No. 25-1350

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

BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Bank Policy Institute ("BPI"), American Bankers Association ("ABA"), the Chamber of Commerce of the United States of America ("Chamber"), and Mortgage Bankers Association ("MBA") (collectively, "*Amici*"), respectfully submit this brief in support of Petitioner, Flagstar Bank, N.A.[1]

The Bank Policy Institute. BPI is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. BPI produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

American Bankers Association. Established in 1875, the ABA is the united voice of America's $23.4 trillion banking industry, comprised of small, regional, and large national and state banks that

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[1] Pursuant to Rules 37.2 and 37.6 of this Court, *Amici* affirm that no party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person or entity, other than *Amici*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief, and affirm that counsel of record received the required 10 days' notice.

safeguard nearly $18.6 trillion in deposits, and extend more than $12.3 trillion in loans.

The Chamber of Commerce. The Chamber is the world's largest business federation. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Mortgage Bankers Association. The MBA is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field.

Amici have a substantial interest in maintaining a predictable and uniform preemption framework under the National Bank Act of 1864 ("NBA") and possess institutional expertise on these issues, routinely appearing as *amici curiae* in cases raising questions critical to the U.S. banking system.[2]

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[2] *See, e.g.*, Brief of *Amici Curiae* The Bank Policy Institute et al. in Support of Petitioner, *Bank of Am., N.A.* v. *Lusnak*, 139

SUMMARY OF ARGUMENT

There are three reasons to grant this petition.

First, lower courts remain deeply divided over how to apply *Cantero* and have reached irreconcilable results. Although the First and Second Circuits both properly acknowledged that *Cantero* requires a "nuanced comparative analysis," *Cantero* v. *Bank of Am., N.A.*, 602 U.S. 205, 220 (2024), they arrived at polar opposite conclusions. The First Circuit held that Rhode Island's interest-on-escrow law was not preempted. *Conti* v. *Citizens Bank, N.A.*, 157 F.4th 10, 28 (1st Cir. 2025). The Second Circuit, however, held that New York's materially similar law was preempted. *Cantero* v. *Bank of Am., N.A.*, 175 F.4th 201, 216 (2d Cir. 2026).

The Ninth Circuit compounded this confusion by declining to conduct the analysis *Cantero* requires at all, instead adhering to its pre-*Cantero* decision in *Lusnak* v. *Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). *See Kivett* v. *Flagstar Bank, FSB*, 154 F.4th 640, 645–49 (9th Cir. 2025). National banks are thus subject not only to conflicting outcomes but also

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S. Ct. 567 (Sep. 17, 2018) (No. 18-212); Brief of *Amici Curiae* The Bank Policy Institute et al. in Support of Defendant-Appellant, *Kivett* v. *Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. Feb. 13, 2025) (No. 21-15667), Dkt. No. 95-2; Brief of The Bank Policy Institute et al. as *Amici Curiae* in Support of Defendant-Appellee, *Conti* v. *Citizens Bank, N.A.*, 157 F.4th 10 (1st Cir. Nov. 4, 2024) (No. 22-1770); Brief of *Amici Curiae* The Bank Policy Institute et al. in Support of Respondent, *Cantero* v. *Bank of Am., N.A.*, 602 U.S. 205 (Jan. 25, 2024) (No. 22-529).

to fundamentally incompatible analytical frameworks for NBA preemption, creating significant uncertainty regarding the scope of federally conferred banking powers. That uncertainty extends beyond the courts, leaving national banks, consumers, and state policymakers befuddled about the scope of state regulatory authority.

Second, the question presented is of exceptional importance. States should not be permitted to impose price controls on national banks or to micromanage their operations; doing so undermines the broad discretion that federal law affords and harms the very consumers such state mandates purport to protect. And uniformity in the treatment of mortgage-escrow accounts is critical given how central those accounts are to national banks' federally conferred lending powers. But more broadly, permitting conflicting state pricing mandates to stand would generate a proliferation of state-by-state requirements that extend far beyond mortgage-escrow accounts, fragmenting the uniform national framework the NBA was enacted to preserve.

Third, this Court should grant review because by adhering to its pre-*Cantero* jurisprudence, the Ninth Circuit used a preemption framework irreconcilable with *Cantero*. The Ninth Circuit's decision impermissibly sets forth the type of categorical standard that "would preempt virtually no non-discriminatory state laws that apply to both state and national banks." *Cantero*, 602 U.S. at 221.

When the analytical framework *Cantero* prescribes is properly applied, these state interest-on-escrow laws significantly interfere with national banks' exercise of their federally conferred powers: they dictate the pricing of a product integral to mortgage lending, constrain the operational flexibility that federal law affords, and impose burdens more substantial than those this Court has already held warrant preemption.

This Court's immediate intervention is necessary to resolve these questions and restore certainty to the preemption framework.

ARGUMENT

I. COURTS REMAIN DIVIDED OVER THE ANALYSIS REQUIRED BY *CANTERO*.

Notwithstanding this Court's efforts to develop a uniform analytical framework that should lead to uniform results, the lower courts continue to be in direct conflict. Since this Court's decision in *Cantero*, 602 U.S. 205, three courts of appeals have addressed whether state interest-on-escrow laws are preempted. *Conti*, 157 F.4th 10; *Cantero*, 175 F.4th 201; *Kivett*, 154 F.4th 640. The First and Second Circuits each recognized that *Cantero* demands a "nuanced comparative analysis" to assess whether a state law is preempted under the NBA*, see Cantero*, 175 F.4th at 209; *Conti*, 157 F.4th at 15, yet reached diametrically opposed results on basically indistinguishable statutes.

The Ninth Circuit, meanwhile, never undertook the Court's analysis at all. In *Kivett*, the majority and dissent diverged sharply in applying the *Cantero* framework, arriving at opposite conclusions regarding California's interest-on-escrow statute. *See* 154 F.4th at 649; *id.* at 659 (Nelson, J., dissenting). The majority declined to engage in the comparative analysis *Cantero* prescribes, instead deferring to its pre-*Cantero* precedent, *Lusnak* v. *Bank of America, N.A.*, 883 F.3d 1185. *Id.* at 645–49. In doing so, the majority did not find that *Lusnak* was consistent or even reconcilable with *Cantero*, but that it was "not clearly irreconcilable with *Cantero*." *Id.* at 649. The dissent, for its part, applied *Cantero*, finding that California's interest-on-escrow law was preempted. *See generally id.* at 649–63 (Nelson, J., dissenting).

Cantero does not merely create tension with or cast doubt on *Lusnak*. Rather, this Court flatly rejected *Lusnak*'s approach. Further, the majority's reasoning in the Ninth Circuit conflicts with the First and Second Circuits' recognition that *Cantero* prescribed a mandatory analysis. *See Conti*, 157 F.4th at 15 ("*Cantero* directs courts to perform a 'nuanced comparative analysis'" based on "two categories of precedents"); *Cantero*, 175 F.4th at 210 (courts "must" analyze the nature of the interference and compare to past Supreme Court jurisprudence). Even worse, *Lusnak* employs precisely the kind of categorical standard *Cantero* rejected—one that "would preempt virtually no non-discriminatory state laws that apply to both state and national banks." *Cantero*, 602 U.S. at 221. The result is that national banks now confront incompatible preemption standards across three circuits, with no reliable framework for determining the scope of their federally conferred powers. In view of what is now a clear circuit split over states' ability to fix prices for national bank products and services, this Court should grant certiorari to eliminate such uncertainty.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE AND WARRANTS THIS COURT'S IMMEDIATE REVIEW.

Mortgage escrow accounts illustrate why states should be preempted from imposing price limitations and requirements on national banks' financial products and services. The central role these accounts play in mortgage lending, the concrete harms that inconsistent state escrow-interest mandates impose on homeowners and lenders alike, and the resulting regulatory fragmentation all demonstrate why this issue warrants this Court's immediate review.

Mortgage-escrow accounts originated during the Great Depression, when countless homeowners lost their homes through foreclosure. *See* U.S. General Accounting Office, *Study of the Feasibility of Escrow Accounts on Residential Mortgages Becoming Interest Bearing* 6 (1973) ("GAO Study"). Escrow accounts address a core problem: when homeowners fail to pay property taxes or insurance premiums, they risk tax liens on the property (which are superior to mortgage liens) or gaps in coverage that leave the property unprotected. *See* Bruce E. Foote, Cong. Rsch. Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998) ("CRS Report"); GAO Study at 5. By collecting small payments throughout the year and ensuring taxes and insurance premiums are timely paid, escrow accounts "protect both the bank and the borrower," because borrowers avoid payment shock from large lump sum payments and lenders protect their collateral from tax foreclosure or uninsured damage. *Cantero*, 602 U.S. at 210–11. Empirical evidence confirms this design works, demonstrating that for homes without escrow accounts, "payment shock associated with property tax bills accelerates the pace of mortgage delinquency outcomes." Nathan B. Anderson & Jane K. Dokko, *Mortgage Delinquency and Property Taxes*, 101st Annual Conference Procs., 2008, Nat'l Tax Ass'n 176, 184 (2008), https://ntanet.org/wp-content/uploads/proceedings/2008/019-anderson-mortgage-delinquency-property-2008-nta-proceedings.pdf. Without mortgage-escrow accounts, lenders may need to charge elevated interest rates, require higher down payments, or decline loans to those with riskier credit profiles altogether. *See* Real Estate Lending Escrow Accounts, 91 Fed. Reg. 29,340, 29,340–41, 29,344 (May 19, 2026) (codified at 12 C.F.R. pts. 34 & 160); Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. 29,350, 29,356 (May 19, 2026) (codified at 12 C.F.R. pt. 34).

It is thus unsurprising that today, such accounts are central to the residential mortgage market. Indeed, "approximately 80 percent of U.S residential real estate mortgages to purchase a property use an escrow account." Real Estate Lending Escrow Accounts, 91 Fed. Reg. at 29,340 (citing Fed. Hous. Fin. Agency & Consumer Fin. Prot. Bureau, *A Profile of 2016 Mortgage Borrowers: Statistics from the National Survey of Mortgage Originations* 27, 30 (2018)).

In light of escrow accounts' exceptional importance to mortgage lending, itself an express power under the NBA, *Cantero*, 602 U.S. at 210, national banks have long had broad discretion to determine the pricing and other terms of their escrow-related products and services. *See* Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. at 29,356 ("The OCC's regulations have long made clear that national banks have broad discretion to determine the pricing of their products and services.").

State interest-on-escrow laws directly override that discretion by dictating the price at which national banks must offer a core banking product. Because national banks depend on the ability to price their products to "manage credit risk exposures," such mandates "meaningfully interfere[] with fundamental and substantial elements of the business of national banks." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) (codified at 12 C.F.R. pts. 4, 5, 7, 8, 28 & 34). As the OCC has emphasized, "[r]equiring compliance with State interest-on-escrow laws would undermine this discretion and could cause national banks to, among other things, attempt to recoup or offset costs in other ways that are not as well aligned with their sound banking judgment or safe and sound banking principles." Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. at 29,356.

State interest-on-escrow laws also contravene the balanced regime chosen by Congress in regulating certain aspects of mortgage-escrow accounts but not mandating interest. RESPA, for example, regulates the amount banks can require borrowers to place in escrow but "does not mandate that national banks pay interest to borrowers on the balances of their escrow accounts." *Cantero*, 602 U.S. at 211; *see* Br. for Resp't Opposing Cert. at 8, *Cantero* v. *Bank of Am., N.A.*, 602 U.S. 205 (2024) (No. 22-529) (describing how, in adopting RESPA, Congress considered mandating a study on the feasibility of requiring lenders to pay interest on escrow but ultimately declined to take even that step).

The dissent in *Kivett* observed that "Congress has considered [requiring interest payments on funds held in mortgage-escrow accounts] three times—and has rejected it each time." *Kivett*, 154 F.4th at 652 (Nelson, J., dissenting); *see also* Bruce E. Foote, Cong. Rsch. Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 4 (1998) (detailing five instances as of 1998 where bills requiring lenders to pay interest on escrow accounts were introduced but no action was taken). The OCC also determined that state interest-on-escrow laws are preempted by the NBA. 12 C.F.R. § 34.7 (codifying Preemption Determination: State

Interest-on-Escrow Laws, 91 Fed. Reg. 29,350 (May 19, 2026)).[3] These expressions of congressional and OCC policy reflect the fact that state interest-on-escrow laws are "incompatible" with the federal scheme that Congress contemplated. *See Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 374 (1954) ("We think the federal and state statutes are incompatible, and in such circumstances the policy of the State must yield.").

Beyond interfering with national banks' federally conferred powers, even well-meaning price controls can harm the very consumers they purport to protect. *See, e.g.*, William F. Baxter, *Section 85 of the National Bank Act and Consumer Welfare*, 1995 Utah L. Rev. 1009, 1012, 1019–23 (1995) (explaining, based on empirical studies, how federal preemption of state-level price controls improves consumer welfare in competitive credit markets, particularly for the least well-off consumers).

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[3] The limited "carveout" for "high-priced mortgages" in § 1639d(g)(3) of the Truth in Lending Act ("TILA") does not somehow support a "general legislative intent that *all* state [interest-on-escrow] laws (even those untouched by TILA) pass muster under *Barnett Bank*'s significant-interference test." *Kivett*, 154 F.4th at 656 (Nelson, J., dissenting). Indeed, to the contrary, "[w]hen Congress takes care to enumerate certain exceptions, additional exceptions are rarely implied." *Id.* (citing *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001)). The logical and correct reading of TILA's § 1639d(g)(3) is "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." *Id.*

Recent empirical evidence specific to interest-on-escrow laws confirms this pattern. In particular, BPI analyzed the effects of state interest-on-escrow laws on banks' mortgage lending practices by studying the impact of Iowa's 2022 repeal of its interest-on-escrow law. That research demonstrates that, after the repeal, the chance a mortgage application ended in origination was higher in Iowa relative to comparison states, and this positive effect was concentrated among lower-income borrowers. Laurence Bristow & Daniel Grodzicki, *Does Mandating Interest Payments on Mortgage Escrow Accounts Benefit Consumers?* 2, 8–11 (Bank Pol'y Inst., Working Paper 2026). Origination fees also dropped in Iowa relative to comparison states after the repeal, suggesting lenders had previously passed on most of the costs of escrow accounts to consumers, with lower-income consumers again bearing the brunt of the impact. *Id.* at 2, 10–11; *see also* Real Estate Lending Escrow Accounts, 91 Fed. Reg. at 23,940–41 ("[The burden of making escrow account administration more expensive] may fall especially hard on first-time and lower-income borrowers, as origination fees, for example, may represent a proportionally larger financing charge compared to higher-balance mortgages.").

These consumer harms are compounded by the regulatory fragmentation that results when states are permitted to impose their own escrow-interest mandates. At least 12 states have enacted interest-on-escrow laws, *Conti*, 157 F.4th at 24, imposing a variety of requirements on this critical banking product.[4] Rhode Island, for example, requires lenders to pay interest on escrow funds "at a rate equal to" or "not less than" that on "regular savings accounts," 19 R.I. Gen. Laws § 19-9-2(a), while New York mandates a minimum rate of 2% "or a rate prescribed by the superintendent of financial services," N.Y. Gen. Oblig. Law § 5-601. Connecticut uses a deposit index to calculate the minimum required interest rate, Conn. Gen. Stat. Ann. § 49-2a, while Oregon uses a statutory "discount rate," defined as "the auction average rate on 91-day United States Treasury bills . . . less 100 basis points." Or. Rev. Stat. § 86.245(1), (2). This patchwork of conflicting obligations forces national banks to tailor their operations on a state-by-state basis, undermining the uniform national framework the NBA was enacted to preserve.

The threat of state price controls extends well beyond mortgage-escrow accounts. Post-*Cantero*, state pricing mandates are already proliferating, and the Ninth Circuit's departure from *Cantero* encourages such efforts.[5] Illinois, for instance,

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[4] The First Circuit's conclusion that interest-on-escrow laws must not conflict with the "overall scheme of federal-banking law" because "interest-on-escrow laws have been enacted by at least twelve states" would immunize any state law from preemption so long as other states enact similar laws. *Conti*, 157 F.4th at 24. That logic—that multiple wrongs can make a right—cannot withstand scrutiny.

[5] *See, e.g.*, N.Y. Banking Law § 745 (capping interest rates on certain buy-now-pay-later loans); 6 R.I. Gen. Laws § 6-40.1-2 (prohibiting paper statement fees for those over age 65); S.B. S4228, 2025-2026 Reg. Sess. (N.Y. 2025) (prohibiting fees for

enacted the Interchange Fee Prohibition Act ("IFPA"), which, among other things, caps interchange fees by eliminating portions of a transaction on which banks, including national banks, can receive interchange fees. 815 Ill. Comp. Stat. Ann. 151/150-10(a). The IFPA has already been the subject of a preemption challenge that reached the Seventh Circuit once. *Ill. Bankers Ass'n* v. *Raoul*, 2026 WL 1291987 (7th Cir. May 8, 2026). If *Kivett* were left undisturbed, states would be emboldened to extend similar reasoning to ATM fees, overdraft charges, deposit accounts, and other core banking products—further eroding national banks' ability to function as national institutions.

Preemption serves as the essential safeguard against this fragmentation. For more than a century, this Court has recognized that the national banking system is meant to be "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903). Recognizing the importance of such uniformity, Congress codified *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996), and this Court's

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paper statements required for certain benefits applications); 815 Ill. Comp. Stat. Ann. 151/150-10(a) (limiting interchange fees); S.B. 26-134, 75th Gen. Assemb., 2026 Reg. Sess. (Colo. 2026) (prohibiting banks holding over $60 billion in assets from receiving interchange fees on the tax portions of transactions) (vetoed on June 3, 2026); S.B. 512, 158th Gen. Assemb., 2025-2026 Reg. Sess. (Ga. 2026) (same); H.B. 8212, 2026 Leg. Sess. (R.I. 2026) (same).

longstanding precedent, and instructed "courts how to analyze federal preemption of state laws regulating national banks." *Cantero*, 602 U.S. at 213; *see* 12 U.S.C. § 25b. This analysis is based on whether a state law "prevents or significantly interferes with the national bank's exercise of its powers," and that question, in turn, is based on "the text and structure of the laws, comparison to other precedents, and common sense." *Cantero*, 602 U.S. at 220 & n.3. Under this uniform federal framework, the OCC may establish rules governing the pricing of national bank products and services or leave such determinations to the business judgment of individual national banks. In either case, it is the federal framework, not a patchwork of state mandates, that governs.

If the Ninth Circuit's fractured preemption framework is left to stand, national banks would be subject to "'[d]iverse and duplicative' state regulation[s] . . ., which is 'precisely what the NBA was designed to prevent.'" *Kivett*, 154 F.4th at 663 (Nelson, J., dissenting) (quoting *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13–14 (2007)). Such state-by-state pricing mandates would increase costs and operational burdens and undermine national banks' ability to manage risk, capital, credit, and credit terms across state lines. It is therefore paramount that this Court reiterate that *Cantero* requires a uniform preemption framework and make clear that such pricing mandates are preempted under the NBA.

III. STATE INTEREST-ON-ESCROW LAWS ARE PREEMPTED UNDER THE NBA.

This Court should grant review and hold that state interest-on-escrow laws are preempted. As it stands, substantially similar laws have been preempted in the Second Circuit but not in the First or Ninth. *Compare Cantero*, 175 F.4th at 216 (New York interest-on-escrow law preempted in reliance on *Cantero*, 602 U.S. 205), *with Conti*, 157 F.4th at 28 (Rhode Island interest-on-escrow law not preempted in reliance on *Cantero*), *and Kivett*, 154 F.4th at 649 (California interest-on-escrow law not preempted relying on its own pre-*Cantero* precedent). Properly applied, *Cantero* compels the conclusion that state interest-on-escrow laws are preempted: they significantly interfere with national banking powers and are preempted as a matter of law.

A. The Ninth Circuit Improperly Bypassed *Cantero*'s Mandatory Analytical Framework.

In *Cantero*, this Court unequivocally held that courts applying *Barnett Bank* "must" undertake a "nuanced comparative analysis," including a "practical assessment of the nature and degree of interference caused by a state law" "based on the text and structure of the laws, comparison to other precedents, and common sense." *Cantero*, 602 U.S. at 219–20, 220 n.3. The Ninth Circuit did not follow this instruction. Though the majority recognized that "*Cantero* admonishes courts to consider *Barnett Bank* and the six cases that *Barnett Bank* cited," *Kivett*, 154 F.4th at

647, it did not engage in this prescribed task. The *Kivett* majority merely determined that it was not sure what it "should glean from" only two of those six Supreme Court precedents and concluded that the preemption question was "in equipoise." *Id.* at 648. That conclusion does not stand up against the court's own acknowledgement that interest-on-escrow laws "raise[] the cost to national banks to use escrow accounts and may discourage them from issuing and servicing loans," which "certainly 'interferes' with the banks' unfettered exercise of their statutory powers." *Id.* But rather than meaningfully assess the nature or degree of that interference, the court fell back on its pre-*Cantero* precedent, *Lusnak* v. *Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018).

Even if this Court's *Cantero* decision did not directly reject the holding in *Lusnak*, it repudiated the *Lusnak* analytical framework for three reasons.

First, *Lusnak*'s categorical rule that NBA preemption could not apply unless a state interest-on-escrow law "set[s] punitively high rates banks must pay on escrow balances" is plainly inconsistent with *Cantero*. 883 F.3d at 1195 n.7. *Cantero* made clear that *Barnett Bank* did not allow for a "categorical test" but instead requires that courts "carefully account for and navigate this Court's prior bank preemption cases." *Cantero*, 602 U.S. at 220–21. *Lusnak*'s "punitive" requirement is exactly the type of impermissible categorical standard *Cantero* forbids. Moreover, the "punitive" standard is, as a matter of common sense, more extreme than this Court's and

Congress's "significant interference" standard. Unsurprisingly, then, the categorical "punitive" standard finds no support in *Cantero* or any of this Court's decisions on which *Cantero* relies.

Further, this Court directed lower courts to apply "common sense" in assessing the nature and degree of interference posed by a state law against prior precedent. *Cantero*, 602 U.S. at 220 n.3. But *Lusnak*'s myopic focus on the direct financial impact of a state law, combined with its "punitively high" threshold, requires a fact-intensive inquiry that is irreconcilable with NBA preemption, which is a question of law. Neither Flagstar Bank nor any other national bank bears the burden of making such an extensive factual showing. *See Rose* v. *Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 n.4 (9th Cir. 2008) (refusing to remand for discovery on whether the state law at issue constitutes significant interference because "no amount of discovery would change the central holding that Congress intended for the NBA to preempt [the state law at issue]"); *Cantero*, 602 U.S. at 221 (rejecting petitioners' argument for a fact-intensive inquiry); *Franklin*, 347 U.S. at 376 (declining to analyze the facts even though the trial court had "accumulated a large record"); *Lusnak*, 883 F.3d at 1194 n.6 ("[NBA preemption] arguments are purely legal and do not depend on resolution of any factual disputes over the effect of [the state law] on the bank's business.").[6]

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[6] The First Circuit's criticism of Citizens Bank for failing to "develop[] any substantial argument about the practical effects that arise from the enforcement of the Rhode Island [interest-on-

As a practical matter, if NBA preemption turned on such factual showings, courts would be required to analyze, among other things, individual bank characteristics and prevailing market conditions. Preemption determinations that should be universal would depend on which bank was a party and when the lawsuit was filed: the same state law might significantly interfere with the business of one national bank but not another, or during times of low interest rates but not high ones. *Cf. Kivett*, 154 F.4th at 657 n.2 (Nelson, J., dissenting) (noting at that time that "[the 2% interest rate required by the California interest-on-escrow law] is 'six times higher than the long-run average of .32% paid by FDIC-insured U.S. depository institutions on certificates of deposit'") (quoting Br. of *Amici Curiae* The Bank Pol'y Inst. et al. at 12, *Bank of Am., N.A.* v. *Lusnak*, 139 S. Ct. 567 (2018) (No. 18-212)). Perhaps that is why, as the *Kivett* dissent observed, "*Lusnak* never explained what constitutes a punitively high interest rate." *Kivett*, 154 F.4th at 657 (Nelson, J., dissenting).

Such an anomalous result simply cannot be what Congress intended NBA preemption to achieve. Nor should preemption depend on a court's ad hoc intuition about what crosses the line into "punitive" territory. Such an excessively high bar would not only burden national banks' federally granted powers, but also

escrow law] on the exercise of the federal-banking power" was equally misplaced. *Conti*, 157 F.4th at 25. In any event, as explained above, interest-on-escrow laws have a significant impact on national banks and consumers alike.

"inhibit judicial economy and encourage plaintiffs to sue any time they desired a higher rate on their [] accounts." *See In re Cap. One 360 Sav. Acct. Int. Rate Litig.*, 779 F. Supp. 3d 666, 693 (E.D. Va. 2024).

Second, *Lusnak* "did not cite or discuss the six preemption cases discussed in *Barnett Bank* and recounted in *Cantero*." *Kivett*, 154 F.4th at 647. That alone sets the Ninth Circuit apart from every other court that has applied *Cantero*. *See, e.g.*, *Ill. Bankers Ass'n* v. *Raoul*, 819 F. Supp. 3d 882 (N.D. Ill. 2026), *vacated and remanded by* 2026 WL 1291987 (7th Cir. May 8, 2026); *In re Cap. One 360 Sav. Acct. Int. Rate Litig.*, 779 F. Supp. 3d 666; *Conti*, 157 F.4th 10; *Cantero*, 175 F.4th 201.

Finally, *Lusnak*'s reliance on TILA's § 1639d(g)(3) only deepens the conflict with *Cantero*. *See* 15 U.S.C. § 1639d. According to the Ninth Circuit, § 1639d(g)(3) "shows Congress's view that . . . large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference."[7] *Lusnak*, 883 F.3d at 1196. But what the *Lusnak* court left out was that these large corporate banks were only complying with a narrowly defined subset of state escrow laws, and were mandated to do so by Congress. *See also Kivett*, 154 F.4th at 655 (Nelson, J., dissenting) (citing 15 U.S.C. § 1639d(b), (f)); *supra*

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[7] This inference is unsupported. Indeed, nothing in the legislative history indicates Congress's view that compliance with state escrow interest laws generally would not amount to significant interference with the national banking power. *See generally* H.R. 111-94, 111th Cong. (2009).

note 3.[8] And, as this Court expressly held in *Cantero*, § 1639d(g)(3), which "requires national banks to operate escrow accounts for certain mortgages," does not apply to the mortgages at issue here, *Cantero*, 602 U.S. at 211 n.1, making it irrelevant to the preemption inquiry.

At bottom, *Kivett* illustrates the danger of allowing courts to devise their own preemption tests. Absent this Court's intervention, other courts may join the Ninth Circuit's reasoning and bypass *Cantero* altogether.

B. State Interest-On-Escrow Laws Significantly Interfere with National Banking Powers.

The NBA "expressly supplies national banks with the power to 'make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate'—in other words, to administer home mortgage loans," and all other incidental powers.

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[8] *Lusnak* also improperly considered the ability of some national banks to comply with California's interest-on-escrow law as evidence that California's law does not significantly interfere with national banking powers. 883 F.3d at 1196. Whether a bank *can* comply with a state law is inapposite. *See Cantero*, 602 U.S. at 214 ("*Barnett Bank* made clear that a non-discriminatory state banking law can be preempted even if it is possible for the national bank to comply with both federal and state law."); *id.* at 217 (California law in *Fidelity Federal Savings & Loan Association* v. *De la Cuesta*, 458 U.S. 141 (1982) was preempted even where "federal savings and loan association could readily comply with both the state and federal laws").

Cantero, 602 U.S. at 210. Applying the analytical framework *Cantero* prescribes, the "common sense" conclusion is that state interest-on-escrow laws, including Cal. Civ. Code § 2954.8(a), "significantly interfere[]" with the exercise of that national banking power, and are therefore preempted by the NBA. *Cantero*, 602 U.S. at 219–20, 220 n.3.

As the Ninth Circuit itself recognized, California's interest-on-escrow law "raises the cost to national banks to use escrow accounts and may discourage them from issuing and servicing loans," which "certainly 'interferes' with the banks' unfettered exercise of their statutory powers" and "might reasonably" be "preempted under *Barnett Bank*." *Kivett*, 154 F.4th at 648. That acknowledgment alone underscores the strength of the case for preemption, and makes the Ninth Circuit's failure to carry the analysis forward all the more untenable.

In *Franklin*, one of the two cases the Ninth Circuit discussed and the "paradigmatic example of significant interference," *Cantero*, 602 U.S. at 216, this Court struck down a New York law that merely prohibited national banks "from using the word 'saving' or 'savings' in their advertising or business." *Franklin*, 347 U.S. at 374. Although "[t]he state law did not prevent national banks from taking savings deposits or advertising that they did so," *Kivett*, 154 F.4th at 647, this Court held that New York's law conflicted with national banks' powers to "receive deposits without qualifications or limitation," as well as "all such incidental powers as shall be necessary to carry on the business of banking." *Franklin*, 347 U.S.

at 376–78. *Fidelity* is equally instructive. There, federal law "allowed, but did 'not compel, federal savings and loans to include due-on-sale clauses in their contracts.'" *Cantero*, 602 U.S. at 216 (quoting *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 155). California's law placed limits on—but did not entirely bar—the ability of federal savings and loan associations to exercise due-on-sale clauses. *Id.* at 216–17 (citing *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 154–55). Still, this Court held the California law preempted because it "interfered with 'the flexibility given' to the savings and loan by federal law." *Id.* at 217 (quoting *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 155).

Setting aside that the Ninth Circuit never considered *Fidelity*, these cases plainly support preemption here.[9] As the dissent in *Kivett* correctly observed, "[i]t is hard to see how preventing national banks from setting their own prices is not a significant interference with their enumerated or incidental powers." *Kivett*, 154 F.4th at 660 (Nelson, J., dissenting). State interest-on-escrow laws increase the cost of maintaining mortgage-escrow accounts, and banks "must offset the costs to ensure sufficient returns, either by charging higher interest rates on

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[9] Interest-on-escrow laws are not "generally applicable state laws," such as those in *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), or *McClellan* v. *Chipman*, 164 U.S. 347 (1896). *See Cantero*, 602 U.S. at 218–19. Nor do such laws "require national banks to perform a duty already required by federal law" or reflect a rule "as old as the common law itself." *Kivett*, 154 F.4th at 662 (Nelson, J., dissenting).

mortgage loans or requiring larger down payments." *Id.*; *see also* Real Estate Lending Escrow Accounts, 91 Fed. Reg. at 29,341 ("It is . . . critical that banks have the flexibility to make the business decisions that adapt to local circumstances and other relevant considerations; otherwise, inefficient and ineffective results are more likely to prevail, which may lead to higher prices and reduced mortgage lending."). Put simply, "[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," as in *Franklin*. *Kivett*, 154 F.4th at 660 (Nelson, J., dissenting); *see also Cantero* Tr. at 14 (comparing mortgage-escrow interest mandates to "putting a tax on the bank to sell the product, . . . a much more significant interference than simply saying you can't use the word 'savings' in your advertising, which was the issue in *Franklin*").

The Ninth Circuit was not licensed to disregard these precedents merely because it was "not sure what additional information [to] glean from" them. *Kivett*, 154 F.4th at 648. The precedents speak clearly: if a restriction on advertising warranted preemption in *Franklin*, and a limitation on discretionary loan terms warranted preemption in *Fidelity*, then, a fortiori, a state law that compels national banks to pay a specified rate of return on funds held incident to a core banking product in ways that restrain their discretion and impair their ability to effectively manage credit risk exposure must also. *See supra* Section II. To hold otherwise would permit states to exercise control over pricing, and thus over national banks' core products and services, a result fundamentally at odds with the NBA's purpose of shielding national banks from state interference.[10] *See McCulloch* v. *Maryland*, 17 U.S. 316, 431 (1819) ("[T]he power to tax involves the power to destroy."). Properly applied, *Cantero*'s framework leaves no room for a contrary result here.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari.

Respectfully submitted.

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[10] It is thus unsurprising that courts have routinely concluded that state laws imposing pricing mandates are preempted. *See, e.g.*, *Bank of Am.* v. *City & Cnty. of S.F.*, 309 F.3d 551 (9th Cir. 2002) (non-depositor ATM fees); *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (non-account holder check-cashing fees); *Corvallis Hosp., LLC* v. *Wilmington Tr.*, 2025 WL 2624512 (D. Or. Sep. 11, 2025) (interest, fines, and fees on loans); *Deming* v. *Merrill Lynch & Co.*, 528 F. App'x 775 (9th Cir. 2013) (loan administrative and compliance fees); *Martinez* v. *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010) (underwriting and tax service fees); *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (account service fees); *Montgomery* v. *Bank of Am. Corp.*, 515 F. Supp. 2d 1106 (C.D. Cal. 2007) (non-sufficient funds and overdraft fees); *NNDJ, Inc.* v. *Nat'l City Bank*, 540 F. Supp. 2d 851 (E.D. Mich. 2008) (non-account-holder official check-cashing fees); *Pereira* v. *Regions Bank*, 918 F. Supp. 2d 1275 (M.D. Fla. 2013), *aff'd*, 752 F.3d 1354 (11th Cir. 2014) (check-cashing and settlement fees); *Powell* v. *Huntington Nat'l Bank*, 226 F. Supp. 3d 625 (S.D. W. Va. 2016) (payment ordering and late fees).

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