federal law"—it does not demand a preemption finding. App.19a (emphasis omitted).

In any event, this case does involve a "broad" power, and does not involve a "trivial" interference. That is particularly so in light of the unique combination of federal laws that extensively govern mortgage-escrow accounts in particular, but that require the payment of escrow interest only under targeted circumstances not present here or in most cases. App.21a-23a. Yet national banks must contend with New York's interest-on-escrow law daily, as to "a broad swath of properties" not covered by the federal law, just to go about their banking business. App.25a n.7.

2. The decision correctly understands the relevant body of law.

Aside from attempting to attribute an all-encompassing preemption test to the Second Circuit that it did not impose, petitioners claim (Pet. 30-31) that the Second Circuit majority misunderstood *Barnett Bank*, *Fidelity*, and *Franklin*. They further insist (Pet. 31-32) that RESPA and TILA do not support, and in fact weigh against, preemption here. Petitioners are wrong, and none of their arguments supports certiorari.

Petitioners first say that the majority's analysis of *Barnett Bank* and *Fidelity* was not sufficiently "nuanced"—which apparently means that those cases should be disregarded as inapposite because they do not *exactly* map on to the facts here. Pet. 30. That find-a-specific-match approach to preemption is the antithesis of the "nuanced" approach this Court directed. And if adopted, it "would preempt virtually no non-discriminatory state laws that apply to both state and national banks." 602 U.S. at 221. This Court already rejected that extreme. *Id*.

Petitioners argue that *Franklin* is distinguishable because there was a "textual hook" to an express power (to accept "savings"). Pet. 30-31. But as even the First Circuit explained in finding no preemption, "*Franklin* did not rest on that textual hook alone." *Conti*, 157 F.4th at 23. "It also inferred that the" state law barring references to "savings" in advertising "was inconsistent with the overall federal scheme established by Congress." *Id.; see Franklin*, 347 U.S. at 378. That is why this case is "akin" to *Franklin*: Both laws "restrict banks' ability to exercise [an] incidental power," "essential to [the] exercise of an express power," in ways not envisioned by the federal scheme. App.23a-24a.

For similar reasons, the Second Circuit majority correctly looked to both RESPA and TILA as informing the breadth of the national bank power at issue here. Indeed, petitioners do not disagree that "federal statutes like RESPA and TILA were relevant in the Court's preemption precedents, including *Barnett Bank*, *Franklin*, and *Fidelity*." App.27a. They just disagree with how the majority viewed them. Their disagreement raises no certworthy issue.

Petitioners first claim that RESPA's "silence on interest-on-escrow" laws does not support the existence of a "broad" power. Pet. 31. But as this Court already explained, RESPA "extensively regulates national banks' operation of escrow accounts"—but nowhere in that set of regulations does it "mandate that national banks pay interest." 602 U.S. at 211. That omission "suggests that national banks have a broad power to set those rates." App.21a. That inference is entirely justified; indeed, the Court in *Franklin* went further and found preemption "in part from statutory silence." App.22a; *Franklin*, 347 U.S. at 378.

Petitioners also note that RESPA has its own preemption provision and argue that New York's law is not preempted under *that* provision. But the question here is not whether New York's law is "inconsistent with any provision" *of RESPA*. 12 U.S.C. § 2616. Whether or not it would be preempted by other statutes, New York's law is preempted *under Dodd-Frank* as a "State consumer financial law" that "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B).

Finally, the Second Circuit correctly understood TILA's impact on the preemption question. Dodd-Frank amended TILA to direct interest payments only on certain mortgage escrow accounts, "if prescribed by applicable State or Federal law." 15 U.S.C. § 1639d(a), (g)(3). All agree that requirement does not cover petitioners' mortgages, which either predate Dodd-Frank or do not fall within TILA's definition of covered mortgages. *See* 602 U.S. at 211 n.1. Congress' deliberate exclusion of state authority to prescribe interest payments for other escrow accounts, like petitioners', signals that Congress did not envision such a state-law intrusion. Petitioners' disagreement with the court of appeals on that issue does not warrant review.

II. Further percolation is warranted given the split's narrowness and the uncertainties surrounding OCC's new regulations.

The Court need not intervene now to resolve a narrow split—effectively 1-1. Since this Court directed the use of a nuanced comparative analysis, only the court below and the First Circuit have done that work. The Ninth Circuit in *Flagstar* applied its own outdated circuit precedent instead. And *no* circuit (indeed, no court) has yet addressed the impact of OCC's recently effective regulations addressing preemption and national banks' mortgage-escrow powers. So that 1-1 split pertains at most to the post-*Cantero*, pre-OCC period. Further percolation is therefore warranted.

A. Only two of a possible seven interested circuits have addressed preemption using the proper analysis.

The disagreement on how to apply this Court's preemption analysis to the interest-on-escrow fact-pattern is not deep, and certainly capable of further percolation. According to petitioners, fourteen states have adopted interest-on-escrow laws. Pet. 11. Aside from those in New York, California, and Rhode Island, petitioners point to laws in Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Oregon, Utah, Vermont, and Wisconsin. *Id.* at 11 n.2. Yet out of the seven interested circuits encompassing those fourteen states, only two have carried out the "nuanced comparative analysis" this Court directed.

The Ninth Circuit is not among them. It instead determined that it remained bound by its circuit precedent in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). *See Kivett*, 154 F.4th at 647-49. As the Ninth Circuit acknowledged, that precedent does not itself "cite or discuss the six preemption cases discussed in *Barnett Bank* and recounted in *Cantero*." *Id.* at 647. Rather, *Lusnak* relied on a wrongheaded inference from TILA—that because *federal* law requires interest on escrow *sometimes*, *state* law can require interest on escrow *all the time* without preemption. *See* 883 F.3d at 1194-96.[1] Thus, the Ninth Circuit cannot be said to have actually participated in any split about how to implement this Court's decision in *Cantero*, and its 2018 decision will not be binding in any other type of banking-preemption case.

Given the narrowness of the split, allowing further percolation is warranted. Indeed, this Court expressly invited further percolation when it last addressed this case in 2024. The question presented then was the same as it is now, as petitioners acknowledge. Pet. i. The Court did not apply the preemption standard to the New York state law in question. Instead it remanded, providing lower courts with guidance and allowing them to work out its proper application in the first instance. The best course of action at this time is to let that work continue.

B. No circuit has addressed the impact of OCC's recent regulations.

Further percolation also is warranted given OCC's recently effective Preemption Determination and Escrow Powers Rule. *See* pp. 10-11, *supra*. Those regulations are at least relevant and potentially significant under the Dodd-Frank framework, yet no court has confronted how or to what degree. Because OCC had proposed but not finalized the determination and rule, the courts of appeals did not address their

[1] Notably, neither the Court nor the government nor any party in *Cantero* adopted that reasoning. That makes all the more perplexing the Ninth Circuit's conclusion (*Kivett*, 154 F.4th at 647-49) that *Lusnak*'s reasoning was not "clearly incompatible" with the nuanced comparative analysis that this Court determined is required. 602 U.S. at 215 ("courts addressing preemption questions in this context must do as *Barnett Bank* did").

impact. Granting review now that they are final and effective would leave this Court to confront thorny issues surrounding those regulations' impact and validity on an entirely blank slate. Even if the Court treated those matters as inapplicable to this case, that would just mean that any decision against preemption would immediately have to be revisited in future cases. The 1-1 split over preemption post-*Cantero* but pre-OCC regulations is not certworthy.

1. The impact of OCC's Preemption Determination warrants percolation.

One issue warranting percolation is the impact of OCC's Preemption Determination (declaring New York's interest-on-escrow law (and others) preempted), effective just this June. OCC issued that determination under Dodd-Frank's preemption provision, which provides in relevant part that "any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis." 12 U.S.C. § 25b(b)(1)(B); *see* 91 Fed. Reg. at 29354 & n.51. As the First Circuit has put it, that preemption provision "grants courts and [OCC] concurrent power to make preemption determinations." *Conti*, 157 F.4th at 14 & n.4.

What no court has answered, however, is what OCC's exercise of its "concurrent power" has on litigation like this. *See Cantero*, 602 U.S. at 221 n.4 (noting that the Court was not deciding "the significance here (if any) of the preemption rules of the Office of the Comptroller of the Currency"). Once OCC issues an effective preemption determination, do courts addressing private actions make independent preemption determinations, without regard to OCC's own?

Or does the court go into review mode, assessing OCC's preemption determination under a standard of review looking like that described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and assessing whether it is supported by "substantial evidence"? *See* 12 U.S.C. § 25b(b)(5) (setting standard of review for OCC preemption determinations); *id.* § 25b(c) (requiring OCC orders to be supported by "substantial evidence, made on the record of the proceeding," in order to "invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law"). Given the Preemption Determination's effective date, no court has needed to address that question.

If this Court were to take up that question, the best answer would be that Congress expressly gave the Comptroller the power to declare, "by regulation or order," that a state consumer financial law is preempted. And Congress built certain limitations into the standard by which courts review such a determination. Giving effect to that statutory text precludes declaring that OCC's determination is categorically irrelevant.

One of petitioners' amici claims that OCC's Preemption Determination is *invalid*, taking the view OCC did not make its Preemption Determination on a "case-by-case" basis and that it is not "supported by substantial evidence." Conf. of State Bank Supervisors Amicus Br. 19-23. But those questions also are ones that no court has answered. And so granting review now would yet again pose the risk of this Court having to consider issues anew, with no prior percolation.

2. The impact of OCC's Escrow Powers Rule warrants percolation.

OCC's Escrow Powers Rule adds a further wrinkle to the preemption analysis. Petitioners see as "dispositive" whether the impacted national bank power is "express" or "incidental." Pet. 30. While the Second Circuit disagreed that interferences with "incidental" powers may never be preempted, it agreed that preemption is more likely for interference with "express" powers. App.15a. The First Circuit generally agrees with that. *Conti*, 157 F.4th at 25. Even if this was an incidental-powers question before, it is an express-powers question now, in light of OCC's rulemaking. And if petitioners were to argue that the rulemaking does not affect *this case* purely because of its timing, that would simply confirm that further percolation is warranted: there would be no reason to resolve a 1-1 split over an incidental power that is not incidental anymore.

As OCC sees it, "[t]he Escrow Powers Rule ... makes express national banks' broad, federally authorized power to offer and set the terms of mortgage-escrow accounts." 91 Fed. Reg. at 29355 (quotation marks omitted). Thus, in its Preemption Determination, OCC analyzed New York's interest-on escrow law as interference with an "express" power. *Id.* at 29356 & n.74. The law is preempted, in part because it "creates a direct conflict with the broad Federally authorized powers *expressly* codified in the OCC's concurrent Escrow Powers Rule." *Id.* at 29356 (emphasis added).

The view certainly finds support in the caselaw. As the Court explained in *Fidelity*, "[f]ederal regulations have no less preemptive effect than federal statutes." 458 U.S. at 153; *see* 91 Fed. Reg. at 29356 & n.74 (relying on *Fidelity*). Yet since both the First and Second Circuits analyzed preemption before the regulation's effective date, they started from the premise that interest-on-escrow laws interfere only with "incidental" powers. App.21a (concluding New York's law "does not limit an express power"); *Conti*, 157 F.4th at 17 (addressing "incidental power to offer mortgage-escrow accounts"). For that same reason, they had no occasion to address how making those powers express might change the analysis. They certainly did not confront arguments (like those raised by petitioners' amicus) that OCC lacks the authority to make such a legal change; indeed, those arguments may well be brought in separate legal challenges to OCC's actions. Rather than pretermit that process, this Court should decline review at this time.

III. This petition is not the superior vehicle that petitioners tout.

Should the Court nonetheless decide to resolve the question presented now, there is no reason to do so through this case. Petitioners repeatedly call this case "battle-tested," as if the previous grant of certiorari were argument enough for another. *E.g.*, Pet. 4, 27. But the outcome of that "battle" was inconclusive, with the Court instead choosing to offer guidance about the proper analytical framework and letting the lower courts apply it in the first instance. That is, if anything, a reason *not* to take up this case again, especially when the Court has before it other vehicles that are *at least* as suitable.

Petitioners give no reason why, in light of all recent developments, this case *must* be the vehicle through which the Court addresses the question presented. They do not claim, for example, that there are certworthy issues present here that are absent from the First Circuit's decision in *Conti* (which the same counsel are litigating for the plaintiffs) or the Ninth Circuit's decision in *Kivett v. Flagstar*. Petitioners instead try to trash those cases' viability as vehicles. Their arguments are unavailing.

A. *Flagstar* is a suitable vehicle to address the question presented.

As the petitioner national bank in *Flagstar* explains, that case is a suitable vehicle to resolve the question presented. The petition there comes to this Court from a final judgment, with an evidentiary record; rests exclusively on the Ninth Circuit's no-preemption conclusion; and imposes an injunction requiring a national bank to comply with California's interest-on-escrow law. Flagstar Pet. 28-29 (No. 25-1350). Petitioners here nonetheless claim there are two problems with *Flagstar*, neither of which has merit.

First, petitioners claim (Pet. 26) that *Flagstar* is a poor vehicle because the bank there has not always been a national bank, and so once was subject to a different preemption provision. But the petitioner in *Flagstar* has already persuasively explained why that concern is none at all. Flagstar Pet. 29-30. And since the filing of the petition in this case, the plaintiff-respondents in *Flagstar* have expressly waived any vehicle objection. In fact, they have affirmatively represented to this Court that their case "is a sound vehicle." Kivett Br. in Opp. 21 (No. 25-1350) (heading style omitted). That concession should dispose of petitioners' opportunistic vehicle objections. *See* Sup. Ct. R. 15.2.

Those objections are not jurisdictional, and are not even substantial. As the Solicitor General previously pointed out, there is no question that the same preemption standard applicable here also applies to the named plaintiffs' mortgages in *Flagstar*. Even if the respondents had not foresworn that supposed vehicle issue, therefore, it would not "prevent the Court from answering the question presented" in that case. U.S. Cert.-Stage Amicus Br. 23. Indeed, that is why the Solicitor General recommended that the Court grant review in *Kivett* over this case the last time. *Id.*; *accord* Flagstar Pet. 29-30; Kivett Br. in Opp. 21.

Second, petitioners claim that the Ninth Circuit's failure to apply a nuanced comparative analysis makes *Flagstar* a poor vehicle. Pet. 25-26. Not so. While the Ninth Circuit has not let the issue percolate since this Court's decision in *Cantero*, that goes to whether certiorari is warranted—not to which case to grant. But if the Court were to take one of these cases, the Ninth Circuit's insistence on sticking to its 2018 precedent actually strengthens the reasons to choose *its* decision to review.

If the Court granted review in this case and ultimately repeated its previous analysis, the *Kivett v. Flagstar* panel's reasoning suggests the Ninth Circuit might well ignore it, again (even if the Court were to GVR, again). But if the Court granted review in *Flagstar*, even just reiterating its previous analysis would at least free the Ninth Circuit from the straitjacket of its 2018 precedent.

B. *Conti* also is a viable vehicle.

While *Flagstar* presents the best option, there is no reason why the Court may not resolve the question presented in *Conti*. Petitioners in fact agree (Pet. 26) that *Conti* does not share *Flagstar*'s purported vehicle problems. And their shared counsel have declined to raise any vehicle problems in *Conti*. *See* Conti Rehearing Resp. 1 (No. 25-1004).

Their primary resistance to *Conti* (Pet. 27) is instead that granting review there also would require granting rehearing. But the petitioner in *Conti* has already explained why that relief is warranted: the split developed just two weeks after the Court denied certiorari. Citizens Bank Rehearing Pet. 7-8 (No. 25-1004). The Court has granted rehearing under similar circumstances in the past. *Id.* (collecting cases). With that makeweight objection disposed of, *Conti* is a perfectly viable vehicle through which to resolve the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied. If the Court concludes that the question presented warrants review at this time, it should grant review in either *Kivett* or *Conti* and hold this petition.

Respectfully submitted.

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