No. _____

In the Supreme Court of the United States

ALEX CANTERO, SAUL R. HYMES, and ILANA HARWAYNE-GIDANSKY,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

BANK OF AMERICA, N.A.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

At least thirteen states have enacted laws requiring mortgage lenders to pay a minimum interest rate on funds held in mortgage escrow accounts. Congress has since recognized the existence of these state escrow-interest laws and has expressly required national banks to comply with them where applicable. *See* 15 U.S.C. § 1639d(g)(3).

The question presented is:

Does the National Bank Act preempt the application of state escrow-interest laws to national banks?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Alex Cantero, Saul R. Hymes, and Ilana Harwayne-Gidansky were the plaintiffs in the district court and the appellees in the court of appeals.

Respondent Bank of America, N.A. was the defendant in the district court and the appellant in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Cantero v. Bank of America, N.A.*, No. 21-400 (2d Cir. Sept. 15, 2022)
- *Cantero v. Bank of America, N.A.*, No. 18-cv-4157 (E.D.N.Y. Oct. 7, 2020)
- *Hymes v. Bank of America, N.A.*, No. 21-403 (2d Cir. Sept. 15, 2022)
- *Hymes v. Bank of America, N.A.*, No. 18-cv-2352 (E.D.N.Y. Oct. 7, 2020)

There are no related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

For nearly half a century, New York has required mortgage lenders to pay a modest interest rate on funds advanced by borrowers to cover taxes and insurance. At least thirteen states have "escrow interest" laws of this kind. In the decision below, the Second Circuit held that the National Bank Act preempts New York's 2% escrow-interest requirement as applied to federally chartered national banks—the first time any court has held that one of these laws is preempted by the Act. The Ninth Circuit, by contrast, reached the opposite conclusion, finding no preemption of California's indistinguishable 2% interest requirement. *See Lusnak v. Bank of Am.*, 883 F.3d 1185 (9th Cir. 2018). The result is an acknowledged and growing circuit split that has already prompted divergent decisions by district courts in two other circuits.

The question presented is indisputably important. The banking industry's chief regulator recently described the question as of "foundational consequence to the … federal banking system." Br. of OCC at 3, *Cantero v. Bank of Am.*, 49 F.4th 121 (2d Cir. June 15, 2021) (No. 21-400). A brief just filed in this Court by the U.S. Chamber of Commerce says the same, calling the issue "critical to the U.S. financial system." Br. of Bank Policy Inst., et al. at 2, *Flagstar Bank, FSB v. Kivett*, No. 22-349 (Nov. 23, 2022).

The Second Circuit's decision to preempt escrow-interest laws leaves banks uncertain of the interest rates they must pay, undermining the stability on which our financial system depends. And the Second Circuit's rationale has even further-ranging effects, risking preemption of any state law that seeks to exert control over a banking power—no matter how insignificant its impact on banks. That *per se* rule would allow banks to

ignore state consumer-financial regulations with impunity, effectively reinstating the preemption regime that Congress concluded "planted the seeds" for the 2008 financial crisis. *Lusnak*, 883 F.3d at 1189.

States, however, "have enforced their banking-related laws against national banks for at least 85 years." *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 534 (2009). This Court in *Barnett Bank v. Nelson* articulated the relevant rule, holding that the National Bank Act does not "deprive States of the power to regulate national banks"—even as to a "bank's exercise of its powers"—as long as "doing so does not prevent or significantly interfere with the national bank's exercise" of those powers. 517 U.S. 25, 33 (1996).

New York's law does neither. It doesn't prevent national banks from making real-estate loans or providing mortgage-escrow services. Nor does it significantly interfere with their ability to do so. All it does is require a modest interest payment on the money that borrowers put into their escrow accounts—a requirement that is fully compatible with federal policy. Indeed, the Dodd-Frank Act requires national banks to pay interest on certain escrow accounts "[i]f prescribed by applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). Many of Bank of America's competitors, like Wells Fargo, do just that, as Bank of America itself does in California after *Lusnak*. There is no evidence that the powers of these national banks have been significantly impaired as a result.

This case is the best vehicle for resolving this important issue. Although the petition in *Flagstar Bank, FSB v. Kivett,* No. 22-349, purports to implicate the same question, that case is a flawed vehicle. As here, *Flagstar Bank* asks "[w]hether the National Bank Act preempts" state escrow-interest laws. Pet. at i, *Flagstar Bank, FSB v. Kivett*, No. 22-349 (Oct. 11, 2022). But Flagstar is not

governed by the National Bank Act because it is not a national bank. Rather, it is a federally chartered savings association governed by the Home Owners' Loan Act. At best, that case thus raises the question presented only indirectly, through the lens of HOLA preemption. And, as Flagstar told the district court, the "interplay of" HOLA, "state interest on escrow laws, and federal preemption" would pose "serious legal questions"—questions that could impede this Court's resolution of the case.

Flagstar's petition also fails to note other antecedent questions likely to derail resolution of the question presented. In Dodd-Frank, Congress "significantly altered the regulation of financial institutions"—including by altering National Bank Act preemption "in several ways." *Lusnak*, 883 F.3d at 1188, 1191. Whether a state law is preempted can't be answered intelligently without knowing the contours of these preemption rules—and, at the very least, whether they properly apply to the case. As the Second Circuit noted here, for example, there is a strong argument that Section 1693d of Dodd-Frank requires national banks to comply with state escrow-interest laws. Because some of the mortgages in *Flagstar Bank* are subject to that section, were the Court to grant certiorari there, the Court would also have to decide its meaning—an issue that is not independently certworthy.

There is no need for the Court to take on these extra issues. This petition presents the question without any of *Flagstar Bank*'s problems. Here, the parties agree that Bank of America—the defendant here and in *Lusnak*—is subject to the National Bank Act, and that section 1639d does not apply to the plaintiffs' loans. This case, and this case alone, offers the Court an opportunity to cleanly and definitively resolve the circuit conflict that all agree is of critical importance. The Court should grant the petition.

OPINIONS BELOW

The Second Circuit's decision (App. 1a) is reported at 49 F.4th 121. The district court's decision on the defendant's motions to dismiss (App. 70a) is reported at *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019). Its decision granting interlocutory review (App. 51a) is unreported.

JURISDICTION

The court of appeals entered judgment on September 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

N.Y. G.O.L. § 5-601—Interest on deposits in escrow with mortgage investing institutions

Any mortgage investing institution which maintains an escrow account pursuant to any agreement executed in connection with a mortgage on any one to six family residence occupied by the owner … and located in this state shall, for each quarterly period in which such escrow account is established, credit the same with dividends or interest at a rate of not less than two per centum per year based on the average of the sums so paid for the average length of time on deposit or a rate prescribed by the superintendent of financial services … .

* * *

12 U.S.C. § 25b

(b) Preemption standard

(1) In general

State consumer financial laws are preempted, only if—

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in

comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

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

* * *

15 U.S.C. § 1639d

(g) Administration of mandatory escrow or impound accounts …

(3) Applicability of payment of interest

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

STATEMENT

I. Statutory and regulatory background

1. In the National Bank Act of 1864, Congress established the "competitive mix of state and national banks known as the dual banking system." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 23 (2007). The Act created a "mixed state/federal regime[] in which the

Federal Government exercises general oversight while leaving state substantive law in place." *Cuomo*, 557 U.S. at 530. Under that system, national banks are established and regulated by a federal agency—the Office of the Comptroller of the Currency (OCC). *See id.* But they are also "subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Watters,* 550 U.S. at 24.

For nearly half a century, state laws governing national banks have included rules for mortgage-escrow accounts. *See* Bruce E. Foote, Cong. Rsch. Serv., *Mortgage Escrow Accounts: An Analysis of the Issues* 1 (1998). Today, lenders require such accounts in the vast majority of new home mortgages to ensure timely payment of property taxes and insurance premiums. *See id.* at 1–2. But as the escrow device grew in popularity, it also became subject to abuse. Many banks required borrowers to pay more than necessary to cover tax and insurance charges, and to make these payments well in advance of their due date. *See id.* at 3. As a result, these "accounts often carry a significant positive balance." *Lusnak*, 883 F.3d at 1188. And because banks do not pay interest on that balance, the payments effectively became a large "interest-free loan from the customer" to the customer's bank. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1173 (8th Cir. 1995).

In the 1970s, both Congress and state legislatures erected guardrails on escrow accounts to limit such abuses. In the Real Estate Settlement Procedures Act of 1974 (RESPA), Congress limited the maximum balance that national banks can require and the circumstances in which they can require it. *See, e.g.*, 12 U.S.C. §§ 2605, 2609. Around the same time, many states enacted laws requiring lenders to pay a minimum interest rate on

escrow-account balances. In total, thirteen states have adopted such laws. *See* Foote, *Mortgage Escrow Accounts*, at 3–4. Among them are New York and California, each of which requires banks to pay at least 2% interest on escrow accounts. *See* N.Y. G.O.L. § 5-601.[1]

Soon after its enactment in 1974, New York's escrow-interest law faced an industry challenge on the theory that the new law was preempted by the National Bank Act. A federal district court had little trouble rejecting that argument, concluding that any burden imposed on national banks was "insignificant." *Fed. Nat'l Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364, 1369 (S.D.N.Y. 1975). "The purpose of prepaying certain insurance and tax expenses," the court explained, "is not to provide [the bank] with income but rather to protect the mortgagees' interest in the mortgaged property." *Id.* New York's escrow-interest law, it held, "in no way impairs this purpose." *Id.* The law "does not regulate how [a bank] must keep or invest the escrow funds in its possession" *Id.* "All that New York State has done is to act upon funds which are kept by [the bank] for the ultimate benefit of the original homeowner-mortgagor." *Id.*

2. Congress has allowed state escrow-interest laws like New York's to remain in place for decades without taking action to preempt them. To the contrary, when it enacted Dodd-Frank in 2010, Congress expressly required compliance with these state laws and allowed for federal enforcement for covered escrow accounts. "This sweeping piece of legislation was a response to the worst financial crisis since the Great Depression, in which millions of Americans lost their homes." *Lusnak*, 883 F.3d at 1188–

[1] The other states are Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Oregon, Rhode Island, Utah, and Wisconsin. *See* Foote, *Mortgage Escrow Accounts*, at 3–4.

89. Congress concluded that the OCC had contributed to the crisis by aggressively preempting state consumer-financial laws. "Rather than supporting [state] anti-predatory lending laws, federal regulators preempted them." S. Rep. No. 111-176, at 16–17 (2010). By doing so, the agency "actively created an environment where abusive mortgage lending could flourish without State controls." *Id.*

Despite the decades of coexistence between federal and state escrow-account laws, the OCC in 2004 had issued a new regulation seeking to preempt fourteen broad categories of state law, including all state laws "concerning … escrow accounts." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1917 (Jan. 13, 2004) [codified at 12 C.F.R. § 34.4 (2011)]. The agency provided no reasons for the change. But within just a few years of the OCC's deregulatory efforts, the housing market collapsed and plunged the country into financial crisis. The Financial Crisis Inquiry Commission, which Congress created to investigate the causes of the crisis, concluded that the OCC's preemption efforts "prevent[ed] adequate protection for borrowers and weaken[ed] constraints on this segment of the mortgage market." Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report*, at 126 (2011).

In Dodd-Frank, Congress made clear that "[t]he standard for preempting State consumer financial law would return to what it had been for decades, [the standard] recognized by the Supreme Court in *Barnett Bank v. Nelson*," thus "undoing broader standards adopted by … the OCC." S. Rep. No. 111-176, at 175; *see* 12 U.S.C. § 25b(b)(1)(B) (codifying this standard). Congress further reined in the agency by imposing a set of stringent procedural and evidentiary requirements on

its ability to make preemption determinations, and by limiting the level of deference those determinations are due. *See* 12 U.S.C. § 25b(b)(3), (5)(A). And it amended section 1639d of the Truth in Lending Act to expressly require lenders to comply with "applicable" state escrow-interest requirements as to certain categories of mortgage loans, including loans for which an escrow account is mandatory. 15 U.S.C. § 1639d(g).

II. Factual and procedural history

Plaintiffs Alex Cantero, Saul R. Hymes, and Ilana Harwayne-Gidansky are New York residents who financed the purchase of their homes with mortgage loans from Bank of America, a national bank established under the National Bank Act. App. 52a–53a. Their mortgage agreements required them to cover property taxes and insurance payments by depositing money in escrow accounts held by the bank. *Id.* Although the agreement provided that it would be governed by New York law, Bank of America refused to comply with New York's law requiring at least 2% interest on such mortgage-escrow accounts. App. 10a.

The plaintiffs sued for breach of contract and other claims in two related cases in the Eastern District of New York. App. 52a–53a. The bank moved to dismiss both cases, arguing that the National Bank Act preempts application of state escrow-interest laws like New York's. *See id.* The district court denied the motions in a single decision, closely tracking the Ninth Circuit's reasoning in a case upholding California's similar escrow-interest law. *See Lusnak*, 883 F.3d 1185. Applying *Barnett Bank* and other precedent outlining the scope of preemption under the National Bank Act, the court concluded that requiring modest interest on escrow accounts did not "significantly interfere" with Bank of America's mortgage-lending

authority or its ability to provide escrow-account services. App. 111a. Thus, New York's escrow-interest law was not preempted. *See id.*

The district court certified the preemption question for interlocutory review under 28 U.S.C. § 1292(b). App. 13a. After granting leave to appeal, the Second Circuit reversed, splitting with the Ninth Circuit and holding that the National Bank Act preempts New York's law. The court noted that national banks are authorized under federal law "to create and fund escrow accounts," including the "incidental power to provide escrow services in connection with home mortgage loans." App. 23a. "By requiring a bank to pay its customers," the court held, New York's law would impermissibly "exert control over banks' exercise of that power." *Id.*

The court rejected reliance on the Ninth Circuit's opposite holding in *Lusnak*, concluding that the case was "wrongly decided" and "incorrect" as a matter of law. App. 13a, 29a. The court disagreed, in particular, with the Ninth Circuit's reliance on Dodd-Frank. Because Cantero's mortgage predated section 1639d's effective date, while the other mortgage isn't subject to that section, the court determined that the section "has no relevance to this case." App. 29a. The court also found it unimportant that the required interest rate is "not very high." App. 33a. The test for preemption under the National Bank Act, it held, is "not how much a state law impacts a national bank, but whether it purports to 'control' the exercise of its powers." App. 17a. And under that test, "state laws exercising control over national banks—even if their own practical effect may be minimal—are invalid if, when aggregated with similar laws of other states, they would threaten to undermine a federal banking power." App. 19a.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a circuit split on an issue of "foundational importance" to the national financial system.

A. The decision below acknowledges that it creates a circuit split.

The Second and Ninth Circuits have fully considered the question whether the National Bank Act preempts state laws requiring the payment of interest on mortgage-escrow accounts, and have reached diametrically opposite conclusions. The conflict is stark: Both cases involve application of a state's 2% escrow-interest requirement to the same national bank (Bank of America). There are no material differences in the state laws. But while the Second Circuit held that New York's law is preempted, the Ninth Circuit held that California's virtually identical law is not. The result is an acknowledged—and soon-to-be-deepening—circuit split that only this Court can resolve.

1. On one side of the split is the Ninth Circuit, which rejected Bank of America's argument that the National Bank Act preempts a California escrow-interest law indistinguishable from the law at issue here. *See Lusnak*, 883 F.3d 1185. Like New York, California requires a 2% interest rate on escrow-account balances. *See* Cal. Civil Code § 2954.8(a); *Lusnak*, 883 F.3d at 1190. And like the plaintiffs here, the plaintiff in *Lusnak* alleged that Bank of America violated its contractual obligation by refusing to comply with state law. *Lusnak*, 883 F.3d at 1190.

Unlike the decision below, however, the Ninth Circuit rejected Bank of America's effort to have the complaint dismissed on preemption grounds. As the Ninth Circuit recognized, the National Bank Act preempts state law under *Barnett Bank* "*only if* it 'prevents or significantly

interferes with the exercise by the national bank of its powers.'" *Id.* at 1193. The "operative question," the court explained, was thus whether California law "*prevents* Bank of America from exercising its national bank powers or *significantly interferes* with [its] ability to do so." *Id.* at 1194. Under that test, "[m]inor interference with federal objectives is not enough." *Id.* The interference must be "significant." *Id.*

Bank of America, the Ninth Circuit concluded, could not satisfy that test. *Id.* at 1197. The bank could point to nothing showing that state escrow-interest laws prevent or significantly interfere with the powers of national banks. *See id.* Quite the opposite: Congress in Dodd-Frank expressed its "view that creditors, including large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers." *Id.* at 1196. Accordingly, California's escrow-interest law was not preempted. *See id.*

2. The Second Circuit below reached the opposite conclusion as to New York's indistinguishable law. Bank of America, "which was also the defendant in *Lusnak*," did not even "try to distinguish that case," instead arguing "that it was wrongly decided." App. 13a. The Second Circuit agreed, holding that the Ninth Circuit's decision was "incorrect" as a matter of law. App. 29a.

New York's law, the Second Circuit held, "would exert control over a banking power granted by the federal government, so it would impermissibly interfere with national banks' exercise of that power." App. 5a. It made no difference that the minimum interest rate was "not very high." App. 33a. Under the Second Circuit's rule, it is "not how much a state law impacts a national bank, but whether it purports to 'control' the exercise of its powers."

App. 17a. "To determine whether the NBA conflicts with a state law," the court thus would "not endeavor to assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power." App. 18a. Even if the "practical effect may be minimal," the National Bank Act "displaces *all* state laws that purport to 'control' banks' exercise of [their] powers." App. 19a (emphasis added).

3. This acknowledged "circuit split on the issue of [National Bank Act] preemption" has already led commentators to conclude that the issue is "ripe for review by the Supreme Court." Christopher Greenidge and Lynette I. Hotchkiss, *New York Interest-On-Escrow Law Preempted by National Bank Act*, Business Law Today (Oct. 1, 2022), https://perma.cc/E8WM-D4AX; *see also, e.g.*, Arthur E. Wilmarth, *The Second Circuit's* Cantero *Decision Is Wrong about Preemption under the National Bank Act*, 41 Banking & Fin. Svcs. Policy Rep. 11 (Nov. 2022), https://perma.cc/PU7X-YHWM.

Absent this Court's intervention, the split will only deepen. As Bank of America previously told this Court, "numerous lawsuits have been filed" against national banks alleging failure to abide by state law. Pet. at 3, *Bank of Am., NA v. Lusnak*, No. 18-212 (Aug. 14, 2018). Decisions in those cases have since resulted in inconsistent outcomes even outside the Second and Ninth Circuits. The District of Maryland sided with the Ninth Circuit in upholding that state's interest-on-escrow law. *See Clark v. Bank of Am., NA*, 2020 WL 902457, at *7–*8 (D. Md. Feb. 24, 2020). Maryland's law, the court explained, allows Bank of America "to require escrow accounts for its borrowers" and "merely provides that, if [the bank] chooses to maintain escrow accounts, then it must pay a small amount of interest to the borrowers on their funds."

Id. at *7. The District of Rhode Island, on the other hand, recently followed the Second Circuit in *Cantero*. *See Conti v. Citizens Bank, NA*, 2022 WL 4535251, at *4 (D.R.I. Sept. 28, 2022). Rhode Island's escrow-interest law is preempted, the court held, because the law puts "limits on an incidental power" of national banks—"the power to establish escrow accounts." *Id.*

Conti is currently on appeal in the First Circuit. *Conti v. Citizens Bank, N.A.*, *appeal docketed*, No. 22-1770 (1st Cir. Oct. 14, 2022). But that court can only take sides in the split; it cannot resolve it. There is no reason for this Court to await further percolation in the lower courts before resolving this already entrenched split.

B. There is no dispute that this case presents issues of exceptional importance to the national financial system.

1. All agree that the issue in this case is of paramount importance. As the OCC told the Second Circuit below, the question is of "foundational consequence to the OCC and to the federal banking system." Br. of OCC at 3, *Cantero*, No. 21-400. Just recently, a consortium of industry groups and the Chamber of Commerce similarly described the issue to this Court as "critical to the U.S. financial system." Br. of Bank Policy Inst., et al. at 2, *Flagstar Bank*, No. 22-349.

Given the ubiquity of mortgage-escrow accounts, the circuit split's immediate impact is huge. National banks hold billions of dollars in these accounts. *See* Br. of Bank Policy Inst., et al. at 3, *Cantero v. Bank of America*, 49 F.4th 121 (2d Cir. June 11, 2021) (No. 21-400). And the interest rate applicable to escrow funds is an issue directly affecting the pocketbooks of ordinary borrowers in at

least thirteen states—including New York and California, two of the largest state economies.

The split is particularly intolerable because it creates "confusion and uncertainty for national banks." *Id.* at 20. The financial system's need for regulatory clarity is undeniable. National banks "offer banking products and services in States in both Circuits" that are subject to the circuit split, "as well as all other States" in which they now face "uncertainty … as to which State laws are preempted." Br. of Bank Policy Inst., at 11, *Flagstar Bank*, No. 22-349. If the financial system is to operate rationally, they need to know which laws govern their conduct in those states—especially when the laws affect the interest rates they pay.

Even more significantly, the Second Circuit's holding cannot easily be cabined to escrow-interest laws. Lawyers for the banking industry have already predicted that other state financial regulations "will fall by the wayside if the Second Circuit's analysis is upheld." Jay L. Hack, *Federal Preemption of State Consumer Laws—Reports of Its Demise at the Hands of Dodd Frank Are Premature* (Oct. 19, 2022), https://perma.cc/T296-HVVF. The importance of this issue led Bank of America to petition for certiorari in *Lusnak* even before the decision was the subject of a circuit split. The lack of a settled preemption standard, it told this Court, "creates significant uncertainty about whether a wide range of other state banking laws apply to national banks." Pet. at 3, *Lusnak*, No. 18-212. Now that a clear split exists, there is no reason for the Court to stay its hand.

2. Even setting aside the need for certainty, the question presented has enormous stakes for the national economy. Dodd-Frank reflects Congress's judgment that the OCC's interference with state efforts to protect

consumers helped precipitate the 2008 financial crisis. "Rather than supporting [state] anti-predatory lending laws, federal regulators preempted them." S. Rep. No. 111-176, at 16–17 (2010). By doing so, the agency "actively created an environment where abusive mortgage lending could flourish without State controls." *Id.*

Congress responded by rebuking the OCC in Dodd-Frank—clarifying the proper preemption standard and "undoing broader standards adopted" by the agency. *Id.* at 175. If allowed to stand, the Second Circuit's holding would undo Congress's judgment on those issues, reinstating the same "broad preemption determinations" that Congress concluded had "planted the seeds for 'long-term trouble in the national banking system.'" *Lusnak*, 883 F.3d at 1189.

II. This case is the only suitable vehicle.

A. This case gives the Court an opportunity to cleanly and definitively resolve an acknowledged circuit split on an important issue. The decision below, like the Ninth Circuit's decision in *Lusnak*, answers a single question of law as applied to the same national bank. Both decisions thoroughly set forth the arguments on their respective sides of the issue. And there are no ancillary issues or factual disputes in play. The question is thus squarely presented and straightforwardly teed up by this petition. To avoid additional uncertainty in the financial system, this Court should take this opportunity to answer it.

B. Another pending petition purports to raise the same question, but that case is a flawed vehicle. *Flagstar Bank, FSB v. Kivett*, No. 21-15667. Like the plaintiffs here, Flagstar asks this Court to grant certiorari to decide "[w]hether the National Bank Act preempts state laws" that require "federally chartered banks" to pay interest on escrow accounts. Pet. at i, *Flagstar Bank,* No. 22-349.

But unlike Bank of America, Flagstar is not governed by the National Bank Act because it is not a national bank. Rather, as Flagstar explained to the district court, it is "a federal savings association," and is thus "organized and regulated under HOLA." Mot. to Stay at 9, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. Apr. 16, 2021); *see* 12 USC § 1461. Flagstar, in its own words, "consistently" argued in the district court "that HOLA"—not the National Bank Act—"preempts the enforcement of" California law. Reply at 5, 9 & n.4, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. May 7, 2021); *see, e.g.*, *Kivett v. Flagstar Bank*, 506 F. Supp. 3d 749, 754 (N.D. Cal. 2020) (noting Flagstar's argument that HOLA is "applicable to federal savings associations such as itself").

The distinction is important because it changes the preemption standard. Since "the 1930s, federal savings associations and national banks were separately regulated." *McShannock v. JP Morgan Chase Bank*, 976 F.3d 881, 895 (9th Cir. 2020) (Gwin, J., dissenting). As Flagstar explained to the district court, *Lusnak* "held only that the National Bank Act … does not preempt the application of [California law] to a servicer that is a national bank." Mot. to Dismiss at 13, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. Nov. 30, 2018). But unlike national banks, which are regulated by the OCC, savings associations are governed by the Office of Thrift Supervision (OTS) and have historically "received different and greater preemption from state laws." *McShannock*, 976 F.3d at 895. "*Lusnak*'s holding that preemption did not apply under the [National Bank Act's] standard therefore says little about whether preemption applies under HOLA's less onerous standard." *Id.* at 894. Indeed, *Lusnak* itself found HOLA cases like *Flagstar Bank* "inapposite." *Lusnak*, 883 F.3d at 1196.

Flagstar will presumably respond that its case at least indirectly raises the question presented because Congress in Dodd-Frank subjected both national banks and federally chartered savings associations to the same preemption standard. *See* 12 U.S.C. § 1465. But that just adds another layer of complexity to the case. Congress's codification of a new preemption standard only affects mortgages entered after July 21, 2011. App. 10a n.3. In contrast, the certified class for which the district court entered summary judgment includes all Flagstar mortgage loans that originated up to a year earlier, since July 21, 2010. Order at 7, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. June 11, 2019).

That means this Court would have to resolve Flagstar's case under both standards of HOLA preemption. But neither of those standards is the subject of a circuit split or otherwise worthy of this Court's review. "[W]ell-settled case law" in the lower courts—including decisions by the Second and Ninth Circuits—"holds that HOLA preempts state escrow-interest laws" executed before Dodd-Frank's effective date. *See, e.g.*, *McShannock*, 976 F.3d at 895; *see also, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 181-85 (2d Cir. 2005). And in the post-Dodd-Frank context, the Ninth Circuit's unpublished decision in *Flagstar Bank* is the *only* appellate decision to examine preemption of state laws governing a non-bank depository institution. This Court can afford to await at least a precedential decision, if not a circuit split, before addressing whether and how Dodd-Frank affects preemption with respect to savings associations like Flagstar.

Attempting to address the preemptive scope of the National Bank Act through the prism of HOLA would also needlessly impede this Court's ability to resolve the

questions in the case. As Flagstar told the district court, the "interplay of the Home Owner's Loan Act ('HOLA'), state interest on escrow laws, and federal preemption" will likely pose "serious legal questions" beyond the one posed by the circuit split. Mot. to Stay at 9, *Smith*, No. 18-cv-05131. For example, a heavily contested issue in both *Lusnak* and this case is the proper weight to give the OCC's 2004 preemption rule. But Flagstar was never subject to that rule, which applies only to "national bank[s]." 12 C.F.R. § 34.4(a). It is thus unclear that the Court could resolve that issue in *Flagstar Bank*.

C. The fact that Dodd-Frank's preemption provisions took effect in the middle of *Flagstar Bank*'s class period means that this Court's resolution of the case would also turn on other antecedent and unsettled questions that could alter resolution of the federal-preemption issue. Dodd-Frank "addressed the preemptive effect of the NBA in several ways," *Lusnak*, 883 F.3d at 1191, most of which have never been examined by any court. *Flagstar Bank* would thus require the Court to determine in the first instance whether and how these changes affect the preemption analysis.

Among Dodd-Frank's provisions, Congress included an amendment to the Truth in Lending Act requiring banks to "pay interest to the consumer" on covered escrow accounts "if prescribed by applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). The plain language of that provision appears to demonstrate Congress's intent to allow application of state escrow-interest laws to national banks. *See* App. 29a n.11. But Bank of America disputes that the provision applies to national banks. When a state law is preempted, it argues, the law is not "applicable," and the section therefore does not apply. *See* App. 29a n.11; *see also Lusnak*, 883 F.3d at 1191.

The Second Circuit did "not settle this question" here because there is no dispute that section 1639d "does not apply" to the plaintiffs' mortgage loans. App. 29a & n.11. But the question is not so easily avoided in *Flagstar Bank*, which involves a classwide judgment that encompasses mortgages covered by section 1639d. That section took effect in January 21, 2013, App. 29a—in the middle of the class period.

Resolution of the section 1639d issue in *Flagstar Bank* would be logically antecedent to any preemption analysis. Determining whether a state law is preempted after enactment of Dodd-Frank requires an understanding of the preemption rules that Congress adopted. And the issue would also likely be outcome-determinative. Indeed, as Judge Pérez explained in her concurring opinion below, application of 1639d would likely have compelled the opposite result in this case, even accepting the Second Circuit's preemption holding as to other mortgages. App. 35a–36a.

Apparently recognizing this problem, Flagstar's petition asserts that the named plaintiffs "have never asserted that their mortgages fit within any exception Section 1639d(g)(3) created." Pet. at 30, *Flagstar Bank*, No. 22-349. But the plaintiffs had no need to make that argument there given the Ninth Circuit's holding in *Lusnak* that the National Bank Act did not preempt California's escrow-interest laws even before section 1639d took effect. Rather, it was Flagstar, as the defendant, that should have presented evidence relevant to its preemption defense. *See Lusnak*, 883 F.3d at 1191. In any event, Flagstar's assertion is factually incorrect: The plaintiffs did argue and present evidence below to establish that at least one of the two named plaintiffs' mortgages was subject to section 1639d. Opp. to Mot. for

Summ. J. at 11, *Smith v. Flagstar Bank*, No. 18-cv-05131 (N.D. Cal. Dec. 30, 2019). There is no question that numerous other members of the class likely have covered mortgages too. Flagstar did not respond to that evidence below, so its argument is waived.

* * *

Flagstar's petition should give this Court no comfort that these issues will not obstruct the Court's resolution of its case. Rather than addressing the problems, Flagstar sweeps them under the rug. It never discloses that Flagstar is a savings association subject to HOLA rather than the National Bank Act, or that section 1639d (and Dodd-Frank as a whole) governs at least parts of the case.

Fortunately, this Court can resolve the question presented without engaging with any of those issues. This case is available as an alternative—and one that presents the issue directly and cleanly. Here, there is no dispute that Bank of America is subject to the National Bank Act or that the mortgages at issue are not covered by section 1639d. The Court can thus resolve the case, like the Second Circuit below, based solely on "ordinary legal principles of preemption." *Barnett Bank*, 517 U.S. at 37.

III. The Second Circuit's decision contradicts *Barnett Bank* and lacks any constraining principle.

As a leading banking-law scholar recently wrote, the Second Circuit's decision "squarely conflicts" with this Court's precedents, "is clearly erroneous," and "should be overruled." Wilmarth, *The Second Circuit's* Cantero *Decision Is Wrong*, 41 Banking & Fin. Svcs. Policy Rep. 11. The Second Circuit held that the National Bank Act's preemption of state law turns on "not how much a state law impacts a national bank, but whether it purports to 'control' the exercise of its powers." App. 17a. The court

thus made no attempt to "assess whether the degree of the state law's impact on national banks would be sufficient to undermine that power." App. 18a. That the law "would exert control over a banking power" was enough to render it preempted. App. 23a.

By so holding, the Second Circuit "effectively adopted a *per se* rule"—one that "displaces *all* state laws that purport to 'control' banks' exercise of powers"—no matter how minimal their effects. Wilmarth, *The Second Circuit's* Cantero *Decision Is Wrong*, 41 Banking & Fin. Svcs. Policy Rep. 11. But this Court in *Barnett Bank* held the opposite: that states do have "the power to regulate national banks" even as to a "bank's exercise of its powers." 517 U.S. at 33. Indeed, states "have enforced their banking-related laws against national banks for at least 85 years." *Cuomo*, 557 U.S. at 534. And Congress in Dodd-Frank reinforced that understanding, clarifying that *Barnett Bank* provides the proper preemption standard and "undoing broader standards" purportedly adopted by the OCC. S. Rep. No. 111-176, at 175; *see* 12 U.S.C. § 25b(b)(1) (providing that national banks must generally comply with "[s]tate consumer financial laws," which "are preempted, only if" one of three conditions is met, including *Barnett Bank* preemption).

"It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *Watters*, 550 U.S. at 24. In *Barnett Bank*, this Court thus held that a state law prohibiting banks from selling insurance was preempted by a federal law that expressly permitted them to do so. 517 U.S. at 27–28. Because the state law prevented national banks from exercising a power that Congress chose to give them, the laws were in "irreconcilable conflict." *Id.* at 25. But the Court also made clear that its

holding did not "deprive the States of the power to regulate national banks" as long as "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* at 33. In *First National Bank v. State of Missouri*, for example, the Court upheld a state law prohibiting banks from opening branches. 263 U.S. 640, 656 (1924).

Barnett Bank's requirement of *significant* interference with a national bank's powers cannot be reconciled with the Second Circuit's *per se* approach. In stark contrast to the state law in *Barnett Bank*, New York's law does not "prevent" national banks from exercising a banking power (and no one argued below that it did). App. 54a. Nor does the law significantly interfere with any bank power. It "does not bar the creation of mortgage escrow accounts, or subject them to state visitorial control, or otherwise limit the terms of their use." App. 111a. All it requires is that the bank "pay interest on the comparatively small sums deposited in mortgage escrow accounts" to ensure that the bank is not obtaining an interest-free loan. *Id.*[2]

Dodd-Frank provides strong evidence that Congress itself sees no irreconcilable conflict between state escrow-interest requirements and federal banking laws. Congress's amendment to section 1639d of the Truth in Lending Act makes clear "Congress's view that creditors, including large corporate banks like Bank of America, can

[2] The only power that Congress has explicitly granted banks in this area is the power to "make, arrange, purchase or sell" real-estate loans. 12 U.S.C. § 371(a). That is also the only power that an OCC regulation has explicitly granted banks in this area. *See* 12 C.F.R. § 34.3. And it is this power that the OCC itself has identified as being the relevant power in its preemption regulation. New York's law neither prevents nor significantly interferes with this power.

comply with state escrow interest laws without any significant interference with their banking powers." *Lusnak*, 883 F.3d at 1196; *see also Clark*, 2020 WL 902457, at *8 ("Dodd-Frank … indicated that state statutes requiring payment of interest on escrow accounts are a viable means of consumer protection.").

Although that requirement imposes a modest burden on national banks, the "degree of interference is minimal," as the district court correctly concluded. App. 111a. Many of Bank of America's competitors like Wells-Fargo—and Bank of America in California—already comply with state law in administering mortgage-escrow accounts without apparent issues. *See id.* To be sure, compliance will "cost the Bank money." App. 112a. But the same could be said of other state laws that this Court has held not to be preempted. Just like this case, the state law in *Anderson National Bank v. Luckett* deprived national banks of what were effectively interest-free loans on the balance of certain accounts. 321 U.S. 233 (1944).

This conclusion is not changed by the OCC's attempt to preempt laws relating to escrow accounts. As the Ninth Circuit explained in *Lusnak*, there is no evidence that the agency engaged in a careful, considered analysis of the preemption issue. "There were no factual findings … explaining why preemption was necessary in the specific case or what conflicts between state authorities and federal banks justified preemption." Catherine M. Sharkey, *Inside Agency Preemption*, 110 Mich. L. Rev. 521, 581 (2012). Nor is there reason to believe that the agency "gave any thought whatsoever to the specific question raised in this case"—whether escrow-interest laws prevent or significantly interfere with a national banking authority. App. 103a. Indeed, the agency did "not even mention escrow interest laws" in its analysis. *Id.* And

Congress rebuked the OCC in Dodd-Frank by clarifying that *Barnett Bank* provides the proper preemption standard and "undoing broader standards adopted" by "the OCC in 2004." S. Rep. No. 111-176, at 175.

In sum, there is no basis for concluding that "state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd–Frank, has indicated that they do not." *Lusnak*, 883 F.3d at 1197. This Court should resolve the circuit split by reversing the Second Circuit's contrary conclusion.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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