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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

PETER B. FREDMAN
LAW OFFICE OF
PETER FREDMAN PC
230 Domingo Avenue,
Suite 227
Berkeley, CA 94705
(510) 868-2626
peter@peterfredmanlaw.com

STEVE W. BERMAN
Counsel of Record
HAGENS BERMAN SOBOL
SHAPIRO LLP
1301 Second Avenue,
Suite 2000
Seattle, WA 98101
(206) 623-7292
steve@hbsslaw.com

KEVIN K. GREEN
HAGENS BERMAN SOBOL
SHAPIRO LLP
533 F Street, Suite 207
(206) 623-7292
keving@hbsslaw.com

Counsel for Respondents

121158

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Under the National Bank Act (NBA), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), a "[s]tate consumer financial law" is preempted "only if" it "prevents or significantly interferes" with the exercise of banking 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*, 517 U.S. 25 (1996) [(*Barnett Bank*)]." 12 U.S.C. § 25b(b)(1)(B).

In *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024), this Court provided broad guidance on the application of this post-Dodd-Frank preemption standard in the context of an otherwise obscure circuit split regarding state interest-on-escrow (IOE) laws—but conspicuously abstained from deciding the IOE preemption question itself. We are here again because the circuits' applications of *Cantero*'s guidance only slightly reshuffled the prior split, bringing the same losing parties back seeking the same relief. Meanwhile, the Office of the Comptroller of the Currency (OCC) recently issued a new rule purporting to prospectively preempt all state IOE laws.

Thus, the question presented now is better stated as follows: Is the new circuit split regarding the retrospective application of *Cantero* to state IOE laws of sufficient national importance to warrant this Court's renewed intervention just two years after *Cantero*, and before any lower court's consideration of the new OCC rule on the subject?

CORPORATE DISCLOSURE STATEMENT

Respondents are individuals William Kivett, Bernard Bravo, Lisa Bravo, and the certified classes they represent (collectively, "Plaintiffs"). Respondents do not include any nongovernmental corporations.

TABLE OF CONTENTS

Page

Table of Contents

Page

TABLE OF CITED AUTHORITIES

Page

Cases

INTRODUCTION

The Court should deny the pending petitions by Flagstar Bank, N.A. (Flagstar) and the others because the circuit split regarding retrospective IOE preemption is not sufficiently important to warrant review at this time. Broader questions about *Cantero* and NBA preemption in the post-Dodd-Frank era should await further judicial development, as should any issues raised by the new OCC rule on IOE preemption discussed below. The facts on the ground in the Ninth Circuit continue to demonstrate that California's IOE law, Cal. Civ. Code § 2954.8, does not actually interfere with banking in any "practical" sense as the Court requires for NBA preemption. *Cantero*, 602 U.S. at 219-20.

Eight years ago, *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018) was the first case to address whether the NBA, as amended by Dodd-Frank, preempts state IOE laws. The Ninth Circuit rejected preemption of California's IOE law in the context of a motion to dismiss. After this Court denied certiorari, Bank of America settled its IOE liabilities and began routinely complying with the law, along with all other banks not already in compliance (except Flagstar). This put Bank of America in the same position as the non-bank entities that constitute the majority of the mortgage servicing industry.

Four years later, *Cantero v. Bank of America, N.A.*, 49 F.4th 121 (2d Cir. 2022), *vacated*, 602 U.S. 205 (2024) (*Cantero I*), created a circuit split when it expressly rejected *Lusnak* to order dismissal on preemption grounds of a complaint under New York's IOE statute.

That split ended in 2024 when this Court vacated the Second Circuit's ruling with its *Cantero* decision, which declined to disapprove *Lusnak* or decide whether the New York statute was preempted.

Since it issued in May 2024, this Court's *Cantero* guidance has resulted in three new circuit decisions on IOE preemption and a similar split as before, coalescing in three petitions now pending before this Court as follows:

First, in September 2025, *Conti v. Citizens Bank, N.A.*, 157 F.4th 10 (1st Cir. 2025), *cert. denied*, 224 L. Ed. 2d 501 (2026) (but petition for rehearing pending) held unanimously, on a motion to dismiss, that application of *Cantero* meant that Rhode Island's IOE law was not preempted.

Second, in October 2025, a divided panel in this case, reviewing a money judgment for the third time, found that application of *Cantero*, along with the lingering precedent of *Lusnak*, meant that California's IOE law was also not preempted. Appendix to the Petition for Writ of Certiorari (App.) 18a-19a.

Third, in May 2026, on remand, a divided panel held in *Cantero v. Bank of America, N.A.*, 175 F.4th 201 (2d Cir. 2026) (*Cantero III*) that its application of *Cantero* meant that New York's state IOE law was preempted.

Then, on May 19, 2026, the OCC issued a new final rule that, if valid, will prospectively preempt state IOE laws as of its effective date of June 19, 2026. 91 Fed. Reg. 29350 (May 19, 2026) (to be codified at 12 C.F.R. § 34.7).

In this context, there is no good cause for this Court to grant any of these petitions. The fact that this Court previously denied petitions in *Lusnak* and *Conti* shows that preemption of state IOE laws, standing alone, is not sufficiently important to warrant this Court's intervention. Rather, it is the circuit split triggered by *Cantero III* that garners this Court's attention. But further intervention of this Court as a "tiebreaker" is unnecessary because the current split is minor and transient.

Specifically, there are no other IOE preemption cases coming: these same cases—*Conti*, *Kivett*, and *Cantero*—were all in play when this Court first entered the IOE fray in 2023. And the new OCC rule makes it unlikely the same issue will reemerge in the future. If all three petitions are denied, the only active case left will be *Conti*, where the bank will have the opportunity to show "significant interference" at a later stage of that proceeding. Accordingly, the best course for this Court is to deny all three petitions because more suitable vehicles will arise for elaborating on *Cantero* and broader NBA preemption questions in the post-Dodd-Frank era.

If, however, this Court decides that this circuit split warrants further review, then this case is the best vehicle. In two key respects, this case presents next-generation issues arising after *Cantero*. *First,* unlike the others, there is an evidentiary record here amassed on summary judgment. Entirely ignored in Flagstar's petition, this record facilitates examination of the role of facts in assessing "significant interference" for preemption determinations under *Cantero*. *Second*, this case involves the circuit precedent of *Lusnak*, which this Court left untouched in *Cantero.* If there is another grant of certiorari—despite the ephemeral quality of the current split—this case would provide the opportunity to explain the precedential value of pre-*Cantero* preemption decisions.

STATEMENT OF THE CASE

A. The Evidentiary Record in this Case Shows an Absence of "Significant Interference" with Banking Operations Resulting from State IOE Laws.

In March 2021, the district court granted summary judgment for the Plaintiffs and class in this case. It entered a money judgment for over $9 million on behalf of a certified class of over 139,000 persons.[1] App. 19a; 1-ER-8. The district court separately ordered Flagstar to begin complying with California's IOE law going forward. App. 108a. However, the district court stayed enforcement of the money judgment and implementation of the injunctive relief pending appeal. 3-ER-415.

In the district court, Flagstar took the position that it could prove preemption based on "significant interference" with *its* particular banking operations. *See, e.g.,* 2-ER-91-92 ("The question for the Court is really do facts matter because the standard is substantial interference [*sic*]. So courts do rely on facts. … So we have submitted evidence of the substantial interference"). But Flagstar utterly failed to make this showing and, with the evidence firmly against it, downplayed this theory on appeal. The resulting evidentiary record informs these proceedings as follows.

1. By agreement on appeal, the parties slightly modified the class membership period and thus the amount of the money judgment. App. 19a.

First, it is incorrect for banks to claim that these mortgage escrow accounts are "banking products" or similar to "savings accounts, checking accounts, or the mortgages themselves." Petition for Writ of Certiorari (Pet.) at 28. These accounts are incidents of the mortgage contract whereby "a lender may require a borrower to *prepay* a portion of their annual property taxes, insurance premiums, and certain other payments relating to the mortgaged property, which the lender places into an escrow account." 91 Fed. Reg. 29340 (May 19, 2026) (emphasis added) (to be codified at 12 C.F.R. § 34); *see* 2-ER-203-204, 206, 216. Despite their name, these are not true escrow arrangements, where a neutral third party holds the money. *Id.* Rather, the mechanism gives the lenders free use of the funds until the tax or insurance payment is due. *Id*. Accordingly, as Flagstar observes, such mortgage escrow accounts are regulated through the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* (also known as RESPA). It expressly does *not* preempt state laws except to the extent of direct inconsistency. 12 U.S.C. § 2616. And the mortgage law regimes of several states, including California as in this case, require the lenders to pay interest on the borrower's money while they are holding it.

Second, the claim of interference is belied by the fact that Flagstar complies with state IOE laws for most of its loans regardless of the scope of NBA preemption. This is because Flagstar's mortgage escrow accounts are components of the mortgage servicing right (MSR) assets that Flagstar typically bundles and sells to third party investors like hedge funds, who receive and use escrow account funds among other benefits of their investments. SER-21-23. These securitized transactions account for

80% of Flagstar's loans serviced. For these transactions, Flagstar simultaneously acquires the contractual right to "sub-service" the loans on behalf of the MSR buyer. *Id.;* SER-59-62. Because the MSR owners are not banks, Flagstar began complying with state IOE laws in 2017 (before *Lusnak*). SER-107-108. As the contractual subservicer, Flagstar pays the IOE to the borrower and charges that expense to the MSR owner. SER-63, 153. Flagstar has not advanced any theory that would confer preemption to its non-bank MSR asset buyers.

Third, the claim of interference is further belied by the fact that Flagstar could not produce evidence of any interference with *its* banking operations. Pet. at 28. Given that it is complying with California's IOE law for 80% of its loans serviced, but not the other 20%, Flagstar was ideally positioned to demonstrate how its compliance with IOE law for the majority of its loans serviced actually interfered with its operations or otherwise put Flagstar in an "untenable position," as it asserts. *Id*. Its purported proof, insufficient to preclude summary judgment for Plaintiffs, consisted of employee declarations that amounted to vague speculation. SER-132-142.

Finally, the claim of interference is further belied by the fact that Flagstar did not even try to produce any evidence of broader interference with the banking industry resulting from the industry's general compliance with California state IOE law before and after *Lusnak*. Plaintiffs' evidence showed there was none. SER-98-100. Indeed, the biggest national banks, including Wells Fargo and JPMorgan Chase, had been complying with California's state IOE law for years *prior* to *Lusnak*. *Id.*; *see also Lusnak*, 883 F.3d at 1190 ("Bank of America acknowledges that it does not comply with state escrow interest laws and that Wells Fargo—its chief competitor and the largest mortgage banker in America—does"). After *Lusnak*, compliance became universal in the Ninth Circuit except for Flagstar. SER-98-100. Further, most mortgages (and MSR assets) are owned and serviced by non-bank entities who have no claim to preemption. *Id*. In the district court, after urging this inquiry, Flagstar did not respond to this evidence.

B. This IOE Preemption Question Is Relevant Only to the Three Cases Involving Petitions Now Pending Before this Court.

Due to this Court's decision in *Cantero*, state IOE laws have played an outsized role in post-Dodd-Frank NBA preemption analysis, but the scope of the IOE preemption question itself is quite narrow. The same IOE cases with petitions now pending—*Cantero, Kivett*, and *Conti*—were already in play when this Court decided *Cantero* the first time. To Plaintiffs' knowledge, there are no other IOE cases pending or on the horizon.[2]

Lusnak was the first appellate decision to analyze NBA preemption of state consumer financial laws in the post Dodd-Frank era. Although it could not fully anticipate *Cantero's* "nuanced comparative analysis" approach, 602

2. Plaintiffs do not quibble with Flagstar's assertion that 12 states and two territories have IOE laws, but most appear to be ineffective for one reason or another. *See* Pet. at 7 n.1. For example, Maryland's IOE law has no supporting private right of action. *Clark v. Bank of Am., N.A.*, 561 F. Supp. 3d 542, 557 (D. Md. 2021). Plaintiffs are unaware of any other decisions, trial or appellate, on IOE in the post Dodd-Frank era.

U.S. at 220, *Lusnak* presaged *Cantero* in recognizing the congressional intent behind Dodd-Frank to "undo broad preemption determinations" that had crept into the system and contributed to the financial crisis. *Lusnak*, 883 F.3d at 1189; *see also Cantero*, 602 U.S. at 221. For example, *Lusnak* recognized, as *Cantero* later would, that Dodd-Frank shifted the basis for NBA preemption decisions back to *Barnett Bank* and its "significant interference" standard. *Lusnak*, 883 F.3d at 1191-94. *Lusnak* also recognized, as did *Cantero* implicitly, that the OCC stance on the matter to that point was not entitled to deference, particularly given its persistent flouting of Dodd-Frank's requirements for OCC preemption determinations. *Id.* at 1193-94; *cf. Cantero*, 602 U.S. at 221 n.4.

When Bank of America sought review of *Lusnak* on "exceptional importance" grounds, this Court summarily denied that petition. 139 S. Ct. 567. Thus, effective 2019, Bank of America began routine compliance with California's IOE law and has been complying ever since. SER-98. The *Lusnak* matter ended when Bank of America settled its past California IOE liabilities. *Id.*; *Lusnak v. Bank of Am., N.A.*, 2020 U.S. Dist. LEXIS 143856 (C.D. Cal. Aug. 10, 2020).

The *Cantero* district court found *Lusnak* "persuasive" when it denied Bank of America's motion to dismiss a case based on New York's IOE law on preemption grounds. *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171, 185 (E.D.N.Y. 2019). But the Second Circuit expressly rejected *Lusnak* when it found preemption of the New York law based on what has become known as the "control" test. *Cantero I*, 49 F.4th at 129, 131. Then, in the First Circuit, the *Conti* district court followed *Cantero I* and the "control test" to find that Rhode Island's IOE law was preempted. *Conti v. Citizens Bank N.A.*, 2022 U.S. Dist. LEXIS 175804, at *9 (D.R.I. Sept. 28, 2022).

Meanwhile, in 2021, Plaintiffs in this case obtained judgment against Flagstar as discussed above. The Ninth Circuit affirmed in an unpublished memorandum. App. 63a.

That was the status quo in 2022 when the losing parties in this case and *Cantero I* petitioned this Court for review the first time. Ultimately, this Court chose to decide *Cantero* on the merits while holding this case in abeyance. The First Circuit stayed the direct appeal of *Conti* pending the outcome. *See Conti*, 157 F.4th at 12.

In 2024, this Court vacated the Second Circuit's decision, disapproved of its "control" test, and announced what is known as the "nuanced comparative analysis." *Cantero*, 602 U.S. at 220. It did so without mentioning *Lusnak* or deciding the IOE preemption issue itself. Since then, the circuits in *Conti, Kivett*, and *Cantero III* have applied this Court's *Cantero* standard to the IOE preemption question to reach opposing results. While the losing parties in each of the three cases have now petitioned this Court for review, none points to other IOE preemption cases that would be impacted by this Court issuing a tie-breaker decision—because there are none. The IOE preemption question is relevant only to these three cases.

C. The OCC's New IOE Preemption Rule Makes It Unlikely the Same Issue Will Recur in the Future.

Meanwhile, the new OCC rule makes it unlikely that the same issues will recur in the future. On December 30, 2025, the OCC began the process of agency rulemaking proposing the preemption of state IOE laws. *See* Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. 61093 (proposed Dec. 30, 2025). As the OCC explained, the "preemption determination would provide much needed clarity to banks and other stakeholders." *Id.*

On May 19, 2026, the OCC concluded the process by issuing a final rule "concluding that Federal law preempts State laws that restrict OCC-regulated banks' flexibility to decide whether and to what extent to pay interest or other compensation on funds placed in real estate escrow accounts; or assess fees in connection with such accounts." 91 Fed. Reg. 29350. The rule became effective June 19, 2026 and, if valid, ends IOE requirements as of that date. *Id.* The three cases pending before this Court would not be affected because, subject to exceptions inapplicable here, new rules do not have retroactive effect. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Nothing in the new rule suggests retroactive application and Flagstar does not argue the new rule would apply to this case. Pet. at 9 (noting its enactment).[3]

---

3. The authorizing statute reinforces the conclusion that the new rule does not impact this case. There is no indication Congress intended to give the OCC the power to enact retroactive rules. *See* 12 U.S.C. § 25b. A "statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen*, 488 U.S. at 208.

This new OCC rule greatly undercuts the significance of the current circuit split but its validity still needs to be tested. "Dodd-Frank set out specific criteria that the OCC must follow to preempt a state law." *Conti*, 157 F.4th at 21; *see Lusnak*, 883 F.3d at 1194. One of those criteria, for example, is "substantial evidence, made on the record of the proceeding, [that] supports the specific finding regarding the preemption." 12 U.S.C. § 25b(c). Some rule commentors "asserted that the OCC's preemption determination was not supported by substantial evidence. Some also suggested that the OCC could strengthen its analysis by including more data." 91 Fed. Reg. 29350, at 29352.

In theory, the OCC is well positioned to assess the level of interference that results from particular state laws. In practice, however, the OCC's prior stances in favor of preemption have proved irrelevant in all the IOE cases thus far. *See, e.g.*, *Lusnak*, 883 F.3d at 1193-1194, 1196; *Cantero I*, 49 F.4th at 126, 135, 137; *Conti*, 157 F.4th at 21 n.4 & n.8; *Kivett v. Flagstar Bank*, 154 F.4th 640, 651, 659-660 (9th Cir. 2025); *Cantero III*, 175 F.4th at 208. This Court declined to address the "significance here (if any) of the preemption rules of the [OCC]." *Cantero*, 602 U.S. at 221 n.4.

Regardless, the new OCC rule changes the complexion of future analysis of IOE preemption. If a new IOE preemption case arises, the main question will likely be the validity of the OCC rule, not the current preemption framework. Under Dodd-Frank, OCC preemption determinations are not permanent. 12 U.S.C. § 25b(d). Given congressional concerns about OCC rulemaking, Dodd-Frank expressly requires that the OCC review its preemption determinations at least every five years. *Id.*

REASONS FOR DENYING THE PETITION

A. Certiorari Should Be Denied for Lack of Importance or a Circuit Conflict Calling for this Court's Intervention.

The IOE preemption question presented here does not warrant this Court intervening as "tiebreaker" because the circuit split relates to a minor issue that is unlikely to recur in light of the new OCC rule. The bare objective of *retroactive* uniformity in the application of NBA preemption to state IOE laws is unattainable and not sufficiently important to justify this Court's intervention.

i. The Preemption Question of State IOE Laws is Not Sufficiently Important to Justify Review.

Given the state of the law, Flagstar is mistaken that preemption of state IOE laws in the current posture is of "critical importance to the national banking system." Pet. at 14. As this Court already signaled by denying certiorari in both *Lusnak* and *Conti*, the question presented, without a circuit conflict, is not an "important question of federal law" warranting certiorari. S.Ct. R. 10(a), (c).

Indeed, just a few months ago, the Court denied the bank's petition in *Conti* against the backdrop of consistent decisions by the First and Ninth Circuits applying *Cantero* and finding no preemption. Given the lack of a conflict at that time, if importance alone called for certiorari on state IOE laws, certiorari would have been granted in *Conti.* Instead, the petition in *Conti* was rescued only by the Second Circuit's most recent *Cantero III* decision on remand.

Further, as detailed above, no importance derives from any practical consequences for the banking industry. Flagstar's amici curiae describe a regulatory environment in which states are "permitted to impose price controls on national banks" and to "micromanage their operations," which, they contend, will "generate a proliferation of state-by-state requirements that extend far beyond mortgage-escrow accounts."[4] It is already apparent, however, that the sky is not falling.

The banking industry ignores real-world experience with IOE laws, but this Court should not. As detailed above, for eight years since *Lusnak* (and to a large extent before *Lusnak*), all residential mortgage servicers (whether national banks, state banks, or non-banks) except Flagstar have routinely complied with the California IOE law. Across the industry, the absence of any tangible or measurable impact is manifest.

Contrary to the conclusory assertions offered by Flagstar and its amici, there is no evidence that the availability of escrow accounts has been affected. There is no evidence that banks have declined to offer any services due to state IOE laws. As the First Circuit stated when upholding Rhode Island's IOE statute, there is no "conflict[] with the overall scheme of federal-banking law." *Conti*, 157 F.4th at 24.

4. *See* 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 at 4 (July 15, 2026). The amicus brief merely echoes Flagstar, perhaps because it is not institutionally independent from Flagstar. The public record indicates that Flagstar is a member of the Bank Policy Institute, the American Bankers Association, and the Mortgage Bankers Association.

Flagstar nonetheless warns that banks paying IOE under state law "may restrict lending to riskier borrowers or do so only at higher interest rates or on more stringent terms." Pet. at 28. But, as detailed above, Flagstar does not show any such impact on its own operations, despite the fact that it is already paying IOE on the vast majority of its loans, and there is no proof as to other banks either. The policy preferences of a determined outlier do not create the necessary importance for certiorari.

As an evidentiary matter, there is no interference, much less significant interference, with banking operations resulting from compliance with state IOE laws. According to *Cantero*, this cuts strongly against certiorari. NBA preemption turns on "a practical assessment of the nature and degree of the interference caused by a state law." *Cantero*, 602 U.S. at 219-20. Any practical assessment here reveals an utter lack of disruption to how national banks do business.

ii. The Implications of the Circuit Conflict Are Not Sufficiently Compelling to Justify Review.

Flagstar also mischaracterizes the implications of the circuit conflict. "A petition for a writ of certiorari will be granted only for compelling reasons." S.Ct. R. 10. In an effort to meet this high standard, Flagstar erroneously asserts that all of the opinions that disagree with it in result are the products of manifest failures to properly apply of *Barnett Bank, Cantero,* and the "nuanced comparative analysis" to the NBA preemption question. But that is not correct. All three of these circuit opinions agree that this Court's *Cantero* decision controls so far as it goes and that the primary mode of analysis of these types of preemption questions is its "nuanced comparative analysis." The only true circuit conflict here pertains to the particular results the complex *Cantero* analysis produces when applied to the IOE preemption question.

Specifically, the three circuits applying the analysis produced results both against and favoring preemption. First, *Conti* applied *Cantero*'s analysis to conclude that Rhode Island's IOE law is not preempted. *Conti*, 157 F.4th at 17-26. Then, *Kivett* applied the same analysis and found itself in "equipoise," requiring it turn to *Lusnak* to conclude that state IOE law is not preempted. *Kivett*, 154 F.4th at 647-49. Finally, *Cantero III* purportedly applied the same analysis to conclude that the state IOE law was preempted, but Judge Perez dissented vigorously because her application of the same analysis showed that the state IOE law was not preempted. *Cantero III*, 175 F.4th at 216-32. According to Judge Perez, "[w]hile this new majority opinion nominally sets aside the categorical [aka control] test previously articulated, the majority opinion, in my view, nevertheless trudges through a strained analysis of the Supreme Court's precedents to reach an approach that is just as capacious." *Id*. at 216.

These different views do not compel review under these circumstances. As detailed above, the implications of this particular circuit split are strictly limited to these three cases, *Conti, Kivett*, and *Cantero III*, which are themselves siloed by the new OCC IOE preemption rule that became effective in June 2026. Of course, this Court *could* act in a tiebreaking role, as the losing parties request, but that is not an efficient use of this Court's resources because the result is unlikely to impact future cases or significantly advance the broader jurisprudence regarding preemption of state consumer financial laws after Dodd-Frank. If this Court wanted to decide the IOE preemption question itself, then it presumably would have done so in the first instance in *Cantero*. Under these circumstances, the better choice is denial of certiorari as to all three petitions now before this Court.

B. This Case Was Correctly Decided.

As further reason to deny certiorari, the Ninth Circuit did not get it wrong. It should not even be controversial that *Kivett* relied on other circuit precedent after finding its application of the *Cantero* analysis was inconclusive.

Flagstar asserts there are nonetheless conflicts in methodology between the Ninth Circuit's rationale and *Cantero*. To the contrary, the panel soundly concluded *Lusnak* remained relevant precedent because it was not "clearly irreconcilable" with *Cantero*. *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). On remand from the Supreme Court to address a new decision, circuit courts routinely undertake this type of analysis. Nothing about it here calls for certiorari.

Flagstar fails to grapple with what the Ninth Circuit actually did. Before considering *Lusnak*, the Ninth Circuit dutifully applied *Cantero*'s methodology focusing on two distinct lines of Supreme Court preemption decisions. The panel followed *Cantero's* directive to consider *Barnett Bank* and six other Supreme Court preemption decisions. The Ninth Circuit turned to *Lusnak* only after concluding that *Cantero*'s methodology did not resolve the IOE preemption issue. App. 14a-18a.

Every point of guidance from *Cantero*, whether explicit or implicit, supports the opinion below.

In evaluating the Ninth Circuit's decision, it is critical that *Cantero* is, on balance, a narrow opinion. The Court declined to address whether any state IOE law was preempted. There is no dispute that *Cantero*'s case-specific methodology provides the starting point; but nothing in *Cantero* suggests it is the end point. So, the Ninth Circuit was on firm ground in concluding that the precedents specified in *Cantero* left the IOE preemption issue in this case "in equipoise. Neither line of cases seems to compel the result here." App. 18a.

Further cabining the reach, *Cantero* did not even mention *Lusnak*, much less suggest *Lusnak* is no longer good law. The force of *Lusnak* was directly at issue. The prior proceedings in the Second Circuit were largely about *Lusnak. See, e.g., Hymes*, 408 F. Supp. 3d at 185 ("[t]his Court finds *Lusnak* persuasive and reaches the same result"); *Cantero I*, 49 F.4th at 137 (asserting that "*Lusnak* … is incorrect"). Given this context, the only reasonable inference from silence is that the Court chose *not* to disapprove of *Lusnak.* As the Ninth Circuit observed, "the Supreme Court's decision in *Cantero* suggests that *Lusnak* was correctly decided." App. 8a, 55a.

Flagstar offers a snippet from *Cantero* stating that "courts '*must* do as *Barnett Bank* did.'" Pet. at 2 (quoting *Cantero*, 602 U.S. at 215) (Flagstar's emphasis). But the complete sentence—not quoted in Flagstar's petition—fully supports the panel decision: "[C]ourts addressing preemption questions in this context must do as *Barnett Bank* did *and* likewise take account of those prior decisions of this Court *and similar precedents." Cantero*, 602 U.S. at 215-16 (emphasis added).

Flagstar is wrong that this case involves wayward judges who "simply throw up their hands and take a different course." Pet. at 21. The panel considered *Barnett Bank* and *Lusnak* is a "similar precedent" that may be considered under *Cantero*. The Ninth Circuit majority took the very course prescribed by *Cantero*.

Declining to tie the hands of lower courts addressing preemption, this Court did not hold that a practical assessment is limited to a comparison of the cases cited in *Barnett Bank*. Instead, it held that in "assessing the significance of a state law's interference, courts *may* consider" the Supreme Court precedents identified. *Cantero*, 602 U.S. at 220.

Indeed, Flagstar's quarrel is less with the decision below than with *Lusnak* itself, but *Lusnak* is also fully consistent with *Cantero*. On its first look, the Second Circuit erroneously struck down New York's IOE law by failing to conduct a "nuanced comparative analysis" or to "analyze preemption in a manner consistent with Dodd-Frank and *Barnett Bank*." *Id.* at 220-221. Instead, the Second Circuit "relied on a line of cases going back to *McCulloch v. Maryland* to distill a categorical test that would preempt virtually all state laws that regulate national banks." *Id*. at 221.

Lusnak did not make the same mistake. Even without the guidance this Court provided later in *Cantero*, the Ninth Circuit correctly relied on Dodd-Frank and *Barnett Bank* when it found that the NBA did not preempt

California's IOE law. *Lusnak*, 883 F.3d at 1188. Unlike the vacated Second Circuit opinion, *Lusnak* did not devise a new categorical test but instead applied *Barnett Bank*'s "significant interference" test throughout the opinion to the specifics of California's IOE law. *Lusnak* is also nuanced, drawing on diverse sources (such as cases, statutes, and legislative history) to reach its conclusion that "large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers." *Id.* at 1196.

The Ninth Circuit here and the First Circuit in *Conti* interpreted Dodd-Frank's express preemption provision faithful to the tenor of the statutory text. This of course is paramount: "When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011).

Flagstar's grudging interpretation reads "significantly" out of the statute, all to advance policy objections having no foundation in actual banking practice even before *Lusnak*, much less today. Statutory construction is not a tool for "displacing perfectly legitimate state laws on the strength of 'purposes' that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 778 (2019).

Flagstar overlooks that Congress did not provide that state law is preempted if it *interferes at all* with banking operations *and* possibly in other circumstances, such as the Second Circuit's disapproved "control test." Instead, Congress specified that state law is preempted "only if" it "prevents or significantly interferes" with banking powers. 12 U.S.C § 25b(b)(1)(B). The pairing of "only if"—words not appearing in Flagstar's petition—with "significant" underscores the narrow preemptive scope. In statutory interpretation, "a word is known by the company it keeps." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (declining to find preemption).

The statutory text is "most naturally read" to preclude oddball laws truly encroaching on a bank's ability to conduct business, with the bank carrying the burden to make this factual showing. *Id.* Even then, as discussed at the *Cantero* oral argument two years ago, fair lending laws are not preempted. As one illustration, a state law specifying that "before a loan can be denied, a person has a right to see the bank president" likely would be preempted. Transcript of Oral Argument (Tr. of Oral Arg.), *Cantero v. Bank of Am. N.A.*, 109 (No. 22-529) (U.S. Feb. 27, 2024) (Kagan, J.).

State IOE laws are not oddballs. They are a longstanding and unremarkable feature of banks' compliance obligations across the states. Holding that state IOE laws are preempted would upend a stable lending environment where mortgage servicers routinely comply with state IOE laws. As the first and only appellate court to strike down a state IOE law, the Second Circuit in *Cantero* imagined a problem that does not exist.

C. If Certiorari is Granted, this Case is a Sound Vehicle to Revisit NBA Preemption of State IOE Laws.

Flagstar and the petitioners in *Cantero* and *Conti* urge that their respective cases are the best candidate for another look *if* certiorari is granted again on IOE preemption. In *Cantero* previously, the Solicitor General urged the Court, if accepting a case at that time, to "grant the petition for a writ of certiorari in *Flagstar* and hold the petition in *Cantero*." Brief for the United States as Amicus Curiae, *Flagstar Bank N.A. v. Kivett*, 2023 WL 5725463, at *23 (U.S. Aug. 30, 2023). This advice remains sound. *Cantero* had its turn and good vehicles decrease issues, not multiply them.

The three petitions touch on every conceivable vehicle factor, but not all considerations are equal. In addition to a fresh perspective on the issues, this case presents several comparative advantages.

First, to the extent the Court intends to consider a bank's necessary evidentiary showing to establish preemption, this case is the only one with an evidentiary record on significant interference. There is precedent for preemption turning on an evidentiary record. *See, e.g.*, *Franklin Nat'l Bank of Franklin Square v. People of State of N.Y.*, 347 U.S. 373, 376 (1954) ("The trial accumulated a large record devoted mainly to the merits and demerits of the New York legislation and its consequences upon banks and depositors."). As observed at the *Cantero* oral argument two years ago, significant interference presents "a factual question or at least it's a heavily factual question" difficult to decide "without evidence." Tr. of Oral Arg. 21 (Alito, J.).[5]

In Dodd-Frank, Congress also made plain that preemption of state consumer financial protection laws depends on a factual record. In addition to codifying *Barnett Bank*, Congress expressly required the OCC to justify any preemption determinations with "substantial evidence, made on the record of the proceeding" that "supports the specific finding" "in accordance with" the fact-dependent standard of *Barnett Bank*. 12 U.S.C. § 25b(c).

Second, consistent with Dodd-Frank's mandated approach, cases with fuller records are generally better vehicles. Granting certiorari here, if it is granted at all, takes heed of the longstanding principle that certiorari usually "does not lie until after final judgment." *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 382 (1893).

Third, this case presents the question, alluded to in *Cantero*, of the role of circuit precedent. Unlike the First

5. *See also* Tr. of Oral Arg. 46 ("we're in the realm of evidence, and we're doing this on a case-by-case basis") (Jackson, J.); *id.* at 60 (significant interference "does seem to have a very strong factual component" such that "it [is] hard to understand how an empirical question like that can be decided without evidence") (Alito, J.); *id.* at 77 (agreeing with Solicitor General that "the court will be naturally looking at a particular state law just because that's what courts do") (Barrett, J.); *id.* at 78 (suggesting national banks may "be subjected to the same kinds of evidentiary standards that other plaintiffs have to satisfy when they're making legal claims") (Jackson, J.).

and Second Circuits, after following a proper analysis under *Cantero*, the Ninth Circuit grounded its decision on its precedent in *Lusnak*. "[C]ourts addressing preemption questions in this context must do as *Barnett Bank* did," but must also "take account of those prior decisions of this Court and similar precedents." *Cantero*, 602 U.S. at 215-16. Not disapproved in *Cantero*, *Lusnak* has every hallmark of the "similar precedent" the Court had in mind.

If it is necessary to grant one of the three petitions, this case is an appropriate vehicle for another look on IOE preemption.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Peter B. Fredman
Law Office of
Peter Fredman PC
230 Domingo Avenue,
Suite 227
Berkeley, CA 94705
(510) 868-2626
peter@peterfredmanlaw.com

Steve W. Berman
Counsel of Record
Hagens Berman Sobol
Shapiro LLP
1301 Second Avenue,
Suite 2000
Seattle, WA 98101
(206) 623-7292
steve@hbsslaw.com

Kevin K. Green
Hagens Berman Sobol
Shapiro LLP
533 F Street, Suite 207
(206) 623-7292
keving@hbsslaw.com

Counsel for Respondents