

No. 26-62

In the
Supreme Court of the United States

CUSTODIA BANK, INC.,

Petitioner,

v.

FEDERAL RESERVE BOARD OF GOVERNORS and
FEDERAL RESERVE BANK OF KANSAS CITY,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Reserve Act confers upon each and every state-chartered depository institution an absolute entitlement to a deposit account at a Federal Reserve Bank (known as a master account) and use of Federal Reserve financial services, even if a depository institution poses unacceptable risk to the Reserve Bank or the national payment system.

PARTIES TO THE PROCEEDING

Petitioner is Custodia Bank, Inc., which was Plaintiff-Appellant below.

Respondents are the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of Kansas City, which were Defendants-Appellees below.

CORPORATE DISCLOSURE STATEMENT

The Federal Reserve Bank of Kansas City (“FRBKC”) is a corporation incorporated under the laws of the United States, pursuant to the Federal Reserve Act of 1913, 12 U.S.C. § 221 *et seq.* It has no parent company, nor does it have any publicly owned subsidiaries or affiliates. Although stock of FRBKC is owned by member commercial banks within the Tenth Federal Reserve District, none of its stockholders controls FRBKC. Stock of Federal Reserve Banks, unlike stock in a private corporation, is not acquired for investment purposes or for purposes of control. Rather, such stock is acquired because its ownership is a condition of membership in the Federal Reserve System. Unlike owners of a private corporation, Federal Reserve Bank stockholders do not possess a residual equity interest in Reserve Bank assets.

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BRIEF IN OPPOSITION

Petitioner Custodia Bank, Inc. brings to this Court a statutory interpretation so extreme that no court has ever adopted it. According to Custodia, the Federal Reserve Act (“FRA”), as amended by the Monetary Control Act of 1980 (“MCA”), provides each and every state-chartered depository institution an absolute entitlement to a “master” deposit account with a Reserve Bank and access to the Federal Reserve’s payment services, regardless of the risks the institution poses to the Reserve Bank, the federal payment system, the Federal Reserve’s implementation of the nation’s monetary policy, or the public. As Custodia admits, every court to address this question has rejected Custodia’s position. That uniformity strongly counsels against review.

The Tenth Circuit’s holding that the FRA does not provide all eligible institutions an absolute entitlement to a Reserve Bank deposit account and access to the Federal Reserve’s services is not only uniform among lower courts; it is also correct. Since its enactment in 1913 through today, the FRA has stated that Reserve Banks “may receive” deposits from eligible depository institutions. This Court held a century ago that this permissive phrase constitutes “words of authorization merely” that provide discretion to Reserve Banks, *Farmers & Merchs. Bank v. Fed. Rsrv. Bank of Richmond*, 262 U.S. 649, 662 (1923), and Congress has never disturbed that discretionary principle. Instead, when broadening the universe of banks to which that discretion applies in 1980 by amending section 342 to authorize deposits from non-member depository institutions in addition

to member banks—that is, to include state-chartered institutions like Custodia that are not members of the Federal Reserve System—the MCA notably preserved section 342’s controlling “may receive” language. Post-MCA, Reserve Banks have the same discretion to open deposit accounts for banks that are not members of the Federal Reserve System that they had before the MCA for member banks. The Tenth Circuit correctly held that the clause on which Custodia’s theory hinges, section 248a(c)(2), does not withdraw that discretion. There is no basis for this Court to review that decision.

Nor should this Court accept Custodia’s invitation to take up questions that were neither developed nor decided below. For example, Custodia repeatedly asserts that the Tenth Circuit granted Reserve Banks “plenary” and “unreviewable” discretion to deny master account requests. *E.g.*, Pet.18, 23. The Tenth Circuit held no such thing. Because Custodia relied solely on the radical position that respondent Federal Reserve Bank of Kansas City (“FRBKC”) had *no* discretion to deny Custodia’s request, the Tenth Circuit held only that Reserve Banks have at least *some* discretion. The court had no reason to opine on the scope of Reserve Banks’ discretion or potential avenues for judicial review of an account denial. Custodia likewise attempts to inject separation-of-powers issues into this case, despite abandoning such claims earlier in the litigation. The Tenth Circuit correctly found that Custodia’s constitutional claims and constitutional avoidance arguments were waived and declined to reach their merits, and Custodia does not seek review of that waiver holding.

STATEMENT

A. Legal Background

1. The Federal Reserve System was established in 1913 by the FRA, 12 U.S.C. § 221 *et seq.* It comprises the Board of Governors of the Federal Reserve System (the “Board”), the Federal Open Market Committee, and twelve regional Reserve Banks (including FRBKC). Fed. Rsrv. Sys., *The Fed Explained: What the Central Bank Does* (11th ed. 2021), <https://tinyurl.com/4m9amcyu>.

To advance the Federal Reserve’s purpose of “oversee[ing] banking operations and promot[ing] greater economic stability,” *Am. Bankers Ass’n v. United States*, 932 F.3d 1375, 1378 (Fed. Cir. 2019), Congress empowered the Reserve Banks to accept deposits from, and provide payment services to, depository institutions. 12 U.S.C. § 341 *et seq.*; *see also* *The Fed Explained*, *supra*, at 86. In its payment-system role, a Reserve Bank serves as a “bank for banks,” offering accounts and payment services to depository institutions. *The Fed Explained*, *supra*, at 11.

Today, Reserve Banks provide payment services to both “member” and “nonmember” banks. Member banks include national banks and state-chartered banks that have applied for and received membership with the Federal Reserve. 12 U.S.C. §§ 222, 321. These banks buy stock in their regional Reserve Bank and are subject to federal supervision. *Id.* §§ 282, 321, 324. A “nonmember” bank is typically a state-chartered depository institution that is not subject to Federal Reserve supervision. Virtually all nonmember banks,

however, are required by state law to obtain deposit insurance from the FDIC and are thus subject to ongoing federal supervision. *See* Michael S. Barr, Howell E. Jackson, & Margaret E. Tahyar, *Financial Regulation: Law & Policy* 173 (2d ed. 2018).

Since their creation, Reserve Banks have exercised discretion over access to accounts and services. App.37a-38a. That authority stems from section 342, which provides that “[a]ny Federal reserve bank *may receive* from any of its member banks, or other depository institutions, and from the United States, deposits” 12 U.S.C. § 342 (emphasis added). A century ago, when this provision contained the same “may receive” language but limited that authority to deposits from “member banks,” this Court held that this text consists of “words of authorization merely,” *Farmers*, 262 U.S. at 655-56, 662 (quotation marks omitted), thus giving Reserve Banks discretion over accepting deposits.

Importantly, and contrary to Custodia’s suggestion, a Reserve Bank account has never been the only means for a depository institution to access the types of services Reserve Banks offer. From before the creation of the Federal Reserve to the present day, banks have provided services to customers using private clearinghouses, bankers’ banks, and correspondent banking relationships with other banks. *E.g.*, C.A.Supp.App.98-103; App.8a. Indeed, there have always been private competitors offering services similar to the payment services operated by Reserve Banks. *See, e.g.*, Pet.16 (noting that MCA “forc[ed] the Fed to compete with its private competitors”). And before 1980, *no* nonmember banks

had full-service Reserve Bank accounts; they instead relied on other options to access payment services. App.6a, 33a. To this day, only about half of nonmember banks have Reserve Bank accounts. David W. DeCarlo & Jonathan D. Rose, *Who Opened Federal Reserve Accounts After the 1980 Monetary Control Act?* 12-15 (Fed. Res. Bank of Chi., Working Paper No. 2026-15, 2026), <https://tinyurl.com/43wwy6nt>.

In 1980, the MCA amended section 342 to authorize Reserve Banks to accept deposits from and provide services to nonmember banks on the same basis as member banks. Congress accomplished that by adding “or other depository institutions” after “any of its member banks” in the sentence decreeing who a Reserve Bank may receive deposits from. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 105(a), 94 Stat. 132, 139-40. Nothing in the MCA altered the “may receive” language in section 342 by which Congress had granted Reserve Banks discretion over deposits and accounts.

Before the MCA, Reserve Banks provided services for free, but only to member banks. After the MCA, Reserve Bank services would be available to nonmember banks as well. Now, however, all banks would have to pay for those services. In section 248a, a provision titled “Pricing of services” and directed at the Board, Congress spelled out the Board’s duties in setting a fee schedule.

Subsection (a) imposed deadlines for the Board’s actions in proposing and implementing the fee schedule. Subsection (b) listed the “covered services”

for which the Board was to set a fee. Subsection (c) then laid out the “criteria applicable” to the Board’s fee-setting, directing the Board to base the fee schedule “on the following principles.” The first of the four principles was that all services “shall be priced explicitly.” 12 U.S.C. § 248a(c)(1). The third told the Board to take into account “direct and indirect costs” and to set the fees at levels that would prevail in a private market, with some caveats. *Id.* § 248a(c)(3). The fourth specified that interest would be charged at the federal funds rate. *Id.* § 248a(c)(4).

The second principle, which contains the clause on which Custodia bases its case, directed the Board to take account, in setting the fees, of the fact that these Reserve Bank services would now also be available to nonmember banks—a far more numerous group than member banks—and directed the Board to apply a single, uniform fee schedule to members and nonmembers alike. The second principle, *id.* § 248a(c)(2), provides in its entirety:

All Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks, except that nonmembers shall be subject to any other terms, including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks.

Subsections (d) and (e) then went on to address, respectively, Reserve Bank “operating budgets” and “parity in clearing.”

2. A depository institution that wishes to access services directly from the Federal Reserve must do so by submitting a request and, upon approval, making deposits with its “administrative” Reserve Bank. For a time, a depository institution needed to hold separate accounts at multiple Reserve Banks to use Federal Reserve services in different Federal Reserve districts. In 1998, each depository institution’s accounts and access to services were consolidated into a single deposit account that has come to be known as a “master account.” See *Interstate Branching: New Account Structure: Questions and Answers*, FederalReserve.gov (Sept. 27, 2002), <https://tinyurl.com/3am47864>.

Individual Reserve Banks decide to grant or deny a request for a master account from an institution within a Reserve Bank’s geographical jurisdiction based on the risks presented. The Board does not exercise direct authority over such decisions, but it has issued guidelines to promote consistency. *Guidelines for Evaluating Account and Services Requests*, 87 Fed. Reg. 51099 (Aug. 19, 2022). Those guidelines outline a three-tier framework “meant to serve as a guide to the level of due diligence and scrutiny to be applied by Reserve Banks to different types of institutions.” *Id.* at 51109. Tier 1 is for “[e]ligible institutions that are federally insured” and thus federally supervised; Tier 2 is for “[e]ligible institutions that are not federally insured but are subject (by statute) to prudential supervision by a federal banking agency”; and Tier 3 is for eligible institutions, like Custodia, “that are not federally insured and are not considered in Tier 2.” *Id.* at 51109-

10.¹ Requests from Tier 3 institutions, which lack traditional guardrails and federal supervision, “generally receive the strictest level of review.” *Id.* at 51110.

In May 2026, the Board proposed expanded guidelines, including a proposal to standardize how Reserve Banks consider applications from novel entities like Custodia. Proposed Revisions to the Federal Reserve Policy on Payment System Risk and the Guidelines for Account and Services Requests, 91 Fed. Reg. 30627 (May 26, 2026). Among other things, the Board proposed that the Federal Reserve establish “Payment Accounts,” which would be “special-purpose accounts that would clear and settle certain payment activity” and would be “tailored to the needs and risks of institutions focused on payments innovation.” *Id.* at 30627, 30629. Such payment accounts would provide access to certain Reserve Bank payment services without a full master account. *See id.* at 30636.

B. Factual and Procedural Background

1. As noted, virtually all nonmember depository institutions have historically been required by their chartering state to have FDIC insurance and thus to submit to FDIC supervision. Barr, Financial Regulation, *supra*, at 173. As a result, virtually all depository institutions with master accounts have been subject to ongoing safety-and-soundness supervision by federal regulators. For nearly a century, this combination of deposit insurance and

¹ Any entity “engaged in the business of receiving deposits, other than trust funds,” is eligible to request a master account. App.8a n.4 (quoting 12 U.S.C. § 1813(a)).

federal supervision has been an essential component of the effort to protect depositors.

Recently, however, States have begun to experiment with new charters without these safeguards. In 2019, Wyoming created a new “special purpose depository institution” (“SPDI”) charter. Wyo. Stat. Ann. § 13-12-101 *et seq.* Among other features distinguishing them from traditional banks, SPDIs are prohibited from engaging in lending, so they must make money through other business practices. *Id.* § 13-12-103. SPDIs are also exempted from the requirement, applicable to all other Wyoming banks, of obtaining FDIC insurance, thereby making federal supervision optional. *See id.* § 13-2-103(a).

Custodia was chartered under this novel SPDI scheme. App.9a. Unlike most banks, Custodia’s hoped-for profitability would not be derived from lending, but from fees associated with digital-asset transactions. App.10a. The day after receiving its SPDI charter, and before opening its doors, Custodia requested a master account from FRBKC.

2. While Custodia’s request was pending and before it had a certificate of authority from Wyoming to operate, Custodia filed its initial complaint, seeking to compel the Board and FRBKC to give it a master account. App.12a. Custodia claimed that section 248a(c)(2) gave it an absolute entitlement to a master account and services. App.12a. It asserted this absolute-entitlement theory against the Board and FRBKC via the Administrative Procedure Act (“APA”) and the mandamus statute, 28 U.S.C. § 1361. C.A.App.61-70, 79-80. Custodia also asserted various constitutional claims. C.A.App.70-79.

The Board and FRBKC moved to dismiss the complaint, and the district court granted that motion in part and denied it in part. *Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors*, 640 F. Supp. 3d 1169 (D. Wyo. 2022). FRBKC argued that it was not an “agency” subject to the APA; the court declined to decide that question at the pleading stage and allowed Custodia’s APA claim to proceed. *Id.* at 1179-80. The court also declined to decide whether Custodia’s absolute-entitlement theory was correct. *Id.* at 1185. The court dismissed some of Custodia’s constitutional claims and allowed others to proceed. *Id.* at 1196.

3. While the litigation was pending, FRBKC denied Custodia’s account request. As FRBKC’s president explained in a denial letter, her decision was based on a range of risk and policy considerations posed by Custodia’s underdeveloped and novel business, including that Custodia’s “unprecedented business model” was dependent on “higher-risk business activities”; that Custodia was “not subject to an established, interagency capital framework that fully addresses the relevant risks or a defined resolution process”; and that Custodia’s planned activities “do not currently have clarity at the federal level.” C.A.App.1949-50. The letter was accompanied by an analysis that provided further detail on FRBKC’s reasons for denying the request, including Bank Secrecy Act/anti-money laundering and Office of Foreign Assets Control compliance risk, financial viability concerns, a potentially insufficient capital base, counterparty risk, and the lack of federal regulatory oversight. C.A.App.1953-55.

Custodia had separately applied to the Board for membership in the Federal Reserve. App.76a. The Board denied that application in a lengthy order describing how Custodia’s membership would have been inconsistent with multiple statutory factors, including because of inadequacies in Custodia’s compliance programs and risk-management systems. App.77a.

4. Custodia filed an amended complaint challenging the master account denial. It alleged that FRBKC had been poised to grant its account request, but that the Board intervened and forced FRBKC to deny it. C.A.App.405, 416, 422, 424-25 ¶¶ 10, 46, 62, 69-70.

The amended complaint relied solely on the statutory theory that section 248a(c)(2) provides every eligible depository institution an absolute entitlement to a master account. In other words, Custodia chose not to challenge “the reasons underlying the master account denial.” App.77a. Custodia also abandoned its APA claim against FRBKC and did not assert any constitutional claims. C.A.App.427-33 ¶¶ 77-101. Having abandoned the APA as a basis for review of FRBKC’s decision, Custodia invoked the mandamus statute for its sole cause of action against FRBKC. C.A.App.429-31 ¶¶ 86-94.² Custodia did not challenge the Board’s denial of its membership application.

² Although the amended complaint included a “count” brought under the Declaratory Judgment Act, C.A.App.431-33 ¶¶ 95-101, that Act is not a standalone source of authority for judicial review. It merely provides that declaratory relief may be an available form of relief if a plaintiff has a viable cause of action

5. The district court granted summary judgment to FRBKC and the Board. App.100a. The court first dismissed the APA claim against the Board for lack of final agency action. App.79a-84a. The court then rejected Custodia's absolute-entitlement theory, explaining that "[t]he plain language of the relevant statutes can only reasonably be read to give the Federal Reserve Banks discretion in granting or denying requests for master accounts." App.98a-99a. Because FRBKC therefore did not have an absolute, ministerial duty to provide Custodia an account, Custodia's sole legal theory underpinning its causes of action against both FRBKC and the Board failed as a matter of law. App.99a.

6. The Court of Appeals affirmed over Judge Tymkovich's dissent. It held that Custodia failed to allege final agency action by the Board because "the ultimate decisions [over access] remain up to the Reserve Bank," App.20a, and that Custodia "is not statutorily and automatically entitled to a master account," App.44a. The court explained that "§ 342 grants Reserve Banks the authority to issue master accounts, using the term 'may,' which makes this authority discretionary." App.26a. And it further explained that "the single sentence tucked deep and innocuously inside § 248a of the MCA," on which Custodia's argument depends, "does not override the discretionary authority that Congress granted to Reserve Banks in § 342." App.27a. The opinion did not reach the constitutional avoidance arguments

under some other source of law. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960).

Custodia seeks to raise here, finding that Custodia had waived any such contentions. App.42a.

The Tenth Circuit denied rehearing en banc over three dissenting votes. App.103a.

REASONS FOR DENYING THE PETITION

Every court to have considered Custodia's argument has correctly rejected it. Custodia concedes that there is no circuit split over the only question presented, which is purely statutory: Whether the FRA provides each and every eligible depository institution an absolute entitlement to a master account and services. In the absence of a circuit split—or even a district split—Custodia can identify no valid basis for this Court to grant review. To the contrary, this would be a particularly poor vehicle for multiple reasons.

I. The question presented does not warrant review.

1. As Custodia admits (at 13), the quintessential reason for this Court's review—disagreement among lower courts—is absent here. S. Ct. R. 10(a). No court, either appellate or trial, has ever adopted Custodia's extreme position that all eligible depository institutions have an absolute entitlement to access Reserve Bank accounts and services. That courts have uniformly rejected Custodia's position is reason enough to deny review.

The two courts of appeals to have decided the question presented both rejected Custodia's absolute-entitlement theory. The Tenth Circuit below was the first. App.44a. Soon thereafter, the Second Circuit

joined it. *Banco San Juan Internacional, Inc. v. Fed. Rsrv. Bank of N.Y.*, 176 F.4th 163 (2d Cir. 2026). In *Banco San Juan*, a depository institution sued to stop the Federal Reserve Bank of New York from terminating its account based on concerns that it was being used to facilitate money laundering or other illicit activities. *Id.* at 175-76. Notwithstanding these compliance concerns, the bank contended that section 248a(c)(2) gave it an absolute right to a master account. *Id.* at 180. The Second Circuit, “join[ing] the Tenth Circuit and every district court to address this question,” held “that 12 U.S.C. § 342 grants Reserve Banks discretionary authority over master account access, and that this authority is undisturbed by the pricing principles enacted in § 248a(c).” *Id.* at 182.

As the Second Circuit noted, district courts agree. In addition to the district courts in this case and *Banco San Juan*, the district court in *PayServices Bank v. Federal Reserve Bank of San Francisco*, 2024 WL 1347094 (D. Idaho Mar. 30, 2024), likewise held that the FRA does not grant an absolute entitlement to master accounts. An appeal from that decision is currently pending before the Ninth Circuit. *PayServices Bank v. Fed. Rsrv. Bank of S.F.*, No. 24-2355 (9th Cir. Apr. 15, 2024). And before this case, another district court in the Tenth Circuit rejected a request for a master account from a bank dedicated to serving the marijuana industry, concluding that “this statute does not mandate the opening of a master account that will facilitate activities that violate federal law.” *Fourth Corner Credit Union v. Fed. Rsrv.*

Bank of Kansas City, 154 F. Supp. 3d 1185, 1189 (D. Colo. 2016).³

Simply put, there is no split to resolve. Custodia instead points to cases “presenting significant separation-of-powers concerns” that it says this Court reviewed “even in the absence of a circuit conflict.” Pet.33. But the cases Custodia cites are inapposite, as in each one the question presented was constitutional—that is, the petitioner directly sought review of a separation-of-powers question. By contrast, the question presented here is “a pure question of statutory interpretation.” Pet.34. There is no split over—and no need for this Court to review—that statutory question.

2. If the absence of a split were not enough, certiorari is further unwarranted because updated guidelines from the Board could obviate or disrupt this Court’s review.

As States like Wyoming have increasingly authorized nontraditional banking charters, the Federal Reserve System has considered how to safely provide services to novel institutions. The Board first issued guidelines to promote transparency and

³ The Tenth Circuit vacated and remanded with instructions to dismiss Fourth Corner’s complaint without prejudice, with no reasoning commanding a majority of the panel. *Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kansas City*, 861 F.3d 1052 (10th Cir. 2017). Although Judge Bacharach believed that Fourth Corner was entitled to an account, his opinion was “not controlling authority” because “the other two judges each voted to dispose of the case without reaching the issue.” App.24a n.14. Judge Bacharach did not dissent from the Tenth Circuit’s denial of rehearing en banc below. App.103a.

consistency in the approaches of the various Reserve Banks. *See* 87 Fed. Reg. at 51099. And just a few months ago, the Board announced that it was revisiting its guidelines to consider “the provision by Reserve Banks of special-purpose accounts that would clear and settle certain payment activity (Payment Accounts).” 91 Fed. Reg. at 30627. These “payment accounts” would “provide direct access to a basic account and services to a broader population of institutions with novel and diverse business models and risk profiles.” *Id.* at 30637. In other words, “[t]he Board is proposing to create a Payment Account to support” novel charter-holders like Custodia “while prudently managing the risks.” *Id.* at 30635.

In the proceedings below, Custodia indicated that it would be satisfied with a limited payment account short of a full master account with access to all services. *E.g.*, C.A. Pet. for Rehearing En Banc 6-7, 17. If FRBKC granted Custodia an account based on the proposed payment account concept, that could moot Custodia’s claims. At a minimum, however, the anticipated change in guidance and regulation will likely reshape the framework for addressing account requests by novel charter-holders.⁴ Among other things, the proposed changes could prompt a new account request by Custodia, which FRBKC would

⁴ Some of Custodia’s amici disagree that payment accounts would be adequate, *see* Blockchain Ass’n Amicus Br. 11-13; Digital Chamber Amicus Br. 22-23, but the divergent views about the utility of potential payment accounts underscore the wisdom of awaiting the Board’s final guidelines—rather than stepping in mid-process before anyone knows how exactly a payment account will work.

review in light of the new guidelines (as well as up-to-date information from Custodia). These new considerations would be relevant to the parties' arguments (about, for example, the risks posed by entities such as Custodia), and would no doubt be useful to this Court's assessment of those arguments.

The possibility that changes to the Federal Reserve's practices could moot or fundamentally alter this case during this Court's consideration is an independent basis to deny review. *Cf. Arizona v. City & Cnty. of San Francisco*, 596 U.S. 763, 765-66 (2022) (Roberts, C.J., concurring) (concurring in dismissal of writ as improvidently granted following regulatory changes); *United States v. Microsoft Corp.*, 584 U.S. 236 (2018) (per curiam) (dismissing as moot after grant of certiorari because of intervening legislation). Custodia's amici highlight the rapidly evolving situation and the uncertain future developments, but they get the Court's certiorari practice backwards by suggesting that the Court reach out now to resolve questions that might (or might not) be raised by these developments. *See* Digital Chamber Amicus Br. 20.

3. Any review of the question presented would also benefit from percolation in the lower courts. Custodia's absolute-entitlement theory has been addressed (and rejected) by just two courts of appeals and a handful of district courts. Custodia asserts that "[f]urther percolation is unlikely to benefit the Court in resolving the question presented," pointing to Judge Tymkovich's dissents below and Judge Bacharach's solo opinion in *Fourth Corner*. Pet.32-33. But this Court does not typically consider intra-circuit disputes to constitute adequate percolation, and that is

particularly true when the applicable legal regime is rapidly evolving and many of the purported issues Custodia raises—such as the scope of Reserve Banks’ discretion, any avenues for judicial review, and any constitutional issues relating to account decisions—were not developed or decided below. *See infra* Section II. In these circumstances, this Court would plainly benefit from further lower-court analysis.

Custodia’s reliance (at 25-27) on this Court’s recent opinions in *Trump v. Slaughter*, 609 U.S. 422, 146 S. Ct. 2283 (2026), and *Trump v. Cook*, 609 U.S. 528, 146 S. Ct. 2234 (2026), only highlights why further percolation is advisable. *Cook* emphasized the unique constitutional position occupied by the Federal Reserve and indeed upheld the “constitutionality of the Federal Reserve as currently structured.” *Cook*, 146 S. Ct. at 2254 n.6. And the Court’s decision illustrates the complexities stemming from the Federal Reserve’s unique structure and the resulting wisdom of allowing the lower courts to grapple with *Cook*’s implications. While Custodia would have the Court rush to address undeveloped constitutional questions mere months after *Cook*—questions that are not even presented in this case—the far better course would be to allow the dust to settle through percolation in the lower courts.

II. This case is a poor vehicle.

The petition makes sweeping assertions about Reserve Banks’ supposedly “unreviewable” power and the separation of powers, but this case would be a remarkably bad vehicle to address those purported issues. That is for a reason entirely of Custodia’s own making: Many of the arguments Custodia now

trumpets were not addressed by the Tenth Circuit because Custodia made the strategic decision not to raise them. This case is an unsuitable vehicle to address such undeveloped and undecided issues. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (because this “is a court of final review and not first view,” it does “not decide in the first instance issues not decided below” (cleaned up)).

1. Custodia and its amici consistently distort the decision below to claim that it “held that a regional bank president had *plenary* discretion to deny a master account to an eligible nonmember bank,” Pet.18 (emphasis added), and “vests *absolute, unreviewable* power in regional Federal Reserve Bank presidents,” Pet.23 (emphasis added); *accord* Pet.4, 13, 23-24; Blockchain Ass’n Amicus Br. 1-2, 7, 9; Digital Chamber Amicus Br. 4. Those assertions are incorrect no matter how many times Custodia and its allies repeat them. This case does not present any questions regarding the bounds of Reserve Banks’ discretion or the availability of judicial review over account decisions, so the panel majority below appropriately did not opine on any such questions.

Throughout this case, Custodia has always and exclusively relied on the theory that Reserve Banks have *zero* discretion to deny master account requests from eligible depository institutions. Custodia never challenged the basis for FRBKC’s denial of its request or argued that FRBKC abused whatever discretion it might have. App.77a. To reject Custodia’s all-or-nothing theory, the Tenth Circuit had to hold only that Reserve Banks have at least *some* discretion to deny account requests, such that Custodia was not

“automatically entitled to a master account.” App.44a. Indeed, FRBKC made clear that it was not asking the court to hold that it has plenary or unreviewable discretion. *See* C.A. Oral Argument at 42:40-43:20, 48:20-49:50 (Jan. 21, 2025), <https://tinyurl.com/bdhjdyny>.

Although the dissent below assumed that Reserve Banks’ discretion would be unreviewable, App.65a, that assumption is unfounded. Because Custodia did not allege that FRBKC’s denial violated the Constitution, the Tenth Circuit naturally did not address whether the Constitution would provide an avenue of review if an account denial implicated constitutional rights. *Contra* Pet.28-29; *cf.* *Banco San Juan*, 176 F.4th at 188-89 (rejecting claim that revocation of master account violated Banco San Juan’s equal protection rights). And Custodia abandoned its APA claim against FRBKC in its amended complaint, *see* App.14a n.8, so the Tenth Circuit had no occasion to address any APA issues as to FRBKC.

Custodia’s choice to limit this case to its absolute-entitlement theory was deliberate and strategic. If Custodia had challenged FRBKC’s reasons for the denial, the case would have been about holes in Custodia’s compliance programs and risk-management systems, inadequacies in its business plan, and risks posed by its business model. *See* C.A.App.1949-55 (account denial letter identifying risks). Among these risks was the counterparty credit risk that FRBKC faces when depository institutions use its services; a bank’s deposits in a master account are liabilities on the Reserve Bank’s balance sheet,

and Reserve Banks, like private commercial banks, protect themselves from counterparty risk by doing business only with creditworthy customers or by limiting the amount of credit extended. Bd. of Governors, Federal Reserve Policy on Payment System Risk 4-5, 15, 33-34 (effective July 20, 2023), <https://tinyurl.com/24dpa2t6>. Counterparty risk can be heightened where, as here, an institution engages in “novel, risky activities” and “is not subject to any federal prudential regulation or supervision.” C.A.App.1954.

Custodia did not want this case to be about the risks and uncertainties plaguing its business. So Custodia limited itself to a theory under which it would be entitled to an account even if FRBKC was entirely correct about the risks it posed.⁵ This Court should not reach out to consider the contours of Reserve Bank discretion over account requests or potential avenues of judicial review for account decisions when Custodia intentionally designed its claims to make those issues irrelevant.

2. The court below also did not decide any of the constitutional questions Custodia gestures at in its petition. Custodia raises “a pure question of statutory interpretation,” Pet.34, which turns entirely on the meaning of the FRA and MCA. The Tenth Circuit

⁵ Custodia’s choice to rely only on the mandamus statute to assert a cause of action against FRBKC, *see supra* 11, was consistent with its choice to rely only on its absolute-entitlement theory. The mandamus statute provides a remedy only to enforce duties that are so “clear and indisputable” as to be “ministerial.” *See, e.g., United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931).

decided only that statutory question, and nothing more.

Nonetheless, Custodia invokes the separation of powers and supposed “constitutional ramifications” of the decision below. Pet.5, 22-26, 33 (quoting App.104a (Tymkovich, J., dissenting from the denial of rehearing en banc)). The thrust of Custodia’s argument is that by providing discretion to Reserve Bank presidents to deny master accounts, the FRA “creates serious constitutional problems under the Appointments Clause.” Pet.22-27. But that argument (besides being wrong, *infra* Section III.4) was not preserved below. Custodia did not adequately raise the issue of the appointment of Reserve Bank *presidents* on appeal, even as a constitutional avoidance argument, and it abandoned any Appointments Clause claim regarding Reserve Bank *directors* in the district court. App.42a-44a; C.A. Opening Br. 55-56. In fact, Custodia mentioned constitutional avoidance for the first time in its reply brief, and even then without developing any argument in connection with Reserve Bank *presidents*. App.42a-44a; C.A. Reply Br. 16-17. The Tenth Circuit thus held that Custodia had waived its Appointments Clause argument, whether characterized as a standalone claim or a basis for constitutional avoidance. App.42a-44a. Custodia’s petition does not challenge that waiver holding.

Custodia’s decision not to raise its separation-of-powers argument below was driven by litigation strategy. Custodia’s factual theory throughout this case has been that FRBKC was prepared to grant its account request but was overruled by the Board—*i.e.*,

that the *Board* rather than FRBKC's president effectively made the decision to deny Custodia's request. C.A.App.405 ¶ 10; C.A. Opening Br. 26. That narrative (which is incorrect, *see* App.18a) is irreconcilable with Custodia's current constitutional argument: there is no conceivable separation-of-powers problem with the *Board* denying an account request, particularly after this Court's decision in *Cook*. Custodia cannot shift its theory of the case now just because it lost. If anything, the dispute over who made the account decision further complicates the question presented and makes this a poor vehicle.

3. Custodia suggests that the Court should overlook these vehicle problems because this case purportedly “presents a rare opportunity for the Court to resolve the question[s].” Pet.34. But that unsupported assertion conflicts with Custodia's contention elsewhere that these questions are “frequently recurring.” Pet.31 (capitalization omitted). If Custodia is right that the issues frequently arise and matter to depository institutions, *see* Pet.35, then other institutions will have the opportunity and incentive to litigate them in other cases. The Court should not rush to review issues here that were not presented or decided in the lower courts. *Zivotofsky*, 566 U.S. at 201. Indeed, it would turn constitutional avoidance principles on their head for this Court to reach out to address constitutional questions that were not preserved, developed, or resolved below.

III. The decision below is correct.

For all the reasons given above, review would be unwarranted even if the decision below were incorrect. But it is correct. The Tenth Circuit, along with every

other court to reach the question, was right to reject Custodia's absolute-entitlement theory and hold that Reserve Banks have discretion to deny master account requests under 12 U.S.C. § 342.

1. This case is controlled by section 342: "Any Federal Reserve bank *may* receive from any of its member banks, or other depository institutions, ... deposits" (emphasis added). Just ten years after the FRA's 1913 enactment, this Court held that Reserve Banks have discretion to reject deposits because section 342's operative language—"may receive"—consists of "words of authorization merely." *Farmers*, 262 U.S. at 662 (quotation marks omitted).

The relevant language in section 342 has not changed in the 103 years since this Court's decision, and it forecloses Custodia's absolute-entitlement theory. Custodia concedes that "the Fed created [master] accounts ... pursuant to its statutory authority to take deposits and provide services" under section 342. Pet.8. And section 342 unambiguously makes that authority discretionary. *Farmers*, 262 U.S. at 662. It follows that, as the Tenth Circuit held, Reserve Banks' "authority to issue master accounts" is "discretionary." App.26a-27a. Custodia's contrary theory is irreconcilable with section 342's unambiguous text as authoritatively construed by this Court in a decision that Custodia—remarkably—does not so much as cite.

History confirms the point. In the century since *Farmers*, Reserve Banks have always understood themselves to have discretion over who can access their services. In 1935, when nonmembers lacked full access to Reserve Bank services but could open

limited-purpose accounts known as “clearing accounts,” Reserve Banks declined to open such accounts in various circumstances. Letter from Chester Morrill, Sec’y, Bd. of Governors of Fed. Rsrv. Sys., No. X-9187, on Nonmember bank clearing accounts, 42 Mimeograph Letters and Statements of the Board 364, 365 (Apr. 26, 1935), <https://tinyurl.com/yekrjcj4>. In 1985, shortly after the MCA was passed, the Board adopted policies that expressly reaffirmed Reserve Banks’ authority “to reject funds transfer[r]ed” when transfers “expose[d] the Reserve Bank to excessive risk.” Policy Statement Regarding Risks on Large-Dollar Wire Transfer Systems, 50 Fed. Reg. 21120, 21124 (May 22, 1985). And in 1998, when master accounts were first introduced, governing circulars made clear that “[a]ll master accounts are subject to Reserve Bank approval.” Operating Circular No. 1, Account Relationships ¶ 2.3 (Jan. 2, 1998), *in* WaybackMachine (archived Aug. 16, 2000), <https://tinyurl.com/4dn7temc>. Individual Reserve Banks also have their own procedures that recognize their discretion. *E.g.*, C.A.Supp.App.112-14, 118 (FRBNY handbooks regarding risk assessment); C.A.Supp.App.131, 553-68 (documents regarding FRBKC’s Credit Risk Management department).

Custodia’s claim that Reserve Banks only recently “discovered” such discretion, Pet.17, 30 (quotation marks omitted), is thus contrary to the historical record, App.37a-38a. That Reserve Banks have “generally not exercised [their] discretion to deny account access” is best explained by the fact that Reserve Banks have rarely “been faced with access requests from novel institutions like Custodia.” App.37a n.22. As proof of this, “[a]s of November 2023,

540 institutions held master accounts with FRBKC, and only one of them lacked both federal insurance and a federal supervisor. And the one outlier was a century-old institution that had insurance and a federal supervisor when it first received its account.” App.37a n.22.

The MCA did nothing to change Reserve Banks’ discretion under section 342. While Congress amended section 342 to bring nonmember banks within the universe of institutions to which Reserve Banks are authorized to grant accounts, Congress did not change the discretionary “may receive” language. Because this Court had “authoritatively interpreted” that language in *Farmers*, the MCA “is presumed to carry forward that interpretation.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); accord *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 n.11 (2009). Custodia asserts without support that Congress enacted the MCA “to remove the Fed’s discretionary authority,” Pet.18, but it cannot explain away Congress’s failure to amend the very language that *makes* the authority discretionary. It is not as if section 342 escaped Congress’s notice; the MCA added “or other depository institutions” a mere handful of words away from section 342’s “may receive” language, so it would have been a simple matter for Congress to change “may” to “shall” while it was editing that sentence. By instead retaining the “may receive” language, Congress “accepted and ratified” this Court’s interpretation of that language as conferring discretion. *PayServices Bank*, 2024 WL 1347094, at *6 (quotation marks omitted); cf. *Forest Grove Sch. Dist.*, 557 U.S. at 243 n.11 (“When Congress amended [the statute] without altering the

text [at issue], it implicitly adopted [the Court's] construction of the statute.”).

2. Rather than meaningfully engage with section 342's controlling language, Custodia argues that Congress obliquely abrogated it through section 248a(c)(2), a sub-sub-provision in a different subchapter of the FRA that is directed at the Board (not Reserve Banks) and governs the pricing of services (not the receipt of deposits or the provision of accounts to receive them). Custodia is wrong: section 248a(c)(2) does not withdraw the discretion that section 342 provides. App.27a-30a.

Section 248a, titled “Pricing of services,” directed the Board to create a schedule of fees for services that previously were free for member banks. Subsection (c) told the Board to base that schedule on four “principles,” the second of which was:

(2) All Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks, except that nonmembers shall be subject to any other terms, including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks.

This provision governs the Board's pricing of Federal Reserve services and “simply provides that those services must be provided to both member and nonmember banks on equal terms and with nondiscriminatory pricing.” App.27a; *see also Banco*

San Juan, 176 F.4th at 182 (noting “§ 248a(c)(2)’s purpose of preventing discrimination against nonmember banks as a class”). In other words, section 248a is a pricing provision that implements a nondiscrimination principle: the Board cannot charge nonmembers more or “subject” nonmembers to different “terms” than members. 12 U.S.C. § 248a(c)(2). Together with the MCA’s addition of nonmember banks to section 342, that nondiscrimination principle put nonmember banks on the same footing as member banks for purposes of Reserve Banks’ longstanding discretion to grant or deny accounts to individual banks. This pricing principle does not obligate Reserve Banks to provide master accounts to all comers, whether member or nonmember: “the plain language of § 248a(c)(2) does not say that services must be available to *all* nonmember depository institutions.” App.29a-30a; *see also Banco San Juan*, 176 F.4th at 180 (“Tellingly, Congress can and did modify neighboring terms with ‘all,’ but did *not* include it before ‘nonmember depository institutions.’”).

Custodia responds that Congress need not include the word “all” where it is already implied, Pet.19, but that fails to account for Congress’s choice *in the same provision* “to use the word ‘all’ before ‘Federal Reserve bank services,’” which “signals Congress intended to treat the two phrases differently,” App.29a (cleaned up). Custodia’s analogy to a hypothetical statute that “instructed schools to provide ‘all listed services to students with disabilities’” falls flat. Pet.19. For one, there *is* a federal statute governing services for students with disabilities, and it sets as a condition on federal funding that “[a] free appropriate public

education is available to *all* children with disabilities.” 20 U.S.C. § 1412(a)(1) (emphasis added). Congress, apparently, did not agree with Custodia’s view that it was unnecessary to modify “children” in such a statute with “all.” In any event, even Custodia’s contrary-to-reality statute would at most require schools to make services available to students with disabilities on the same terms as all other students. Just because one “service” a school provided was an accelerated math program, each and every student with a disability would not be automatically entitled to a spot in the program; such students would be entitled to an opportunity to apply for the program on equal terms as other students. Here, nonmember banks are similarly subject to the same discretionary regime under section 342 that member banks have always been subject to.

Section 248a’s structure and context reinforce this conclusion. The provision’s title is “Pricing of services,’ suggesting that § 248a(c)(2) is concerned not with mandating access, but pricing.” App.32a; *see also Banco San Juan*, 176 F.4th at 181 (“[P]lacing § 248a(c)(2)’s ‘shall be available’ language in the context in which it is used, the sub-section is best read as a pricing principle, rather than an account access mandate.”). Moreover, the provision is “directed to the Board, not Reserve Banks, which have the authority to grant or deny an application for a master account.” App.32a. Section 342, by contrast, is directed to the individual Reserve Banks and “is found in a subchapter entitled ‘Powers and Duties of Federal Reserve Banks,’ which is precisely the issue presented.” App.32a; *see Yates v. United States*, 574 U.S. 528, 540 (2015) (“[T]he title of a statute and the

heading of a section are tools available for the resolution of a doubt about the meaning of a statute.” (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)).

When setting prices for Reserve Bank services following the enactment of the MCA, the Board naturally would need to take into account that the market for those services now could include many more banks. DeCarlo & Rose, *supra*, at 11 (noting that approximately 35,000 nonmember depository institutions existed at time of MCA). It thus makes sense that Congress would note that fact in section 248a(c)(2). What makes no sense is the notion that Congress would choose a sub-sub-provision announcing one of the Board’s pricing principles as the home for a revolutionary new mandate that Reserve Banks must give an account to each and every nonmember bank regardless of risk—let alone that Congress would take such a convoluted and obscure path while preserving the language in section 342 that this Court had long held makes Reserve Bank deposit-taking discretionary. Custodia’s position requires assuming that Congress “hide[s] elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).⁶

⁶ Contending that section 248a(c)(2) gives all banks an absolute entitlement to a master account is apparently a bridge too far even for Custodia, which suggests that only *nonmembers* enjoy such an absolute entitlement. Pet.14-15. But limiting its absolute-entitlement theory to nonmember banks multiplies the problems with Custodia’s position. First, reading section 248a(c)(2) as giving preferential treatment to nonmember banks makes nonsense of the nondiscrimination principle that Congress included in that provision. Second, such a distinction ignores that

3. In addition, Congress amended the FRA in 2022 to require the Board to publish a “list of every entity that submits an access request for a reserve bank master account and services,” including whether the request “was approved, *rejected*, pending, or withdrawn.” 12 U.S.C. § 248c(b)(1) (emphasis added). As the Tenth Circuit explained, this provision shows “Congress envisioned that Reserve Banks would reject some master account applications from eligible entities.” App.30a.

Neither of Custodia’s responses is persuasive. *First*, Custodia says Congress was only gathering information. Pet.20. But as the Tenth Circuit explained, “it would seem oddly indirect for Congress, if it intended for Reserve Banks to approve all applications without discretion, to amend the statute simply to monitor these wrongful rejections instead of directly instructing the Reserve Banks to approve all eligible applications.” App.31a n.17. The 2022 amendment provides no hint that the account rejections that are to be reported violate the FRA in any way.⁷

section 342’s “may receive” language applies to members and nonmembers alike. Third, it is difficult to imagine why Congress would want to confer such preferential treatment on nonmember banks.

⁷ Custodia’s amici worry that the decision below will undermine congressional oversight, but their own examples show that Congress can make clear that required reports reflect violations of law. *See* Lummis/Toomey Amicus Br. 11 (citing 31 U.S.C. § 1351, which requires reports whenever certain officials “violate[] section 1341(a) or 1342 of this title”).

Second, Custodia argues that even its reading of the MCA permits Reserve Banks to reject requests from non-eligible applicants. Pet.21. But the 2022 amendment required the Board’s ongoing list of requests (including “rejected” ones) to specify whether each requester is one of three entity types (an “insured depository institution,” “an insured credit union,” or “a depository institution that is not an insured depository institution or an insured credit union”), and all three entity types are “eligible for a master account.” App.31a (quoting 12 U.S.C. § 248c(b)(1)). Thus, the law specifically contemplates that requests from “a depository institution that is not an insured depository institution”—a category that includes Custodia—may be “rejected.”

4. The constitutional-avoidance canon does not warrant a different outcome. *Contra* Pet.22.

To start, the Tenth Circuit correctly held that the relevant statutes are unambiguous, and constitutional avoidance plays no role in interpreting unambiguous statutes. *McFadden v. United States*, 576 U.S. 186, 197 (2015). In any event, Custodia’s separation-of-powers arguments—which Custodia did not preserve and the Tenth Circuit did not pass upon, *supra* Section II.2—lack merit. No court has ever held that granting or denying a bank account constitutes “wielding the executive power of the United States,” as would be necessary to implicate the President’s appointment and removal powers. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 503 (2010). Even if it did, Reserve Bank presidents are at most inferior officers, and they are appointed with approval by the Board (the “[h]ead[]” of a federal agency) in accordance

with the Appointments Clause. U.S. Const. art. II, § 2, cl. 2; see *Free Enter. Fund*, 561 U.S. at 512-13 & n.13.

The Reserve Banks' constitutionality is further supported by this Court's recent decision "upholding the constitutionality of the Federal Reserve as currently structured and with its existing enforcement authorities." *Cook*, 146 S. Ct. at 2254 n.6. That holding badly undermines, if not forecloses, Custodia's suggestion that the Federal Reserve's structure is constitutionally problematic if Reserve Banks have discretionary authority regarding accounts.

Federalism principles also do not support Custodia's extreme position. Nothing about the "state-federal balance," Pet.27 (quoting App.113a (Tymkovich, J., dissenting from the denial of rehearing en banc)), allows States to force the Federal Reserve to open the federal payment system to depository institutions that Reserve Banks believe pose too much risk. Custodia's attempt to find support in the Nation's history of "dual banking," Pet.27-28, is misplaced. "Dual banking" means only that either federal or state authorities may grant charters to operate depository institutions. Nothing in the decision below disrupts this: Wyoming remains free to charter banks as it pleases. But "dual banking" does not mean States can unilaterally dictate which institutions may access the Federal Reserve's balance sheet and services and introduce risk into the federal payment system.

To the contrary, it is undisputed that before the MCA's enactment in 1980, nonmember banks did *not* have direct access to the full suite of Federal Reserve services. App.6a, 33a. Custodia does not (and cannot)

explain why the dual banking system could exist during that lengthy period, yet the Tenth Circuit's recognition of Reserve Banks' discretion to limit access to services gives "a quiet burial" to the "power of States to charter banks." Pet.28. It plainly does not. Nonmember banks (including state-chartered ones) operated without access to Federal Reserve services before 1980, and depository institutions can operate without master accounts today. This is because, among other reasons, institutions may access payment services through other means. *Supra* 4-5. Custodia itself has "accessed the Federal Reserve banking system through a correspondent bank with a master account." App.76a. So it is simply incorrect for Custodia to say that "a bank without a master account can't really function as a financial institution." Pet.7 (quotation marks omitted). There are thousands of such banks. DeCarlo & Rose, *supra*, at 13-15.

In reality, it is Custodia's position that would upend the federal-state balance. On Custodia's view, States could create ever more novel charters, with ever laxer rules and supervision, entirely at their own discretion, while Reserve Banks would have to give all those institutions full access regardless of their risks. This could lead to "a 'race to the bottom' among states and politicians to attract business by reducing state chartering burdens through lax legislation, allowing minimally regulated institutions to gain ready access to the central bank's balance sheet and Federal Reserve services." App.98a. Indeed, Custodia's CEO accurately captured the implications of the absolute-entitlement theory when she admitted that this case was a test of whether a hypothetical bank with no compliance officer to ensure compliance with federal

laws prohibiting money laundering and terrorist financing would nonetheless be entitled to a master account. C.A.Supp.App.1089.⁸ Nothing in the second of four pricing principles for the Board’s use in setting a fee schedule requires such an extreme and dangerous result.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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⁸ Even Judge Tymkovich was uncomfortable with the notion of truly unfettered access, writing that the Federal Reserve could “use[] other tools to mitigate potential risk to the financial system.” App.67a (dissenting op.). But Judge Tymkovich did not explain how power to deny access to services squares with Custodia’s absolute-entitlement theory.