**No. 21-15667**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**WILLIAM KIVETT; Bernard Bravo; Lisa Bravo,**

*Plaintiffs-Appellees,*

*v.*

**FLAGSTAR BANK, FSB,**

*Defendant-Appellant.*

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On Appeal from the United States District Court
for the Northern District of California
Case No. 3:18-CV-05131 Hon. William H. Alsup, Judge

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# BRIEF OF AMICUS CURIAE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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## INTRODUCTION

When Congress enacted the National Bank Act over 150 years ago, it "intended to facilitate . . . a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) (quoting Cong. Globe, 38th Cong., 1st Sess., 1451 (1864)); *see also Easton v. Iowa*, 188 U.S. 220, 231 (1903) ("It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the [National Bank Act]."). Consistent with this purpose, the Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996). Under the conflict preemption standard set forth in *Barnett Bank*, the National Bank Act[1] preempts state laws that "prevent or significantly interfere" with national banks' federally authorized powers. Recently, the Supreme Court reaffirmed the standard in *Barnett Bank* and prescribed an analytical approach for courts to follow when applying this standard. *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024).

[1] 12 U.S.C. § 1 *et seq*. For purposes of this brief, references to the National Bank Act generally include 12 U.S.C. § 371, which authorizes national banks to engage in real estate lending, although Section 371 is part of the Federal Reserve Act.

Undermining the foundational role of preemption in the federal banking system, the Ninth Circuit misapplied the *Barnett Bank* standard in *Lusnak v. Bank of America, N.A.,* 883 F.3d 1185 (9th Cir. 2018) when it assessed whether a California law that requires national banks to pay interest on funds held in a mortgage escrow account was preempted. That error has been perpetuated by the rehearing panel in the instant case, contrary to the Supreme Court's instructions in *Cantero*. In opining that *Lusnak* is not "clearly irreconcilable" with *Cantero* under the test in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003), the rehearing panel abided by an analytical approach that conflicts with Supreme Court precedent. Significantly, the panel noted, "[w]e do not hold that *Lusnak* was correctly decided, only that we have no authority to overrule it." *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640, 645 (9th Cir. 2025). Under *Miller*, the panel concluded (in error) that it was bound by *Lusnak* and opined that "[c]orrection in this court, if any is warranted, is only appropriate through [] en banc procedures." *Id.* at 645.

*En banc* rehearing is indeed warranted. First, the rehearing panel's misapplication of the *Barnett Bank* standard directly conflicts with the Supreme Court's decision in *Cantero*. The panel did not undertake the "nuanced comparative analysis" required by Supreme Court preemption precedent. Instead, the panel continued this Court's reliance on an alternative argument—one based on the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA")—an argument that

*Cantero* does not adopt. Second, this case involves questions of exceptional importance. The rehearing panel's errors in its preemption analysis threaten to undermine the fundamental role that preemption and the *Barnett Bank* standard play in the national banking system broadly, and with respect to mortgage lending powers specifically. *En banc* rehearing must be granted to preserve the congressionally granted authority of national banks to exercise their federal banking powers.

## STATEMENT OF INTEREST

The Office of the Comptroller of the Currency ("OCC") is an independent bureau of the U.S. Department of the Treasury with responsibility for chartering, supervising, and regulating national banks and Federal savings associations. *See* National Bank Act of 1863, codified at 12 U.S.C. § 1 *et seq.*, as amended, and Home Owners' Loan Act of 1933, codified at 12 U.S.C. § 1461 *et seq.*, as amended ("HOLA").[2] The OCC is authorized generally to represent itself in litigation by 12 U.S.C. § 93(d) and to appear as *amicus curiae* in this Court by Federal Rule of Appellate Procedure 29(a)(2).

[2] Federal savings associations derive their powers from HOLA, including the power to "invest in, sell, or otherwise deal in . . . [l]oans on the security of liens upon residential real property." 12 U.S.C. § 1464(c)(1)(B). The HOLA directs courts to apply "the laws and legal standards applicable to national banks" in determining whether federal law preempts state regulation of Federal savings associations. *Id.* § 1465(a). Although this *amicus curiae* brief focuses on national banks, the analysis is equally applicable to Federal savings associations.

As the administrator of the national banking system, the OCC has a paramount interest in ensuring that the *Barnett Bank* standard is properly understood and applied. The rehearing panel's decision in this case creates uncertainty regarding national banks' exercise of their federally authorized powers under the National Bank Act. Congress has granted national banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate," 12 U.S.C. § 371(a), as well as to engage in the business of banking more generally and "all such incidental powers as shall be necessary to carry on the business of banking . . .." 12 U.S.C. § 24(Seventh). As the agency charged with the "primary responsibility for surveillance of 'the business of banking,'" *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995), and with regulating the broad real estate lending powers of national banks, *see* 12 U.S.C. § 371(a), the OCC has a substantial interest in clarifying the applicable preemption standard when assessing such powers.

## ARGUMENT

### I. Background

Congress has vested national banks with broad enumerated and incidental powers, including the power to engage in real estate lending, subject to requirements imposed by the OCC. 12 U.S.C. §§ 24(Seventh), 371(a). This includes the provision of mortgage escrow services. *See Cantero*, 602 U.S. at 210-

11; *see also* OCC Interpretive Letter No. 1041, 2005 WL 3629258 (Sept. 28, 2005).

States may also seek to regulate to some extent a national bank's activities. However, any state law that prevents or significantly interferes with a national bank's exercise of its federal powers—including its power to engage in mortgage lending and related escrow services—is preempted in accordance with *Barnett Bank*. *See Cantero*, 602 U.S. at 213-19 (discussing *Barnett Bank* and 12 U.S.C. § 25b(b)(1)(B)).

In *Cantero*, the Supreme Court provided additional guidance on how to apply the *Barnett Bank* standard. Specifically, the Court stated that application of this standard must be based on "a practical assessment of the nature and degree of the interference caused by a state law" that considers "the text and structure of the laws, comparison to other precedents, and common sense." 602 U.S. at 219-20 n.3. Such an assessment, the Court explained, must include a "nuanced comparative analysis" that "carefully account[s] for and navigate[s]" *Barnett Bank* and the antecedent case law that the Supreme Court specifically identified in its opinion: *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869); *McClellan v. Chipman*, 164 U.S. 357 (1896); *First National Bank of San Jose v. California*, 262 U.S. 366 (1923); *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373 (1954); and

*Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982). *Cantero*, 602 at 215-21.

## II. The Petition for *En Banc* Rehearing Should Be Granted

### A. The Rehearing Panel's Decision Conflicts with *Cantero*

The Ninth Circuit should grant the petition for rehearing *en banc* because the rehearing panel's decision conflicts with the Supreme Court's decision in *Cantero*. *See* FED. R. APP. P. 40(b)(2)(B).

First, the rehearing panel's decision fails to engage in a nuanced comparative analysis of the antecedent preemption cases as required by *Cantero*. Second, the rehearing panel's decision retains *Lusnak*'s misguided reliance on an inapplicable statute (*i.e.*, TILA), an approach that *Cantero* declined to endorse. Third, other fundamental errors in the rehearing panel's application of the *Barnett Bank* standard in its preemption analysis further underscore the conflict with *Cantero*.

#### 1. The Rehearing Panel Explicitly Did Not Apply the Analytical Approach Required by *Cantero*

In *Cantero*, a unanimous Supreme Court provided clear instructions to lower courts regarding the application of the *Barnett Bank* standard, directing them to engage in a "nuanced comparative analysis" that "carefully account[s] for and navigate[s]" *Barnett Bank* and its antecedent case law. 602 U.S. at 219-21.

It is beyond dispute that this Court's prior decisions in this matter have not carried out this nuanced analysis of *Barnett Bank* and its antecedent case law in reaching a view on the preemption of California's interest-on-escrow law, codified at Section 2954.8(a) of the California Civil Code. The rehearing panel's decision engaged in a truncated discussion of only two of the antecedent preemption cases, *Kivett*, 154 F.4th at 647-48, and, in fact, did not even reach the actual application of the *Barnett Bank* standard. *Id.* at 644-45 (declining to reach question of whether California's interest-on-escrow law "is preempted under the standards described in 12 U.S.C. § 25b(b)(1)(B)"). Indeed, the rehearing panel minimized the relevance of these cases when it noted that it was "not sure what additional information we should glean from these cases" and stated that its analysis of these cases left it "in equipoise." *Id.* at 648. This approach cannot suffice under *Cantero*. And the *Lusnak* decision does not fill the gap, since *Lusnak* "did not cite or discuss the six preemption cases discussed in *Barnett Bank* and recounted in *Cantero*." *Kivett*, 154 F.4th at 647.

In this manner, the rehearing panel erred by sidestepping the required analysis of preemption case law, which it justified by concluding that it could rely on an analytical substitute. Specifically, the panel concluded that *Lusnak* remains good law because it relies "on other tools of statutory interpretation" and held that this approach is permissible under the "mode of analysis" prescribed in *Cantero*.

*Kivett*, 154 F.4th at 648-49. While *Cantero* may permit the application of a "full array of interpretive tools in preemption analysis," *id.*, the use of such tools cannot entirely supplant the required analysis of the identified preemption cases. *See Cantero* 620 U.S. at 215-16 ("[C]ourts addressing preemption questions in this context must do [the same] as *Barnett Bank* did and likewise take account of [the same] prior decisions . . .. ").

Because the rehearing panel never "carefully account[ed] for and navigate[d] [the Supreme] Court's prior bank preemption cases," *id.* at 221—and in effect suggested that analysis of the case law directed by the Supreme Court is neither necessary nor helpful—the panel's decision conflicts with *Cantero* and therefore warrants *en banc* reconsideration and correction.

2. *Lusnak* Relies, in Error, on an Inapplicable Provision of TILA

Compounding the errant absence of the required analytical approach, the specific "interpretive tool" applied in *Lusnak* and accepted by the rehearing panel—reliance on a provision of TILA—was based on faulty logic and, unsurprisingly, was not adopted by the Supreme Court in *Cantero*. In *Lusnak*, the Ninth Circuit focused on a provision of TILA, 15 U.S.C. §1639d(g)(3), that requires creditors to comply with *applicable* interest-on-escrow laws in connection with certain escrow accounts.[3] Although not applicable to the loans at issue in *Lusnak*, the decision wrongly reasons that the TILA provision reflects Congress's more general view that these types of state laws do not "prevent or significantly interfere with a national bank's business," except potentially in limited cases. *See Lusnak*, 883 F.3d at 1194-95 n.7. In this way, *Lusnak* commits an interpretive error by asserting that one statutory exception implies other more expansive and unstated exceptions.[4] Accordingly, the *Lusnak* Court wrongly concluded that California's interest-on-escrow law was not preempted, even where a claim had been made with respect to mortgage escrow accounts *not* subject to the TILA provision. *Id.* at 1189-90, 1197 (describing the loans at issue in *Lusnak* as having originated prior to the TILA provision's effective date).

The relevance of TILA was considered in both the Ninth Circuit and the Second Circuit prior to the Supreme Court's review. *Compare Kivett v. Flagstar Bank, FSB*, 2022 WL 1553266 (9th Cir. May 17, 2022) ["*Kivett I*"] ("[T]he district court correctly concluded that, given our decision in *Lusnak*, [premised on the

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[3] Section 1639d(g)(3) provides that "[i]f prescribed by applicable State or Federal law," a creditor shall pay interest on the amount held in an escrow account "that is subject to this section . . .."

[4] *See generally TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted).

TILA provision,] Flagstar could not succeed in arguing that Section 2954.8(a) was preempted by the [National Bank Act]."), *vacated and remanded by* 144 S. Ct. 2628 (2024), *with Cantero v. Bank of America, N.A.*, 49 F.4th 121, 137-39 (2d Cir. 2022) (analyzing the inapplicability of the TILA provision) ("[T]he district court, like the Ninth Circuit in *Lusnak*, concluded that the TILA amendments somehow reflected Congress's judgment that all escrow accounts, before and after Dodd-Frank, must be subject to such state laws. That is incorrect."), *vacated and remanded on other grounds by* 602 U.S. 205, 209 (2024). And on review in *Cantero*, the Supreme Court declined to endorse *Lusnak* and *Kivett I*'s approach. Instead, the Court only addressed TILA to note that Section 1639d(g)(3) "d[id] not apply to the mortgages" at issue. *Cantero*, 602 U.S. at 211 n.1. The rehearing panel should have taken the same approach because the TILA provision is similarly inapplicable to the mortgages at issue in the present case. *See Kivett,* 154 F.4th at 653 (Nelson, J., dissenting) ("Nor have Plaintiffs ever maintained that their mortgages fall under Section 1639d(g)(3)."). Thus, as the dissent opined upon rehearing, *Lusnak*'s reliance on the TILA provision is inconsistent with *Cantero*. *Id.* at 656 (Nelson, J., dissenting) ("We do not look at statutory exceptions, refashion them as broader, universal 'intent' of Congress, and then deduce 'further exceptions from there. . .. In that vein, the Supreme Court in *Cantero* declined to infer from [TILA] a general intent of Congress with respect to preemption of state [interest-on-escrow] laws . . ..'") (internal citations omitted). By failing to recognize this error in *Lusnak*, the rehearing panel's decision conflicts with *Cantero*.

3. The Rehearing Panel's Fundamentally Erroneous Preemption Analysis Further Conflicts with *Cantero.*

Instead of applying *Barnett Bank* and its prescribed antecedent case law, the rehearing panel perpetuated the now rejected approach of *Lusnak*. In addition to errant reliance on TILA, the rehearing panel failed to recognize *Lusnak*'s fundamental misinterpretation of the *Barnett Bank* standard. Specifically, in acknowledging that a state interest-on-escrow law with a "punitively high rate[]" may be preempted, *Lusnak* implies that the standard for preemption is very high. 883 F.3d 1185, 1195 n.7. On the contrary, federal courts have recognized that "'the level of interference that gives rise to preemption under the [National Bank Act] is not very high.'" *Illinois Bankers Ass'n, et al. v. Raoul*, 760 F. Supp. 3d 636, 657 (N.D. Ill. 2024) (citing *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) (citation omitted) and *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1017 (E.D. Ca. 2002) ("The threshold of preemption is in some cases remarkably low.")).[5]

[5] In the same manner that the Supreme Court in *Cantero* rejected the Second Circuit's more permissive control test for finding preemption, 602 U.S. at 213, 220-21, *Lusnak*'s erroneous preemption analysis simply does not survive *Cantero*.

Additionally, the extent of the conflict between the rehearing panel's continued adherence to *Lusnak*, on one hand, and the requirements of *Cantero*, on the other, becomes even starker when viewed in the light of the relevant preemption case law. Although Supreme Court precedent does not "establish a clear line to demarcate" whether a state law is preempted by federal law, *Cantero*, 602 U.S. at 214, it elucidates that a state law prevents or significantly interferes with a federal power, at a minimum: (1) when it interferes with critical flexibility granted to a national bank under federal law, *see Fidelity*, 458 U.S. at 154-59; (2) when it frustrates a national bank's efficiency and effectiveness in exercising its federal power, *see Cantero*, 620 U.S. at 216 (discussing *Franklin*, 347 U.S. at 374, 378-79); or (3) when it qualifies a federal power in an unusual way, *San Jose*, 262 U.S. at 370. Analyzed against these precedents, California's interest-on-escrow law is "more akin" to those the Court has found to be preempted, particularly those state laws at issue in *Franklin* and *Fidelity*. *See generally Cantero*, 620 U.S. at 220 (describing the approach "for assessing the significance of a state law's interference").[6]

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[6] In contrast, Section 2954.8(a)'s interference with national bank powers is less akin to the interference in cases in which state laws were not preempted. *See, e.g.*, *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944); *McClellan v. Chipman*, 164 U.S. 347 (1896); *Nat'l Bank v. Commonwealth*, 76 U.S. 353 (1869). These cases focus on state laws of general applicability, which have limited relevance to state interest-on-escrow laws.

As the rehearing panel recognized, *en banc* procedures will provide the Ninth Circuit with an opportunity to apply the correct analytical approach—the approach demanded by *Cantero*—and to reach the appropriate conclusion on the merits. *See Kivett*, 154 F.4th at 645 (emphasizing correction, as warranted, is appropriate *en banc*).

### B. The Questions of the Appropriate and Consistent Application of *Cantero* in the Ninth Circuit and the Risk of Disruption to National Banks' Mortgage Lending Are of Exceptional Importance

The Ninth Circuit should also grant the petition for rehearing *en banc* because this case raises questions of exceptional importance. FED. R. APP. P. 40(b)(D). Clear and consistent application in this Circuit of the *Barnett Bank* standard, as clarified by *Cantero*, is critical to the efficient and effective administration of the dual banking system. Moreover, misapplication of the *Barnett Bank* standard in the context of state interest-on-escrow laws carries serious implications for national bank mortgage lending and the functioning of the multi-trillion-dollar U.S. mortgage market.

#### 1. Unclear and Inconsistent Application of *Cantero* Undermines the Dual Banking System

The dual banking system, which is "made up of parallel federal and state banking systems" that "co-exist and compete," is foundational to the American financial system. *Cantero*, 602 U.S. at 209-10. Congress has designed this system to permit banks to choose the charter—state or federal—that best fits their business needs and allows them to best serve their customers. Federal preemption is one of the key legal principles upon which this system is based and reflects Congress's careful balancing regarding when state law should and should not apply. *See generally Easton*, 188 U.S. at 229 (Federal legislation and regulation "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states."). Preemption enables national banks to efficiently and effectively engage in the business of banking on a nationwide basis, which in turn fuels the American economy.[7] *See Talbott v. Bd. of Cnty. Comm'rs of Silver Bow Cnty.*, 139 U.S. 438, 443 (1891) ("various provisions, scattered through the entire body of the statute respecting national banks, emphasize . . . an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation . . . "). For this reason, it is imperative that courts consistently and accurately apply the *Barnett Bank* preemption standard.

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[7] Federal preemption does not exclusively affect the federal banking system. OCC News Release 2025-96, "Comptroller Issues Statement on Areas of Focus as FDIC Board Member" (Oct. 7, 2025), *available at* https://occ.gov/news-issuances/news-releases/2025/nr-occ-2025-96.html. Rather, Congress has also periodically engaged in fine-tuned rebalancing to provide state-chartered banks with comparable federal preemption in some cases. *See, e.g.*, 12 U.S.C. § 1831a(j).

The Ninth Circuit's misapplication of the *Barnett Bank* standard, originating in *Lusnak* and perpetuated in the rehearing panel's decision, however, threatens to undermine this consistency and accuracy. Absent correction through *en banc* rehearing, future court decisions in the Ninth Circuit can be expected to continue to diverge from controlling Supreme Court precedent governing National Bank Act preemption. Such errors could go beyond state interest-on-escrow laws; they could threaten to confuse and mislead financial institutions, consumers, and lower courts confronting questions regarding whether the National Bank Act preempts a wide range of state laws.[8] This will create significant uncertainty and alter the careful balance Congress has struck within the dual banking system. Therefore, ensuring the proper application of the *Barnett Bank* preemption standard in the Ninth Circuit is exceptionally important and warrants *en banc* rehearing.

2. Unclear and Inconsistent Application of *Cantero* to California's Interest-on-Escrow Law Threatens to Disrupt Mortgage Lending

In addition to broad effects across state laws, consistent and accurate application of the *Barnett Bank* standard to California's interest-on-escrow law in

[8] While Congress codified the *Barnett Bank* standard for the preemption of specifically "State consumer financial laws," 12 U.S.C. § 25b(b)(1), *Barnett Bank* also applies to preemption of other types of state laws. *See Cantero*, 620 U.S. at 214 n.2 ("*Barnett Bank* was also the governing preemption standard before Dodd-Frank . . ..").

the instant case is itself of exceptional importance. Residential mortgage lending has been core to the business of national banks for over 100 years. *See* 12 U.S.C. § 371(a).[9] This history, and the statutory role of the OCC as the agency delegated discretion in enacting real estate lending regulations, evinces a clear congressional intent to provide national banks with broad, discretionary real estate lending powers.[10] National banks have broad authority to originate mortgages, service them, and sell them in the secondary market. *See* Comptroller's Handbook, Safety and Soundness Mortgage Banking (Feb. 2014) pp. 3, 50-52.[11] National banks must be able to use a variety of tools to safely and soundly manage the risks of mortgage lending, including escrow accounts, which provide multiple benefits to borrowers and banks. As the Court in *Cantero* observed, escrow accounts "help[] the

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[9] Congress has progressively expanded banks' mortgage lending powers under Section 371. Initially limited to loans on farm land, Pub. L. No. 63-43, ch. 6, § 24, 38 Stat. 251, 273 (1913), Congress amended the law to include limited general real estate lending in 1916, Pub. L. No. 64-270, ch. 461, 39 Stat. 752, 754-55 (1916), and has through the years removed all limits and conditions on real estate lending, Pub. L. No. 97–320, Title IV, § 403(a), 96 Stat. 1469, 1510-11 (1982), other than those prescribed in regulation by the Comptroller.

[10] The effect of the OCC's regulation at 12 C.F.R. § 34.4 is not presently at issue in the matter before the Court. As such, *en banc* rehearing should be granted for the Court to determine whether the National Bank Act preempts California's interest-on-escrow law in accordance with the *Barnett Bank* standard as clarified by *Cantero*. *See* 12 U.S.C. § 25b(b)(1)(B).

[11] *Available at* https://occ.gov/publications-and-resources/publications/comptrollers-handbook/files/mortgage-banking/pub-ch-mortgage-banking.pdf.

borrower by simplifying expenses and budgeting", while also assisting the bank "by ensuring that the borrower's insurance and tax bills are timely paid, thus protecting the loan collateral (the home) against tax foreclosure or uninsured damage. In light of those benefits to both sides, the vast majority of home mortgages come with escrow accounts." *Cantero*, 620 U.S. at 210-11.

Indeed, ensuring that national banks have the appropriate flexibility to set the terms and conditions of the escrow accounts that they administer, including interest paid thereon, allows them to efficiently and effectively balance the risks and rewards of mortgage lending. *See generally Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12-13 (2007) ("When state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA [including the real estate lending power], the State's regulations must give way.") (citing *Barnett Bank*, 517 U.S. at 32-34 and *Franklin*, 347 U.S. at 375-79). The rehearing panel's decision, if not corrected *en banc*, threatens to stand as precedent allowing future intrusions on the broad array of mortgage lending powers Congress has granted to national banks in 12 U.S.C. § 371 by circumventing the nuanced analysis required in *Cantero*.

## CONCLUSION

For these reasons, *Amicus Curiae* respectfully urges the Court to grant the petition for rehearing *en banc*.

Dated: November 25, 2025

Respectfully submitted,

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*/s/ Ashley W. Walker*

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## CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2025, the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

*/s/Ashley W. Walker*

Ashley W. Walker
Counsel for *Amicus Curiae*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**9th Cir. Case Number(s)** No. 21-15667

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**OR**

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**Signature** /s/ Ashley W. Walker **Date** November 25, 2025
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