No. _____

In the
Supreme Court of the United States

FLAGSTAR BANK, N.A.,

Petitioner,

v.

WILLIAM KIVETT, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Bank Act grants federally chartered banks both enumerated and incidental powers. Those powers include the enumerated authority to engage in real estate lending and the incidental power to administer associated escrow accounts used to pay real estate taxes, insurance, and similar fees. Twelve States have laws that purport to dictate interest rates that a national bank must pay on funds held in mortgage escrow accounts.

In *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024), this Court held that whether such state-banking laws are preempted turns on a nuanced comparative analysis of those laws and similar laws whose preemption this Court has determined. Since then, the courts of appeals have divided on whether state interest-on-escrow laws are preempted under *Cantero*. The Second Circuit has concluded they are; the First and the Ninth Circuits disagree. The Office of the Comptroller of the Currency has adopted the Second Circuit's view and emphasized the importance of a uniform resolution for the national banking system.

The question presented is as follows:

Whether the National Bank Act preempts state interest-on-escrow laws that, like California Civil Code § 2954.8(a), attempt to set the financial terms on which federally chartered banks may offer mortgage escrow accounts authorized by federal law.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Flagstar Bank, N.A., a federally chartered national bank, appellant in the Ninth Circuit and defendant in this action.

Respondents in this Court are William Kivett, Bernard Bravo, and Lisa Bravo, as representatives of a certified class of borrowers, appellees in the Ninth Circuit and plaintiffs in this action.

CORPORATE DISCLOSURE STATEMENT

Flagstar Bank, N.A., a federally chartered national bank, is publicly traded on the New York Stock Exchange (stock ticker: FLG). According to schedules filed with the Securities and Exchange Commission, affiliates of funds managed by Liberty 77 Capital L.P. hold 10% or more of the shares of the bank.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

- *Flagstar Bank, N.A. v. Kivett*, No. 22-349 (U.S. June 10, 2024).
- *Kivett v. Flagstar Bank, N.A.*, No. 21-15667 (9th Cir. Oct. 2, 2025).
- *Kivett v. Flagstar Bank, FSB*, No. 21-15667 (9th Cir. May 17, 2022).
- *Kivett v. Flagstar Bank, FSB*, No. 18-cv-5131 (N.D. Cal. Dec. 10, 2020).
- *Kivett v. Flagstar Bank, FSB*, No. 18-cv-2350 (N.D. Cal. Aug. 21, 2018).

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INTRODUCTION

This Court has long recognized that a State's authority to regulate a national bank's federal banking powers is limited. Thirty years ago, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the Court articulated the standard that emerged from its precedents. Congress has codified that standard by name. In *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024), the Court made clear that courts applying that standard must therefore follow the interpretive approach this Court took in *Barnett Bank*. Yet the Ninth Circuit has now expressly declined to apply this Court's precedents, finding them insufficiently instructive, and has instead reaffirmed its pre-*Cantero* precedent, sanctioning California's attempt to set the core financial terms of a national bank's banking product. That decision is wrong and should be reversed.

The United States "maintains a dual system of banking," under which banks may choose to obtain a charter from the federal or state government. *Cantero*, 602 U.S. at 209-10. When a bank chooses to obtain its charter from the federal government under the National Bank Act, it "gains various enumerated and incidental powers." *Id.* at 210. That grant of authority is "not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32. As amended by the 2010 Dodd-Frank Act, the National Bank Act preempts any state law that "prevents or significantly interferes with the exercise by the national bank of its powers," determined according to the standard for preemption in *Barnett Bank*. 12 U.S.C. § 25b(b)(1)(B).

This case concerns whether so-called interest-on-escrow (IOE) laws, which set minimum interest rates for mortgage escrow accounts, are preempted under that

standard. Three years ago, the Court granted certiorari in *Cantero* to resolve that question. The Ninth Circuit had held, in this case, that California's IOE law was not preempted, reasoning that because a different federal law requires banks to pay interest on some escrow accounts, setting interest rates on all such accounts must not significantly interfere with national banking powers. Months later, the Second Circuit held that New York's IOE law was preempted, reasoning that any law that controls a national banking power crosses the preemptive line.

In *Cantero*, this Court eschewed both circuits' approaches. As the Court explained, because Congress codified the Court's decision in *Barnett Bank*, "courts addressing preemption questions in this context must do as *Barnett Bank* did" and engage in a "practical assessment of the nature and degree of the interference caused by a state law" as compared to the laws that the Court considered in *Barnett Bank* "and the other precedents on which *Barnett Bank* relied." 602 U.S. at 216, 219-20. Because the Second Circuit did not "conduct that kind of nuanced comparative analysis," the Court remanded *Cantero* back to the Second Circuit to undertake the analysis in the first instance. *Id.* at 220. It also vacated the Ninth Circuit's decision in this case and remanded the case for reconsideration in light of its new guidance. App, *infra*, 57.

On remand, both courts have reaffirmed their previous views. For its part, the Second Circuit revisited its analysis, undertaking the comparative analysis this Court directed and concluding that the interference posed on national banking powers is more like the interference posed by state laws that are preempted than that posed by laws that are not. *Cantero v. Bank of America, N.A.*, _ F.4th _, 2026 WL 1217467 (2d Cir. May 5, 2026). The Ninth Circuit,

over the dissent of Judge R. Nelson, declined to engage in such comparison, concluding instead that this Court's approach was not clear enough to displace its pre-*Cantero* approach. App., *infra*, 18a. Meanwhile, the First Circuit joined the fray—agreeing with the Second Circuit (and disagreeing with the Ninth) that a comparative analysis is required but erroneously agreeing with the Ninth (and disagreeing with the Second) that under *Cantero*, IOE laws survive. *See Conti v. Citizens Bank, N.A.*, 157 F.4th 10, 28 (1st Cir. 2025).

Thus, despite this Court's guidance, the courts of appeals are now more divided on whether state IOE laws are preempted and how to answer that question. This Court's resolution of that conflict is no less important than when the Court granted certiorari three years ago. As the Office of the Comptroller of the Currency (OCC) explained to the Ninth Circuit, "[c]lear and consistent application … of the *Barnett Bank* standard" is "critical to the efficient and effective administration of the dual banking system." OCC Br. at 13, *Kivett v. Flagstar Bank, FSB.*, 154 F.4th 640 (9th Cir. 2025) (No. 21-15667). And the Ninth Circuit's "misapplication" of that standard to state IOE laws "carries serious implications for national bank mortgage lending the functioning of the multi-trillion-dollar U.S. mortgage market." *Ibid.*

This case presents the ideal vehicle for considering this question and resolving the uncertainty. The Ninth Circuit affirmed a final judgment and entered an injunction requiring Flagstar—a national bank—to pay interest on escrow accounts going forward. That decision rests exclusively on the Ninth Circuit's view that California's IOE law is not preempted under Section 25b(b)(1)(B). As the United States recognized last time this case came before

the Court, no obstacles exist to prevent this Court from resolving the question presented in this case. Indeed, although the petitioners in *Conti* and *Cantero* both recycle the same manufactured vehicle arguments that the *Cantero* plaintiffs (not ours) previously advanced when arguing against Flagstar's pre-*Cantero* petition for certiorari, the United States rightly agreed at that time that Flagstar's case was the *better* vehicle. The same is true today.

The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-50a) is reported at 154 F.4th 640. The order of the district court granting respondents' motion for summary judgment as to liability (App., *infra*, 110a-12a) is unpublished. The opinion and order of the district court granting respondents' motion for summary judgment as to restitution and injunctive relief (*Id.* at 64a-109a) is reported at 506 F. Supp. 3d 749.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2025. A timely petition for rehearing en banc was denied on March 26, 2026 (App., *infra*, 112a-13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix, *infra*, 120a-49a.

STATEMENT OF THE CASE

I. Legal Background

Congress enacted the National Bank Act, 12 U.S.C. § 1 *et seq.*, in 1863 to establish an independent, uniform national banking system insulated from intrusive state regulation. *See Cantero*, 602 U.S. at 210; *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007) (observing that Congress designed the NBA to avoid "[d]iverse and duplicative" state regulation of national banking activities); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003) (noting that the national banking system "needed protection from 'possible unfriendly State legislation'"); *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891) ("[T]he character of the system implies an intent to create a national banking system ... with uniform operation.").

Under the NBA, federally chartered banks operate as "instrumentalit[ies] of the federal government," *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and are "subject primarily to federal oversight and regulation," *Cantero*, 602 U.S. at 210. Established in 1863, the OCC has been regulating banks for over 160 years and is the federal agency charged "with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by" national banks. 12 U.S.C. § 1(a).

The NBA "expressly affords national banks the powers that they need to organize and operate." *Cantero*, 602 U.S. at 210. It also "expressly authorizes national banks to exercise 'all such incidental powers as shall be necessary to carry on the business of banking.'" *Id.* (quoting 12 U.S.C. § 24(Seventh)). Among the enumerated powers is the authority to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interest in real

estate." 12 U.S.C. § 371(a). And the OCC has recognized that, incidental to their mortgage-lending power, national banks possess the power to provide, establish, and service associated mortgage escrow accounts. OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005); *see* Real Estate Lending Escrow Accounts, 91 Fed. Reg. 29340, 29347 (May 19, 2026) (to be codified at 12 C.F.R. pts 34 and 60).

Mortgage escrow accounts "are designed to protect both the bank and the borrower." *Cantero*, 602 U.S. at 210. These accounts permit lenders to collect, and borrowers to pay, money to fund the amounts that borrowers will periodically owe in property taxes, insurance premiums, and other charges related to the property. Lenders then use the escrowed funds to directly pay those charges when due. This arrangement "helps the borrower by simplifying expenses and budgeting" and "assists the bank by ensuring the borrower's insurance and tax bills are timely paid," avoiding issues like tax liens and lapses in insurance coverage on the property. *Id.* at 210-11.

Federal law extensively regulates mortgage escrow accounts through the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2601 *et seq.*, and its implementing regulation, Regulation X, 12 C.F.R. § 1024.17. Among other requirements, RESPA requires lenders to make timely payments from escrow accounts when charges become due and to promptly return any escrowed funds after a mortgage loan is paid off. *See* 12 U.S.C. § 2605(g). It limits the amount that a lender may require a borrower to deposit in any escrow account each month. *See id.* § 2609(a). The law requires lenders to provide borrowers with certain statements and notifications about escrow account balances and the charges accounts are intended to cover. *See id.* § 2609(b)-(c). And Regulation X

details extensive requirements for performing escrow-account analyses, providing escrow account statements, and disbursing escrow funds. *See* 12 C.F.R. § 1024.17.

But RESPA "does *not* mandate that national banks pay interest to borrowers on the balances of their escrow accounts." *Cantero*, 602 U.S. at 211 (emphasis added). Congress has considered such a requirement three times—but has never adopted it. *See generally*, U.S. General Accounting Office, Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing (1973), https://tinyurl.com/5e6j3ce4; H.R. 3542, 102d Cong. (1991); H.R. 27, 103d Cong. (1993).

Meanwhile, several States have taken a different approach. At least 12 States, including California, have their own unique laws requiring banks to pay interest on funds held in mortgage escrow accounts.[1] Each of these IOE laws differs from the others in some respects, imposing different interest rates calculated differently and applying to different properties. California Civil Code § 2954.8(a), requires financial institutions to pay at least 2% interest annually on escrow accounts associated with "loans upon

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[1] *See* Cal. Civil Code § 2954.8(a); Conn. Gen. Stat. § 49-2a; Mass. Gen. Laws ch. 183, § 61; Md. Code Ann., Com. Law § 12-109(b)(1); Me. Rev. Stat. Ann. tit. 33, § 504; Minn. Stat. § 47.20, subdiv. 9(a); N.Y. G.O.L. § 5-601; Or. Rev. Stat. §§ 86.205, 86.245; R.I. Gen. Laws § 19-9-2; Utah Code Ann. § 7-17-3; Vt. Stat. Ann. tit. 8, § 10404; Wis. Stat. § 138.052(5)(a)-(am). The *Cantero* plaintiffs count 14 States, but as the OCC has explained, Iowa's IOE law is entirely permissive, and New Hampshire's appropriately applies only to state-chartered banks. *See* Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. 29350, 29356 & n.83 (May 19, 2026) (to be codified at 12 C.F.R. pt 34). As the OCC notes, Guam and the U.S. Virgin Islands have also adopted IOE laws. *Ibid.*

the security of real property" located in California and "containing only a one-to four-family residence."

The Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, requires creditors—whether state banks, federally chartered banks, or other lenders—to establish escrow accounts for certain higher-priced mortgage loans. *See id.* § 1639d(a)-(b). A creditor required to establish an escrow account under TILA Section 1639d must pay interest on the amount held in the account, "[i]f prescribed by applicable State or Federal Law," "in the manner as prescribed by that applicable State or Federal law." *Id.* § 1639d(g)(3). Respondents have never claimed that Section 1639d(g)(3) applies to their mortgage escrow accounts.

More than "200 years ago, in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), this Court held federal law supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10. In *Barnett Bank*, this Court thus explained that States may regulate national banks only where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 34.

Congress codified this preemption standard in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Dodd-Frank provides that "[s]tate consumer financial laws are preempted" if, "in accordance with the legal standard for preemption in the decision of [this Court] in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the [s]tate consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 1044(b), 124 Stat. at 2015 (codified at 12 U.S.C. § 25b(b)(1)(B)).

This Court clarified Section 25b(b)(1)(B)'s preemption standard in *Cantero*, directing courts applying that standard to "do as *Barnett Bank* did." *Cantero*, 602 U.S. at 215. That is, courts must make a "practical assessment of the nature and degree of the interference caused by a state law." *Cantero*, 602 U.S. at 219-20. As this Court did in *Barnett Bank*, courts must conduct a "nuanced comparative analysis" of the challenged state law and those the Court examined in *Barnett Bank* and the precedents "on which *Barnett Bank* relied." *Id.* at 220.

After Dodd-Frank's enactment, the OCC reaffirmed its longstanding view that federally chartered banks may exercise their real estate lending powers "without regard to state law limitations concerning ... [t]he terms of credit [and] ... [e]scrow accounts." 12 C.F.R. § 34.4(a)(2), (a)(4), (a)(6); *see* Office of Thrift Supervision Integration and Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43557 (July 21, 2011) (concluding that state escrow laws "would meaningfully interfere with fundamental and substantial elements of the business of national banks").

The OCC has consistently expressed the view, in keeping with its regulation, that state IOE laws like California's are preempted. *See, e.g.*, OCC Br., *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025) (No. 21-15667); OCC Br., *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018) (No. 14-56755). The agency reaffirmed that view to the Ninth Circuit following this Court's decision in *Cantero*. *See* OCC Br. at 16-17, *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025) (No. 21-15667). It recently codified that preemptive conclusion. *See* 91 Fed. Reg. at 29350.

II. The Present Controversy

A. Flagstar is a national bank engaged in mortgage lending and servicing. App., *infra*, 66a. Like many mortgage lenders and servicers, Flagstar uses escrow accounts to reduce the risks associated with individual loans.

Flagstar did so for Respondents William Kivett and Bernard and Lisa Bravo, who had home mortgage loans in California that Flagstar serviced. App., *infra*, 68a-70a. The deeds of trust securing those loans required escrow accounts. *Ibid.* Flagstar did not pay interest on the amounts held in escrow for either loan. *Id.* at 69a-70a.

Respondents filed this putative class action asserting that California Civil Code § 2954.8(a) applied to Flagstar and that the company's nonpayment of interest on California mortgage escrow accounts was an "unlawful … business act or practice" under California's Unfair Competition Law. Cal. Bus. & Prof. Code § 17200. In response, Flagstar argued that Section 2954.8(a) was preempted as applied to federally chartered banks because it would significantly interfere with the exercise of national banking powers.

The district court certified a class of California borrowers, rejected Flagstar's preemption argument, and granted respondents' motion for summary judgment on liability, holding Flagstar liable for failing to pay interest on respondents' escrowed funds. App., *infra*, 71a. The court enjoined Flagstar to pay interest going forward and awarded the class around $9 million in restitution and prejudgment interest. *Id.* at 109a, 118a.

B. On appeal, the Ninth Circuit affirmed the district court's preemption holding based on its earlier decision in

Lusnak v. Bank of America, N.A., 883 F.3d 1185 (9th Cir. 2018). App., *infra*, 63a.

In *Lusnak*, the Ninth Circuit held pre-*Cantero* that the NBA did not preempt Section 2954.8. *Lusnak* cited *Barnett Bank* but did not conduct any comparative analysis of Section 2954.8 and the law in *Barnett Bank* (or any other case). Instead, it relied on TILA's requirement for creditors to pay interest on escrow accounts associated with higher-cost mortgages, "if prescribed by applicable State or Federal Law." 15 U.S.C. § 1639d(g)(3). Although Section 1639d did not apply in *Lusnak*, the panel saw it as "express[ing] Congress's view that [state interest-on-escrow] laws would not necessarily prevent or significantly interfere with a national bank's operations." *Lusnak*, 883 F.3d at 1194-95. The panel thus concluded that, absent "punitively high rates," state IOE are not preempted. *Id.* at 1195 n.7, 1197.

In this case, the panel held that it was bound by *Lusnak*'s holding. "*Lusnak*'s language is unqualified," the court explained. App., *infra*, 61a. Under *Lusnak*, the NBA "does not preempt [California Civil Code] § 2954.8(a)" as to any national bank's activities on any record. *Ibid.* The court observed that, without a decision from this Court "bring[ing] *Lusnak*'s holding into question," the panel was not free to "depart from [the] earlier panel's decision." *Id.* at 63a. It therefore affirmed the district court's preemption holding.[2]

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[2] Respondents conceded, however, that the district court had incorrectly tolled the statute of limitations and thus misstated the restitution award and incorrectly defined the class. App., *infra*, 63a. The court of appeals thus vacated and remanded the district court's order to decrease the monetary recovery by about $80,000 and to reduce the date range defining the class by about five months. *Ibid.*

C. Shortly after the panel's decision, the Second Circuit reached a contrary conclusion about preemption of New York's similar IOE law. In *Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022), the Second Circuit rejected *Lusnak*'s view "that the TILA amendments somehow reflected Congress's judgment that all escrow accounts … must be subject to [state IOE] laws." *Id.* at 137. And it concluded that because New York's IOE law "would exert control over" a national banking power, it was preempted. *Id.* at 132.

Both Flagstar and the *Cantero* plaintiffs petitioned this Court for certiorari to resolve the conflict. When the Solicitor General weighed in at the Court's invitation, she argued that *Cantero*, *Lusnak*, and the panel's initial decision here all erred in their approach to preemption. In the United States' view, while *Cantero*'s rule was too broad, *Lusnak* and the panel here likewise erred by "fail[ing] to make the practical, degree-of-interference assessment that [Dodd-Frank] Section 25b(b)(1)(B) requires" and in "treating [TILA] Section 1639d as determinative of the preemption question." CVSG Br. at 20, *Flagstar Bank, N.A. v. Kivett*, Nos. 22-349 and 22-529 (U.S. Aug. 30, 2023).

This Court granted certiorari in *Cantero*. After clarifying *Barnett Bank*'s preemption standard in its decision in *Cantero*, the Court granted Flagstar's petition, vacated the panel's ruling, and remanded to the Ninth Circuit for further consideration in light of *Cantero*.

D. On remand, the panel issued a new decision, again affirming the district court's preemption holding—this

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The district court has since done so. Order Modifying Judgment, No. 18-cv-5131 (N.D. Cal. June 3, 2022), ECF No. 227.

time over Judge R. Nelson's dissent. App., *infra*, 1a-50a.[3] Despite this Court's intervening decision in *Cantero*, the panel majority held that it could not depart from *Lusnak* because *Cantero* was not "clearly irreconcilable" with *Lusnak*. *Id.* at 9a. The panel acknowledged that *Lusnak* did not perform *Cantero*'s nuanced comparative analysis or analyze the key precedents *Cantero* identifies. *Id.* at 14a-15a. But the panel majority reasoned that *Cantero* did not make that mode of analysis "the sole method for determining preemption" under the NBA. *Id.* at 18a. And, thus, despite its failure to use *Cantero*'s methodology, "*Lusnak* remains good law." *Ibid.*

Judge Nelson disagreed. As he explained, "*Lusnak* derived from an inapplicable statute a categorical anti-preemption rule that *Cantero* declined to endorse and which is inconsistent with a fortified application of *Cantero*'s reasoning." *Id.* at 20a. Because "*Lusnak* did not apply the comparative analysis required by *Cantero*," he found *Cantero* and *Lusnak* to be "clearly irreconcilable," and *Lusnak* "effectively overruled." *Ibid.*

On the merits of preemption, Judge Nelson further reasoned that *Cantero* dictated a different result. Applying the comparative framework *Cantero* requires, he explained, Section 2954.8(a) interferes with the exercise of national banking powers in a way "more akin to the interference stemming from state laws that th[is] Court has already deemed preempted" and "less analogous to the interference in cases where a state law was not preempted."

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[3] Initially, the panel merely re-issued its unpublished memorandum opinion without any new analysis or meaningful changes to the vacated decision. App., *infra*, 51a-56a. Only after Flagstar petitioned for *en banc* rehearing did the court accept supplemental briefs and hear argument on the effect of this Court's guidance.

App., *infra*, 50a. "That means California's IOE law is preempted." *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's review is warranted to resolve a three-way post-*Cantero* conflict on a question of critical importance to the national banking system. The Ninth Circuit's precedential decision in this case directly conflicts with the precedential decisions of both the First and Second Circuits. The decision below is flatly inconsistent with the mode of analysis *Cantero* prescribes and reaches the wrong result. This Court recognized the importance of the question presented when granting certiorari and providing corrective guidance in *Cantero*. Yet the Ninth Circuit has declined to follow that guidance, and the conflict has only deepened. As everyone seems to accept, this Court's further guidance is essential. And this case presents an ideal vehicle to provide it.

I. The Ninth Circuit's Decision Conflicts with the First and Second Circuits' Decisions.

Following *Cantero*, three courts of appeals have considered whether the NBA preempts state IOE laws and have offered three conflicting answers. The First Circuit applied *Cantero*'s comparative methodology and concluded that Rhode Island's IOE law is not preempted. On remand from this Court, the Second Circuit applied the same methodology but reached the opposite conclusion with respect to New York's IOE law. Meanwhile, the Ninth Circuit on remand refused to follow the instructive methodology that was expressly provided in *Cantero* and found that California's IOE law is not preempted, based on an entirely different approach. This three-way conflict on the regulation of national banks is untenable.

A. The First Circuit analyzed Rhode Island's IOE law in *Conti v. Citizens Bank, N.A.*, *supra*. Rhode Island's law requires banks holding a mortgage escrow account for a mortgaged property in Rhode Island to pay interest "at a rate equal to the rate paid to the mortgagee on its regulator savings account, if offered, and otherwise at a rate not less than the prevailing market rate of interest for regular savings accounts offered by local institutions." R.I. Gen. Laws. § 19-9-2(a). Pre-*Cantero*, the district court found Rhode Island's law was preempted and dismissed the plaintiffs' claims seeking that interest. *Conti*, 157 F.4th at 13. Post-*Cantero*, the First Circuit reversed. *Id.* at 12.

The First Circuit correctly explained that to decide whether a state law is preempted under the NBA, *Cantero* "instruct[s] that courts must make 'a practical assessment of the nature and degree of the interference caused by a state law.'" *Id.* at 15 (citation omitted). And "[t]o do so, *Cantero* directs courts to perform a 'nuanced comparative analysis' of the preemption cases relied on in *Barnett Bank*," specifically identifying "two categories of precedents" to consider. *Id.* (citation omitted). The district court in *Conti* had not "performed the analysis required by *Cantero*," including by "compar[ing] the interference produced by the Rhode Island statute against the interference arising from th[is] Court's seminal banking-preemption precedents." *Id.* at 16. The First Circuit thus rightly determined that it must undertake that analysis in the first instance. *Ibid.*

In performing that analysis, however, the First Circuit gave short shrift to four of those seven "seminal" decisions, deeming them "inapposite." *Id.* at 20. It concluded that because IOE laws are banking-specific, this

Court's decisions on generally applicable laws were of "limited use." *Ibid.* And it found *Barnett Bank* itself and one other precedent "not useful" on the ground that both involved "an express conflict between federal and state law," *id.* at 20, rejecting the bank's argument that Rhode Island's law similarly conflicted with RESPA's extensive regulatory scheme. *Id.* at 20 & n.7.

From the remaining precedents, the First Circuit divined two relevant considerations: "whether the state law was generally consistent with the federal-banking scheme" and "the likely practical effect of the state law's enforcement." *Id.* at 24. The court (oddly) reasoned that Rhode Island's law was generally consistent with the *federal* scheme because several *States* had enacted similar laws and TILA requires compliance with state IOE laws for certain types of mortgages. *Ibid.* And the court faulted Citizens Bank for failing to "develop[] any substantial argument about the practical effects that arise from the enforcement of the Rhode Island statute on the exercise of federal-banking power." *Id.* at 25. The court thus concluded that the bank "failed to satisfy its burden of showing that the Rhode Island statute should be preempted as a matter of law." *Id.* at 28.

B. The Second Circuit's post-remand decision in *Cantero* reached a starkly different result with respect to New York's IOE law. *See Cantero*, 2026 WL 1217467. Consistent with this Court's guidance, the Second Circuit walked through each of the seven key precedents *Cantero* identified to determine whether New York's IOE law was preempted. *See id.* at *2 ("*Barnett Bank* requires us to survey prior Supreme Court cases 'to demarcate when a state law significantly interferes with [a] national bank's exercise of its powers.'") (quoting *Cantero*, 602 U.S. at

215). As compared to the laws in those cases, the Second Circuit found it significant (1) that New York's law does not "merely affect [national banks]" but "affects [a national bank's] exercise of its powers," *id.* at *6 (citation omitted); (2) that it is banking-specific, not a generally applicable law nor the application of a generally applicable rule to banks, *id.* at *7; and (3) that it imposes a limit on that power "more severe" than the interference this Court has previously found impermissible, *id.* at *8. For those reasons, the court concluded that New York's IOE law is more like the laws that this Court found preempted than the laws that survived, "so is preempted too." *Id.* at *9.

In reaching that conclusion, the Second Circuit disagreed with both the Ninth and First Circuits' approaches. As to the Ninth Circuit, the Second Circuit endorsed Judge Nelson's conclusion in dissent that a "state law that alters a national bank's pricing almost by definition interferes more with national bank's powers" than a restriction on advertising that this Court struck down in *Franklin National Bank v. New York*, 347 U.S. 373 (1954). *Cantero*, 2026 WL 1217467, at *8. The Second Circuit also drew the exact opposite inference than *Lusnak* from TILA's limited IOE requirement, reasoning that "Congress's decision to adopt specific [IOE] requirements in TILA" suggests that state laws that apply more broadly "are preempted." *Id* at *7.

The Second Circuit "decline[d] to follow the First Circuit's analysis" for two similar reasons. *Id.* at *9. The court noted that in reaching the contrary preemption conclusion, the First Circuit had "failed to acknowledge the practical reality that a state law restricting the pricing of a bank's product would have a 'material impact ... on banking operations.'" *Ibid.* (quoting *Conti*, 157 F.4th at 23-24).

And it faulted the First Circuit for failing to recognize the implications of RESPA and TILA on the flexibility that federal law affords national banks to set the terms of mortgage escrow accounts within those statutes' limits. *Ibid.* (citing *Conti*, 157 F.4th at 20 and n.7).

C. The decision below is inconsistent with the First and Second Circuits' decisions. Most obviously, the Ninth Circuit's determination that California's IOE law is not preempted cannot be squared with the Second Circuit's decision that New York's law is. Both laws require national banks to pay interest on mortgage escrow accounts at no less than 2%. No one and no court has identified any reason to treat those laws differently, and nothing about the Second Circuit's and Ninth Circuit's reasoning suggests any grounds for distinguishing them.

The Ninth Circuit's decision also conflicts with the First Circuit's reasoning in a critical respect. In the decision below, the Ninth Circuit declined to engaged in a "nuanced comparative analysis" of this Court's precedents, reasoning that "nothing in *Cantero* suggests that the 'nuanced comparative analysis' of the cases cited in *Barnett Bank* … is the sole method for determining preemption." App., *infra*, 18a. For that reason, the Ninth Circuit panel found itself bound by its pre-*Cantero* precedent in *Lusnak*. *Ibid.* But that reasoning is directly contrary to the First Circuit's recognition that *Cantero* requires lower courts to engage in such a comparative analysis and the First Circuit's rejection of the district court's decision for failing to undertake that task. *See Conti*, 157 F.4th at 16.

Without this Court's intervention, this three-way conflict has no reasonable prospect of resolution. There is no reason to expect the First Circuit to revisit its unanimous conclusion in *Conti*. The Ninth Circuit denied a petition

for rehearing *en banc* in this case, even after the conflict with the First Circuit was identified. App, *infra*, 112a-113a. The Second Circuit considered and rejected the analysis of both the First and Ninth Circuits, *see Cantero*, 2026 WL 1217467, at *8-9, and the *Cantero* plaintiffs have declined to seek rehearing *en banc*, opting instead to proceed directly to this Court. The Court's intervention is thus necessary to restore a uniform approach to state regulation of national banks.

II. The Ninth Circuit's Decision Is Doubly Wrong.

The Court's review is also warranted because, as Judge Nelson recognized, the decision below is doubly wrong. The panel majority blatantly misconstrued this Court's direction in *Cantero* about the proper approach to preemption under the NBA and reached the wrong conclusion about preemption of California's IOE law.

A. *Cantero* Requires a Comparative Analysis of State-Banking Laws.

In *Cantero*, this Court explained how to apply the *Barnett Bank* preemption standard that Dodd-Frank adopted. It observed that *Barnett Bank* did not "establish a clear line to demarcate when a state law 'significantly interfere[s] with the national bank's exercise of its powers,'" but instead "analyzed the Court's precedents on that issue." *Cantero*, 602 U.S. at 215 (quoting *Barnett Bank*, 517 U.S. at 33). Because Dodd-Frank codified that approach by name, *Cantero* explained that courts analyzing NBA preemption must "do as *Barnett Bank* did and likewise take account of those prior decisions of this Court and similar precedents." *Id.* at 215-16.

Cantero also identified the key precedents. *Barnett Bank* itself, *Franklin National Bank of Franklin Square*

v. New York, *supra*; *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982); and *First National Bank of San Jose v. California*, 262 U.S. 366 (1923), the Court explained, "illustrate the kinds of state laws that significantly interfere with the exercise of a national bank power and thus are preempted." *Id.* at 217, 220. Conversely, *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869); and *McClellan v. Chipman*, 164 U.S. 347 (1896), reflect "the kinds of state-law interference that are not 'significant' and that are therefore not preempted." *Id.* at 217-19. If a "state law's interference with national bank powers is more akin to the interference in" the first set of cases, it is preempted; if it is more like the interference in the latter set, it is not. *Id.* at 220.

Although the Court did not "draw a bright line" of preemption, *id.* at 221, it left no ambiguity on the analysis that is required. "A court applying that *Barnett Bank* standard," the Court explained, "*must* make a practical assessment of the nature and degree of the interference caused by a state law" in the same manner that *Barnett Bank* did. *Id* at 219-20. (emphasis added). It is "[t]hose precedents" that "furnish content to *Barnett Bank*'s significant-interference test—and therefore also to Dodd-Frank's preemption standard incorporating *Barnett Bank*." *Id* at 219. And it was because the Second Circuit had "not conduct[ed] that kind of nuanced comparative analysis" that the Court vacated and remanded its decision. *Id.* at 220; *see id.* at 221.

The Ninth Circuit thus badly erred in concluding that "nothing in *Cantero* suggests that [a] 'nuanced comparative analysis' of the cases cited in *Barnett Bank* and reviewed in *Cantero* is the sole method for determining

preemption" in this context. App., *infra*, 18a. As both the First and Second Circuits recognized, however, this Court did not merely suggest a nuanced comparative analysis in *Cantero*, it demanded it. *See Cantero*, 2026 WL 1217467, at *2 ("*Barnett Bank* requires us to survey prior Supreme Court cases 'to demarcate when a state law significantly interferes with [a] national bank's powers.'") (quoting 602 U.S. at 215); *Conti*, 157 F.4th at 15 ("*Cantero* directs courts to perform a 'nuanced comparative analysis' of the preemption cases relied on in *Barnett Bank*.").

The Ninth Circuit was not free to disregard this Court's direction in favor of its pre-*Cantero* approach. It is no excuse that the court was "not sure what additional information [it] should glean" from this Court's precedents. App., *infra*, 17a. There is nothing foreign about applying this Court's precedents to new situations, reasoning by analogy. Judge Nelson in dissent and the panels in both *Cantero* and *Conti* understood that task. Although the conflicting conclusions make clear that further guidance from this Court is needed, that need for guidance is not a license for lower courts to simply throw up their hands and take a different course.

B. California's IOE Law is Preempted Under *Cantero*'s Standard.

The Ninth Circuit further erred by reaffirming its ultimate conclusion that state IOE laws are not preempted. Under the comparative analysis *Cantero* requires, California's IOE law is preempted. As Judge Nelson carefully explained, California's attempt to set the financial terms of mortgage escrow accounts interferes with the exercise of national banks' unqualified federal banking power to administer those accounts in a manner more akin to the state laws that were preempted in *Franklin*, *Fidelity*, and

Barnett Bank than the state laws that were not preempted in *Anderson*, *Commonwealth*, and *McClellan*. App., *infra*, 42a-50a (Nelson, J., dissenting). Nothing in the majority's decision undermines that conclusion.

1. Consider this Court's decision in *Franklin*. That case concerned a state-law advertising regulation that *Cantero* identified as "the paradigmatic example of significant interference." 602 U.S. at 216. The New York law "prohibited most banks 'from using the word saving or savings in their advertising or business.'" *Ibid.* (quoting *Franklin*, 347 U.S. at 374). "Importantly," however, "the New York law did not bar national banks from receiving savings deposits, 'or even' from 'advertising that fact.'" *Ibid.* (quoting *Franklin*, 347 U.S. at 378). It simply required that when banks advertised their deposit accounts, they did so without using the term "savings." As this Court explained in *Cantero*, even that seemingly modest limit significantly interfered with the bank's power "to receive savings deposits" because it prevented the bank from "efficiently" advertising those accounts, "'using the commonly understood description which Congress ha[d] specifically selected' to describe their activities." *Ibid.* That was enough to cross the preemptive line.

California's IOE law imposes a far more significant burden on a national bank's exercise of its power to administer mortgage escrow accounts. "The interference stemming from an advertising restriction pales in comparison to a state law that dictates a national bank's pricing of its mortgage products." App., *infra*, 43a (Nelson, J., dissenting). Yet that is exactly what California's law purports to do. A federally chartered bank can offer mortgage escrow accounts only if it pays customers at least 2% interest on escrowed funds—"a rate far higher than what the market

may otherwise demand." *Ibid.* Such a law is no less intrusive than a law instructing a national bank what it must pay on traditional savings accounts.

No sensible reading of *Franklin* would permit such an intrusion on federal banking powers. A "state law that alters a national bank's pricing almost by definition interferes more with the bank's powers than a simple advertising restriction." *Id.* at 44a. If a State cannot remove one word from a bank's options for advertising its savings accounts, it plainly cannot set the core financial terms of an account itself, including by requiring an above-market interest rate. Section 2954.8 prevents national banks from efficiently exercising their mortgage lending powers just as the law in *Franklin* did.

2. Of course, *Cantero* requires considering more than just one of this Court's seminal NBA precedents; but the remaining decisions are no better for California's law. In *Fidelity*, the Court found preempted a California law that limited national banks' ability to include and enforce due-on-sale clauses in their contacts—permitting them only where "reasonably necessary." *Cantero*, 602 U.S. at 216-17 (quoting *Fidelity*, 458 U.S. at 154-55). As the Court explained in *Cantero*, that law impermissibly "interfered with 'the flexibility given' to the savings and loan by federal law." *Id.* at 217 (quoting *Fidelity*, 458 U.S. at 155). And in *Barnett Bank*, the Court held that a state-banking law was preempted when it prevented a national bank from exercising a specific banking power—there, selling insurance—"authorized by federal law." *Id.* at 214.

California's IOE law similarly interferes with the flexibility that federal law affords national banks in determining interest rates on mortgage escrow accounts. Although RESPA and Regulation X regulate those accounts

extensively, federal law does not dictate the interest, if any, that banks must pay. The Second Circuit correctly recognized that omission is meaningful. *See Cantero*, 2026 WL 1217467, at *7. The OCC likewise explained, "in legislating a system of escrow account disclosures and amount limits," RESPA "implicitly recognizes the flexibility banks have in deciding … whether and to what extent to pay interest." 91 Fed. Reg. at 29343. Section 2954.8(a) "undercuts th[at] flexibility" in a manner akin to *Fidelity* and *Barnett Bank*. App., *infra*, 45a (Nelson, J., dissenting).

Conversely, neither *Anderson*, *Commonwealth*, nor *McClellan* involved the sort of intrusive interference in the exercise of federal banking powers presented here. The Kentucky law in *Anderson* required only that banks "turn over abandoned deposits to the State." *Cantero*, 602 U.S. at 217. As this Court recognized, in so doing, the law did nothing more than enforce "an inseparable incident" of a national bank's power to accept deposits—an "obligation to pay" those deposits "to the persons entitled to demand payment according to the law of the state where [the bank] does business." *Anderson*, 321 U.S. at 248-49. What's more, it defined that entitlement based on an escheat principle "as old as the common law itself." *Id.* at 251. RESPA demonstrates that paying interest on escrow accounts is not an "inseparable incident" or ancient principle of mortgage lending powers. It is a new and additional requirement in conflict with federal law.

Finally, *Commonwealth* and *McClellan* both involved insignificant burdens on the exercise of federal banking powers that bear no resemblance to California's law. In *Commonwealth*, the Kentucky law on the collection of a federally authorized tax simply "govern[ed] [banks] in 'their daily course of business,'" just like other "generally

applicable state contract, property, and debt-collection laws." *Cantero*, 602 U.S. at 219 (quoting *Commonwealth*, 76 U.S. at 361-62). It "produced 'no greater interference with the functions of the bank than any other' law governing businesses." *Ibid.* (quoting *Commonwealth*, 76 U.S. at 362-63). Meanwhile, *McClellan* concerned a Massachusetts fraudulent-conveyance law that broadly applied to any transfer of property by any person or entity—not just banks—in cases of insolvency. 164 U.S. at 348-49. California's banking-specific IOE law is nothing like such generally applicable laws that necessarily form the context for the exercise of federal banking powers.

In sum, the precedents that "furnish content to *Barnett Bank*'s significant-interference test—and therefore also to Dodd-Frank's preemption standard incorporating *Barnett Bank*," *Cantero*, 602 U.S. at 219, all demonstrate that California's IOE law cannot survive.

3. Because the majority below refused to apply *Cantero*'s methodology, it offers scant support for a different conclusion. To the contrary, the panel acknowledged that California's IOE law "raises the cost to national banks to use escrow accounts" in a manner that "may discourage them from issuing and servicing loans." App., *infra*, 17a. And it conceded that, for that reason, if a court compared California's IOE law to those at issue in *Barnett Bank* and its precedents it "might reasonably determine" that Section 2954.8 "significantly interferes" with the exercise of federal banking powers. *Ibid.* Despite that concession, the panel majority relied instead on *Lusnak*'s errant reading of TILA Section 1639d. *Id.* at 18a. Section 1639d provides no support for the court's conclusion.

As an initial matter, the premise of the Ninth Circuit's conclusion is questionable because Section 1639d(g)(3)

does not clearly require national banks to comply with state IOE laws for *any* mortgage escrow accounts. It instead requires any creditor—national bank or otherwise—to pay interest on escrow, as "prescribed by applicable State or Federal Law." 15 U.S.C. § 1639d(g)(3). If state IOE laws are preempted with respect to national banks, they cannot apply to national banks—and thus they are not "applicable State … law." 15 U.S.C. § 1639d(g)(3).

But even assuming Section 1639d(g)(3) requires national banks to comply with some state IOE laws, it does so only for certain higher-priced mortgages. *Id.* § 1639d(a)-(b). TILA therefore does not decide the preemption question for mortgages not covered by Section 1639d, as this Court's decision in *Cantero* makes clear. *See* 602 U.S. at 211 n.1 (discussing Section 1639d but recognizing it did not apply to the mortgages at issue).

Moreover, to the extent Section 1639d is relevant to the preemption question at all, it supports preemption. As the Second Circuit explained, the Ninth Circuit's (and now First Circuit's) inference from TILA's limited IOE requirement is exactly backwards. *See Cantero*, 2026 WL 1217467, at *7. Whether TILA ever requires national banks to comply with state IOE laws, the salient point is that TILA, like RESPA, indisputably affords national banks flexibility for setting interest rates on escrow accounts for most mortgages, including respondents'. *See* 15 U.S.C. § 1639d(f)(1)-(2) (allowing escrow accounts, except for higher-priced mortgages, as "mutually agreeable to the parties to the loan" or "at the discretion of the lender or servicer"). Under *Cantero*, *Fidelity*, and *Barnett Bank*, California cannot deprive national banks of that federally conferred flexibility.

III. The Question Presented Is of Significant Importance to the National Banking System.

The proper scope of National Bank Act preemption and the preemption of state IOE laws in particular are important and recurring questions of federal law that warrant this Court's review. The OCC has repeatedly emphasized the "exceptional importance" of the proper interpretation of *Barnett Bank*'s preemption standard for the national banking system. OCC Br. at 13, *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025) (No. 21-15667); *see, e.g.*, OCC Br. at 10-15, *Ill. Bankers Ass'n v. Raoul*, 760 F. Supp. 3d 636 (N.D. Ill. 2024) (No. 24-cv-7307); OCC Br. at 11, *Clark v. Bank of Am., N.A.*, No. 18-cv-3672 (D. Md. Mar. 17, 2020), Dkt. 50; 91 Fed. Reg. at 29351 n.17; National Bank Non-Interest Charges and Fees, 91 Fed. Reg. 22989, 22992 (Apr. 29, 2026). The issue arises frequently in lower courts, as reflected by the three published decisions from three different circuits discussed here, all issued in recent months.

As to state IOE laws specifically, the OCC has explained that the Ninth Circuit's erroneous preemption ruling "carries serious implications for national mortgage lending and the functioning of the multi-trillion-dollar U.S. mortgage market." OCC Br. at 13, *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025). Federally chartered banks use residential mortgage escrow accounts as a vital risk mitigation tool that "benefits both lending institutions and homeowners." U.S. General Accounting Office, Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing at 5. As a matter of economic reality, conditioning a national bank's authority to offer those accounts on a requirement to pay interest (especially at rates exceeding what the bank

typically pays on savings accounts) will have consequences for lenders and consumers. Banks faced with that choice may restrict lending to riskier borrowers or do so only at higher interest rates or on more stringent terms.

Moreover, the First and Ninth Circuits' errors in applying the *Cantero*'s standard will "go beyond state interest-on-escrow laws" and "threaten to confuse and mislead financial institutions, consumers, and lower courts confronting questions regarding whether the National Bank Act preempts a wide range of state laws." OCC Br. at 15, *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025) (No. 21-15667). If States can dictate the core financial terms of a national bank's mortgage escrow accounts, there is no apparent reason why they cannot set the core financial terms for any number of banking products—savings accounts, checking accounts, or the mortgages themselves. At a minimum, the confusion surrounding the scope of state authority to affect core banking activities leaves national banks like Flagstar in an untenable position as it attempts to navigate the patchwork of state laws to its national banking business.

IV. This Case Is an Ideal Vehicle To Resolve the Question Presented.

This case presents an ideal vehicle for resolving the question presented and the scope of NBA preemption of state IOE laws. The judgment is final. It imposes money damages and an ongoing injunction for Flagstar to comply with Section 2954.8(a). App., *infra*, 109a. The Ninth Circuit's affirmance of that judgment rests exclusively on the court's conclusion that "the NBA does not preempt California Civil Code § 2954.8(a)." *Id.* at 18a-19a (citation omitted). The preemptive scope of the NBA is thus the only issue presented and the only grounds on which to

affirm or reverse the court of appeals' decision. There is no danger that the Court's consideration would be frustrated by further proceedings in the lower court or obviated by further developments. Finally, the Solicitor General has already vetted the case for any potential obstacles to review and, despite disagreeing to some extent with Flagstar (and the OCC) on the merits, found no reason the Court could not use this case to resolve the question presented. Indeed, it affirmatively urged the Court, if it granted review, to do so in this case, not *Cantero*.

Contrary to Citizen Bank's and the *Cantero* plaintiffs' suggestion, it makes no difference that, at the outset of this litigation, Flagstar was a federal savings bank, rather than a national bank. *Conti* Pet. Reh'g at 10, No. 25-1004; *Cantero* Pet. at 26. We have been through this before. As both petitioners recognize, Dodd-Frank's preemption standard applies to all federally chartered banks, including savings banks. *See* 12 U.S.C. § 25b(a)(1), (b)(1)(B) (defining "national banks" to include "any bank organized under the laws of the United States" and applying *Barnett Bank* preemption standard to all national banks). Although Dodd-Frank preserves the preemption standard previously applicable to savings banks under the Home Owners Loan Act, 12 U.S.C. § 1461 *et seq.*, for loans "entered into on or before July 21, 2010," 12 U.S.C. § 5553, the class definition here excludes borrowers "whose mortgage loans originated *on or before July 21, 2010*" for exactly that reason. App., *infra*, 69a (emphasis added).

The other petitioners nevertheless suggest there could be a question about class members whose mortgages were originated between July 21, 2010, and Dodd-Frank's effective date in July 2011. So we explain again: there is no such question. Dodd-Frank's "effective date"

governs only when the law is *in effect*, not to which mortgage escrow accounts it applies. *See* 12 U.S.C. § 1465(a) (providing that "[a]ny" preemption determination for federal savings banks after that date "shall be made" under Section 25b(b)(1)(B)). The only exception is for loans like those already carved out of the class. And the claims in this seek damages for the failure to pay interest only after Dodd-Frank's effective date. That is presumably why neither the actual parties in this case nor the lower courts have suggested that the *Barnett Bank* standard does not apply, even on remand from this Court after the *Cantero* plaintiffs argued it in their last petition. Even if the argument had any merit, it is far too late to raise it now.

In any event, the named plaintiffs' mortgages originated after Dodd-Frank's effective date—as did presumably the majority of the mortgages in the class, which includes all California mortgages serviced by Flagstar for 2014 to 2019 (with the exception above and anyone who would be owed less than $1 in IOE). The judgment imposes damages and prospective relief on Flagstar (a current national bank) based on those loans. That award and that injunction cannot stand if California's IOE law is preempted under Section 25b(b)(1)(B). Thus, even if the Court were inclined to entertain an argument only ever raised by non-parties in support of their own cert. petitions, it would not "prevent the Court from answering the question presented as applied to the named-plaintiff respondents." *Kivett* CVSG Br. at 23.

The other petitioners also argue that this case is a poor vehicle because the Ninth Circuit failed to apply *Cantero*'s comparative approach. But the Ninth Circuit's disregard for *Cantero*'s clear mandate is added reason for the Court's review in this case, not the others. The Court has

all the materials necessary to correct that error and resolve the preemption question. Judge Nelson's dissent provides a comprehensive and careful analysis of California's law under the proper standard. And in the process of deciding this case, the Court is perfectly capable of considering the full range of post-*Cantero* cases in the courts of appeals and their different approaches to resolving the question presented.

Finally, the *Cantero* plaintiffs (represented by the same counsel as the *Conti* plaintiffs) make the curious suggestion that *Cantero* is a superior vehicle because, in their view, it would provide the Court the best vehicle for simply vacating the Second Circuit's decision, "as it did before," without determining the preemption question. *Cantero* Pet. at 27. That suggestion makes no sense. The national banking system needs clarity. Two courts of appeals and Judge Nelson have taken up the question presented in light of this Court's guidance. The Court should provide further clarity now by applying that standard and resolving the ultimate question.

But whatever it does, the Court should not entertain a request to vacate and remand again in *Cantero* (or in *Conti*). Absent direct review, the Ninth Circuit has shown it is unlikely to follow that sort of interpretive guidance. The best way to avoid the prospect of yet another round of appeals and petitions—and prolonged uncertainty for the national banking system—is to directly review and correct the Ninth Circuit's approach.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2026

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 2, 2025)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM KIVETT; BERNARD BRAVO;
LISA BRAVO,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

No. 21-15667

D.C. No. 3:18-cv-05131-WHA

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

On Remand from the United State Supreme Court

March 18, 2025, Argued and Submitted
San Francisco, California

Before: Jay S. Bybee and Ryan D. Nelson, Circuit Judges, and Susan R. Bolton,* District Judge.

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*The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

Appendix A

Opinion by Judge Bybee
Dissent by Judge R. Nelson.

SUMMARY[**]

National Bank Act / Preemption

On remand from the United States Supreme Court, the panel (1) affirmed the district court's holding that the National Bank Act (NBA) did not preempt a class of borrowers' claim that Flagstar Bank, FSB, failed to pay interest on their escrow accounts as required by California Civil Code § 2954.8(a); and (2) vacated and remanded the district court's judgment and class certification order for the district court to modify the class definition date and the judgment amount.

In *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1188 (9th Cir. 2018), this court held that California's interest-on-escrow rule was not preempted by the NBA. The panel held here that, under the standards described in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), it does not have the authority to overrule *Lusnak* in light of the Supreme Court's intervening decision in *Cantero v. Bank of America, N.A.*, 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024), because *Cantero* is not clearly irreconcilable either with the reasoning or the result in *Lusnak*.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge R. Nelson dissented because he viewed *Cantero* as clearly irreconcilable with *Lusnak*, since *Lusnak* did not apply the comparative analysis required by *Cantero*. As an intermediate court, this court must follow Supreme Court precedent, and *Lusnak* has been effectively overruled by *Cantero*. While *Miller v. Gammie* constrains a three-judge panel's authority to overrule circuit precedent, it does not allow the panel to apply precedent inconsistent in theory or reasoning with intervening Supreme Court precedent. Applying *Cantero*, the NBA preempts California's interest-on-escrow law.

OPINION

BYBEE, Circuit Judge:

In *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1188 (9th Cir. 2018), we held that California's interest-on-escrow rule was not preempted by the National Bank Act. The issue in this case is whether, under the standards described in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), this panel has the authority to overrule *Lusnak* in light of the Supreme Court's intervening decision in *Cantero v. Bank of America, N.A.*, 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). We hold that we do not.

I. BACKGROUND

Adopted in 1864, the National Bank Act (NBA) "establish[ed] the system of national banking still in place today. . . . The Act vested in nationally chartered banks

enumerated powers and 'all such incidental powers as shall be necessary to carry on the business of banking.'" *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10-11, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007) (quoting 12 U.S.C. § 24 Seventh). Although "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA," the Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Id.* at 11 (citations omitted). In *Barnett Bank of Marion County, N.A. v. Nelson*, the Court stated that state laws are preempted where they "forbid, or . . . impair significantly, the exercise of a power that Congress explicitly granted." 517 U.S. 25, 33, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996). At the same time, the Court adverted that "this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.*

In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress clarified the state law preemption standards for national banks and expressly incorporated *Barnett Bank* in the statute. As relevant here, the statute provides:

> State consumer financial laws are preempted, only if—
>
> . . .

> (B) In accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, . . . the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers . . . .

12 U.S.C. § 25b(b)(1).

Since 1976, "[e]very financial institution" in California that makes certain home mortgage loans and sets up an escrow account "shall pay interest on the amount so held to the borrower . . . of at least 2 percent simple interest per annum." Cal. Civ. Code § 2954.8(a). In 2018, we held that the NBA does not preempt § 2954.8(a). *Lusnak*, 883 F.3d at 1188. We acknowledged that "Dodd-Frank significantly altered the regulatory framework governing financial institutions," but we found that "with respect to NBA preemption, it merely codified the existing standard established in *Barnett Bank*[.]" *Id.* Applying *Barnett Bank*, we held that § 2954.8(a) "does not prevent or significantly interfere with Bank of America's exercise of its powers." *Id.* at 1194. We held open the possibility, however, that if a state set "punitively high rates," a bank could bring a successful claim that the rate "prevent[ed] or significantly interfere[d] with a bank's ability to engage in the business of banking." *Id.* at 1195 n.7.

In this case, William Kivett and Bernard and Lisa Bravo represent a class of borrowers for whom Flagstar maintained escrow accounts for payment of property

taxes and insurance premiums. Flagstar acknowledged that it did not pay interest on any escrow accounts until 2017—when it began paying interest on subserviced escrow accounts only—as required by California Civil Code § 2954.8(a). These accounts did not include the class. Flagstar took the position that the NBA preempted § 2954.8(a) and, because the California law was invalid, Flagstar was not required to pay interest on funds held in escrow accounts. Relying on our decision in *Lusnak*, the district court granted summary judgment in favor of the plaintiffs and ordered Flagstar to pay the class $8 million in restitution, plus prejudgment interest. *Kivett v. Flagstar Bank, FSB*, 506 F. Supp. 3d 749, 754, 762, 767-68 (N.D. Cal. 2020).

Flagstar appealed, and we affirmed, concluding that *Lusnak* foreclosed Flagstar's preemption argument. *Kivett v. Flagstar Bank, FSB*, No. 21-15667, 2022 U.S. App. LEXIS 13347, 2022 WL 1553266, at *1 (9th Cir. May 17, 2022). We rejected Flagstar's invitation to overrule *Lusnak* as wrongly decided. *Id.* But because the district court incorrectly tolled the statute of limitations and misstated the award, we remanded to the district court to modify its order. 2022 U.S. App. LEXIS 13347, [WL] at *2.

Meanwhile, a similar challenge to New York's interest-on-escrow law was making its way to the Second Circuit. Similar to California, New York requires banks to pay interest on escrow of "not less than two per centum per year . . . or a rate prescribed by the superintendent of financial services[.]" N.Y. Gen. Oblig. L. § 5-601. In *Cantero v. Bank of America, N.A.*, the Second Circuit

reasoned that it was "the nature of an invasion into a national bank's operations—not the magnitude of its effects—that determines whether a state law purports to exercise control over a federally granted banking power and is thus preempted." 49 F.4th 121, 131 (2d Cir. 2022), *vacated and remanded by* 602 U.S. 205, 220-21, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). Accordingly, "[t]he issue is not whether [New York's] rate of 2% is so high that it undermines the use of such accounts, or . . . it substantially impacts national banks' competitiveness. The power to set minimum rates is the 'power to control,' and [that] is the 'power to destroy.'" *Id.* at 134-35 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819)). The Second Circuit held that the New York law was preempted. *Id.* at 125.

Both the *Cantero* plaintiffs and Flagstar petitioned the Supreme Court for a writ of certiorari. The Court granted certiorari in *Cantero* and rejected the Second Circuit's preemption approach, holding that the Second Circuit "did not analyze preemption in a manner consistent with [the] Dodd-Frank [Act] and *Barnett Bank*[.]" *Cantero*, 602 U.S. at 221. The Court held that the Second Circuit had employed "a categorical test that would preempt virtually all state laws that regulate national banks[.]" *Id.* at 220-21. The Court commented that the parties might wish for a "clearer preemption line one way or the other. But . . . *Barnett Bank* did not draw a bright line." *Id.* at 221. Rather than deciding the preemption question, the Court remanded to the Second Circuit to conduct a "nuanced comparative analysis" of the Court's prior preemption cases and "make a practical assessment of

the nature and degree of the interference caused by [the] state law." *Id.* at 219-20.

The Supreme Court then granted Flagstar's petition, vacated our judgment, and remanded "for further consideration in light of *Cantero*[.]" *Flagstar Bank, N.A. v. Kivett*, 144 S. Ct. 2628, 219 L. Ed. 2d 1266 (2024). In a revised memorandum disposition, we again stated that in *Lusnak* "[w]e properly applied the test for preemption from *Barnett Bank*" and we observed that "the Supreme Court's decision in *Cantero* suggests that *Lusknak* was correctly decided[.]" *Kivett v. Flagstar Bank FSB*, No. 21-15667, 2024 U.S. App. LEXIS 21222, 2024 WL 3901188, at *2 (9th Cir. Aug. 22, 2024). We concluded, in any event, that we could not overrule *Lusnak* unless it was "clearly irreconcilable with the reasoning or theory of intervening higher authority." *Id.* (quoting *Miller*, 335 F.3d at 893). We thus reaffirmed the district court's decision. *Id.* (citation omitted).

Flagstar filed a petition for panel rehearing, which we granted so that we could consider "whether California Civil Code § 2954.8(a) is preempted by the National Bank Act under the standard and methodology described in *Cantero*[.]" *Kivett v. Flagstar Bank FSB*, No. 21-15667, 2024 U.S. App. LEXIS 32639, 2024 WL 5206133, at *1 (9th Cir. Dec. 24, 2024). We asked the parties for further briefing and heard oral argument.

II. STANDARD OF REVIEW

"We review *de novo* the district court's decision on cross motions for summary judgment." *Csutoras v.*

Paradise High Sch., 12 F.4th 960, 965 (9th Cir. 2021). "[V]iewing the evidence in the light most favorable to the nonmoving party," we consider "whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (citation omitted). We review *de novo* questions of statutory interpretation and preemption. *McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 887 (9th Cir. 2020) (citation omitted).

III. DISCUSSION

This case raises two separate questions: First, whether our decision in *Lusnak* is so "clearly irreconcilable" with the Supreme Court's "theory or reasoning" in *Cantero* that it has been "effectively overruled" and is no longer binding on this panel. *Miller*, 335 F.3d at 899-90. Second, if so, whether § 2954.8(b) is preempted under the standards described in 12 U.S.C. § 25b(b)(1)(B). We conclude that *Cantero* is not clearly irreconcilable either with the reasoning or the result in *Lusnak*, so we decline to reach the second question. We do not hold that *Lusnak* was correctly decided, only that we have no authority to overrule it. Correction in this court, if any is warranted, is only appropriate through our en banc procedures.

A. *The* Miller *Rule*

Miller v. Gammie is our en banc decision providing the standards under which a three-judge panel may overrule a prior circuit decision. In that decision, we emphasized that as an intermediate appellate court "[a] goal of our circuit's

decisions, including panel and en banc decisions, must be to preserve the consistency of circuit law." *Miller*, 335 F.3d at 900. Our starting point is the general principle that a three-judge panel may not overrule a prior court decision. Nevertheless, we have acknowledged the reality that consistency in our court decisions "must not be pursued at the expense of creating an inconsistency between our circuit decisions and the reasoning of state or federal authority embodied in a decision of a court of last resort." *Id.* Just as we are bound by our own decisions, we are also bound by the decisions of the Supreme Court (or a state supreme court on an issue of state law) and our need for consistency in our own decisions must sometimes yield to the reality that a decision has become untenable because of the "holding[] . . . [or] 'mode of analysis'" of the higher court. *Id.* (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)). In *Miller*, we decided that "issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.*

Since *Miller*, we have added to our understanding of what constitutes "clear irreconcilability." The requirement is a "high standard." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013). The presumption is against overruling our prior decision: "if we can apply our precedent consistently with that of the higher authority, we must do so." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019). "It is not enough for there to be 'some tension' between the intervening higher authority

and prior circuit precedent or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (first quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140-41 (9th Cir. 2012); then quoting *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011)). Even if a Supreme Court decision "contain[s] language that might persuade us to decide [the prior case] differently if presented to us today[,] . . . the fact that we might decide a case differently than a prior panel is not sufficient grounds for deeming the case overruled. Nothing short of 'clear irreconcilability' will do." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073-74 (9th Cir. 2018) (citations omitted).

B. *What Did* Cantero *Hold*?

The Supreme Court presumably took *Cantero* to resolve a circuit split between the Second Circuit's decision in *Cantero* and our decision in *Lusnak*. It did not resolve that split. Instead, the Supreme Court disapproved of the Second Circuit's "categorical test that would preempt virtually all state laws that regulate national banks[.]" *Cantero*, 602 U.S. at 220-21. That is the Court's holding—that there is no categorical test for determining when a state banking regulation is preempted. The Court held that the *Barnett Bank* standard—which was explicitly incorporated into the Dodd-Frank revisions to 12 U.S.C. § 25b—meant that "some (but not all) non-discriminatory state laws that regulate national banks are preempted." *Id.* at 221. "*Barnett Bank* did not draw a bright line," but "navigate[d] th[e] Court's prior bank preemption cases." *Id.* What *Barnett Bank* requires is "a practical assessment

of the nature and decree of the interference caused by a state law," *id.* at 219-20 , a "nuanced comparative analysis" of the Court's prior cases, *id.* at 220, "based on the text and structure of the laws, comparison to other precedents, and common sense," *id.* at 220 n.3.

What the Court did, without reaching its own conclusion whether interest-on-escrow laws are preempted, was to review how *Barnett Bank* addressed six of the Court's bank-preemption cases issued between 1870 and 1982. Three of those cases—*Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 74 S. Ct. 550, 98 L. Ed. 767 (1954); and *First National Bank of San Jose v. California*, 262 U.S. 366, 43 S. Ct. 602, 67 L. Ed. 1030 (1923)—held that the state regulation was preempted. The other three cases—*Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692 (1944); *McClellan v. Chipman*, 164 U.S. 347, 17 S. Ct. 85, 41 L. Ed. 461 (1896); and *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 19 L. Ed. 701 (1870)—held that the state regulation was not preempted. The Court then advised:

> If the state law's interference with national bank powers is more akin to the interference in cases like *Franklin, Fidelity, First National Bank of San Jose*, and *Barnett Bank* itself, then the state law is preempted. If the state law's interference with national bank powers is more akin to the interference in cases like *Anderson, National Bank v. Commonwealth*,

> and *McClellan*, then the state law is not preempted.

Cantero, 602 U.S. at 220.

Because *Cantero* did not decide whether the NBA preempts state interest-on-escrow laws, the result is not inconsistent with *Lusnak*'s judgment. Nor is *Cantero*'s holding—that the Second Circuit erred in applying a categorial test for preemption—inconsistent with *Lusnak*. Had the *Lusnak* panel adopted a categorical test that "would preempt virtually no non-discriminatory state laws that apply to both state and national banks," *id.* at 221, we would conclude that *Lusnak* is clearly irreconcilable with *Cantero*. But we did not apply anything close to a categorical test, and we left open the possibility for a future as-applied challenge to California's interest-on-escrow rule. *Lusnak*, 883 F.3d at 1195 n.7.

Nevertheless, in *Miller*, we emphasized that it was not only results, but "the theory or reasoning"—the Court's "explications of the governing rules of law"—that count. *Miller*, 335 F.3d at 900 (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (Kennedy, J., concurring in part and dissenting in part)). That will require a closer comparison of *Barnett Bank* and the preemption cases cited by the Court and our methodology in *Lusnak*.

C. *What Did We Do in* Lusnak?

We will start with some observations about how we proceeded in *Lusnak*. First, we identified the "central question" in the case as "whether the NBA preempts California Civil Code § 2954.8(a)." *Lusnak*, 883 F.3d at 1190. Second, we reviewed briefly the background of the NBA and the changes brought about by Dodd-Frank in 2010. We quoted the NBA's preemption provision, 12 U.S.C. § 25b(b)(1)(B), and noted that although "there is no presumption against preemption," the burden of proof rested with the bank challenging the statute. *Id.* at 1191. Third, we discussed *Barnett Bank* in some detail, both for its influence on Dodd-Frank, *id.* at 1191-94 and for its substantive rule of preemption, *id.* at 1194-95.

Fourth, and perhaps most important for the issue now before us, although we addressed *Barnett Bank*, we did not cite or discuss the six preemption cases discussed in *Barnett Bank* and recounted in *Cantero*. We did, however, consider whether the interest-on-escrow rule "prevent[ed] or significantly interfere[d] with Bank of America's exercise of its powers." *Id.* at 1194. One reason we concluded that § 2954.8(a) did not do so was because in Dodd-Frank, Congress amended the Truth in Lending Act (TILA), to require interest-on-escrow in certain accounts "[i]f prescribed by applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). We accepted this provision as "express[ing] Congress's view that [interest-on-escrow] laws would not necessarily prevent or significantly interfere with a national bank's operations." *Lusnak*, 883 F.3d at 1194-95. We found that our reading of § 1639d was

reinforced by the Dodd-Frank legislative history which noted that the new provision would require servicers to "'mak[e] interest payments on the escrow account if required under [state or federal] laws.'" *Id.* at 1196 (quoting H.R. Rep. No. 111-94, at 91). "This passage shows Congress's view that creditors, including large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers." *Id.*

D. *Is* Lusnak *"Clearly Irreconcilable" with* Cantero?

Is *Cantero*'s methodology clearly irreconcilable with our methodology in *Lusnak*? We think not. Two points are critical here. First, *Cantero* admonishes courts to consider *Barnett Bank* and the six cases that *Barnett Bank* cited. We will not review all of those cases here, because the Court reviewed them carefully in *Cantero*. 602 U.S. at 214-19. We will review the two cases that we think most applicable to this case. The first is *Franklin National*, which presents the best case for preemption. In that case, which *Cantero* described as the "paradigmatic example of significant interference," *id.* at 216, the state law at issue prohibited commercial banks "from using the word 'saving' or 'savings' in their advertising or business," *Franklin National*, 347 U.S. at 374. The state law did not prevent national banks from taking savings deposits or advertising that they did so—national banks just could not use the word "savings" in their advertising. *Id.* at 378. Federal law, in contrast, provided that national banks could receive savings deposits "without qualification or limitation" and that national banks possessed "all

such incidental powers as shall be necessary to carry on the business of banking[.]" *Id.* at 375-76. The Court held that New York's restriction on the use of the word "savings"—a word that "aptly describe[d] . . . the type of business carried on by these national banks"—created a "clear conflict" between state and federal law. *Id.* at 378. Accordingly, federal law preempted the state law. *Id.* at 378-79.

The second case is *Anderson National Bank*, which *Cantero* called "the primary example of a case where state law was not preempted." *Cantero*, 602 U.S. at 217. *Anderson* involved a Kentucky law that permitted Kentucky to confiscate abandoned bank deposits. *Anderson*, 321 U.S. at 236. The Court had previously held in *First National Bank of San Jose*, that a California law that authorized California to claim bank deposits that customers left unclaimed for more than 20 years interfered with the national bank's powers and success, so federal law preempted the state law. 262 U.S. at 370. The Court had reasoned in *First National Bank of San Jose* that "[t]he success of almost all commercial banks depends upon their ability to obtain loans from depositors, and [banks] might well hesitate to subject their funds to possible confiscation." *Id.* But unlike the California law, the Kentucky law in *Anderson* required the state to produce proof that seized accounts had been abandoned. *Anderson*, 321 U.S. at 250. The Court reasoned that "the escheat or appropriation by the state of property in fact abandoned or without an owner is . . . as old as the common law itself" and would not "deter [bank customers] from placing their funds in national banks." *Id.* at 251-52. The

law did "not discriminate against national banks," *id.* at 247, and "the mere fact that the depositor's account is in a national bank" and was subject to Kentucky law did "[not] impose an undue burden on the performance of the banks' functions," *id.* at 248; *see id.* at 252 ("[W]e can perceive . . . no unlawful encroachment on the rights and privileges of national banks."). The Court concluded that Kentucky's law was not preempted.

We are not sure what additional information we should glean from these cases. Neither case seems particularly applicable to the interest-on-escrow law. As in *Franklin National*, we recognize that national banks possess "all such incidental powers as shall be necessary to carry on the business of banking," and that should include the power to create escrow accounts. 347 U.S. at 376. The interest-on-escrow accounts raises the cost to national banks to use escrow accounts and may discourage them from issuing and servicing loans. That certainly "interferes" with the banks' unfettered exercise of their statutory powers, and a court might reasonably determine that it "significantly interferes" and, for that reason, is preempted under *Barnett Bank*. On the other hand, the interest-on-escrow rule is a rule of general application in California, applying equally to state and federal banks, and "state laws c[an] apply to national banks as long as the state laws d[o] not 'in any way impai[r] the efficiency of national banks or frustrate[e] the purpose for which they were created.'" *Cantero*, 602 U.S. at 219 (quoting *McClellan*, 164 U.S. at 358). A court might reasonably conclude that such a general rule is not preempted because *Barnett Bank* ruled that "some (but not all) non-discriminatory state laws that regulate national banks are preempted." *Id.* at 221.

This leaves us in equipoise. Neither line of cases seems to compel the result here. Which leads to our second point: *Lusnak* relied on other tools of statutory interpretation and nothing in *Cantero* suggests that the "nuanced comparative analysis," *id.* at 220, of the cases cited in *Barnett Bank* and reviewed in *Cantero* is the sole method for determining preemption. Indeed, *Cantero* noted that there were other issues that the lower courts "may address as appropriate on remand." *Id.* at 221 n.4. More importantly, *Barnett Bank* applied "ordinary legal principles of [preemption]," which included considering "the Federal statute's background or history." *Barnett Bank*, 517 U.S. at 37. Nothing in *Cantero* casts doubt on our power to use the full array of interpretive tools in preemption analysis.

We do not think that *Cantero* has prescribed a mode of analysis that is clearly irreconcilable with what we did in *Lusnak*. That means that we have no warrant as a three-judge panel to declare *Lusnak* overruled and decide the question of California's interest-on-escrow rule anew. In reaching this conclusion, we hold only that *Lusnak* remains good law. Whether we would have reached the same conclusion is irrelevant. Until an en banc court or the Supreme Court tells us otherwise, we are bound by our prior decision.

IV. CONCLUSION

Because *Lusnak* is not clearly irreconcilable with *Cantero*, we cannot overrule it. *Lusnak* controls this case, and under *Lusnak*, "the NBA does not preempt

California Civil Code § 2954.8(a)." 883 F.3d at 1197. The district court did not err in granting summary judgment for the plaintiffs, except that, as we previously concluded, it incorrectly tolled the statute of limitations and therefore misstated the award. Accordingly, we **AFFIRM** the district court's preemption holding. We **VACATE** and **REMAND** the judgment and class certification order for the district court to modify the class definition date from April 18, 2014, to August 22, 2014, and the judgment amount from $9,262,769.24 to $9,180,580.15.

R. NELSON, Circuit Judge, dissenting:

This was at one point a straightforward case. In *Lusnak v. Bank of America, N.A.*, we held that federal law does not preempt California Civil Code § 2954.8(a), which requires financial institutions to pay at least 2% interest annually on certain mortgage escrow accounts. 883 F.3d 1185, 1194 (9th Cir. 2018). So when Flagstar Bank argued that California's law is preempted as to federally chartered banks, we rejected its argument as foreclosed by our precedent. *Kivett v. Flagstar Bank, FSB* (*Kivett I*), No. 21-15667, 2022 U.S. App. LEXIS 13347, 2022 WL 1553266, at *1 (9th Cir. May 17, 2022).

Since then, the landscape has changed. Last year, in *Cantero v. Bank of America, N.A.*, the Supreme Court clarified the standard for federal preemption of state banking laws. 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). Under *Cantero*, a state law significantly

interferes with national banking powers, and is thus preempted, if a "nuanced comparative analysis" of the Supreme Court's precedents shows that the law interferes like other laws that the Court has considered preempted. *Id.* at 220. By contrast, if the state law's interference is more like the interference from laws that the Court has upheld, the state law is not preempted. *Id.*

After rehearing, I view *Cantero* as "clearly irreconcilable" with *Lusnak*, since *Lusnak* did not apply the comparative analysis required by *Cantero*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Instead, *Lusnak* derived from an inapplicable statute a categorical anti-preemption rule that *Cantero* declined to endorse and which is inconsistent with a fortified application of *Cantero*'s reasoning. As an intermediate court, we must follow Supreme Court precedent. *Lusnak* has therefore been "effectively overruled." *Id.* While *Miller v. Gammie* constrains a three-judge panel's authority to overrule circuit precedent, it does not allow us to apply precedent inconsistent in theory or reasoning with intervening Supreme Court precedent.

Setting *Miller v. Gammie* aside, *Lusnak* was wrongly decided. Under *Cantero*'s comparative framework, California's law is preempted: its interference with national banking powers is "more akin" to the interference stemming from state laws that the Court has already deemed preempted. *Cantero*, 602 U.S. at 220. And its interference is less analogous to the interference in cases where a state law was not preempted. *Id.* The majority does not conclude otherwise. I respectfully dissent.

Appendix A

I

A

Two centuries ago, the Supreme Court famously held in *McCulloch v. Maryland* that federal law supersedes state law in matters involving the national banking system. 17 U.S. (4 Wheat.) 316, 430-31, 4 L. Ed. 579 (1819); *see Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007). When Maryland levied a tax on "all banks or branches thereof" not "chartered by the [state] legislature," James McCulloch, a cashier at the federally chartered Second Bank of the United States, did not pay. 17 U.S. at 318-19. Chief Justice Marshall wrote that Maryland could not tax the federal bank, noting the "plain repugnance" in giving state governments a "power to control the constitutional measures" of the federal government. *Id.* at 431. "[T]he power to tax," after all, "involves the power to destroy." *Id.*

Though the federal bank in *McCulloch* no longer exists, the United States still "maintains a dual system of banking, made up of parallel federal and state banking systems" that "co-exist and compete." *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 209-10, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). In 1863, Congress enacted the National Bank Act (NBA), which created today's uniform national banking system. Under that system, privately owned banks may choose a federal or state charter. Banks with federal charters—so-called "national" banks—are governed mainly by federal law, while state-chartered banks are subject to additional state regulation. For national banks,

the NBA confers certain enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh.

In *Barnett Bank of Marion County, N.A. v. Nelson*, the Supreme Court explained that the NBA's grants of authority, both enumerated and incidental, are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." 517 U.S. 25, 32, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996). As the Court explained, "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. So while a "presumption against federal preemption of state law" sometimes applies, that principle "is inapplicable to federal banking regulation." *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008) (quotation omitted); *see Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 554-55, 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009) (Thomas, J., concurring in part and dissenting in part).

Still, there is some room for state regulation of national banks. In *Barnett Bank*, the Court held that states may regulate national banks where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. For instance, national banks are not exempt from "state laws of general application . . . to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters*, 550 U.S. at 11. But that is the exception, not the rule. When a state law "significantly impair[s] the exercise of authority, enumerated or incidental under the NBA," it "must give way." *Id.* at 12 (citing *Barnett Bank*, 517 U.S. at 32-34).

Barnett Bank applied its significant-interference test to a Florida law that prohibited national banks from selling insurance in small towns. To determine whether Florida's insurance law was preempted, the Court looked at prior cases where a state law was preempted, as well as some where it was not. 517 U.S. at 32-37. For example, the Court pointed to *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 377-78, 74 S. Ct. 550, 98 L. Ed. 767 (1954), which held that a New York law forbidding national banks from using the word "savings" in advertising significantly interfered with the national bank's ability to advertise efficiently. *Id.* at 33. In part because New York's "quite similar" law interfered with national banking powers in a manner akin to Florida's insurance law, the Florida law was preempted. *Id.*

Besides analyzing other pro-preemption cases, the *Barnett Bank* Court addressed cases where the state-law interference was not significant. *Id.* at 33-34. It cited, for example, *Anderson National Bank v. Luckett*, 321 U.S. 233, 252, 64 S. Ct. 599, 88 L. Ed. 692 (1944), where a Kentucky statute governing abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks." *Id.* at 33 (quoting *Anderson*, 321 U.S. at 247-52). In the end, though, Florida's insurance law more significantly interfered with national banking powers than the laws in those other decisions.

The takeaway from *Barnett Bank* is simple: there is no one-size-fits-all approach for deciding when a state law "significantly interfere[s] with the national bank's exercise of its powers." *Id.* Courts must instead look to the laws in

prior bank preemption precedents, comparing the nature and degree of interference caused by those laws with the state regulation under review.

In 2010, Congress codified *Barnett Bank*'s comparative analysis in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Today, a state law is preempted if—and "only if"—it "prevents or significantly interferes with the exercise by the national bank of its powers" "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996)." 12 U.S.C. § 25b(b)(1)(B). [1]

B

Among the NBA's enumerated powers is the authority to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate"—put simply, to administer home mortgage loans. 12 U.S.C. § 371(a); *see also* 12 C.F.R. § 34.3(a). Incidental to that authority, national banks can provide and service escrow accounts to aid in home mortgage lending. Office of the Comptroller of the Currency (OCC) Inter. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005).

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1. Dodd-Frank also permits preemption when a state law would have a discriminatory effect on national banks, or the state law is preempted by a federal statute outside of "title 62 of the Revised Statutes." 12 U.S.C. § 25b(b)(1)(A), (C). Neither provision applies here.

Mortgage escrow accounts are an important tool for lenders and borrowers alike. *See Cantero*, 602 U.S. at 210-11. Borrowers make installment payments into escrow, which lenders then use to pay property taxes, insurance premiums, and other charges on the borrower's behalf. This simplifies the budgeting process for borrowers and mitigates risk for lenders, who can avoid tax liens and lapses in insurance coverage on the property. For these reasons, mortgage escrow accounts have taken hold in the American residential mortgage market, with most loan originations including an escrow account. And several federal agencies, like the Department of Agriculture's Rural Housing Service, require escrow accounts for government-sponsored housing programs. *See* 7 C.F.R. § 3555.252(b)(1).

Lenders will sometimes pay interest to borrowers on the balances of their mortgage escrow accounts. That remains true even though the federal statute that regulates mortgage escrow accounts—the Real Estate Settlement Procedures Act (RESPA)—does not require national banks to pay interest on funds held in escrow. Congress has considered such a requirement three times—and has rejected it each time. *See* H.R. 27, 103d Cong. (1993); H.R. 3542, 102d Cong. (1991); Gov't Accountability Off., *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* (1973), https://perma.cc/W4WQ-JU7J.

There is one limited exception, however. Under § 1639d of the Truth in Lending Act (TILA), national banks must establish escrow accounts for certain high-priced

mortgages. *See* 15 U.S.C. § 1639d(a)-(b). And contrary to RESPA, a lender who maintains a TILA account must pay interest on the funds held in escrow "[i]f prescribed by applicable State or Federal law," "in the manner as prescribed by that applicable State or Federal law." *Id.* § 1639d(g)(3). This ensures that borrowers with weak credit receive the benefits that escrow accounts provide.

Apart from federal law, the states administer their own web of interest-on-escrow (IOE) laws. These laws require lenders to pay interest on funds that borrowers must deposit in mandatory mortgage escrow accounts. At least 12 states have such laws. *See, e.g.*, Or. Rev. Stat. § § 86.205, 86.245; Minn. Stat. § 47.20, subdiv. 9(a). And each differs from the others—whether by imposing unique interest rates or restricting their application to certain properties.

C

The question here is whether national banks must comply with state IOE laws. Seven years ago, in *Lusnak v. Bank of America, N.A.*, we answered yes. 883 F.3d 1185, 1194 (9th Cir. 2018). According to *Lusnak*, the NBA does not preempt California's IOE law—the same law Flagstar challenges. *Id.* Without more, this appeal is open and shut, as we first found. *Kivett v. Flagstar Bank, FSB* (*Kivett I*), No. 21-15667, 2022 U.S. App. LEXIS 13347, 2022 WL 1553266, at *1 (9th Cir. May 17, 2022).

But doubt remained about whether *Lusnak* was correctly decided. According to the Nation's top banking regulator, *Lusnak* "comprehensively misinterpreted" *Barnett Bank* by "invert[ing]" its expectation that the NBA's enumerated and incidental powers will ordinarily preempt contrary state law. Br. of Amicus Curiae Off. of the Comptroller of the Currency in Support of Appellee's Pet. for Reh'g En Banc at 1, 10-11, *Lusnak*, 883 F.3d 1185 (9th Cir. 2018) (No. 14-56755). And three years ago, the Second Circuit expressly rejected *Lusnak* in concluding that the NBA preempts New York's IOE law. *Cantero v. Bank of Am., N.A.*, 49 F.4th 121, 137-38 (2d Cir. 2022), *vacated and remanded by* 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024).

This resulted in a split between the Second Circuit's decision in *Cantero* and our decision in *Lusnak*. Though the Supreme Court granted certiorari in the Second Circuit case, it did not resolve the split. Instead, the Court returned the case to the Second Circuit because it "did not analyze preemption in a manner consistent with Dodd-Frank and *Barnett Bank*." *Cantero*, 602 U.S. at 221. In doing so, the Court reminded us of what *Barnett Bank* requires: a "practical assessment of the nature and degree of the interference caused by a state law," based on a "nuanced comparative analysis" of the Court's prior preemption cases. *Id.* at 219-20.

Post-*Cantero*, we too were told to reconsider our initial decision under *Lusnak*. *Flagstar Bank, N.A. v. Kivett*, 144 S. Ct. 2628, 219 L. Ed. 2d 1266 (2024). We first followed our prior decision applying *Lusnak*. *See Kivett v.*

Flagstar Bank FSB (*Kivett II*), No. 21-15667, 2024 U.S. App. LEXIS 21222, 2024 WL 3901188, at *1-2 (9th Cir. Aug. 22, 2024). We granted rehearing to consider again whether *Cantero* so undermines *Lusnak* that it no longer binds this panel. *Kivett v. Flagstar Bank FSB*, No. 21-15667, 2024 U.S. App. LEXIS 32639, 2024 WL 5206133, at *1 (9th Cir. Dec. 24, 2024).

II

Today, the majority solidifies *Lusnak* in our circuit law. I would not. Under our precedent, we must treat as "effectively overruled" any circuit decision that is "clearly irreconcilable" with the "theory or reasoning" of new Supreme Court authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). That standard, though rigorous, is satisfied here. *Lusnak* embraced a categorical preemption test that is nothing like *Cantero*'s comparative analysis. And *Cantero*, standing alone, compels us to hold that the NBA preempts California's IOE law.

A

Start with the first question: Is *Lusnak* good law after *Cantero*? If so, *Lusnak* still dictates this case. *See Kivett I*, 2022 U.S. App. LEXIS 13347, 2022 WL 1553266, at *1.

1

In *Lusnak*, the plaintiff argued on behalf of a putative class that a national bank's noncompliance with California's IOE law violated the State's Unfair Competition Law

(UCL). 883 F.3d at 1190. Citing *Barnett Bank* and Dodd-Frank for the significant-interference test, we held that California's IOE law was not preempted because it did not prevent or significantly interfere with the exercise of national banking powers. *Id.* at 1194 (citing § 25b(b)(1)(B)).

But rather than analogize to prior preemption cases, we based our conclusion on a statute that was never mentioned in *Barnett Bank* or any other preemption precedent: TILA's § 1639d(g)(3). *See Lusnak*, 883 F.3d at 1194-95. Recall that § 1639d(g)(3) requires national banks to pay interest on escrowed funds "[i]f prescribed by applicable State . . . law," but only for certain mortgages. 15 U.S.C. § 1639d(g)(3). The statute did not apply to the mortgage in *Lusnak*. 883 F.3d at 1197. Nor have Plaintiffs ever maintained that their mortgages fall under § 1639d(g)(3).

Still, *Lusnak* reasons that § 1639d(g)(3)'s state-law payment requirement "expresses Congress's view that [state IOE] laws would not necessarily prevent or significantly interfere with a national bank's operations." *Id.* at 1194-95. As the logic goes, by requiring national banks to pay interest on escrowed funds for a different subset of mortgages, Congress saw no conflict between state IOE laws and the powers of national banks. Thus, Congress did not intend for the NBA to preempt such laws.

This reasoning was apparently "confirm[ed]" by a House Report that "explains Congress's purpose" behind § 1639d(g)(3). *Id.* at 1195-96 (citing H.R. Rep. No. 111-94 (2009)). The Report states that mortgage servicers

must administer escrow accounts in accordance with "applicable" state laws, "including making interest payments on the escrow account if required under such laws." H.R. Rep. No. 111-94, at 91. From this unenacted legislative history we derived "Congress's view" that "creditors, including large corporate banks[,]" can comply with state IOE laws "without any significant interference with their banking powers." *Lusnak*, 883 F.3d at 1196.

In a footnote, we also mentioned that the NBA may preempt a state law "setting punitively high [interest] rates." *Id.* at 1195 n.7. But we did not explain what such laws might be. Instead, we repeated—rather categorically—that "no legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers." *Id.* at 1197. "Congress itself . . . has indicated that they do not." *Id.* So California's IOE law was not preempted.

2

Now consider *Cantero*. The Second Circuit's decision, like our decision in *Lusnak*, adopted a categorical preemption rule—just to the opposite extreme. Whereas *Lusnak* allows for virtually no preemption, on the Second Circuit's read, cases stretching back to *McCulloch* show that the NBA preempts any state law that "exert[s] control over a banking power." *Cantero*, 49 F.4th at 132.

Rejecting the Second Circuit's interpretation, the Court emphasized that clear-cut standards have no place under *Barnett Bank*. The Second Circuit "distill[ed] a

categorical test that would preempt virtually all state laws that regulate national banks." *Cantero*, 602 U.S. at 220-21. Meanwhile, the *Cantero* plaintiffs "would yank the preemption standard" in the other direction and "preempt virtually no non-discriminatory state laws that apply to both state and national banks." *Id.* at 221. The Court acknowledged the desire for a "clearer preemption line." *Id.* But its hands were tied. "Congress expressly incorporated *Barnett Bank* into the U.S. Code," and "*Barnett Bank* did not draw a bright line." *Id.*

Nor did *Cantero* draw any categorical inferences from § 1639d(g)(3). The *Cantero* plaintiffs invoked *Lusnak*'s theory, arguing that § 1639d(g)(3) provides "strong evidence" that Congress "sees no irreconcilable conflict" between state IOE laws and national banking powers. Pet. for Writ of Cert. at 23, *Cantero*, 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024) (No. 22-529). The Court implicitly rejected that argument, simply noting, as was true in *Lusnak*, "that § 1639d does not apply to the mortgages in this case." 602 U.S. at 211 n.1. Rather than rely on an inapplicable law as we did in *Lusnak*, the Court focused its preemption analysis solely on *Barnett Bank*. And *Barnett Bank* said nothing about § 1639d(g)(3).

Instead, *Barnett Bank* "sought to carefully account for and navigate [the Supreme] Court's prior bank preemption cases." *Id.* at 221. And as Dodd-Frank makes clear, courts may find a state law preempted "only if" it "prevents or significantly interferes" with national banking powers "in accordance with the legal standard" from *Barnett Bank*. *Id.* (quoting § 25b(b)(1)(B)). So we too "must do

as *Barnett Bank* did and likewise take account of" the Court's preemption precedents. *Id.* at 215-16.

To aid in this analysis, *Cantero* identified six relevant precedents, each cited in *Barnett Bank*. *Id.* at 219-20. Three show the kinds of preempted state laws that significantly interfere with national banking powers. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); *Franklin*, 347 U.S. at 373; *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 43 S. Ct. 602, 67 L. Ed. 1030 (1923). Another three reflect the degree of state-law interference that is not significant enough to warrant preemption. *Anderson*, 321 U.S. at 233; *McClellan v. Chipman*, 164 U.S. 347, 17 S. Ct. 85, 41 L. Ed. 461 (1896); *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 19 L. Ed. 701 (1870). In all six, the Court assessed the "nature and degree" of the state laws' interference "based on the text and structure of the laws, comparison to other precedents, and common sense." *Cantero*, 602 U.S. at 220 n.3.

The Court then articulated the preemption test. In assessing significant interference, "courts may consider the interference caused by the state laws in *Barnett Bank, Franklin, Anderson*, and the other precedents on which *Barnett Bank* relied." *Id.* at 220. If a state law's interference with national banking powers is "more akin" to the interference in the first set of cases, the law is preempted. *Id.* If the state law's interference is "more akin" to the interference in the second set of cases, it is not preempted. *Id.* Because the Second Circuit "did not conduct that kind of nuanced comparative analysis," remand was required. *Id.*

Lusnak did not conduct a comparative analysis, either. Though *Lusnak* pointed to *Barnett Bank* for the significant-interference test, we did not cite, much less analyze, any of the bank preemption precedents identified in *Cantero*. Instead, we extracted *Lusnak*'s holding—state IOE laws are generally not preempted—from a statute that *Barnett Bank* never addressed and on which *Cantero* did not rely. *Lusnak*'s reasoning and holding is thus incompatible with the "theory or reasoning" of *Cantero*. *Miller*, 335 F.3d at 900.

Start with *Lusnak*'s reliance on § 1639d(g)(3). As the majority notes, *Cantero* holds at least that "there is no categorical test for determining when a state banking regulation is preempted." Maj. Op. at 12. *Lusnak* violates that principle in spades. We held that § 1639d(g)(3) expressed Congress's understanding that state IOE laws did not significantly interfere with the exercise of national banking powers. 883 F.3d at 1194-95, 1197. That is a categorical test. By using § 1639d(g)(3) to resolve the preemption question in one fell swoop, *Lusnak* did precisely what *Cantero* forbids.

Section 1639d(g)(3) is not a broad congressional pronouncement on preemption of state IOE laws, but a limited exception to the default rule that national banks need not pay interest on escrowed funds. Again, the statute applies only to a subset of high-priced mortgages, none of which appear in this case, *Cantero*, or *Lusnak*. *See* 15 U.S.C. § 1639d(b), (f) (preserving lenders' authority to set

the terms of non-covered escrow accounts). So § 1639d(g)(3) shows at most that Congress wanted national banks to comply with state IOE laws when administering the kinds of mortgage escrow accounts addressed in the statute. *See Cantero*, 49 F.4th at 140 (Pérez, J., concurring) ("Congress *did* intend to subject national banks" to state IOE laws, but only "when financing certain [covered] mortgage loans."). Otherwise, there is no requirement that national banks pay interest on escrowed funds.

Lusnak took TILA's carveout to the extreme. It seized on Congress's exception for high-priced mortgages and extrapolated a general legislative intent that *all* state IOE laws (even those untouched by TILA) pass muster under *Barnett Bank*'s significant-interference test. That is not how we read statutes. We do not look at statutory exceptions, refashion them as a broader, universal "intent" of Congress, and then deduce "further exceptions from there." *Id.* at 138 (maj. op.) (noting that the Supreme Court's oft-maligned decision in *Holy Trinity Church v. United States*, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892), applied similar reasoning). When Congress takes care to enumerate certain exceptions, additional exceptions are rarely implied. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001). It makes more sense to read § 1639d(g)(3) "as a decision by Congress to carve out an exception from its general [preemptive] rule, rather than expressly imposing a burden on some mortgage loans in order to impliedly impose a burden on all of them." *Cantero*, 49 F.4th at 138.

In that vein, the Supreme Court in *Cantero* declined to infer from § 1639d(g)(3) a general intent of Congress with respect to preemption of state IOE laws, noting that the statute did not apply to the mortgages at issue. 602 U.S. at 211 n.1. Nor did the statute apply to the mortgage in *Lusnak*. 883 F.3d at 1194-95, 1197. In *Cantero*, the Court could have followed our lead and held that § 1639d(g)(3) expresses Congress's understanding that state IOE laws do not significantly interfere with national banking powers. That theory was presented to the Court. *See supra*, at 31. Yet *Cantero* says nothing about § 1639d(g)(3)'s relevance to the preemption inquiry.

It makes sense why: courts can apply *Barnett Bank*'s preemption standard while still honoring § 1639d(g)(3). In instructing national banks to comply with state IOE laws when financing some covered mortgage loans, Congress did not abandon the statutory mandate that preemption of state IOE laws with respect to all other mortgages must be assessed "in accordance with" *Barnett Bank*'s comparative analysis. *See* 12 U.S.C. § 25b(b)(1)(B); *contra Lusnak*, 883 F.3d at 1197. And as *Cantero* makes clear, *Barnett Bank*'s comparative analysis—codified in Dodd-Frank—is diametrically opposed to *Lusnak*'s categorical reliance on § 1639d(g)(3).

The majority asserts that *Lusnak* "did not apply anything close to a categorical test." Maj. Op. at 13. Not so. *Lusnak* is unequivocal: "[N]o legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated

that they do not." 883 F.3d at 1197. Also consider *Lusnak*'s reading of § 1639d(g)(3)'s legislative history. The House Report "shows Congress's view that creditors, including large corporate banks . . . can comply with state escrow interest laws without *any* significant interference with their banking powers." 883 F.3d at 1196 (emphasis added). Pre-*Cantero*, we saw *Lusnak*'s language for what it is: "unqualified." *Kivett I*, 2022 U.S. App. LEXIS 13347, 2022 WL 1553266, at *1. It does not get more categorical than that.

And the United States reads *Lusnak* the same way. While both this case and *Cantero* were pending at the certiorari stage, the United States agreed with Flagstar that *Lusnak* was wrongly decided. Br. for U.S. as Amicus Curiae at 19-20, *Flagstar Bank, N.A. v. Kivett*, 144 S. Ct. 2628, 219 L. Ed. 2d 1266 (2024) (No. 22-349). *Lusnak* "erred in treating Section 1639d as determinative of the preemption question." *Id.* at 20. In other words, *Lusnak* "elided" the "practical, degree-of-interference assessment" that Dodd-Frank "requires." *Id.* at 19.

As the majority notes, *Lusnak* mentioned in a footnote that a state law setting "punitively high" interest rates could theoretically prevent or significantly interfere with a national bank's powers. Maj. Op. at 7 (citing *Lusnak*, 883 F.3d at 1195 n.7). *Lusnak* never explained what constitutes a punitively high interest rate. [2] And *Lusnak*

2. *Lusnak* implicitly held that a 2% interest rate is insufficiently punitive. *See* Cal. Civ. Code § 2954.8(a) (requiring payments of no less than 2% interest annually on escrowed funds). That conclusion is itself suspect. *See* Br. of Amici Curiae Bank Pol'y Inst. et al. at 12, *Bank of Am., N.A. v. Lusnak*, 586 U.S. 1020, 139 S. Ct. 567, 202

never squared that caveat with its otherwise categorical reasoning. But even taking *Lusnak* at its word that a state IOE law may be preempted in the right circumstances, our decision still does not align with *Cantero*. In the same footnote, *Lusnak* reiterated that § 1639d(g)(3) "reflects a determination that state [IOE] laws do not necessarily prevent or significantly interfere with a national bank's business." 883 F.3d at 1195 n.7. Yet again, that is not the comparative analysis that *Cantero* prescribes.

In fairness, the majority acknowledges that *Lusnak* "did not cite or discuss" the six preemption cases addressed in *Barnett Bank*, even though *Cantero* "admonishes" courts to do just that. Maj. Op. at 14-15. The majority then conducts a preliminary comparative analysis based on the two precedents—*Franklin* and *Anderson*—that it thinks are "most applicable" to this case. *Id.* at 15-18. But the majority finds itself in "equipoise," concluding that comparison to past preemption cases (i.e., what *Cantero* demands) does not "seem[] to compel the result here." *Id.* at 17. From that the majority suggests that *Lusnak*—which the majority concedes did not conduct a comparative analysis—is not clearly irreconcilable with *Cantero*.

But we consider whether the new authority "undercut[s] the *theory or reasoning* underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900 (emphasis added); *see* Maj. Op. at 14. We are bound by the Supreme Court's

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L. Ed. 2d 403 (2018) (a 2% interest rate is "six times higher than the long-run average of .32% paid by FDIC-insured U.S. depository institutions on certificates of deposit").

"mode of analysis," not just its holdings. *Miller*, 335 F.3d at 900 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)); *see id.* (lower courts must adhere to the Supreme Court's "explications of the governing rules of law" (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (Kennedy, J., concurring in part and dissenting in part))). A three-judge panel can hold that the Court's articulation of a legal standard is clearly irreconcilable with circuit precedent, while reaching the same result as it would have otherwise. *See id.*

The majority ultimately holds that *Lusnak* remains binding precedent because "nothing in *Cantero* suggests" that its nuanced comparative analysis is "the sole method for determining preemption." Maj. Op. at 18. More to the point, the majority concludes that "[n]othing in *Cantero* casts doubt on our power to use the full array of interpretive tools in preemption analysis." *Id.*

Cantero says otherwise. "Under Dodd-Frank . . . courts may find a state law preempted '*only if*,' 'in accordance with the legal standard' from *Barnett Bank*, the law 'prevents or significantly interferes with the exercise by the national bank of its powers.'" 602 U.S. at 221 (emphasis added) (quoting § 25b(b)(1)(B)). What is the legal standard from *Barnett Bank*? A "nuanced comparative analysis" based on the Court's prior bank preemption cases. *Id.* at 220.

Cantero does not allow for anything else, as the majority claims. Quite the opposite. The Court repeated

that a "court applying [the] *Barnett Bank* standard must make a practical assessment of the nature and degree of the interference caused by a state law." *Id.* at 219-20. And "[g]iven Dodd-Frank's direction to identify significant interference 'in accordance with' *Barnett Bank*, courts addressing preemption questions in this context *must* do as *Barnett Bank* did and likewise take account of those prior decisions of [the Supreme] Court and similar precedents." *Id.* at 215-16 (emphasis added) (quoting § 25b(b)(1)(B)). The Court never suggested that we can bypass this analysis—which Congress enshrined in the U.S. Code [3]—for other "interpretive tools." Maj. Op. at 18. By allowing preemption "only if" it is "in accordance with" the standard from *Barnett Bank*, Congress did not permit us to use whatever interpretive tools we find most relevant. *See* 12 U.S.C. § 25b(b)(1)(B). And if the Court thought that Dodd-Frank allows for the "full array" of preemption analyses, Maj. Op. at 18, then why explain what courts "must do" when "addressing preemption questions in this context"? *Cantero*, 602 U.S. at 215-16. [4]

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3. Congress rarely directly incorporates a judicial decision into statutory law. *See Apache Stronghold v. United States*, 101 F.4th 1036, 1077 & n.11 (9th Cir. 2024) (en banc) (Bea, J., dissenting in part and concurring in part) (collecting cases). But when it does, courts interpret the statute in accord with the judicial decision. *See id.* (citing *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 485, 143 S. Ct. 1206, 215 L. Ed. 2d 444 & n.6 (2023) (using *Halberstam v. Welch*, 705 F.2d 472, 227 U.S. App. D.C. 167 (D.C. Cir. 1983), to define aiding and abetting because Congress pointed to *Halberstam* as "providing the proper legal framework for civil aiding and abetting and conspiracy liability" under chapter 113B of Title 18 (cleaned up))).

4. The majority suggests that *Miller v. Gammie* does not permit reference to interpretive tools other than *Cantero* to determine clear

The majority notes that *Cantero* identified other matters that the Second Circuit "may address as appropriate on remand." Maj. Op. at 18 (quoting 602 U.S. at 221 n.4). The implication is that *Cantero* did not adopt the comparative analysis as the preemptive be-all-and-end-all. The majority, however, leaves out what those matters are. The Second Circuit was free to address the OCC's preemption rules and a Dodd-Frank provision that allows preemption of state law by federal provisions outside of "title 62 of the Revised Statutes." *See* 12 U.S.C. § 25b(b)(1)(B)-(C). Those matters prove my point. Both derive from Dodd-Frank's codified preemption standard, not some extra-textual interpretive device that Congress has not approved for use in banking preemption cases. The OCC can make "preemption determination[s]" on a "case-by-case basis," but only "in accordance with the legal standard" from *Barnett Bank*. *Id.* § 25b(b)(1)(B). And § 25b(b)(1)(C) authorizes an additional statutory pathway (besides under *Barnett Bank*) for federal preemption of state banking laws. *Id.* § 25b(b)(1)(C) ("State consumer financial laws are preempted, only if . . . the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes."); *see also supra*, at 23 n.1. Thus, *Cantero*'s reference to other issues on remand only supports its

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irreconcilability. *See* Maj. Op. at 18-19. That is a false premise not consistent with our case law. To determine whether *Lusnak* is clearly irreconcilable with *Cantero*, we are free to consider other sources as well. To be clear, *Cantero* allows nothing more than a "nuanced comparative analysis" of the Supreme Court's prior preemption cases. 602 U.S. at 220. That *Cantero* analysis, *see infra* II.B, focuses on the Court's precedents.

holding that preemption determinations must conform to what Congress authorized in Dodd-Frank—a nuanced comparative analysis under *Barnett Bank*.

We should have treated *Lusnak* as effectively overruled. Granted, this is a "high standard" to meet. *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (quotation omitted). But this is not a situation where there is merely "some tension" between the cases or where a new Supreme Court decision simply "cast[s] doubt" on our precedent. *Id.* (quotations omitted). Nor is this a matter of "decid[ing] a case differently than a prior panel," as the majority alleges. *See* Maj. Op. at 11-12 (quoting *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073-74 (9th Cir. 2018)). The question is whether we can apply *Lusnak* "without running afoul" of *Cantero*. *Lair*, 697 F.3d at 1207 (cleaned up). Because *Lusnak* did not "do as *Barnett Bank* did and likewise take account of" the Court's prior bank preemption cases, the answer is no. [5] *Cantero*, 602 U.S. at 215-16.

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5. Not even California courts would apply *Lusnak*'s analysis to uphold the State's IOE law. In *Parks v. MBNA American Bank, N.A.*, the California Supreme Court held that a state law requiring national banks to include certain disclosures on convenience checks was preempted by the NBA. 54 Cal. 4th 376, 142 Cal. Rptr. 3d 837, 278 P.3d 1193, 1194-95 (Cal. 2012). The court explained that the California law effectively "forbid national banks from offering credit in the form of convenience checks *unless they comply with state law*." *Id.* at 1200 (emphasis added). Requiring compliance with the state law as a condition of exercising national banking powers "'significantly impair[s] the exercise of authority' granted to national banks by the NBA." *Id.* (quoting *Watters*, 550 U.S. at 12). California's IOE law does the same thing: it conditions a national bank's exercise of its banking powers in the state on its willingness to pay interest on

B

As discussed above, *Lusnak* is clearly irreconcilable with *Cantero*. Regardless of whether *Cantero* satisfies *Miller v. Gammie*, however, *Lusnak* was wrongly decided. And *Cantero* explains why. The NBA preempts California's IOE law under *Cantero*'s comparative framework. That analysis is straightforward: California's IOE law significantly interferes with national banking powers like the preempted state laws in *Barnett Bank*. Thus, California's IOE law is preempted in line with *Cantero*'s comparative methodology.

Begin with *Franklin*, which *Cantero* called the "paradigmatic example of significant interference." 602 U.S. at 216. New York prohibited most banks "from using the word 'saving' or 'savings' in their advertising or business." *Id.* (quoting *Franklin*, 347 U.S. at 374). As *Cantero* explained, New York's advertising restriction "significantly interfered" with national banks' statutory powers because it prevented the use of a "'commonly understood description which Congress has specifically selected' to describe [the banks'] activities: receiving savings deposits." *Id.* (quoting *Franklin*, 347 U.S. at 378). Because New York "could not interfere with the national bank's ability to [advertise] efficiently," its law was preempted. *Id.*

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escrowed funds. *Parks* would therefore compel a California court to hold that the State's IOE law is preempted. While NBA preemption is ultimately a question of federal law, the fact that California's own courts would find the State's IOE law preempted underscores *Lusnak*'s flaws.

California's IOE law is far more disruptive to national banking powers than the law in *Franklin*. The interference stemming from an advertising restriction pales in comparison to a state law that dictates a national bank's pricing of its mortgage products. *Cf. Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) ("[T]he level of 'interference' that gives rise to preemption under the NBA is not very high." (quotation omitted)). A national bank operating in California can only offer mortgage escrow accounts if it pays at least 2% interest on escrowed funds, a rate far higher than what the market may otherwise demand. *See* Cal. Civ. Code § 2954.8(a); *see also supra*, at 34 n.2. A state law requiring national banks to pay extra to conduct mortgage lending in the state no doubt interferes with both the enumerated power to administer home mortgage loans, 12 U.S.C. § 371(a), and the incidental power to provide and service mortgage escrow accounts, OCC Inter. Ltr. 1041, 2005 WL 3629258, at *2. *See Watters*, 550 U.S. at 13 (states "may not curtail or hinder a national bank's efficient exercise of any . . . power, incidental *or* enumerated under the NBA" (emphasis added)).

It is hard to see how preventing national banks from setting their own prices is not a significant interference with their enumerated or incidental powers. If state IOE laws make it more expensive for national banks to administer escrow accounts, then banks must offset the costs to ensure sufficient returns, either by charging higher interest rates on mortgage loans or requiring larger down payments. And by increasing underwriting costs, California's IOE law may "reduce lending" by

national banks, "particularly to high-risk borrowers." *McShannock v. JP Morgan Chase Bank, N.A.*, 976 F.3d 881, 893-94 (9th Cir. 2020) (California's IOE law is preempted under the "less onerous" standard for the federal Home Owners' Loan Act). A state law that alters a national bank's pricing almost by definition interferes more with the bank's powers than a simple advertising restriction.

Indeed, our court and others regularly find federal preemption in cases involving national banks' pricing schemes. In *Martinez v. Wells Fargo Home Mortgage, Inc.*, we found preempted a plaintiff's claim that a national bank overcharged underwriting and tax service fees in violation of California's UCL. 598 F.3d 549, 555-56 (9th Cir. 2010). And in *Bank of America v. City & County of San Francisco*, we held that the NBA preempted municipal ordinances prohibiting banks from charging ATM fees to non-depositors. 309 F.3d 551, 561-64 (9th Cir. 2002); *see also Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 (11th Cir. 2011) (preemption where the "state's prohibition on charging fees to non-account-holders . . . substantial[ly] conflict[ed] with federal authorization to charge such fees"). These cases all involve efforts to dictate how much a national bank can charge for its banking products. So too here.

There is also *Fidelity*, another case that *Cantero* identified as a pro-preemption example of significant interference with national banking powers. Federal law authorized federal savings and loans to include due-on-sale clauses in their contracts. *Fidelity*, 458 U.S.

at 154. Yet California law "limited" that right to times when "enforcing the due-on-sale clause was reasonably necessary." *Cantero*, 602 U.S. at 216-17 (quoting *Fidelity*, 458 U.S. at 154-55). The Court considered the California law preempted because it barred a federal savings and loan from exercising a due-on-sale clause "solely at its option," even though it could comply with both the state and federal laws. *Id.* at 217 (quoting *Fidelity*, 458 U.S. at 155). The state law "thus interfered with 'the flexibility given' to the savings and loan by federal law." *Id.* (quoting *Fidelity*, 458 U.S. at 155).

California's IOE law similarly interferes with "the flexibility given" to national banks in the administration of mortgage escrow accounts. *See id.* (quoting *Fidelity*, 458 U.S. at 155). RESPA does not require lenders to pay interest on escrowed funds. And even TILA recognizes that lenders can decide the terms of escrow accounts for mortgage loans that do not require escrow-interest payments under § 1639d(g)(3). *See* 15 U.S.C. § 1639d(f)(1)-(2) (for non-TILA mortgages, nothing in the statute precludes establishing escrow accounts "on terms mutually agreeable to the parties to the loan" or "at the discretion of the lender or servicer"). By mandating interest payments on escrowed funds, California's law undercuts the flexibility that federal law affords to national lenders who offer mortgage escrow accounts. Like *Franklin*, *Fidelity* favors preemption here.

First National Bank of San Jose—the final pro-preemption case identified in *Cantero*—cuts both ways. California law allowed the State to seize unclaimed

deposits after 20 years without proof of abandonment. 262 U.S. at 366. The law therefore "attempt[ed] to qualify in an unusual way agreements between national banks and their customers." *Cantero*, 602 U.S. at 218 (quoting *First Nat'l*, 262 U.S. at 370). As *Cantero* explained, this qualification "could cause customers to 'hesitate' before depositing funds at the [national] bank—and thus interfere with the 'efficiency' of the national bank in receiving deposits." *Id.* (quoting *First Nat'l*, 262 U.S. at 369-70).

California's IOE law undermines the "efficiency" of Flagstar's exercise of its national banking powers by requiring the bank to comply with IOE requirements for some, but not all its mortgages (i.e., only for properties located in California). And California's law, like the law in *First National*, qualifies the terms of mortgage lending agreements between national banks and their customers. But *First National* focused on the California law's "deterrent effect" on potential national bank customers. *Id.* An IOE law that benefits borrowers by requiring lenders to pay interest on escrowed funds lacks a similar deterrent effect. So *First National* is a draw under *Cantero*'s comparative analysis.

Even so, the significant interference caused by California's IOE law is still more analogous to the state laws in *Barnett Bank*'s pro-preemption cases. On the other hand are cases like *Anderson*, the "primary example of a case where state law was not preempted." *Id.* at 217. The Kentucky law in *Anderson* required banks "to turn over abandoned deposits to the State." *Id.* (citing *Anderson*, 321 U.S. at 236). The Court explained that "an inseparable

incident" of a national bank's power to accept deposits is the "obligation to pay" those deposits "to the persons entitled to demand payment according to the law of the state where [the bank] does business." *Id.* (quoting *Anderson*, 321 U.S. at 248-49). "And [the] Kentucky law simply allowed the State to 'demand payment of the accounts in the same way and to the same extent that the depositors could' after the depositors abandoned the account." *Id.* at 217-18 (quoting *Anderson*, 321 U.S. at 249). Put simply, Kentucky's law could not "impose an undue burden" on the operations of national banks because it reflected a rule "as old as the common law itself." *Anderson*, 321 U.S. at 248, 251. The law required "nothing more than performance of a duty by the bank [already] imposed by the federal banking laws." *Id.* at 252.

California's IOE law does not require national banks to perform a duty already required by federal law. Federal law does the opposite. Unless TILA's exception applies, federal law does not mandate interest payments on escrowed funds. Nor is an IOE requirement "as old as the common law itself." *Id.* at 251. So *Anderson* is not analogous.

Neither is *Commonwealth*, another case that *Barnett Bank* cited as an example of a state law that could apply to national banks. The generally applicable law there "taxed the shareholders of all banks (including national banks) on their shares of bank stock." *Cantero*, 602 U.S. at 218-19 (citing *Commonwealth*, 76 U.S. at 360). The Court "explained that national banks are 'exempted from State legislation, so far as that legislation may interfere with,

or impair their efficiency in performing the functions' that federal law authorizes them to perform." *Id.* at 219 (quoting *Commonwealth*, 76 U.S. at 362). But, as *Cantero* emphasized, national banks "remain subject to state law governing 'their daily course of business' such as generally applicable state contract, property, and debt-collection laws." [6] *Id.* (quoting *Commonwealth*, 76 U.S. at 361-62). Because the *Commonwealth* law "'in no manner hinder[ed]' the national bank's banking operations, and produced 'no greater interference with the functions of the bank than any other' law governing businesses, the law was not preempted." *Id.* (quoting *Commonwealth*, 76 U.S. at 362-63).

The same cannot be said of California's IOE law. Unlike the law in *Commonwealth*, and contrary to the majority's suggestion, California's IOE law is not a generally applicable business statute. Maj. Op. at 17. Rather, California's law is a banking-specific provision that hinders a national bank's exercise of its banking powers. *See* Cal. Civ. Code § 2954.8(a) (limiting the statute to "financial institution[s]"). So *Commonwealth* is inapt.

McClellan is much the same. That case involved another generally applicable law that voided any transfer

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6. We too have explained that "states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." *Bank of Am.*, 309 F.3d at 559 & n.3; *see also Franklin*, 347 U.S. at 378 n.7 ("[N]ational banks may be subject to some state laws in the normal course of business if there is no conflict with federal law.").

of property by any person or entity in cases of insolvency. 164 U.S. at 348-49. The *McClellan* Court recognized that generally applicable state contract laws "could be said to act as 'a restraint upon the power of a national bank within the State to make such contracts.'" *Cantero*, 602 U.S. at 219 (quoting *McClellan*, 164 U.S. at 358). Still, "such state laws could apply to national banks as long as the state laws did not 'in any way impai[r] the efficiency of national banks or frustrat[e] the purpose for which they were created.'" *Id.* (quoting *McClellan*, 164 U.S. at 358).

Again, California's IOE law is not a "generally applicable contract law" like the law in *McClellan*. *Id.* And California's IOE law—by making it more costly for national banks to offer and service mortgage escrow accounts for properties located in California—"frustrat[es] the purpose for which" the national banking system was created. *Id.* (quotation omitted). If the NBA did not preempt IOE laws like California's, national banks would be subject to "[d]iverse and duplicative" state regulation of mortgage escrow accounts, which is "precisely what the NBA was designed to prevent." *Watters*, 550 U.S. at 13-14; *see also Easton v. Iowa*, 188 U.S. 220, 229, 23 S. Ct. 288, 47 L. Ed. 452 (1903) (the national banking system was meant to be "independent" of legislation which "might impose limitations and restrictions as various and as numerous as the states"). As the Supreme Court has routinely explained, Congress did not intend "to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation," given the "[c]onfusion [that] would necessarily result from control possessed and exercised by two independent authorities."

Watters, 550 U.S. at 14 (quoting *Easton*, 188 U.S. at 231-32). On these facts, *McClellan* points to preemption.

This is the analysis that we should have done. Using the language of *Cantero*, the significant interference stemming from California's IOE law is "more akin" to the interference in *Franklin* and *Fidelity*. 602 U.S. at 220. And it is less analogous to the interference in *Anderson*, *Commonwealth*, and *McClellan*. That means California's IOE law is preempted.

III

Cantero controls this case. Its comparative methodology bears no resemblance to *Lusnak*'s categorical test, so much so that *Lusnak* has been "effectively overruled." *Miller*, 335 F.3d at 900. Regardless, following *Cantero* 's comparative analysis, we should have held that the NBA preempts California's IOE law. I respectfully dissent.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 22, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM KIVETT; *et al.*,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

No. 21-15667

D.C. No. 3:18-cv-05131-WHA

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding.

On Remand from the United States Supreme Court.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,** District Judge.

Flagstar Bank, FSB ("Flagstar"), a midsize federal savings bank operating in all fifty states, appealed the district court's order granting summary judgment to former and current mortgagors to whom Flagstar never paid interest on escrow ("IOE"), notwithstanding California Civil Code § 2954.8(a), which requires all banks to pay 2% interest to borrowers on money held in escrow accounts. The district court found that *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), foreclosed Flagstar's argument that the National Bank Act ("NBA") preempted § 2954.8(a) and granted summary judgment to the classes without making any factual findings as to the impact of § 2954.8(a) on Flagstar's banking operations. We affirmed. The Supreme Court granted Flagstar's petition for writ of certiorari, vacated the judgment, and remanded the case for our consideration in light of *Cantero v. Bank of America, N.A.*, 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). We have jurisdiction under 28 U.S.C. § 1291 and reaffirm.

1. "Questions of statutory interpretation are reviewed de novo . . . as are questions of preemption." *Lopez v. Wash. Mut. Bank, F.A.*, 302 F.3d 900, 903 (9th Cir. 2002), *as amended*, 311 F.3d 928 (9th Cir. 2002) (internal citations omitted). Summary judgment is also reviewed de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en

** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

banc). Viewing the evidence in the light most favorable to the nonmovant, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.* (citation omitted).

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") mandates that national banks comply with applicable state laws that do not "prevent[] or significantly interfere[] with" national bank powers. *Cantero*, 144 S. Ct. at 1297 (quoting 12 U.S.C. § 25b(b)(1)(B)). In *Lusnak*, we reversed a district court's holding that the NBA preempted § 2954.8(a). 883 F.3d at 1194-97. We found that Dodd-Frank's mandate that national banks comply with "applicable" state IOE laws "expresses Congress's view that [IOE] laws would not necessarily prevent or significantly interfere with a national bank's operations." *Id.* at 1194-95 (citing 15 U.S.C. § 1639d(g)(3)). We also found that no legal authority established that IOE laws prevented or significantly interfered with national bank powers. We therefore held that the NBA did not preempt § 2954.8(a).

Here, the district court correctly concluded that, given our decision in *Lusnak*, Flagstar could not succeed in arguing that § 2954.8(a) was preempted by the NBA. Flagstar concedes that its banking operations in this case are regulated by the NBA, which has regulated all federal savings banks since the passage of Dodd-Frank. *See id.*, 883 F.3d at 1196 & n.8 (reasoning that the OCC, regulator under the NBA, does not enjoy field preemption over the regulation of national banks or federal savings

associations). Though Flagstar argues that *Lusnak*'s holding applies only to "large corporate banks," *Lusnak*'s language is unqualified: "no legal authority establishes that state [IOE] laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated that they do not. Accordingly, we hold that the NBA does not preempt California Civil Code § 2954.8(a)." *Id.* at 1197.

Flagstar's argument that *Lusnak*'s procedural posture limits its authority in this case is similarly unavailing. Arguing that the instant appeal of summary judgment should not be controlled by a decision reversing a motion to dismiss, Flagstar ignores our practice of deciding questions of preemption whenever they may arise in litigation, including on motions to dismiss. *See, e.g., McShannock v. JP Morgan Chase Bank N.A.*, 976 F.3d 881, 895 (9th Cir. 2020) (reversing denial of motion to dismiss on the basis that the Home Owners' Loan Act of 1933 preempted state law); *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 716-18, 730 (9th Cir. 2012) (vacating permanent injunction after bench trial on the basis that the NBA preempted state law); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1035-38 (9th Cir. 2008) (affirming judgment on the pleadings on the basis that the NBA preempted state law); *Polich v. Burlington N., Inc.*, 114 F.3d 122, 124 (9th Cir. 1997) (per curiam) (affirming summary judgment on the basis that the Interstate Commerce Act preempted state law). Relatedly, Flagstar argues that Dodd-Frank mandated preemption determinations be "case-by-case" and based on "substantial evidence." But as the *Lusnak* court reasoned, "[t]hese [regulations] have no bearing

here where the preemption determination is made by this court and not the OCC." 883 F.3d at 1194; *see also* 12 U.S.C. § 25b(b)(1)(B). No factual review of Flagstar's record on summary judgment was necessary to determine whether § 2954.8(a) prevented or significantly interfered with Flagstar's banking operations, and the district court did not err in declining to conduct such review.

Flagstar and amici Mortgage Bankers Association and American Bankers Association alternatively ask us to overrule *Lusnak* as wrongly decided. A three-judge panel may only depart from an earlier panel's decision if it is "clearly irreconcilable with the reasoning or theory of intervening higher authority[.]" *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). And the Supreme Court's decision in *Cantero* suggests that *Lusnak* was correctly decided. We properly applied the test for preemption from *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996), in concluding that no legal authority established that IOE laws significantly interfered with national bank powers, and that the text of Dodd-Frank also reflected Congress's view that such laws do not. *Lusnak*, 883 F.3d at 1197; *see Cantero*, 144 S. Ct. at 1301 n.3 (collecting cases determining the degree of state laws' interference with national bank powers from "the text and structure of the laws, comparison to other precedents, and common sense").

2. Flagstar also argued that the district court incorrectly tolled the statute of limitations and accordingly misstated the award. Appellees concede this point, and all

parties agree that, pursuant to 28 U.S.C. § 2106, we should modify the final class certification order and judgment. The Court will therefore remand for modification of these two points.

The district court's preemption holding is AFFIRMED. The judgment and class certification order are VACATED and REMANDED to modify the judgment amount from $9,262,769.24 to $9,180,580.15 and the class definition date from April 18, 2018, to August 22, 2018.

APPENDIX C — ORDER OF THE SUPREME COURT OF THE UNITED STATES (JUNE 10, 2024)

SUPREME COURT OF THE UNITED STATES

No. 22–349

FLAGSTAR BANK, N.A.,

Petitioner,

v.

WILLIAM KIVETT, *et al.*

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Cantero* v. *Bank of America, N.A.*, 602 U. S. .... (2024).

IT IS FURTHER ORDERED that the petitioner, Flagstar Bank, N.A., recover from William Kivett, et al., Three Hundred Dollars ($300.00) for costs herein expended.

Appendix C

June 10, 2024

SCOTT S. HARRIS

/s/ Scott S. Harris
Clerk of the Supreme Court
of the United States

APPENDIX D — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MAY 17, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-15667
D.C. No. 3:18-cv-05131-WHA

WILLIAM KIVETT; *et al.*,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

Filed May 17, 2022

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted April 14, 2022
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,** District Judge.

Flagstar Bank, FSB ("Flagstar"), a midsize federal savings bank operating in all fifty states, appeals the district court's order granting summary judgment to William Kivett, Bernard Bravo, and Lisa Bravo. The three are representatives of former and current mortgagors to whom Flagstar never paid interest on escrow ("IOE"), notwithstanding California Civil Code § 2954.8(a), which requires all banks to pay 2% interest to borrowers on money held in escrow accounts. The district court found that *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), foreclosed Flagstar's argument that the National Bank Act ("NBA") preempted § 2954.8(a) and granted summary judgment to the classes without making any factual findings as to the impact of § 2954.8(a) on Flagstar's banking operations. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. "Questions of statutory interpretation are reviewed de novo . . . as are questions of preemption." *Lopez v. Wash. Mut. Bank, F.A.*, 302 F.3d 900, 903 (9th Cir. 2002), as amended, 311 F.3d 928 (9th Cir. 2002) (internal citations omitted). Summary judgment is also reviewed de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). Viewing the evidence in the light most favorable to the nonmovant, we must determine whether there are any genuine issues of material fact and

** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

whether the district court correctly applied the relevant substantive law. *See id.* (citation omitted).

In *Lusnak*, we reversed a district court's holding that the NBA preempted § 2954.8(a). 883 F.3d at 1194–97. We found that the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank"), which mandates that national banks comply with applicable state IOE laws, "expresses Congress's view that [IOE] laws would not necessarily prevent or significantly interfere with a national bank's operations." *Id.* at 1194–95. We therefore held that the NBA did not preempt § 2954.8(a).

Here, the district court correctly concluded that, given our decision in *Lusnak*, Flagstar could not succeed in arguing that § 2954.8(a) was preempted by the NBA. Flagstar concedes that its banking operations in this case are regulated by the NBA, which has regulated all federal savings banks since the passage of Dodd–Frank. *See id*, 883 F.3d at 1196 & n.8 (reasoning that the OCC, regulator under the NBA, does not enjoy field preemption over the regulation of national banks or federal savings associations). Though Flagstar argues that *Lusnak*'s holding applies only to "large corporate banks," *Lusnak*'s language is unqualified: "no legal authority establishes that state [IOE] laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd–Frank, has indicated that they do not. Accordingly, we hold that the NBA does not preempt California Civil Code § 2954.8(a)." *Id.* at 1197.

Flagstar's argument that *Lusnak*'s procedural posture limits its authority in this case is similarly unavailing. Arguing that the instant appeal of summary judgment should not be controlled by a decision reversing a motion to dismiss, Flagstar ignores our practice of deciding questions of preemption whenever they may arise in litigation, including on motions to dismiss. *See, e.g.*, *McShannock v. JP Morgan Chase Bank N.A.*, 976 F.3d 881, 895 (9th Cir. 2020) (reversing denial of motion to dismiss on basis that the Home Owners' Loan Act of 1933 preempted state law); *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 716–18, 730 (9th Cir. 2012) (vacating permanent injunction after bench trial on basis that the NBA preempted state law); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1035–38 (9th Cir. 2008) (affirming judgment on the pleadings on basis that the NBA preempted state law); *Polich v. Burlington N., Inc.*, 114 F.3d 122, 124 (9th Cir. 1997) (per curiam) (affirming summary judgment on basis that the Interstate Commerce Act preempted state law). Relatedly, Flagstar argues that Dodd–Frank mandated preemption determinations be "case-by-case" and based on "substantial evidence." But as the *Lusnak* court reasoned, "[t]hese [regulations] have no bearing here where the preemption determination is made by this court and not the OCC." 883 F.3d at 1194; *see also* 12 U.S.C. § 25b(b)(1)(B). No factual review of Flagstar's record on summary judgment was necessary to determine whether § 2954.8(a) prevented or significantly interfered with Flagstar's banking operations, and the district court did not err in declining to conduct such review.

Flagstar and amici Mortgage Bankers Association and American Bankers Association alternatively ask us to overrule *Lusnak* as wrongly decided. A three-judge panel may only depart from an earlier panel's decision if it is "clearly irreconcilable with the reasoning or theory of intervening higher authority[.]" *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Considering neither the Supreme Court nor the Ninth Circuit sitting en banc has heard a case that could bring *Lusnak*'s holding into question, we reject Flagstar and amici's invitation to overturn *Lusnak*.

2. Flagstar also argued that the district court incorrectly tolled the statute of limitations and accordingly misstated the award. Appellees concede this point and all parties agree that, pursuant to 28 U.S.C. § 2106, we should modify the final class certification order and judgment. The Court will therefore remand for modification of these two points.

The district court's preemption holding is AFFIRMED. The judgment and class certification order are VACATED and REMANDED to modify the judgment amount from $9,262,769.24 to $9,180,580.15 and the class definition date from April 18, 2014, to August 22, 2014.

APPENDIX E — ORDER RE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (DECEMBER 10, 2020)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 18-05131 WHA

WILLIAM KIVETT AND BERNARD AND LISA BRAVO, INDIVIDUALLY, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

FLAGSTAR BANK, FSB, A FEDERAL SAVINGS BANK,

Defendant.

Signed December 10, 2020

ORDER RE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In this certified class action against defendant bank for non-payment of interest on escrows for California borrowers, as required under Section 2954.8(a) of

California's Civil Code, brought under Section 17200 of California's Business and Professions Code, plaintiffs move for summary judgment, requesting restitution and injunctive relief. A prior order already determined the bank's liability, finding it in violation of Section 2954.8(a), and thereby liable under the "unlawful" prong of Section 17200. This order grants plaintiffs' request for restitution of accrued and outstanding interest on escrows that the bank failed to pay to class members. Because its violations of Section 2954.8(a) are ongoing with respect to a subclass of class members whose loans it continues to service, this order certifies a subclass under Rule 23(b)(2), appoints subclass representatives, and grants injunctive relief thereunder. To the extent stated herein, therefore, plaintiffs' motion for summary judgment is **Granted**.

STATEMENT

Section 2954.8(a) of California's Civil Code requires:

> Every financial institution that makes loans upon the security of real property containing only a one-to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be credited to the borrower's

> account annually or upon termination of such account, whichever is earlier.

In short, California's interest-escrow-law requires financial institutions to pay certain borrowers at least two percent annual interest on funds held in borrowers' escrow accounts. Such accounts are typically set up in conjunction with a home loan—indeed often as a condition by a lender—to ensure payment of property obligations associated with a home loan, such as property taxes.

Defendant Flagstar Bank, FSB, is a federally chartered savings bank, which originates, purchases, sells, and services home loans covered by Section 2954.8(a). After a loan is originated, it is typically sold in the secondary market to third-party investors. This leads to a bifurcation of the loan into two main assets: "[o]ne is the beneficial ownership of the loan and the other would be the income received to do the actual servicing activities" (Chang. Dep. 13:21-14:19). The latter creates the mortgage servicing right ("MSR") asset.

From at least 2014 until January 28, 2017, Flagstar categorically failed to pay or credit interest on escrow ("IOE") to California borrowers' whose loans Flagstar serviced (Ryan Dep. 47:4-7). More specifically, when Flagstar collected money in advance from California borrowers for payment of taxes and assessments on a property mortgaged as security for a home loan, or for insurance, for example, it failed to pay them the two percent interest per annum required under Section 2954.8(a). Beginning on January 28, 2017, however,

Flagstar began a phased-out process of prospectively paying IOE for loans that it subserviced on behalf of third-party investors who owned the mortgage servicing rights (Ryan Dep. 46:21-47:2). Though Flagstar now complies with Section 2954.8(a) for all loans it subservices for third-party investors, it still does not pay IOE on loans for which *it* owns the mortgage servicing rights (Ryan Dep. 34:13-19; 45:14-16); nor does it plan to (Ryan Dep. 47:24-48:2) (*see also* Stip. Fact ¶ 6). Its reason: federal preemption. More specifically, Flagstar says that the Home Owner's Loan Act ("HOLA")—applicable to federal savings associations such as itself—preempts Section 2954.8(a) and thus exempts it from paying IOE.

In 2018, however, our court of appeals held that the passage of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act changed the federal preemption scheme. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194 (9th Cir. 2018). In so holding, it found that the National Bank Act does not preempt Section 2954.8(a). *Id.* at 1197. Various actions against banks, including this one, ensued. *See McShannock v. JP Morgan Chase Bank N.A.*, 354 F.Supp.3d 1063 (N.D. Cal. 2018) (Judge Edward Chen); *see also Wilde v. Flagstar Bank FSB*, No. 18-cv-1370-LAB (BGS), 2019 WL 1099841 (S.D. Cal. Mar. 8, 2019) (Chief Judge Larry Alan Burns).

In April 2018, Lowell and Gina Smith brought this civil action against Flagstar. They alleged that in October 2004, they'd obtained a loan to finance their purchase of real property located in California. They had executed a deed of trust as security for the loan. The deed of

trust called for the establishment of an escrow impound account and required that interest be paid on funds in the escrow account if doing so was required by applicable law. Flagstar then took over the servicing of the Smiths' mortgage account and remained the loan servicer until August 2015. No interest accrued on their escrow funds (Case No. 18-02350, Dkt. No. 1).

The Smiths' complaint alleged two claims against Flagstar: (i) breach of contract, and (ii) violation of California's Unfair Competition Law, California Business & Professions Code §§ 17200 *et seq.* In August 2018, a Rule 12 order dismissed that complaint without prejudice due to the Smiths' failure to comply with a threshold notice-and-cure requirement provided by the deed of trust. Judgment then entered in favor of Flagstar and against the Smiths (Case No. 18-02350, Dkt. Nos. 1, 38). The Smiths quickly provided Flagstar written notice and an opportunity to cure, which Flagstar refused. Having fixed the cure issue, the Smiths filed the instant suit, alleging the same claims on the same facts as before (Case No. 18-05131, Dkt. No. 1).

In October 2018, William Kivett came in as another plaintiff. He only alleged a violation of Section 17200 (Dkt. No. 30 at 2). In 2012, Kivett and Flagstar had executed a promissory note reflecting a $400,610 mortgage loan secured by a deed of trust on a California residential property. Flagstar serviced Kivett's loan from its inception until 2015 when he refinanced his loan with another institution. Pursuant to the deed of trust, Flagstar "established and maintained an escrow account for the payment of [Kivett's] property taxes and insurance

premiums and other potential charges related to the property" throughout that time (Stip. Fact ¶ 5).

Following discovery and motion practice, summary judgment issued in favor of Flagstar, dismissing the Smiths from this action. In brief, that order found that the Smiths' claims were still preempted by HOLA because Section 1043 of the Dodd-Frank Act preserved HOLA's preemption scheme for any contract entered into on or before July 21, 2010, "by national banks, [f]ederal savings associations, or subsidiaries thereof . . . " 12 U.S.C. § 5553. Because Flagstar, a federal savings association, had participated in the origination of the Smiths' 2004 loan, their claims were dismissed.

Kivett pressed on. Then, a November 2019 order appointed Kivett as class representative and certified the following class pursuant to Rule 23(b)(3) (Dkt. No. 120):

> All persons who on or after April 18, 2014 had mortgage loans serviced by Flagstar Bank FSB ("Flagstar") on 1-4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, but did not receive interest on the amounts held by Flagstar in their escrow accounts (excluding, however, any such persons whose mortgage loans originated on or before July 21, 2010) (the "Class").

That class was "certified as to plaintiff Kivett's Section 17200 claim, except for prospective injunctive relief" (*id.* at 13). But, in express contemplation of seeking injunctive relief, Kivett had also moved for leave to amend in order to add Bernard and Lisa Bravo as named plaintiffs. On December 1, 2017, the Bravos had executed a promissory note with California Financial Real Estate Center, Inc., secured by a deed of trust on a California property. The servicing rights to the Bravos' loan were almost immediately transferred from Financial Real Estate Center to Flagstar (Mansell Decl. ¶¶ 6-7). Pursuant to the terms of the deed of trust, Flagstar "maintained an escrow account for the Bravos upon servicing the loan from origination through present" (*id.* at ¶¶ 8-9). Unlike Kivett's loan, therefore, Flagstar *currently* services the Bravos' loan for which Flagstar still does not pay any IOE to.

Accordingly, the "primary purposes" for seeking leave to amend, as stated in the class certification order, was to add the Bravos as class representatives "to ensure standing for an injunction and a class under Rule 23(b)(2)" (Dkt. No. 120 at 4). Rejecting Flagstar's arguments of prejudice and futility, the class certification order also granted Kivett's motion for leave to amend the first amended complaint. More specifically, that order held that Kivett's "motion for new plaintiffs to intervene and for leave to amend to add new class representatives [was] provisionally **Granted**" (*id.* at 13). It ordered Kivett's counsel to "promptly make the Bravos available for depositions and to produce their records to Flagstar by December 6, 2020." Flagstar, in turn, had until January 2, 2020, to show cause "why the Bravos should not be

authorized to co-represent the class" (*ibid.*). Flagstar failed to show cause by that date.

Instead, on January 2, 2020, the parties submitted a joint stipulation and proposed order, which slightly altered the class definition and included the details of the parties' proposed form of notice to the class. An order then entered the proposed order, approving the parties' notice plan, and redefined the class as follows (Dkt. No. 144) (emphasis in original):

> All persons who **at any time** on or after April 18, 2014 **through September 30, 2019** had mortgage loans serviced by Flagstar Bank, FSB ("Flagstar") on 1-4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, but did not receive interest on the amounts held by Flagstar in their escrow accounts (excluding, however, any such persons **(a)** whose mortgage loans originated on or before July 21, 2010 **or (b) who would be owed less than $1 in interest-on-escrow as of September 30, 2019 if plaintiffs' allegations are proven**) (the "Class").

Notice was effected. Out of the 139,923 class members, four opted out.

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In December 2019, the parties filed cross-motions for summary judgment. Finding *Lusnak* controlling, and Flagstar's proposed exceptions unpersuasive, a March 2020 order denied Flagstar's motion, and granted plaintiffs' motion for partial summary judgment instead (Dkt. No. 154). In so ruling, that order found that plaintiffs had established Flagstar's liability under Section 17200 for failing to pay or credit two percent interest on the positive balances in California borrowers' escrow accounts in violation of Section 2954.8(a). That order also found that "Flagstar does not and has not paid any interest on California loans owned by Flagstar" (Dkt. No. 154). That is, while Flagstar now complies with Section 2954.8(a)—*i.e.*, pays IOE—for loans that it subservices for third-party investors, it remains in violation of the same for loans whose mortgage servicing rights Flagstar itself owns and services.

Plaintiffs now move for summary judgment seeking restitution for accrued and outstanding IOE owed to class members through December 31, 2019, and prejudgment interest of two percent per annum thereon. Additionally, plaintiffs also seek a permanent injunction ordering Flagstar to comply with Section 2954.8(a)—to pay and/or credit IOE that accrues from January 1, 2020, onward, to *current* Flagstar customers (Dkt. No. 174). To repeat, while Flagstar has now completed its phased-out process of paying IOE to class members whose loans it subservices on behalf of third-parties who own the mortgage servicing rights, Flagstar itself continues *not* to pay IOE to class members whose MSR Flagstar owns and whose loans it currently services. Flagstar opposes. It argues that

there are numerous triable issues for trial. For example, it argues that there are disputed issues of fact as to whether or not the amount of restitution to class members should be *offset* by unrelated expenses that it ostensibly incurred with respect to the 8,936 class loans that were "in default"; the 722 class loans that were "in foreclosure"; and the 41,523 class loans that carried negative escrow balances (Albers Decl. ¶ 6).

A review of the evidence in the record, however, shows that there are no triable issues of fact. Flagstar has not presented any evidence of any unreimbursed cost exacted against any particular class loan in this litigation. Instead, it presents amorphous, globalized, and conjectural evidence—and in some case, none at all—in an attempt to manufacture after-the-fact expenses where none existed prior to class certification. Thus, it has failed to carry its burden in showing any offset is merited in law or in equity, and the class is entitled to restitution and injunctive relief, as now discussed.

1. The Evidence.

Plaintiffs' expert, Arthur Olsen, is an expert in data analysis. Flagstar's expert is David M. Skanderson, Ph.D., a former head of compliance at Washington Mutual Bank F.A., and the current Vice President of an economic consulting firm. Skanderson has extensive history testifying in mortgage lending and servicing matters (Powell Decl. Exh. A).

Appendix E

Using the same data sets, and "implement[ing] the basic IOE calculations that are outlined in Flagstar's operating procedures," both experts calculated the same number of class loans (139,923). They also calculated the total amount of accrued and unpaid IOE for the subject loans "within a penny or two" difference, leading Expert Skanderson to testify that "[he] has no issues with the accuracy of [Olsen's] calculations mathematically" (Skanderson Dep. 19:11-18). In his report, Expert Olsen calculated total outstanding IOE to be $8,536,758.84. Though Expert Skanderson's report does not independently state his corresponding figure, it states that the figure differs from Expert Olsen's by *just two cents* (Skanderson Report at 9 n.7). Both experts used two percent as the annual interest rate in calculating IOE. Both experts ignored all negative and zero daily escrow account balances carried by any borrower who held one; instead, they only applied a two percent interest rate to positive daily escrow account balances that all class members held throughout the class period, and aggregated those amounts in coming up with $8,536,758. For example (Olsen Report ¶ 21(c)):

> [S]uppose a loan had an escrow balance of $10,000 as of January 10, 2017. In that case, interest outstanding for that day would be $0.55, which is the daily interest rate (i.e., .02/365) multiplied by $10,000 (the daily escrow balance for that day). The process was then repeated for each day for each Class Loan.

Expert Olsen's figure, moreover, excluded loans owned by third-party investors, for which Flagstar had started

paying IOE, for the appropriate and relevant time periods. For instance, with respect to loans whose mortgage servicing rights were owned by Lakeview, but for which Flagstar subserviced the loans on Lakeview's behalf, the experts ignored escrow account activity after March 2017, the date Flagstar started prospectively paying IOE for those loans. The amounts of unpaid IOE which accrued prior to that date, however, were included in the total figure. (Olsen Report ¶ 21(d)). The experts observed this methodology for all applicable loans. The experts' reports, however, only included calculations through July 2019, not through December 31, 2019—the date through which plaintiffs request restitution.

Along with its opposition to plaintiffs' motion for summary judgment, however, Flagstar includes the supplemental declaration of Expert Skanderson, wherein he incorporates the relevant data through December 31, 2019. Expert Skanderson revises his calculations to not only reflect IOE that *accrued* from August through December 2019, but also "updated information regarding certain MSR holder's loans for which previously unpaid IOE has now been *paid*" (Skanderson Suppl. Decl. ¶ 2) (emphasis added).

More specifically, Expert Skanderson represents that Flagstar has now paid all of the accrued IOE that was owed to class members whose mortgage servicing rights are owned by Lakeview and New Residential Mortgage. While Flagstar had begun prospectively paying IOE on the Lakeview loans as of March 2017, and on the New Residential loans as of May 2018, the amounts accrued

before those periods remained unpaid and thus part of the $8,536,758 figure above. Additionally, his updated figures exclude the four class members who opted out of this class action (*id.* at ¶ 6). Making the foregoing adjustments, Expert Skanderson represents that the number of class loans is now 139,492; and the amount of accrued and unpaid IOE through December 31, 2019, is $8,101,175.65 (*id.* at ¶ 7).

In their reply brief, plaintiffs accept Flagstar's representations of amounts paid to borrowers whose mortgage servicing rights are owned by Lakeview and New Residential. Moreover, plaintiffs also supply the declaration of Expert Olsen similarly implementing the after-acquired data information, including accrued interest on positive escrow balances through December 2019 (Olsen Decl. ¶¶ 1-6). Applying the same methodology as before, he, too, provides updated figures for class membership, total amount of unpaid and accrued IOE through December 2019, and the total amount of prejudgment interest plaintiffs seek, as follows (*id.* at ¶ 5):

	As of 12/31/2019 Loans	As of 12/31/2019 IOE	As of 5/21/2020 prejud. int. at 2%	Daily prejudgment interest at 2%
Prior	139,923	$8,536,758.84	$567,582.51	$467.77
Adjusted	**139,492**	**$8,101,175.64**	**$541,053.11**	**$443.90**
Difference	431	$435,583.20	$26,529.40	$23.87

To the foregoing extent, therefore, there is no dispute of fact or difference of opinion between the parties' experts. The scope of their assignments, however, differed. Thus, this order briefly summarizes their findings and opinions as to those differing subjects. In brief, Expert Olsen was asked to calculate prejudgment interest while Expert Skanderson was asked to list categories of expenses Flagstar could potentially offset against accrued and unpaid IOE to class members.

A. Expert Olsen's Calculation of Prejudgment interest.

In calculating the prejudgment interest figure in the above table, Expert Olsen "distinguished between IOE accruals and the date those accruals should have been paid (or credited) to each Class Loan." More specifically, he "assumed that IOE accruals should have been paid on the first day of the following calendar year or the day after termination of the account, whichever was earlier." For instance (Olsen Report ¶ 21(e)):

> [S]uppose a Class Loan had an escrow balance through February 28, 2015, but did not contain an escrow balance after that date. In that case, IOE accruals for 2014 would have a due date of January 1, 2015, but the IOE accruals for 2015 would have a due date of March 1, 2015.

Indeed, Expert Olsen's assumptions are consistent with not just Section 2954.8(a) ("Such interest shall be credited to the borrower's account annually or upon

termination of such account, whichever is earlier."), but also with Flagstar's own practice. That is, through Stephanie Ryan, Flagstar testified that for loans that Flagstar does pay IOE, Flagstar credits their accrued interest at the end of the calendar year, or upon termination of an escrow account, whichever is earlier (*see* Ryan Dep. 26:8-18).

Since any IOE that Flagstar would have credited to borrowers' escrow accounts would have also earned two percent interest, Expert Olsen used a two percent interest rate in calculating prejudgment interest. Unlike Expert Olsen, Expert Skanderson does not provide a figure for prejudgment interest. But Expert Skanderson testified that, assuming "the interest that was credited remains in the escrow account," he had "no principled objection" to a two percent interest rate for prejudgment interest used by Expert Olsen (Skanderson Dep. 23:1-26:5). Expert Skanderson agreed that had Flagstar credited class members' escrow accounts for interest that accrued at the point where they became due, that interest itself would also earned interest at two percent, assuming the credited interest would have stayed in the escrow account. He also agreed with Expert Olsen's methodology in calculating prejudgment interest inasmuch as Expert Olsen assessed prejudgment interest based on the following assumptions: (1) Flagstar would have credited accrued IOE to class members' escrow accounts at the end of the calendar year; (2) or, in the event that a class members' account was terminated prior to the end of the year, at the point of termination.

Thus, Expert Skanderson testified that, assuming two percent was indeed an accurate prejudgment interest rate, he agreed with Expert Olsen's figure for the total amount of prejudgment interest (*id.* at 28:12-29:4; 46:23-25). In short, he agreed that "2 percent represents [class members'] opportunity cost" as a matter of economics (*id.* at 23:6-14).

B. Expert Skanderson's Opinion Regarding Categories of Offsets.

In his report, Expert Skanderson opines that any restitution for unpaid IOE to class members should be offset by losses imposed on Flagstar arising from situations where class members defaulted on their mortgage loans; entered foreclosure; filed for bankruptcy; received a loan modification; struck a forbearance agreement; or carried a negative escrow balance at any point during the class period (Skanderson Report ¶¶ 33-40).

According to Mark Albers, the First Vice President of Flagstar, his analysis of the class loans in this action show that of the 139,923 total loans, 8,936 were "in default," 722 were "in foreclosure," and 41,523 had a negative escrow balance for at least one monthly period from January 2014 through December 2019 (Albers Decl. ¶ 6). Flagstar maintains that defaults and foreclosures "often" lead it to incur unreimbursed costs, including "costs related to tasks such as property inspections, retention of counsel, retention of a foreclosure trustee, as well as other hard costs related to filing fees and Broker Price Opinions" (White Decl. ¶ 5). "Flagstar calculates *an average* of

$8,034.16 in un-reimbursed costs per each defaulted loan where non-judicial or judicial foreclosure proceedings have been performed" (*id.* at ¶ 6) (emphasis added).

With respect to the class members whose escrow accounts carried a negative balance, Expert Skanderson opines that "the costs imposed on the servicer include the working capital cost of advancing funds on behalf of the borrower, which is a tangible financial cost to the loan servicer" (Skanderson Report ¶ 35). With respect to class members who obtained loan modifications and/or forbearance agreements, he opines that "the servicer and investor incur the cost of reduced or deferred interest income from a loan" (*id.* at ¶ 36). With respect to foreclosures, he opines that Flagstar loses a portion of the outstanding principal balance of a loan (*id.* at ¶ 38). "Similarly, any loans that were discharged in bankruptcy would have imposed costs on Flagstar (charged-off principal, foregone interest, legal costs, and other costs), which would offset any IOE that Flagstar may have been obligated to pay the borrower to the extent that those costs were borne by Flagstar" (*id.* at ¶ 37).

In his report, Expert Skanderson states that with the exception of class loans that carried a negative escrow balance, the *number* of class loans which would fall within the other potential offsets categories he identifies, cannot be ascertained from the data Flagstar provided him. And, even if the number of loans in each of his offset categories could be identified, he opines that (*id.* at ¶ 41) (emphasis added):

> the *amount* of offset for each loan could not be identified by applying a standard data query or calculation to the data. The type of calculation required to determine offsets would differ among the categories of loans subject to offsets and, based on [his] experience in analyzing loan servicing data, such calculations generally could not be performed by applying straightforward and uniform queries to loan servicing data. In most cases, analysis of data beyond those contained in the escrow account histories and manual review of documents would need to be performed.

In short, even if the number of class loan in each category of offset are identified, Expert Skanderson's position is that a "loan-by-loan review of Flagstar's servicing records would be required to calculate the amount of offset for loans subject to offsets"; assuming, of course, such offsets are legally cognizable to begin with (Skanderson Report ¶ 11(e)). For example, he states that for loans that had a negative escrow balance over some period of time (*id.* at ¶ 42):

> An offset could be calculated by determining an interest rate that represents Flagstar's cost of working capital and applying that rate to the (negative) balance for periods during which a negative balance occurred. The resulting amount would be subtracted from the IOE accrued for such loans during periods for which the average daily escrow balance was positive.

To bolster this claim, Flagstar now submits the declaration of Sean Mansell, Flagstar's Director of Servicing Loans, who swears that (Mansell Decl. ¶ 5):

> For customers who accrue a negative escrow balance for any period of time, Flagstar must advance its own funds on behalf of the customer to make the customer's tax, insurance payments, or other property related payments. In doing so, Flagstar incurs direct and indirect costs associated with advancing such funds, proportionate with the funding costs for Flagstar (i.e., the effective interest rate paid for working capital) at the time each amount was advanced, which can vary based on market fluctuations.

Both experts agree that a total of 41,523 loans within the class carried negative escrow balances on one or more days throughout the class period. Applying a two percent interest rate, Expert Olsen calculated the cost bore to Flagstar for advancing funds to these 41,523 loans to be $142,766.88 (Olsen Decl. ¶ 12).[1]

Unlike Expert Olsen, Expert Skanderson testified that he was not asked to quantify the effect of crediting Flagstar's costs associated with negative escrow balances

1. Flagstar contends that Expert Olsen's use of a two percent interest rate in calculating $142,766.88 figure "is not grounded in any evidentiary support," and is plaintiffs' attempt to "simplify the calculation." Pointing to Expert Skanderson's report, Flagstar contends that the calculation is "more complex," requiring knowledge of numerous variables (*see* Opp. 11).

against accrued and unpaid IOE; but that he easily could have done so if he was supplied with information pertaining to Flagstar's cost of funds. Instead, Expert Skanderson only calculated the total amount of accrued IOE ($217,000) associated with loans that carried a negative escrow balance (Skanderson Dep. 85:8-87:2; 92:10-13) (Skanderson Decl. ¶ 9).

Crucially, Expert Skanderson testified that for loans where Flagstar does pay IOE—*e.g.*, loans that Flagstar subservices for Lakeview—Flagstar does not credit itself for negative escrow balances (Skanderson Dep. 87:10-13). Indeed, he testified that "in general, in the industry," banks do not give themselves credit for negative escrow balances. "To the extent that interest is paid, it is paid when there is a positive escrow balance. And to the extent the balance is zero or negative, there is no positive or negative interest associated with that" (Skanderson Dep. 93:12-94:1-3).[2]

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2. Plaintiffs point to Expert Skanderson's testimony for the proposition that the "industry norm" is for banks not to credit themselves for negative escrow balances. Flagstar objects, stating that they mischaracterize Expert Skanderson's testimony, and that their "argument of an 'industry norm' should be excluded as it lacks foundation, is speculative, and relies on improper expert opinion. See FRE 701-705, 900-902, 1000-1004" (Opp. 11). First off, Expert Skanderson is a banking expert with extensive experience in that field. Not only has he worked in the compliance department of a bank, but he has testified and submitted expert reports in many bank related litigations, including those concerning loan servicing. Moreover, his testimony shows that he did not speculate when he proffered this opinion. Rather, he based it, in part at least, on knowledge he acquired during the course of another litigation

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Moreover, throughout his testimony, Expert Skanderson makes clear that: (1) his opinions concerning purported expenses that are potentially offset-able are purely economic, not legal; and that (2) he agrees that he does not offer an opinion about the *extent* of costs associated with any of the various offset categories he elucidates in his report (Skanderson Dep. 123:20-25). His opinions about these categories of offsets are not based on any individual review of any class loan or any expenses Flagstar actually may have incurred in servicing the class loans herein (Skanderson Dep. 124:22-25). Indeed, in his deposition, he conceded that he did not know the parameters of class loans Flagstar has classified as "in foreclosure" or "in default," as they were provided to him in the form of tabulations (Skanderson Dep. 115:19-21). Rather, his opinions regarding potential costs imposed on Flagstar with respect to all of the categories of offsets (*e.g.*, loans modifications) are solely based on his "extensive experience in mortgage servicing" (Skanderson Dep. 126: 19-21); (*see*, *e.g.*, Skanderson Dep. 116:19-20) ("any default, I would argue, would impose costs on the servicer"). For illustration, some of the costs that he opines are potentially offset-able, include costs Flagstar incurred in *preparing* a loan modification agreement (Skanderson Dep. 127:11-15).

ANALYSIS

Given that liability under Section 17200's "unlawful" prong—using Section 2954.8(a) as the predicate offense—

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involving another bank. It thus strains credulity that Flagstar now objects to its own expert's testimony, contending that it lacks foundation.

was already established in a prior order, what remains is the appropriate remedy and/or remedies. Plaintiffs and the class seek both restitution and injunctive relief.

"A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices." *Cortez v. Air Filtration Products Co.*, 23 Cal.4th 163, 173, 96 Cal. Rptr.2d 518, 999 P.2d 706 (2000). Under Section 17203 of California's Business and Professions Code:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

A court's discretion in fashioning a remedy under Section 17203 "is very broad." *Cortez*, 23 Cal.4th at 180, 96 Cal.Rptr.2d 518, 999 P.2d 706. In addition to injunctive relief—"the primary form of relief" available under Section 17200—Section 17203 also provides for restitution. *See In re Tobacco II Cases*, 46 Cal.4th 298, 319, 93 Cal. Rptr.3d 559, 207 P.3d 20 (2009).

"[W]hat would otherwise be equitable defenses may be considered by the court when the court exercises its discretion over which, if any, remedies authorized by [S]ection 17302 should be awarded." *Cortez*, 23 Cal.4th. at 179-80, 96 Cal.Rptr.2d 518, 999 P.2d 706. Indeed, "[a] court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute." *Id.* at 180, 96 Cal.Rptr.2d 518, 999 P.2d 706. Equitable defenses, however, "may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct." *Id.* at 179, 96 Cal.Rptr.2d 518, 999 P.2d 706.

1. Restitution.

This order finds that an award of $8,101,175.64 in restitution is warranted under Section 17203 to restore the unpaid IOE that Flagstar failed to pay to class members through its unlawful practice as stated herein. This amount is supported by substantial evidence. Moreover, Flagstar has not carried its burden in showing there is any substance to its categories of so-called offsets. Importantly, Flagstar has not shown that it levied any charges against any class members for any of the expenses that it now contends it incurred—and ought to be able to offset against restitution—at the moment in time that they purportedly occurred. Instead, its attempt is a gimmick to manufacture charges after-the-fact based on amorphous evidence, such as its aliquot share of general overhead.[3]

3. The $8,101,175.64 figure excludes the amount of interest owed to the four class members who opted out, and all accrued amounts that Flagstar has retroactively paid to borrowers whose loans it subservices on behalf of third-party investors, such as Lakeview.

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Aside from offering general evidence about the number of class loans that were "in foreclosure," and/or in "in default," Flagstar offers no evidence—specific or globalized—concerning the dollar amount of any expenses it claims those loans subjected it, and for which it argues it is entitled to offsets. Its only effort is a vague declaration about the average cost that foreclosures—not any associated with any particular loan in this litigation—sometimes impose on it (*see* White Decl. ¶ 6). This is in stark contrast to the $8,101,175.64, which was calculated on an account-by-account basis.

Moreover, with respect to one of the other categories of its purported offsets (*i.e.*, bankruptcies), it doesn't even provide any evidence. Lastly, with respect to class loans that carried negative escrow balances, it also fails to provide any dollar amount of any alleged cost to it. In any event, as Flagstar's own expert testified, Flagstar's own practice is to not charge its customers for any cost associated with negative escrow balances. For the following reasons, equity demands that class members be paid full restitution without any offsets thereto.

Restitution under California's Unfair Competition Law "serves two purposes—returning to the plaintiff monies in which he or she has an interest and deterring the offender from future violations." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 695, 38 Cal.Rptr.3d 36 (2006) (citations omitted). These dual purposes are concurrent rather than independent. Restitution "must be of a measurable amount to restore to the plaintiff what has been acquired by violation[] of the statute[], and that

measurable amount must be supported by [substantial] evidence." *Id.* at 698-70, 38 Cal.Rptr.3d 36.

"The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person." *Cortez*, 23 Cal.4th at 178, 96 Cal.Rptr.2d 518, 999 P.2d 706. "Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1149, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003). In *Cortez*, for example, the defendant failed to pay its employees the lawful rate for overtime. The California Supreme Court determined that "earned wages that are due and payable pursuant to . . . the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." 23 Cal.4th at 178, 96 Cal.Rptr.2d 518, 999 P.2d 706. It reasoned that because "equity regards that which ought to have been done as done [citation], and thus recognizes equitable conversion" it follows that "unlawfully withheld wages are property of the employee within the contemplation of the UCL." *Ibid.* It thus concluded "that orders for payment of wages unlawfully withheld from an employee are also a restitutionary remedy authorized by [S]ection 17203." *Id.* at 177, 96 Cal. Rptr.2d 518, 999 P.2d 706.

Similarly, here, the IOE that Flagstar unlawfully withheld from class members are also the proper subject of a restitutionary remedy under Section 17203. Class members' interest in accrued IOE became vested when

the IOE would have otherwise became due: at the end of each calendar year or, for escrow accounts that closed before then, at the point of closure.

Moreover, the total amount of accrued and unpaid IOE is a "measurable amount" that is supported by "substantial evidence." *See Colgan*, 135 Cal.App.4th at 698-70, 38 Cal.Rptr.3d 36. Both experts analyzed the daily escrow balances of all class members from January 2014 through December 2019. They applied a two percent annual interest rate—the minimum IOE rate required by Section 2954.8(a)—to the positive daily escrow balances of all class members. They ignored days where any class member carried either a negative escrow balance or a balance of zero. In doing so, both experts were able to calculate with mathematical precision the total amount of IOE necessary to restore borrowers to the position in which they would have been but for Flagstar's unlawful conduct. Importantly, both experts arrived at the same figure. Thus, there is no dispute as to the total amount of IOE that Flagstar would have been required to pay class members through December 2019 had it been complying with Section 2954.8(a).

Rather, the dispute concerns whether or not that amount should be offset by Flagstar's alleged unreimbursed expenses that it claims to have incurred with respect to class loans that were "in default," "in foreclosure," went through bankruptcy, or held negative escrow balances.

Flagstar points to the 8,936 class loans that were "in default" at some point between 2014 through 2019,

the 722 class loans that were "in foreclosure" during the same period, and the 41,523 class loans that had a negative escrow balance for at least one day during the same period, to argue that "there are triable issues of material fact regarding whether Flagstar is entitled to reduce or entirely offset the accrued IOE sought in restitution for these loans, and in what amount" (Opp. 10). More specifically, it contends that "the amount of IOE restitution for loans that were in default or had at least one negative escrow balance should be offset on the basis of legal, contractual, or equitable principles" because (*ibid.*) (internal citations omitted):

> Flagstar incurs unreimbursed costs as a result of the customers' default and foreclosure, including property inspections, retention of counsel, retention of a foreclosure trustee, waived fees, filing fees, and Broker Price Opinions. For loans with negative escrow balances, Flagstar incurs unreimbursed costs as it advances its own funds to make a customer's tax and insurance payments. According to Flagstar's expert, calculating the cost requires determining the amounts advanced, the amount of time over which the amounts were advanced, and Flagstar's funding cost (i.e., the effective interest rate paid for working capital) at the time each amount was advanced.

This order disagrees with Flagstar's contention that there are disputed issues of material fact. To the

contrary, the issues it raises present questions of law and/or considerations of equity. *See Cortez*, 23 Cal.4th at 173, 180, 96 Cal.Rptr.2d 518, 999 P.2d 706 ("A UCL action is an equitable action" and a court's discretion in fashioning a remedy is "very broad."). Balancing the equities, this order finds that Flagstar has not shown a basis for reducing the amount of restitution by its purported categories of offset. Had Flagstar adduced concrete evidence showing that it had levied specific charges against a specific class loan within the relevant class period, the undersigned would have been amenable to holding a trial and requiring Flagstar to give notice to those class members, so that they could contest those charges at trial. But what Flagstar did instead was pull a gimmick—an after-the-fact manufacturing of factual issues for trial where none existed prior to class certification. The supposed offset-able charges that Flagstar now complains of will not be allowed by way of defense because Flagstar failed to show a contractual, legal, or equitable basis for them to be offset. Had it done so, it would have produced that evidence. Indeed, it was its burden to do so. Tellingly, it failed to produce a shred of concrete evidence showing that it perfected any such charges and/or expenses by levying them against any of the class members prior to class certification, or that any such charges remain unpaid to Flagstar. Rather, Flagstar produces amorphous evidence, stating generally, for example, that loans that go through foreclosure cost it, *on average*, approximately eight thousand dollars. And yet, as discussed in detail below, neither itself nor its expert, tethered any such purported foreclosure expenses to any of the class loans herein. In sum, there are no issues for

trial because the amount and method of restitution are undisputed, and because this order rejects Flagstar's defenses. Such rejection is without prejudice to pursuing those individual claims against individual borrowers.

Furthermore, the decisions Flagstar cites to are inapposite here. The decisions it cites to stand for the proposition that an award of restitution under Section 17203 does not allow consumers to recover the full amount they paid for a product or service when such product or service had some value to consumers, notwithstanding the alleged deceptive advertising. For instance, in *Chowning v. Kohl's Dep't Stores, Inc.*, 2016 WL 1072129 (C.D. Cal. Mar. 15, 2016) (Judge Gary Klausner), the plaintiffs purchased the defendant's products because the defendant's juxtaposition of a lower "selling price" next to a significantly higher price purporting to represent the item's "original price" created the belief that they were receiving a certain discount. Judge Klausner noted that "any proposed method [of restitution] must account for the benefits or value that a plaintiff received at the time of purchase." *Id.* at *6; *see also In re POM Wonderful LLC*, 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014) (Judge Dean D. Pregerson) ("Plaintiffs do not cite, nor is the court aware of, any authority for the proposition that a plaintiff seeking restitution may retain some unexpected boon, yet obtain the windfall of a full refund and profit from a restitutionary award.").

The banking decision Flagstar cites to sings the same tune. *See Corvello v. Wells Fargo Bank N.A.*, 2017 WL 3449072 (N.D. Cal. May 4, 2017) (Judge Vince Chhabria).

The plaintiffs there brought a Section 17200 claim against Wells Fargo based on allegations that it misled borrowers into enrolling in trial period payment plans incorrectly believing it would lead to permanent loan modifications within a certain time. It was undisputed that the plaintiffs would have lost the right to stay in their homes if they did not make the trial period payments. Accordingly, Judge Chhabria granted the bank's motion for summary judgment because he found that the plaintiffs had "not presented evidence supporting any theory of restitution that account[ed] for this benefit." 2017 WL 3449072, at *2.

All of these decisions are distinguishable. The challenged products and practices in these mislabeling and deceptive advertising cases conferred some benefit on the plaintiffs. By contrast, here, Flagstar's unlawful conduct—failure to pay IOE in accordance with California law—conferred no benefit to any of the class members. Unlike in *Chowning*, plaintiffs here were not duped into purchasing a tangible product such that any award of restitution must account for the value of what they believed they received. In contrast to *Corvello*, moreover, the unlawful conduct here did not confer any benefit to class members. Put differently, whether or not Flagstar paid IOE in compliance with Section 2954.8(a), it had no bearing on whether or not class members could stay in their homes.

These decisions would have had import here, if, hypothetically, Flagstar had been paying class members part of the IOE required by Section 2954.8(a) all along, say, one percent. In that event, surely, any award of restitution

should have accounted for the one percent IOE—*i.e.*, the benefit—class members had received. Here, to repeat, all accrued IOE amounts that Flagstar has already paid to class members have been excluded from the total figure of restitution ($8,101,175.64). Unlike the decisions Flagstar cites, therefore, not double dipping or windfalls will result here.

To the extent Flagstar is trying to offset total restitution by administrative expenses that it *may* have incurred in connection with services and disputes unrelated to the unlawful business practice discussed herein—*e.g.*, the cost of drafting a loan modification agreement or attorney's fees associated with foreclosures—none of the decisions it cites to provide support for such a fanciful proposition. To the contrary, as plaintiffs point out, California law limits a lender's recourse to foreclosure of the secured asset. *See*, *e.g.*, *Sec. Pac. Nat'l Bank v. Wozab*, 51 Cal.3d 991, 997, 275 Cal.Rptr. 201, 800 P.2d 557 (1990).

Furthermore, Flagstar isn't servicing class members' loans for free. Rather, the owner of a loan's mortgage servicing rights receives income in exchange for servicing that loan (Chang Dep. 14:3-19). It therefore strains credulity that Flagstar wants to offset the amounts it unlawfully withheld by its overhead expenses, which, presumably, already factor into its servicing fee. Notably, Flagstar's argument for offset for alleged costs it incurred with respect to escrow accounts that carried a negative balance is particularly egregious given that Flagstar's own expert testified that for loans where Flagstar does pay IOE, Flagstar does not credit itself for negative

escrow balances (Skanderson Dep. 87:10-13). Thus, seeking to apply a discount based on a classification that is contrary to Flagstar's own practice offends—and, is antithetical to—any notion of equity.

Lastly, Flagstar's evidence of the various unreimbursed expenses it claims to have incurred is speculative, at best. For instance, though it puts into the record that it "often" incurs an "average" cost of approximately eight thousand dollars in connection with loans that proceed to foreclosure, it has not adduced any evidence that any of the class loans herein inflicted any such expense. As Albers testified, the 722 class loans that he identifies as having been "in foreclosure," refer not necessarily to loans associated with completed foreclosure proceedings, but to loans associated with a foreclosure "status code" (Albers Dep. 49:11-19). Loans bearing this designation can include active, suspended, on hold, and completed foreclosures (*id.* at 50:16-22). Yet, Albers' tabulation that 722 class loans bear this designation fails to identify how many fall into each bucket, let alone any alleged unreimbursed expense associated with any which one. For instance, as Albers testified, even for borrowers that go on to cure their default and thus suspend foreclosure, the designation of "in foreclosure" still remains (*id.* at 52:2-13). In making his calculation that 722 class loans were "in foreclosure," Albers did not look at any of the individual loan files. Rather, he just added up the loans that had the "in foreclosure" designation in Flagstar's system without discriminating as to their various circumstances (*id.* at 50:9-15). Thus, as far as we know, it is entirely possible that all 722 class loans that are associated with a

"status code" of "in foreclosure" later cured their default, suspended foreclosure, and Flagstar thereby bore no unreimbursed expense. Again, it was Flagstar's burden to adduce evidence on these issues. It failed.

Moreover, as plaintiffs point out, Expert Skanderson's opinion regarding the various categories of offsets he elucidated suffer from similar deficiencies. For one thing, Flagstar just provided Albers' tabulations to Expert Skanderson without explaining how each category was constructed or what each category even meant. Expert Skanderson agreed that he did not know the exact parameters of any of the categories of offset he identified in his report—except for negative escrow balances—and that they were provided to him in tabulated form. Expert Skanderson also did not examine any class-loan-specific documents. Thus, his opinions about the *fact* of expenses is not tethered to any particular class loan herein. Unsurprisingly, therefore, he offers no opinion about the *amount* of any such expenses.

In short, Flagstar has not adduced any evidence that *any* of the class loans herein subjected it to unreimbursed expenses, assuming Flagstar claims were even legally cognizable in the first instance. The same is true for all of the purported categories of offsets. Accordingly, Flagstar has failed to carry its burden concerning its defenses of offset. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (on an issue where

the nonmoving party will have the burden of proof at trial, the party moving for summary judgment need only point out "that there is an absence of evidence to support the nonmoving party's case.").

2. Pre-judgment Interest.

"Although a court may not award prejudgment interest under Civil Code section 3287, subdivision (a), to a restitutionary award under the UCL, a court nevertheless has discretion in equity to award prejudgment interest on a UCL award as a component of restitution." *Espejo v. The Copley Press, Inc.*, 13 Cal.App.5th 329, 375, 221 Cal.Rptr.3d 1 (2017). "The policy underlying an award of prejudgment interest is to make the injured party whole for the accrual of wealth that could have been produced during the period of loss." *Ibid.* "[W]here, as here, an award of prejudgment interest is a matter of the trial court's equitable discretion, the requirement under Civil Code section 3287, subdivision (a), that damages be 'certain, or capable of being made certain by calculation' does not apply." *Id.* at 376, 221 Cal.Rptr.3d 1.

Here, but for Flagstar's unlawful conduct, class members' escrow accounts would have been credited two percent IOE at the end of each calendar year or, in the event of termination before then, such amounts would have been disbursed to them at the point of termination. In turn, any credited IOE would have earned two percent IOE. Importantly, Flagstar's own expert agreed that, economically speaking, a two percent prejudgment interest rate represented class members' "opportunity

cost" (Skanderson Dep. 23:8-21). For disbursed IOE, class members would have been able to earn interest elsewhere. Either way, therefore, had class members been in possession of the wrongfully withheld IOE, they would have been able to earn interest on those amounts. This order thus finds that awarding plaintiffs two percent prejudgment interest is a necessary component of restitution in order to make class members whole.

As already discussed, Expert Olsen calculated total accrued IOE to class members with near mathematical certainty. Moreover, in calculating prejudgment interest to the class, he made assumptions—*e.g.*, crediting class members' escrow accounts for accrued IOE at the end of each calendar year—that were consonant with Flagstar's own practices. Thus, his calculation of prejudgment interest bears a reasonable relationship to making the class members "whole for the accrual of wealth that could have been produced during the period of loss." *Espejo*, 13 Cal.App.5th at 375, 221 Cal.Rptr.3d 1.

Accordingly, this order hereby awards class members the requested two percent of prejudgment interest as a component of their award of restitution. According to Expert Olsen, this amount was $541,053.11 as of the May 21, 2020; with $443.90 accruing every day since (Olsen Decl. ¶ 5).

3. Injunctive Relief.

In addition to restitution, plaintiffs also seek a permanent injunction. *See In re Tobacco II Cases*, 46

Cal.4th 298, 319, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009) ("[T]he primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction."). Again, Flagstar does not currently pay IOE to class members whose mortgage servicing rights Flagstar owns and whose loans it currently services. This is an undisputed fact. To avoid repetitive lawsuits, therefore, the Bravos, on behalf of themselves and a subset of similarly situated class members, seek a permanent injunction ordering Flagstar to prospectively comply with Section 2954.8(a) from January 1, 2020, onward—namely, to pay them two percent interest on funds held in their escrow accounts. Plaintiffs seek such relief not just with respect to the described subclass, but with respect "to *all* [of Flagstar's] California customers" (Dkt. No. 180 at 12) (emphasis in original).

Flagstar mounts both procedural and substantive challenges to the Bravos' request for injunctive relief. To the following extent and for the following reasons, the request for injunctive relief is **Granted**. Such relief is limited to the subclass certified herein.

A. Procedural Issues.

As an initial matter, Flagstar lodges procedural attacks to oppose plaintiffs' request for injunctive relief. It argues that Kivett is the only named plaintiff and "the sole class representative" in this action, and injunctive relief is thus improper because Kivett—a *former* customer whose loan Flagstar no longer services—does not have standing to seek injunctive relief on behalf of class members' whose

loans Flagstar *currently* services but for which it does not pay IOE. Put differently, it argues that the Bravos—*current* Flagstar customers—are not named plaintiffs and thus cannot serve as co-class representatives for a subclass of *current* Flagstar customers. The crux of Flagstar's argument is that once Kivett was granted leave to file his second amended complaint to add the Bravos as named plaintiffs, Kivett failed to formally file the second amended complaint as a standalone document on the docket. In its view, therefore, the first amended complaint is still the operative complaint. Flagstar also argues that Kivett's failure to formally file the second amended complaint deprived it of procedural safeguards afforded it by the Federal Rules of Civil Procedure, such as asserting affirmative defenses.

This order disagrees and finds that the second amended complaint is the operative complaint. First off, Kivett had attached the second amended complaint to the declaration of his attorney as part of his motion for leave to amend (Dkt. No. 83-2). The second amended complaint differed from the first amended complaint only insofar as it added the Bravos as named plaintiffs. It remained similar in all other material respects. Although Kivett should have formally filed it again on the docket as a standalone document, that failure is not fatal here. Flagstar had access and notice of the contents of the second amended complaint. And, significantly, Flagstar subsequently filed an answer to the second amended complaint, asserting all its defenses therein (Dkt. No. 178). At bottom, the parties have acted for all intents and purposes as though the Bravos are named plaintiffs, and Flagstar's cries of prejudice are insincere.

Moreover, context and chronology are important here. This order thus finds it helpful to place events in context before proceeding further. Importantly, the class certification order granted Kivett's request to file his second amended complaint in express contemplation of ensuring there would be co-class representatives whose loan Flagstar currently services such that standing to pursue injunctive relief wouldn't be an issue (*see* Dkt. No. 120 at 4, 12-13); (*see also id.* at 13) ("Plaintiff's motion for new plaintiffs to intervene and for leave to amend to add new class representatives is provisionally **Granted**.").

That order gave Flagstar until January 2, 2020, to show cause why the Bravos should not be authorized to co-represent the class; and required the facilitation of discovery from the Bravos to Flagstar. Specifically, the Bravos were required to promptly turn over their records to Flagstar and sit for depositions before the due date for Flagstar to show cause. The Bravos obliged.

Yet, Flagstar did not show cause by said deadline. Instead, in the parties' joint stipulation regarding class notice that was filed on January 2, 2020, it opted for a footnote therein, purporting to reserve its ability to do so "in the future, including at trial" (Dkt. No. 164 at 1 n.1). Simultaneously, plaintiffs again announced their intention of pursuing injunctive relief (*see id.* at 3 n.2) ("Plaintiffs will seek injunctive relief covering the period from January 1, 2020 forward."). Meanwhile, the December 5, 2019, deadline to file dispositive motion had come to pass.

Accordingly, on March 13, 2020, plaintiffs filed a proposed order, unaccompanied by a motion, requesting the certification of a subclass "consisting of all members of the certified [c]lass who (a) did not opt out and (b) are current customers of Flagstar" pursuant to Rule 23(b)(2) for the purpose of seeking injunctive relief (Dkt. No. 155).

Flagstar objected. It filed an administrative motion to strike plaintiffs' proposed order for an injunction subclass on the ground that the class certification order specifically confined its holding to a certification under Rule 23(b)(3) (Dkt. No. 156) (citing Dkt. No. 120 at 13) ("class is certified as to plaintiff Kivett's Section 17200 claim, except for prospective injunctive relief.").

In response to this dispute along with plaintiffs' representation that this action could be decided if given further opportunity to move for summary judgment, an order dated March 23, 2020, invited each party to file a motion for summary judgment "addressing both damages and injunctive relief. The parties shall include any briefing they deem necessary in light of Rule 23(b)(2)" (Dkt. No. 171). Thus, the parties dispute about a Rule 23(b)(2) subclass has cascaded into this current motion, as now discussed.

(i) Subclass of Current Flagstar Customers Under Rule 23(b)(3).

"An order that grants or denies class certification may be altered or amended before final judgment." Rule 23(c)(1)(C). Accordingly, this order hereby certifies a Rule 23(b)(2) subclass of class members whose loans Flagstar

currently services, and appoints Bernard and Lisa Bravo as subclass representatives, in order to seek injunctive relief on behalf of the subclass.

(a) Rule 23(a) Requirements are met.

In previously certifying a class of both former and current Flagstar customers under Rule 23(b)(3) based on the same claim, a prior order already found that all of the requirements of Rule 23(a) were met (*see* Dkt. No. 120). With the exceptions noted below, the same rationales apply here and need not be discussed in detail herein again.

Where this subclass varies is as to numerosity, typicality, and adequacy of representation. The main class comprises of both former and current Flagstar customers. According to expert Olsen, as of December 31, 2019, the existent certified class includes 65,477 current Flagstar customers, 14,907 of whom Flagstar still does not pay any IOE to (Olsen Decl. ¶ 10). Numerosity is thus satisfied. Moreover, Bernard and Lisa Bravo's claims—harm caused by Flagstar's ongoing violations of Section 2954.8(a)—are typical of other class members whose loans Flagstar currently services but does not pay IOE to.

Now, as to the adequacy of the Bravos as subclass representatives. First off, despite the facilitation of discovery from the Bravos to Flagstar—including depositions—and ample opportunity to show cause why the Bravos should not be authorized to co-represent the class, Flagstar failed to do so by the required deadline. Nonetheless, this order still considers Flagstar's current arguments.

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Flagstar contends that the Bravos are not adequate representatives to seek injunctive relief on behalf of the subclass because they lack standing. It points to the fact that their escrow account carried a negative balance of $239 for thirty days in 2018 (*see* Albers Decl. ¶ 7). Flagstar thus claims that it is entitled to "offset" the unspecified alleged cost of advancing that amount to the Bravos against any amount of accrued IOE owed to them, which it argues "may" preclude the Bravos from having suffered any injury in fact (Opp. 21).

This order disagrees on various grounds. *First*, as discussed earlier in this order, Flagstar has not shown that it has a cognizable defense of offset based on negative escrow balances. But, even if it did, simple math tells another story. Namely, it is undisputed that at two percent interest, the funds held in the Bravos' escrow account accrued $39.57 in IOE from origination through December 31, 2019; and that Flagstar has not paid this amount. Hypothetically then, even giving Flagstar the benefit of a glaring fifty percent interest rate for its cost of working capital in advancing the $239 to the Bravos for thirty days—equaling $9.82—and offsetting it against the amount owed to the Bravos, $29.75 would still remain. Tellingly, Flagstar avoids this math. At bottom, the Bravos' injury—a sum certain—is "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Second, it is undisputed that Flagstar does not pay any IOE on class loans for which Flagstar owns the mortgage servicing rights (Ryan Dep. 34:13-19; 45:14-16) (Stip. Facts

¶ 6); nor is it disputed that Flagstar owns the Bravos' mortgage servicing rights and that it currently services their loan. Thus, Flagstar remains in continuing violation of Section 2954.8(a), causing ongoing injuries to the Bravos, as it is not paying them the two percent interest on their escrow funds. Importantly, then, the Bravos injuries are continuing and imminent, traceable to Flagstar's ongoing violation of Section 2954.8(a), and an injunction will more than likely redress that harm. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. Irrespective of the amounts owed to them in restitution for accrued IOE arising out of Flagstar's past violations, therefore, the Bravos have standing to seek injunctive relief for Flagstar's present and future violations of Section 2954.8(a). Accordingly, the Bravos have standing and are adequate subclass representatives.

Lastly, Flagstar's challenges to the sufficiency and admissibility of the Bravos' declaration are red herrings (Opp. 22-23) (citing Bravos Decl. ¶ 4) ("The declaration is riddled with vague and speculative representations, none of which actually show that the Bravos have actually been injured by Flagstar's challenged conduct"). The evidence adduced by Flagstar itself belies its assertion and demonstrate that the Bravos have standing. For example, it submits the declaration of Mansell who swears that: (1) Flagstar owns the mortgaging servicing rights to the Bravos' loan; (2) Flagstar began servicing their loan beginning in February 2018 through the present; (3) Flagstar created and maintains an escrow account pursuant to their deed of trust; (4) "[a]t 2% interest for funds held in their escrow account, $39.57 would have

accrued on the Bravos loan from origination through December 31, 2019" (Mansell Decl. ¶¶ 6-10).

(b) The Condition of Rule 23(b)(2) is also met.

The condition of Rule 23(b)(2) itself is also met. Because Flagstar continues not to pay the two percent interest required by Section 2954.8(a) to a subclass of class members—such as the Bravos—whose loans servicing rights Flagstar owns and currently services, Flagstar "has acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief . . . is appropriate respecting the [sub]class as a whole." Rule 23(b)(2).

Furthermore, the parties had already stipulated that if a subclass is certified under Rule 23(b)(2), another round of notice would not be necessary (Dkt. No. 144). Regardless, notice to a class certified under Rule 23(b)(2) is discretionary. *See* Rule 23(c)(2)(A).

In order to obtain injunctive relief, therefore, a subclass of the existent class that are current Flagstar customers is hereby CERTIFIED pursuant to Rule 23(b)(2). Additionally, the Bravos are hereby APPOINTED subclass representatives.

(ii) Subclass members' standing is irrelevant to injunctive relief.

Next, Flagstar makes multiple arguments, the thrust of which is that all subclass members must have standing in

order for injunctive relief to issue. Not so. To the contrary, our court of appeals has held that in seeking injunctive relief, as opposed to individual monetary damages, only the class representative need have standing. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020) (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)) (en banc). Similarly, "actions for relief" under Section 17200 may be brought by "a person who has suffered injury in fact and has lost money or property as a result of their unfair competition." Bus. & Prof. Code § 17204. In representative actions, Section 17204 is satisfied as long as the representative plaintiff meets the standing requirements. *In re Tobacco II Cases*, 46 Cal.4th at 315-16, 93 Cal.Rptr.3d 559, 207 P.3d 20.

For reasons already discussed, the Bravos, the subclass representatives, have standing. They can thus pursue injunctive relief on behalf of the class.

B. Flagstar's Substantive objections to Injunctive Relief.

The Bravos and the subclass of current Flagstar customers seek a permanent injunction enjoining Flagstar from the unlawful business practice stated herein. This order finds that such relief is appropriate under Section 17203 of the California Business and Professions Code, and necessary to prevent further harm to current Flagstar customers. The Effective Date shall be January 1, 2020. The following subclass-wide relief is therefore ordered:

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1. Flagstar shall credit subclass members' escrow accounts for any IOE that may have accrued after January 1, 2020. Consistent with its current practices and with Section 2954.8(a) itself, Flagstar shall do so at the end of each calendar year for escrow accounts that remain active. For example, Flagstar shall credit the escrow accounts of subclass members for any IOE that has already accrued and will accrue in 2020 on January 1, 2021. That process shall continue each year thereafter.

2. For class members whose loans (a) Flagstar serviced in 2020; (b) did not pay IOE on; (c) whose escrow accounts were subsequently closed after January 1, 2020, but before the issuance of this order, Flagstar shall retroactively pay those class members their accrued IOE, if at all, for the relevant time period. Flagstar shall do so by January 29, 2021.

3. Similarly, going forward, subclass members whose loans Flagstar will stop servicing for whatever reason before the end of a calendar year, shall be paid their accrued IOE, if at all, at the point where Flagstar closes their escrow accounts.

4. Consistent with Section 2954.8(a), the amount of IOE Flagstar pays shall be at least two percent.

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CONCLUSION

To the foregoing extent, plaintiffs' motion for summary judgment is **GRANTED**. Plaintiffs' are **AWARDED** $8,101,175.64 in restitution for accrued and unpaid IOE to the class through December 31, 2019, as well as prejudgment interest of two percent thereon. Plaintiffs should calculate the account-by-account allotment to each class member—with IOE and prejudgment interest stated separately—and file a form of judgment with class members' names that gives exact recovery. The injunction herein is limited to the subclass.

IT IS SO ORDERED.

Dated: December 10, 2020.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (MARCH 4, 2020)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOWELL SMITH AND BERNARD AND LISA BRAVO, AND LOWELL AND GINA SMITH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

FLAGSTAR BANK, FSB, A FEDERAL SAVINGS BANK, AND DOES 1—100, INCLUSIVE,

Defendants.

No. C 18-05131 WHA

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

This order holds *Lusnak* applies to the claim in this case, and that exceptions proposed by Flagstar are not persuasive, including the "small bank vs. large bank" distinction. Therefore, the motion for summary judgement is **Denied** to the foregoing, and plaintiff's motion is **Granted.**

This order further finds that Flagstar does not and has not paid any interest on California loans owned by Flagstar.

IT IS SO ORDERED.

Dated: March 4, 2020.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX G — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARCH 26, 2026)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-15667
D.C. No. 3:18-cv-05131-WHA
Northern District of California, San Francisco

WILLIAM KIVETT; *et al.*,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

Filed March 26, 2026

ORDER

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,* District Judge.

Judge Bybee and Judge Bolton have voted to deny the petition for rehearing and recommend denying the

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

petition for rehearing en banc. Judge Nelson has voted to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed November 17, 2025, are DENIED.

APPENDIX H — ORDER GRANTING PANEL REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (DECEMBER 24, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM KIVETT; *et al.*,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

No. 21-15667

D.C. No. 3:18-cv-05131-WHA
Northern District of California
San Francisco

ORDER

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,* District Judge.

Flagstar Bank's petition for panel rehearing, filed October 7, 2024, is GRANTED. The memorandum

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

disposition filed on August 22, 2024, is withdrawn and submission is vacated pending further order of the court. The court intends to schedule oral argument on a date to be determined. With the withdrawal of the memorandum disposition filed on August 22, 2024, Flagstar Bank's petition for rehearing en banc is denied as moot.

The court requests simultaneous supplemental briefing by the parties addressing whether California Civil Code § 2954.8(a) is preempted by the National Bank Act under the standard and methodology described in *Cantero v. Bank of America, N.A.*, 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). The simultaneous briefs may not exceed 12,000 words and shall be due 30 days from the date of this order.

APPENDIX I — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 14, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-15667
D.C. No. 3:18-cv-05131-WHA
Northern District of California, San Francisco

WILLIAM KIVETT; *et al.*,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

Filed July 14, 2022

ORDER

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,* District Judge.

Judge R. Nelson voted to deny the petition for rehearing en banc, and Judge Bybee and Judge Bolton

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

APPENDIX J — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (MARCH 17, 2021)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

No. 3:18-CV-05131-WHA

WILLIAM KIVETT AND BERNARD AND LISA BRAVO, INDIVIDUALLY, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

FLAGSTAR BANK, FSB, A FEDERAL SAVINGS BANK, AND DOES 1-100, INCLUSIVE,

Defendant.

JUDGMENT

Honorable Judge William Alsup

Judgment in favor of the Class and Subclass and against Defendant Flagstar Bank, FSB is hereby entered in the total amount of $9,262,769.24. The individual Class and Subclass members' names and exact recoveries through December 31, 2020 are set forth in Exhibit A hereto.

Appendix J

Dated: March 17, 2021

/s/ William Alsup
William Alsup
United States District Court Judge

APPENDIX K — CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix K

12 U.S.C. § 25b. State law preemption standards for national banks and subsidiaries clarified.

(a) Definitions

For purposes of this section, the following definitions shall apply:

(1) National bank

The term "national bank" includes—

(A) any bank organized under the laws of the United States; and

(B) any Federal branch established in accordance with the International Banking Act of 1978 [12 U.S.C. 3101 et seq.].

(2) State consumer financial laws

The term "State consumer financial law" means a State law that does not directly or indirectly discriminate against national banks and 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.

(3) Other definitions

The terms "affiliate", "subsidiary", "includes", and "including" have the same meanings as in section 1813 of this title.

(b) Preemption standard

(1) In general

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 the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and 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, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

(2) Savings clause

Title 62 of the Revised Statutes and section 371 of this title do not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).

(3) Case-by-case basis

(A) Definition

As used in this section the term "case-by-case basis" refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.

(B) Consultation

When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the

Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) Rule of construction

Title 62 of the Revised Statutes does not occupy the field in any area of State law.

(5) Standards of review

(A) Preemption

A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.

(B) Savings clause

Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised

Statutes of the United States or other Federal laws.

(6) Comptroller determination not delegable

Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

(c) Substantial evidence

No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996).

(d) Periodic review of preemption determinations

(1) In general

The Comptroller of the Currency shall periodically conduct a review, through notice

and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 43 of this title.

(2) Reports to Congress

At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

(e) Application of State consumer financial law to subsidiaries and affiliates

Notwithstanding any provision of title 62 of the Revised Statutes or section 371 of this title, a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

(f) Preservation of powers related to charging interest

No provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of "interest" under such provision.

(g) Transparency of OCC preemption determinations

The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and

practices covered by each determination and the requirements and constraints determined to be preempted.

(h) Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks

(1) Definitions

For purposes of this subsection, the terms ''depository institution'', ''subsidiary'', and "affiliate" have the same meanings as in section 1813 of this title.

(2) Rule of construction

No provision of title 62 of the Revised Statutes or section 371 of this title shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).

(i) Visitorial powers

(1)[1] In general

In accordance with the decision of the Supreme Court of the United States in Cuomo v.

1. So in original. No par. (2) has been enacted.

Clearing House Assn., L. L. C. (129 S. Ct. 2710 (2009)), no provision of title 62 of the Revised Statutes which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.

(j) Enforcement actions

The ability of the Comptroller of the Currency to bring an enforcement action under title 62 of the Revised Statutes or section 45 of title 15 does not preclude any private party from enforcing rights granted under Federal or State law in the courts.

(R.S. § 5136C, as added and amended Pub. L. 111–203, title X, §§ 1044(a), 1045, 1047(a), July 21, 2010, 124 Stat. 2014, 2017, 2018.)

Appendix K

12 U.S.C. § 371. Real estate loans.

(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Appendix K

12 U.S.C. § 1464. Federal savings associations.

(a) In general

In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Comptroller of the Currency is authorized, under such regulations as the Comptroller of the Currency may prescribe—

> (1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and
>
> (2) to issue charters therefor,

giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit for housing safely and soundly.

* * *

(c) Loans and investments

To the extent specified in regulations of the Comptroller, a Federal savings association may invest in, sell, or otherwise deal in the following loans and other investments:

Appendix K

(1) Loans or investments without percentage of assets limitation

Without limitation as a percentage of assets, the following are permitted:

(B) Residential real property loans

Loans on the security of liens upon residential real property.

Appendix K

12 U.S.C. § 2605. Servicing of mortgage loans and administration of escrow accounts.

* * *

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. Any balance in any such account that is within the servicer's control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.

Appendix K

12 U.S.C. § 2609. Limitation on requirement of advance deposits in escrow accounts.

(a) In general

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower—

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full

installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums and other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided*, *however*, That in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

(b) Notification of shortage in escrow account

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer

shall notify the borrower not less than annually of any shortage of funds in the escrow account.

(c) Escrow account statements

(1) Initial statement

(A) In general

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established a statement clearly itemizing the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

(C) Initial statement at closing

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Bureau shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

(2) Annual statement

(A) In general

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during

the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period, the first such period beginning on the first January 1st that occurs after November 28, 1990, and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

(d) Penalties

(1) In general

In the case of each failure to submit a statement to a borrower as required under subsection (c), the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed on such lender or escrow servicer for all such failures during any 12-month period referred to in subsection (b) 1 may not exceed $100,000.

(2) Intentional violations

If any failure to which paragraph (1) applies is due to intentional disregard of the

requirement to submit the statement, then, with respect to such failure—

(A) the penalty imposed under paragraph (1) shall be $100; and

(B) in the case of any penalty determined under subparagraph (A), the $100,000 limitation under paragraph (1) shall not apply.

Appendix K

15 U.S.C. § 1639d. Escrow or impound accounts relating to certain consumer credit transactions.

(a) In general

Except as provided in subsection (b), (c), (d), or (e), a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, shall establish, before the consummation of such transaction, an escrow or impound account for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums with respect to the property or the loan terms, as provided in, and in accordance with, this section.

(b) When required

No impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property may be required as a condition of a real property sale contract or a loan secured by a first deed of trust or mortgage on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, except when—

(1) any such impound, trust, or other type of escrow or impound account for such purposes is required by Federal or State law;

(2) a loan is made, guaranteed, or insured by a State or Federal governmental lending or insuring agency;

(3) the transaction is secured by a first mortgage or lien on the consumer's principal dwelling having an original principal obligation amount that—

> (A) does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 1454(a)(2) of title 12, and the annual percentage rate will exceed the average prime offer rate as defined in section 1639c of this title by 1.5 or more percentage points; or
>
> (B) exceeds the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 1454(a)(2) of title 12, and the annual percentage rate will exceed the average prime offer rate as defined in section 1639c of this title by 2.5 or more percentage points; or

(4) so required pursuant to regulation.

* * *

(f) Clarification on escrow accounts for loans not meeting statutory test

For mortgages not covered by the requirements of subsection (b), no provision of this section shall be construed as precluding the establishment of an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property—

(1) on terms mutually agreeable to the parties to the loan;

(2) at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower; or

(3) pursuant to the requirements for the escrowing of flood insurance payments for regulated lending institutions in section 102(d) of the Flood Disaster Protection Act of 1973 [42 U.S.C. 4012a(d)].

(g) Administration of mandatory escrow or impound accounts

* * *

(3) Applicability of payment of interest

If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law.

Appendix K

Cal. Civ. Code § 2954.8.

(a) Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier.

(b) No financial institution subject to the provisions of this section shall impose any fee or charge in connection with the maintenance or disbursement of money received in advance for the payment of taxes and assessments on real property securing loans made by such financial institution, or for the payment of insurance, or for other purposes relating to such real property, that will result in an interest rate of less than 2 percent per annum being paid on the moneys so received.

(c) For the purposes of this section, "financial institution" means a bank, savings and loan association or credit union chartered under the laws of this state or the United States, or any other person or organization making loans upon the security of real property containing only a one- to four-family residence.

(d) The provisions of this section do not apply to any of the following:

(1) Loans executed prior to the effective date of this section.

(2) Moneys which are required by a state or federal regulatory authority to be placed by a financial institution other than a bank in a non-interest-bearing demand trust fund account of a bank.

The amendment of this section made by the 1979–80 Regular Session of the Legislature shall only apply to loans executed on or after January 1, 1980.

Appendix K

12 C.F.R. § 34.4 Applicability of state law.

(a) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1]

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

---

1. The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. See 12 U.S.C. 85 and 1735f-7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996):

(1) Contracts;

(2) Torts;

(3) Criminal law;[2]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

---

2. But see the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903), where the Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(9) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), or that is made applicable by Federal law.

[69 FR 1917, Jan. 13, 2004, as amended at 76 FR 43569, July 21, 2011]