No. 25-1313

In the Supreme Court of the United States

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

v.

BANK OF AMERICA, N.A.,
Respondent.

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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF OF PETITIONERS

This petition presents the same question, in the same case, that this Court granted certiorari to answer three years ago. The question met the criteria for certiorari then because the Second Circuit had split with another circuit in holding that New York's interest-on-escrow law was preempted as applied to national banks, and Bank of America conceded the question's importance. The only reason this Court did not ultimately answer the question is that it was able to resolve the split in more minimalist fashion, in a unanimous opinion clarifying the correct test and remanding for application in the first instance.

What was true then is no less true now: The question again meets the criteria for certiorari because the Second Circuit has again expressly split with another circuit in holding that New York's law is preempted as applied to national banks, and Bank of America does not suggest that the question has suddenly become unimportant.

Yet Bank of America opposes certiorari anyway. It advances three arguments in support of denial:

First, it argues that the Second Circuit's decision is correct on the merits. If that were true, however, it would be all the more reason to grant review. Bank of America's position on the merits is that state interest-on-escrow laws significantly interfere with national-banking powers, and that the variation across states is "'incompatible' with the national-banking system." Suppl. Resp. Br. of Bank of America at 3, *Cantero v. Bank of Am.*, No. 21-400 (2d Cir. Oct. 25, 2024), Dkt. No. 183. So it is surprising that the bank is now simultaneously urging the Court to let the conflict be. Either uniformity is essential, or it is not.

Second, Bank of America tries to downplay the split (at 2–3, 23) as "shallow" and "effectively 1-1." But practically speaking, the split is really 2-1, and it encompasses the two most important banking states: New York and California. That makes the conflict here even deeper than the one that compelled the Court to grant certiorari last time. And regardless, National Bank Act preemption is so important that this Court routinely grants certiorari to resolve 1-1 conflicts (or no conflict at all). Bank of America cites no example of this Court ever denying certiorari on an NBA preemption issue that has concededly divided the circuits.

Third, Bank of America claims that certiorari should be denied based on the OCC's most recent preemption effort—the third time it has promulgated rules stating its belief that these same laws are preempted. But the OCC had preemption rules on the books last time too, and the Second Circuit did not rely on them. As a result, this Court did not address them either. It may do the same here.

In any event, the OCC's latest rules have no bearing on the proper resolution of the question presented. By the agency's own admission, the rules do not reflect its technical subject-matter expertise. They reflect only its *legal* analysis—in particular, its reading of this Court's cases. That analysis is not entitled to any deference. *See* 12 U.S.C. § 25b(b)(5)(A), (c) (requiring OCC preemption determinations to be supported by "substantial evidence," and even then, affording them only *Skidmore* deference).

So Bank of America is left to challenge this case as a vehicle. As before, it touts *Flagstar Bank v. Kivett*, No. 25-1350, as its preferred vehicle. The Court wasn't persuaded then, and its decision was vindicated: No vehicle defects emerged, and the Court resolved the split without going further than necessary. There is no reason for it to change horses now. If the split is "effectively 1-1," the Court would be best served by granting a petition from one of those circuits, not the only petition from a different circuit.

I. Bank of America concedes that there is a circuit conflict on the question presented, which it has previously conceded is important.

Although Bank of America opposes certiorari, it does not dispute that this case contains the key ingredient of certworthiness: a circuit split on an important question.

Importance was already conceded. Bank of America has twice told this Court that the question presented is of "exceptional importance." Pet. 2, *Bank of Am., N.A. v. Lusnak*, No. 18-212 (Aug. 14, 2018); *see* BIO 14, *Cantero v. Bank of Am., N.A.*, No. 22-529 (Feb. 16, 2023). And on that much, everyone agrees: The parties to this case. The OCC. *See* Pet. 23. Industry groups. *See id.* A bipartisan coalition of states. *See* Amicus Br. of New York et al. 4. State-chartered banking regulators. *See* Amicus Br. of Conf. of State Bank Supervisors 3. Experts who follow the issue. *See* Kate Berry, *Billions at stake as Supreme Court mulls interest on escrow*, Am. Banker (June 3, 2026), https://perma.cc/38GR-45BS. The petitioners in *Citizens Bank v. Conti*, No. 25-1004, and *Kivett*. And at least four members of this Court, who have already deemed the question sufficiently important to warrant certiorari.

Now, the split is conceded too. Bank of America acknowledges (at 2, 15) that the First and Second Circuits have expressly "disagreed" on how to apply this Court's precedents and, as a result, "reached differing outcomes" on the question presented. The OCC has done the same. *See* 91 Fed. Reg. 29350, 29350 (May 19, 2026) (noting that the Second Circuit has again "creat[ed] a circuit split").

So there is no room for doubt: The Second Circuit has again created a split on an important question. And again, this Court should step in to resolve it.

II. Bank of America's merits argument only confirms the need for this Court's review.

In opposing certiorari, Bank of America begins with an argument (at 16–23) that the Second Circuit's decision is correct on the merits. There will, of course, be plenty of time for the parties to duke it out on the merits if the Court grants certiorari. At this stage, what matters is that Bank of America's merits arguments are not arguments against certiorari at all; they are arguments *for* certiorari.

To see why, think about what Bank of America is saying when it argues that the decision below is correct. It is saying that these state laws interfere with national banks' powers so significantly that federal law requires a single, uniform regulatory regime. And that is necessary to spare national banks of the "particularly onerous" obligation of "daily" compliance with varying state laws. BIO 17, 21. Anything less, according to Bank of America, would "undermine national banks' national character." Suppl. Resp. Br. at 21, *Cantero*, No. 21-400.

If this were right, it would be similarly "incompatible" with our federal banking system to leave the split in place. *Id.* at 3. Doing so would maintain the very patchwork of state laws that Bank of America professes to find so intolerable. Under the First and Ninth Circuit's decisions, at least six states may enforce their laws against national banks (California, Oregon, Rhode Island, Massachusetts, Maine, and New Hampshire). That Bank of America is apparently content with this state of affairs does not cast its merits arguments in a favorable light. But the point still stands: *If* the Second Circuit's decision is correct, the need for uniformity on the question presented would be particularly acute. It would mean that, not only should there be a uniform answer to the preemption question, but there should be a uniform regulatory requirement as well.

III. There is no reason to wait.

Besides defending the Second Circuit's decision on the merits, Bank of America also pitches this Court on delay. It claims that the Court should hold off on resolving the split because it is "effectively 1-1," and because the OCC has once again expressed its view that these state laws are preempted. BIO 23–29. Neither is a reason to wait.

A. NBA preemption is not an area where this Court has historically been willing to let a conflict linger. The Court has repeatedly granted certiorari on NBA preemption issues to resolve 1-1 circuit conflicts—or no conflict at all. *See Cantero v. Bank of Am., N.A.*, 602 U.S. 205 (2024) (acknowledged 1-1 conflict); *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25 (1996) (same); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (same); *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (contested 1-1 conflict); *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009) (no conflict). On the flip side, Bank of America provides no example where this Court has ever denied certiorari on an NBA preemption question that has concededly divided the circuits.

Nor does Bank of America explain what is to be gained by doing so in this case. Three circuits have now weighed in on the question presented, producing starkly different answers. And two have openly disagreed on how to apply *Cantero*'s analysis to state interest-on-escrow laws. It is hard to see the benefit in waiting for another circuit to add itself to the tally. True, borrowers in states like Utah or Maryland could sue in their home states to enforce similar state laws as to a particular national bank. But a decision from the Tenth Circuit or Fourth Circuit could only exacerbate the split, not eliminate it.

Plus: That day could be a long time coming. Because national banks tend to operate in many states, borrowers could also potentially sue in the First Circuit instead, based on past non-compliance in any of the states there, and then seek to certify a multistate class action with borrowers in Utah or Maryland. They could even seek to include borrowers in New York (or other states within the Second Circuit), as the *Conti* plaintiffs are doing. *See* Am. Compl., *Conti v. Citizens Bank, N.A.*, No. 21-296 (D.R.I. Oct. 10, 2025), Dkt. No. 40 (complaint for multi-state class including New York, Connecticut, and Vermont). That possibility creates an additional layer of regulatory uncertainty: Although the Second Circuit has answered the question as to New York's law, First Circuit courts are bound by their own precedent, not the Second Circuit's.

B. Nor is delay justified on account of the OCC's latest preemption rules. For starters, granting certiorari would not "require this Court to address" the legal effect of those rules. *Contra* BIO 3. The history of this case makes that clear. When this Court previously granted certiorari, the posture was the same: The OCC had preemption rules on the books; the Second Circuit had not relied on the OCC's rules in declaring New York's law preempted and creating a circuit split; and this Court resolved the split without addressing "the significance here (if any) of the [OCC's] preemption rules." *Cantero*, 602 U.S. at 221 n.4. The Court could take the same course again now. Because the Second Circuit did not address the significance of the OCC's latest rules, this Court would not have to do so either. It could grant certiorari, resolve the split, and go no further.

But if the Court wanted to consider the OCC's rules, it wouldn't make any difference. The preemption rule says that the OCC "has determined that Federal law preempts State [interest-on-escrow] laws" as applied to national banks. 12 C.F.R. § 34.7(b). By the agency's own admission, that determination was not based on any empirical data or the OCC's technical expertise. The preamble states that "the OCC has not relied on any technical studies or data for its analysis in this preemption determination," 91 Fed. Reg. at 29353 n.22. Rather, "[t]he OCC's preemption determination reflects the agency's" *legal* analysis—its "application of the *Barnett* standard based on its careful review of Dodd-Frank and relevant precedent." *Id.* at 29351. That analysis warrants no deference at all, either under Dodd-Frank or this Court's precedents. *See* 12 U.S.C. § 25b(b)(5)(A), (c); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 374, 394–96, 402 (2024). This Court does not defer to federal agencies on "how to analyze preemption" under its own cases. *Contra* BIO 3.[1]

As for the OCC's escrow-powers rule, it isn't based on any technical expertise either. *See* 91 Fed. Reg. 29340, 29345 (May 19, 2026) ("The OCC has not relied on any technical studies or data for this final rule."). Nor does it even purport to alter the relevant banking power, or to create preemption where previously there was none. Just the opposite: Because the OCC has authority only to impose "restrictions" on real-estate-lending powers, 12 U.S.C. § 371(a), the preamble disavows any attempt to "expand[] national banks' powers beyond the bounds of the statute," 91 Fed. Reg. at 29342. Instead, the rule purports "merely [to] clarif[y] longstanding and recognized real estate lending powers that banks have exercised under existing law" based on the OCC's review

[1] Amazingly, the respondents in *Kivett* take the position that this Court's resolution of the question presented is "unlikely to impact future cases," and that the split is therefore "transient," because of the OCC's preemption determination. BIO 3, 15, *Flagstar Bank v. Kivett*, No. 25-1350 (July 30, 2026). We could not disagree more. Were this Court to answer the question presented against preemption, it is exceedingly unlikely—unthinkable, really—that *any* court would allow this Court's preemption analysis to be displaced by the OCC's.

of the "statutory, judicial, and historical record." *Id.* at 29342, 29345. Again, it is this Court's role to determine the meaning of "existing law," *id.* at 29345—not the OCC's.

If anything, the OCC's rules only exacerbate the uncertainty and further underscore the need for certiorari. As one former senior OCC attorney recently remarked: "The OCC taking the formal step of issuing a preemption determination seems like it sets up something where, how does anybody know what's up and what's down without somebody resolving it." Berry, *Billions at stake as Supreme Court mulls interest on escrow* (bracket omitted). That somebody, of course, can only be this Court.

IV. Bank of America identifies no vehicle defects.

That leaves Bank of America's vehicle arguments. As it did last time, Bank of America urges this Court to grant certiorari in *Kivett* rather than this case. *See* BIO 30–31; BIO 14, *Cantero v. Bank of Am., N.A.*, No. 22-529 (Feb. 16, 2023). But this Court did not do so then, and it should not so now.

This petition once again cleanly presents the question, and Bank of America does not contend otherwise. It does not deny that the decision below is, as before, the decision that created the circuit conflict. Nor does it point to any vehicle defect that emerged when the case was previously before the Court. And Bank of America can hardly dispute that this case involves a particularly salient state law: New York is the financial capital of the United States; its law was the focus of the OCC's preemption rule; and its Solicitor General has spearheaded the coalition of states supporting the petitioners. *See* Amicus Br. of New York et al. 4 (agreeing that "this case presents the best vehicle").

Instead, Bank of America tries to make something of the fact (at 3) that this case "did not generate a definitive answer to the ultimate question," as if that had something to do with the case as a vehicle. But this Court was simply heeding "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). It was not impeded by a mysterious vehicle problem.

Truth be told, Bank of America's vehicle arguments are even weaker than the ones that previously failed to persuade this Court. Before, the Second Circuit created a conflict by expressly disagreeing with the Ninth Circuit. But now, the Second Circuit has expressly disagreed with the First Circuit, producing a 1-1 split on how to apply this Court's decision in *Cantero* to state interest-on-escrow laws. It therefore makes little sense to grant certiorari in a case out of the Ninth Circuit. The Ninth Circuit's opinion does not apply *Cantero* at all. So if any vehicle is likely to produce another opinion from this Court that does not generate a definitive answer to the question, it is *Kivett*.

Bank of America (and, oddly, the *Kivett* respondents) try to spin the Ninth Circuit's idiosyncratic opinion as a feature and not a bug. Bank of America claims (at 31) that this Court should grant review in *Kivett*, even if only to "reiterat[e] its previous analysis," just to "free the Ninth Circuit from the straitjacket of its 2018 precedent." But the principal reason to grant certiorari is to resolve the circuit conflict on how to apply *Cantero*—not to decide the correctness of *Kivett*'s holding that, under Ninth Circuit precedent, a Ninth Circuit panel lacked "the authority to overrule *Lusnak* [*v. Bank of America, N.A.*, 883 F.3d 1185, 1188 (9th Cir. 2018),] in light of the Supreme Court's intervening decision in *Cantero*." *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640, 642 (9th Cir. 2025). And anyway, so long as the Court resolved the conflict and answered the question presented, *Kivett* would effectively become moot. *Lusnak*'s bottom-line holding—that California's law is not preempted by the NBA—would either be confirmed by this Court's holding or contradicted by it.

The respondents in *Kivett*, for their part, take an even stranger tack. They agree that *Kivett* presents a different question than the question that has divided the First and Second Circuits, because it "presents the question … of the role of circuit precedent." BIO 22, *Kivett*, No. 25-1350. Yet they claim that this somehow makes it a *better* vehicle because this Court in *Cantero* "alluded to … the role of circuit precedent," *id.*, when it said that courts "must do as *Barnett Bank* did and likewise take account of those prior decisions of this Court and similar precedents," 602 U.S. at 215–16. Needless to say, *Lusnak* is not what this Court "had in mind." *Contra* BIO 22, *Kivett*, No. 25-1350.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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