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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024), this Court granted certiorari to resolve a 1-1 conflict on the preemption of state interest-on-escrow (IOE) laws. Although the Court provided guidance on the legal framework, it did not resolve the conflict. Three years later, three circuits have been asked to apply the Court's guidance and have issued three conflicting decisions. In other words, despite this Court's intervention, the circuits are now more divided than they were before *Cantero* on the same critically important question for the mortgage market and the national banking system.

Respondents contend there is nothing to see here. Despite acknowledging the materially identical IOE laws in 12 States (and 2 territories), respondents assert that resolution of the question presented somehow affects only the three cases pending in this Court. The chorus from every other party and amicus on both sides of the 'v' in those three cases belies that position. As does the consistent position of the Office of the Comptroller of the Currency (OCC), the federal government's principal banking regulator. The question presented plainly matters—to banks, consumers, and regulators—both with respect to state IOE laws and with respect to National Bank Act (NBA) preemption generally.

The OCC's recent rulemaking on these issues does not obviate the need for review. While the OCC has codified its longstanding view that state IOE laws are preempted, that determination warrants only *Skidmore* deference. The Ninth Circuit already rejected the OCC's preemption view under that same standard in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), which it continues to apply today. There is no indication that, without this Court's intervention, it will change course now.

In the end, the proper understanding and scope of NBA preemption is an issue for this Court. The Court has three vehicles from which it may choose to offer that needed guidance. And respondents concede that this case presents a sound vehicle to do so. The Court should grant certiorari to ultimately resolve the preemption of state IOE laws and provide further instruction to lower courts (and to banks, consumers, and regulators alike) on how to evaluate the preemption question with respect to other state laws going forward.

ARGUMENT

Respondents do not deny the three-circuit post-*Cantero* conflict on whether state IOE laws are preempted. They offer no reason to believe that conflict will resolve without this Court's review. Instead, they assert that the question this Court granted certiorari on three years ago, but did not resolve, is somehow no longer sufficiently important enough to warrant this Court's attention. And they insist that, in any event, the Ninth Circuit correctly declined to follow this Court's preemptive framework, resorting instead to its pre-*Cantero* approach. Those arguments are as wrong as they seem. The Court's review of the question presented is again and still warranted. And this case is an ideal vehicle in which to resolve it.

I. The Question Presented Is Critical to the Mortgage Industry and National Banking System.

The OCC has repeatedly emphasized the "exceptional importance" of *Barnett Bank*'s preemption standard for the national bank system. Pet. 27 (citation omitted). It has further observed that the application of that standard to state IOE laws is a question of "foundational consequence." OCC Br. at 5, *Lusnak*, *supra*. The agency has now put its money where its mouth is. As respondents emphasize, the OCC chose state IOE laws—including the specific law at issue here—as among the first state laws to consider under Dodd-Frank's procedures for OCC preemption determinations. *See* Opp. 10-11.

Neither the broader preemption standard nor the precise question presented is any less important now than it was when the Court last granted certiorari to resolve a 1-1 circuit conflict. None of respondents' arguments for abandoning the Court's effort to bring clarity to this area is persuasive.

A. Respondents first argue that the question presented has no "practical consequences for the banking industry" based on their reading of the evidentiary record below. Opp. 6; *see* Opp. 13. That argument blinks reality. It finds no support in the decision below; the Ninth Circuit ruled both before and after *Cantero* on legal grounds, expressly declining to consider the evidentiary record. *See* Pet. App. 18a-19a, 53a-54a. And it is contradicted by the expressed views of every other party and amici before this Court in these cases—plaintiffs, defendants, the banking industry, state regulators, and States.

Take, for example, the escrow account holders in *Cantero* (i.e., the plaintiffs). While they disagree with Flagstar on the merits, they affirmatively contend that the question presented "is one of paramount importance." *Cantero* Pet. at 23. That is so, the *Cantero* petitioners explain, because of the "ubiquity of mortgage-escrow accounts," which hold "billions of dollars," and the uncertainty regarding what interest rate, if any, is applicable to these accounts in 14 States, including "New York and California, two of the largest state economies." *Id.* The bank petitioner in *Conti* agrees, explaining that absent the Court's guidance, the conflict will force national banks to "tailor compliance with state laws from circuit to circuit," directly undermining the "uniform system" that the NBA was meant to achieve. Reh'g Pet. at 8, No. 25-1004.

The banking industry amici in this case also describe the need for this Court's guidance as "paramount." BPI Amicus Br. 15. Mortgage-escrow accounts, they explain, play a "central role" in mortgage lending and empirical studies show that state IOE laws harm "homeowners and lenders alike" by causing a decline in mortgage application approvals and a rise in mortgage origination fees. *Id.* at 7-12. Meanwhile, the state-chartered-bank regulators as amici in support of the *Cantero* petitioners—echoed by the States themselves—argue that, absent the Court's intervention, the inconsistent preemption decisions will "seriously impair the States' authority to regulate financial institutions." Conference of State Bank Supervisors Amicus Br. at 1, No. 25-1313; *see* States Amicus Br. at 4, No. 25-1313.

Just as importantly, respondents' view is contradicted by the consistent, decades-old view of national banks' primary regulator. The OCC has long maintained that state IOE laws significantly interfere with a national bank's federal banking powers. *See* Pet. 9 (collecting sources). And the OCC recently reiterated that federal preemption is the "critical tool" to remove such state interference, "reducing unnecessary burden, enabling local and national prosperity, and unleashing economic growth." Preemption Determination: State Interest-on-Escrow Laws, 91 Fed. Reg. 29350, 29350 (May 19, 2026). Indeed, the OCC undertook its preemption rulemaking precisely because the current circuit conflict has created "substantial uncertainty for stakeholders who seek to rely on longstanding principles of Federal preemption in the context of State interest-on-escrow laws" and "introduced ambiguity regarding how to evaluate National Bank Act preemption generally." *Id.*

B. As this consensus suggests, respondents are also wrong to dismiss the question presented as about merely "particular results" of the *Cantero* analysis in a handful of cases. Opp. 15. At the outset, the fact that three courts of appeals have reached conflicting conclusions about the preemption of materially identical laws is alone a cause for concern. The purpose of the NBA is to establish a national banking system with "uniform and universal operation through[out] the entire territorial limits of the country." *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891). Three conflicting decisions in rapid succession on the same type of state laws is a strong indicator that guidance on how to apply that framework is needed.

Moreover, the reasoning that these courts employed to reach those conflicting results—and that respondents advocate for—cannot be limited to state IOE laws. Despite respondents' contrary assertion (Opp. 5), if the Ninth and First Circuits' decisions are allowed to stand, there is no ample reason to conclude that the "threat of state price controls extends well beyond mortgage-escrow accounts." BPI Amicus Br. 13. Nothing in respondents' approach to preemption would seem to prevent States from setting minimum interest rates on savings accounts or checking accounts—as long as "large corporate banks" could withstand those rates (Opp. 19) and a court concludes they are not "punitively high," *Lusnak*, 883 F.3d at 1195 n.7.

In any event, the circuits are not divided merely on the result to *Barnett Bank*'s comparative analysis for state IOE laws. They are divided on whether the nuanced comparative analysis set forth in *Cantero* is the "sole method for determining preemption" at all. Pet. App. 18a. As respondents acknowledge, the Ninth Circuit held that it could abandon that approach after finding itself in "equipoise," and instead turn back to its pre-*Cantero* precedent. *Ibid.*; *see* Opp. 16 ("The Ninth Circuit turned to *Lusnak* only after concluding that *Cantero*'s methodology did not resolve the IOE preemption issue."). That conflict—on the basic framework for National Bank Act preemption—plainly has implications beyond the current debate about the preemption of state IOE laws.

C. The OCC's recent rulemaking does not undermine the need for this Court's intervention. In that rulemaking, the OCC relied on the procedure set out in Dodd-Frank for the agency to make preemption determinations on a case-by-case basis under the same *Barnett Bank* standard that applies here. *See* 12 U.S.C. § 25b(b)(1)(B), (b)(3)(A). After notice and comment, and consultation with the Consumer Financial Protection Bureau, the OCC re-affirmed its view that state IOE laws significantly interfere with a national bank's federal banking powers and are therefore preempted by the NBA. *See* 91 Fed. Reg. at 29350. In a concurrent rulemaking, the OCC affirmed that national banks have the power to "establish and maintain escrow accounts" and that "[t]he terms and conditions of any such escrow account," including whether to pay interest on escrow, are "business decisions" within each bank's discretion. Real Estate Lending Escrow Accounts, 91 Fed. Reg. 29340, 29347 (May 19, 2026) (codified at 12 C.F.R. § 34.3(d)).

Those regulations are important codifications and reaffirmations of the OCC's longstanding positions. But they are not material changes that counsel against further review. As the OCC explained—and respondents well know—"the OCC has consistently taken the position that escrow account activities are part of the business of banking." 91 Fed. Reg. at 29344. And even before the latest rulemaking, OCC regulations provided that a national bank "may make real estate loans … without regard to state law limitations concerning … escrow accounts." 12 C.F.R. § 34.4(a)(6) (2021).

That preexisting agency guidance did not prevent the Court from granting certiorari on the question presented in *Cantero*, and it should not dissuade the Court from doing so here. If anything, the OCC's new regulations underscore the need for this Court's review. As noted, the OCC promulgated those regulations to provide "much-needed clarity to banks and other stakeholders" on the status of state IOE laws and "National Bank Act preemption generally." 91 Fed. Reg. at 29350. But the OCC's efforts are unlikely to succeed alone.

"[C]ourts must exercise [their own] independent judgment in determining the meaning of statutory provisions" like Section 25(b)(1)(B) of Dodd-Frank. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024). And the text of Dodd-Frank makes clear that, in undertaking that exercise, the OCC's preemption determinations should be afforded something akin to *Skidmore*, not controlling, deference, under which such determinations should be considered valid "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." 12 U.S.C. § 25b(b)(5)(A); *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Whether a court finds such a determination "persuasive" will depend on the underlying preemption standard. Indeed, in *Lusnak*, the Ninth Circuit held that, "under *Skidmore*," the OCC's previous preemption regulation on escrow accounts was "entitled to little, if any, deference," *because* it reflected only the OCC's application of this Court's preemption standards in a manner the court found unpersuasive. 883 F.3d at 1193-94. The Ninth Circuit's holding in this case that "*Lusnak* remains good law," Pet. App. 18a, provides little reason to hope that, without further intervention, the OCC's new preemption determination will enjoy a warmer reception.

For the OCC's efforts to be meaningful, then, the Court must clarify the underlying legal standard. As was true in *Cantero*, the fact that this petition presents only that straightforward legal preemption question, rather than any additional questions about the validity or retroactivity of the OCC's new preemption regulations is a virtue, not a vice. *Cf.* Opp. at 25-29, No. 25-1313. The Court should take the opportunity to again consider the legal preemption standard that will govern this and all future NBA preemption questions and that is necessary to provide the clarity that the OCC seeks to afford.

II. The Decision Below Is Wrong.

Given the conceded conflict on how to apply the *Cantero* framework and on the outcome of that analysis for more than a dozen state IOE laws, this Court's review would be warranted regardless of the merits of the decision below. But the decision below is also doubly wrong—in declining to conduct the comparative analysis that

Cantero requires and in concluding under its pre-*Cantero* precedent that state IOE laws are not preempted. *See* Pet. 19-26. Respondents' efforts to defend the Ninth Circuit's approach are unconvincing.

As an initial matter, respondents are wrong that the Ninth Circuit panel first "dutifully applied *Cantero*'s methodology" to state IOE laws and "followed *Cantero*'s directive to consider *Barnett Bank* and six other Supreme Court preemption decisions." Opp. 16. To the contrary, the panel forthrightly acknowledged that it "w[ould] *not* review all of those cases here." Pet. App. 15a (emphasis added). Instead, it considered just two precedents before concluding it was "not sure" what to "glean from th[em]" and thus would revert to its pre-*Cantero* precedent in *Lusnak*. *Id.* at 17a; *see id.* at 15a-17a.

More important, though, is the second step in that analysis—the panel's resort to its pre-*Cantero* precedent after finding itself in "equipoise." Pet. App. 18a. As respondents put it—"The Ninth Circuit turned to *Lusnak* only after concluding that *Cantero*'s methodology did not resolve the IOE preemption issue." Opp. 16. That is not how vertical stare decisis works. Contrary to respondents' assertion, when this Court establishes a methodology for resolving legal questions, it is not just the "starting point" for lower courts, "it is the end point." Opp. 17.

As *Cantero* described, lower courts analyzing NBA preemption under Section 25b(b)(1)(B) "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. "Those precedents furnish content to *Barnett Bank*'s significant-interference test—and therefore also to Dodd-Frank's preemption standard incorporating *Barnett Bank*." *Id.* at 219. The Ninth Circuit was not free to take a different path because it found the standard less conclusive than it would like. *See id.* at 221 ("We appreciate the desire by both parties for a clearer preemption line one way or the other. … *Barnett Bank* did not draw a bright line.").

Finally, respondents focus on the *Cantero* Court's instruction to take account of "similar precedents" to those identified in *Cantero*, in an effort to justify the Ninth Circuit's reliance on *Lusnak*. Opp. 17-18. But *Cantero* plainly invites courts to consider "similar precedents" only *after* considering *Barnett Bank* and the other six precedents of this Court. In any event, the suggestion that the panel considered *Lusnak* as just another "similar precedent" in the *Cantero* methodology strains credulity.

As the panel recognized, *Lusnak* "did not cite or discuss the six preemption cases discussed in *Barnett Bank* and recounted in *Cantero*." Pet. App. 14a. Nor did it apply anything like the "nuanced comparative analysis" that those precedents reflect. *Cantero*, 602 U.S. at 220. Instead, to determine whether state IOE laws run afoul of Dodd-Frank, *Lusnak* relied on TILA's Section 1639d's requirement to pay interest on escrow for certain higher-priced mortgages as "prescribed by applicable State or Federal Law." 15 U.S.C. § 1639d(g)(3). Although Section 1639d did not apply to the mortgages at issue (nor does it apply here), the *Lusnak* court "accepted this provision as 'expressing Congress's view that [IOE] laws would not necessarily prevent or significantly interfere with a national bank's operations.'" Pet. App. 14a (citation and brackets omitted).

Flagstar has explained why that reasoning was misguided. *See* Pet. 14-15. Respondents offer no answer; indeed, Section 1639d is strikingly absent from respondents' description of *Lusnak* and, in fact, their entire brief. But the more salient point is that *Lusnak*'s reliance on Section 1639d bears no resemblance to the nuanced, practical assessment of comparative burdens that *Cantero*'s methodology requires. The panel in this case did not claim otherwise. Rather, it reasoned that the "nuanced comparative analysis" was not the "sole method for determining preemption." Pet. App. 18a. That was error that warrants correction.

* * *

As respondents see it, the NBA preempts only "oddball laws." Opp. 20. But *Barnett Bank* itself makes clear that a national bank's authority is "not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 26 (1996). Laws like California's, which purport to set the pricing of a core banking product, are the heartland of the type of state laws that the NBA preempts.

III. This Case Is an Ideal Vehicle.

Finally, respondents' brief confirms that if the Court determines review is warranted, this case is the ideal vehicle to do it. Pet. 28-31. Of the choices, this is the only case involving a final judgment imposing an ongoing injunction requiring a national bank to comply with a state IOE law. The decision below rests exclusively on whether the NBA preempts that law. And respondents' concession that this case is a "sound vehicle" puts to rest any concerns that they might attempt to argue, for the first time, that a preemption standard other than Section 25b(b)(1)(B) applies. *See* Sup. Ct. R. 15.2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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