No. 24-8024

In the United States Court of Appeals for the Tenth Circuit

CUSTODIA BANK, INC.,
PLAINTIFF-APPELLANT

v.

FEDERAL RESERVE BOARD OF GOVERNORS, ET AL.,
DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (CIV. NO. 22-125; THE HONORABLE SCOTT W. SKAVDAHL, J.)

PETITION FOR REHEARING EN BANC BY APPELLANT CUSTODIA BANK, INC.

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INTRODUCTION AND RULE 40(B) STATEMENT

To move money from place to place, American banks must hold "master accounts" with the Federal Reserve. Because a master account is "indispensable" for a bank's day-to-day operations, see *Fourth Corner Credit Union* v. *Federal Reserve Bank of Kansas City*, 861 F.3d 1052, 1064 (10th Cir. 2017) (opinion of Bacharach, J.), closing a bank's master account—or refusing to open one—all but sentences the bank to death.

Yet in this case, a divided panel held that the Fed's master account decisions are wholly discretionary—thus giving regional Federal Reserve Bank presidents plenary power, with no judicial review, over whether a bank shall live or die. Whether that holding, issued over Judge Tymkovich's dissent, was correct presents a question of exceptional importance. *See* 10th Cir. R. 35.1. *First*, it profoundly affects States' authority to charter their own banks: when the Fed denies a master account to a state-chartered financial institution, it effectively vetoes a bank charter that State regulators have approved. And *second*, it raises serious constitutional questions about the Fed's structure by interpreting the applicable statutes to confer that unreviewable power on mid-level Fed officials—regional bank presidents—who are not appointed as either principal or inferior officers under Article II of the Constitution.

Review is also warranted because the panel's decision was incorrect, for the reasons Judge Tymkovich gave in dissent and that Judge Bacharach previously set out in *Fourth Corner*. The panel's interpretation disregarded the

plain text of the Monetary Control Act (MCA), which requires the Fed to offer its payment services to eligible nonmember institutions. It also departed from 35 years of history: for decades, the Fed did not interpret the MCA as conferring the power to debank financial institutions. Finally, the panel's holding invaded the States' core regulatory prerogatives and put the Fed in constitutional quicksand. Courts usually try to avoid such outcomes, not create them.

The petition for rehearing en banc should be granted.

BACKGROUND

1. The Federal Reserve System, commonly known as the "Federal Reserve" or "Fed," consists of a seven-member Board of Governors; the Federal Open Market Committee; and twelve regional Federal Reserve Banks. Op. 7. Together, the Fed operates much of our Nation's payment infrastructure, including its wire transfer and ACH networks. Op. 8.

To use the Fed's payments services, a financial institution must deposit funds in a "master account" with its local Federal Reserve Bank. Op. 10. And because the Fed's services are so important, master accounts "are vital for functioning banks." Diss. Op. 5. Without a master account, a bank cannot transfer funds electronically, making it "nothing more than a vault." *Fourth Corner Credit Union* v. *Federal Reserve Bank of Kansas City*, 861 F.3d 1052, 1053 (10th Cir. 2017) (opinion of Moritz, J.).

No statute expressly authorizes the Fed to offer master accounts. *See* Op. 11 n.4. Rather, the Fed has created those accounts "pursuant to its authority to take deposits and provide services." *Id.* That authority is governed by two statutory provisions. The first, from the 1913 Federal Reserve Act, authorizes regional Federal Reserve Banks to collect deposits: "Any Federal reserve bank may receive from any of its member banks, or other depository institutions . . . deposits of current funds in lawful money." 12 U.S.C. § 342. The second, from the 1980 Monetary Control Act, instructs the Federal Reserve Board to set a fee schedule for the services it provides. 12 U.S.C. § 248a. Those services "shall be available to nonmember depository institutions" and "shall be priced at the same fee schedule applicable to member banks." 12 U.S.C. § 248a(c)(2). The term "nonmember depository institution" includes "any bank which is eligible" for FDIC insurance but is not a member of the Federal Reserve System. 12 U.S.C. § 461(b)(1)(A)(i).

For decades, the Fed gave a master account to every legally eligible bank that asked for one. *See Fourth Corner*, 861 F.3d at 1071-1072 (opinion of Bacharach, J.); J.A. 766-767. In 2015, however, the Fed began repeatedly denying or ignoring master account applications by disfavored banks. *See* Julie Andersen Hill, *Opening a Federal Reserve Account*, 40 Yale J. Reg. 454, 471-496 (2023).

2. Plaintiff Custodia Bank, Inc., is a financial institution that primarily serves digital asset companies. Op. 11. It is headquartered in Cheyenne, Wyoming, and holds a Wyoming Special Purpose Depository Institution (SPDI) charter. *Id.* That charter authorizes Custodia to "[p]rovide payment services" and "[c]arry on a nonlending banking business." Wyo. Rev. Stat. § 13-12-103(b).

Custodia's Wyoming home is no accident. Wyoming has long sought investment by digital asset firms. *See Wyoming Wants to Become America's Crypto Capital*, The Economist (Sept. 14, 2023) <tinyurl.com/WYcryptocapital>. To encourage that investment, Wyoming enacted its SPDI statute, which created a tailored regulatory regime for banks like Custodia and thus "provide[d] a necessary and valuable service to blockchain innovators." 2019 Wyo. Sess. Laws ch. 92, § 1(a)(viii) (legislative findings). That choice, in turn, brought Custodia and similar businesses to Wyoming. Buoyed by its comprehensive legal framework for digital assets, Wyoming has become "America's leading crypto hub." Wishal Chawla, *How Wyoming Became a Crypto Hub*, CryptoBriefing.com (Sept. 11, 2021) <tinyurl.com/WYcryptohub>.

3. On October 29, 2020, Custodia applied for a master account. J.A. 87. The Federal Reserve Bank of Kansas City (hereafter the "Kansas City Fed") told Custodia that it "was legally eligible" for the account and that "there were 'no showstoppers' with its application." Op. 12. In internal

memorandums, its staff deemed Custodia's capital "adequate" and its liquidity risk "low," while praising its "strong" risk management and "impressive" executive team. J.A. 693-694. But when officials from the Board of Governors intervened, the Kansas City Fed changed its tune. *Id.* On January 27, 2023, the Kansas City Fed denied Custodia's master account application. J.A. 1947. Since then, Fed officials have exerted "regulatory pressure" against Custodia's banking partners, apparently in an effort to debank Custodia entirely. *See*, *e.g.*, J.A. 2097.

Custodia sued the Kansas City Fed and the Board of Governors in the United States District Court for the District of Wyoming. Op. 17.[1] It argued that, under Section 248a, the Kansas City Fed lacked discretion to deny its master account application. *Id.* On the defendants' motion, the district court dismissed some of Custodia's claims—including a claim that the Fed's structure violated Article II of the Constitution—and subsequently entered summary judgment for defendants on Custodia's Section 248a claim against them. Op. 15-19.

A divided panel of this Court affirmed. Op. 48. The majority determined that, under the Federal Reserve Act, the regional Reserve Banks possessed

[1] Custodia first filed its lawsuit in June 2022, after its application had been pending for 19 months but before the Kansas City Fed acted on it. Op. 15. When the Kansas City Fed denied the application, Custodia filed an amended complaint challenging that denial. Op. 17.

"discretionary authority" over a depository institution's application. Op. 30 (citing 12 U.S.C. § 342). The majority was not persuaded by the MCA's mandate that all services be provided to nonmember depository institutions—a category that undisputedly includes Custodia—because, in its view, that Act was "concerned with . . . the [Reserve Banks'] *pricing* of services," rather than their *provision* of services. *Id.* (emphasis added) (citing 12 U.S.C. § 248a).

Judge Tymkovich dissented, adopting Judge Bacharach's position from *Fourth Corner*. Diss. Op. 11 (citing 861 F.3d at 1068). He explained that the MCA—which directs the Fed to "provide universal access" to banking services "at equal prices"—stripped the Fed of any authority to deny Custodia master account access. *Id.* at 13. The majority's contrary position, he added, raised "constitutional concerns" that it was "bound to avoid." *Id.* at 25. By granting presidents of the regional Reserve Banks "unreviewable discretion" over account applications like Custodia's, the majority made those individuals "Officers of the United States," raising "thorny question[s]" under Article II of the Constitution. *Id.* at 27-28.

Nor, Judge Tymkovich continued, would giving Custodia a master account create excessive risk for the Fed. Rather, the Fed could address that "policy concern[]" through other tools—for instance, limits on Custodia's access to credit. *Id.* at 25. Fed officials have since admitted those tools could, in

fact, adequately manage Custodia's risks. *See* Interview with Christopher J. Waller by Eleanor Terrett at 8:05-8:40 (Oct. 21, 2025) <tinyurl.com/WallerInterview> (Waller Interview).

REASONS FOR GRANTING THE PETITION

This case is a compelling candidate for en banc review. Leaving in place the panel majority's interpretation of the MCA would gut the States' power to charter banks such as Custodia (and thus Wyoming's statute authorizing those charters) and would raise serious constitutional questions under the Appointments Clause. The panel majority's decision is also incorrect, as Judges Tymkovich and Bacharach have explained. Indeed, the deep division on this Court is itself a reason to grant rehearing en banc, so as to allow all members of the Court an opportunity to weigh in on the question presented.

A. The Question Presented Is Exceptionally Important

Rehearing en banc is warranted to resolve a "question[] of exceptional importance": whether, by statute, the Fed has plenary discretion to deny banks master account access. *See* Fed. R. App. P. 40(b)(2)(D).

1. The panel's decision implicates a longstanding state prerogative—the power to charter banks without approval by the Federal Government.

States have long enjoyed the authority to charter their own banks. In fact, for much of our history, *only* States used that "important power": the Federal Government chartered only two banks before the Civil War. *Briscoe*

v. *Bank of Commonwealth of Kentucky*, 36 U.S. 257, 318 (1837); *see* Arthur E. Wilmarth Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 Fordham L. Rev. 1133, 1153 (1990). Even today, about four-fifths of banks hold state charters, and bank regulation remains "squarely within" the States' remit. *National Association of Industrial Bankers* v. *Weiser*, 159 F.4th 694, 712 (10th Cir. 2025) (citation omitted); *see FDIC State Tables* <tinyurl.com/statetables> (last visited Dec. 14, 2025) (listing 4,379 FDIC-insured banks, of which 3,473 are state-chartered, as of September 30, 2025).

Yet the panel's decision permits the Fed to reduce state charters to nothing—all but erasing the States' historic chartering privileges. A bank charter has no value unless its holder can access the payment system; without payment-system access, a bank is just a "vault." *Fourth Corner*, 861 F.3d at 1053 (opinion of Moritz, J.). But payment-system access requires master-account access, which the panel left to the Fed's unreviewable discretion. Op. 25. The panel's holding thus gives the Fed a veto over state charters. If the Fed thinks certain banks—or entire categories of banks—should not be chartered, it can deny those banks a master account.

Indeed, that is precisely what happened here. In 2019, Wyoming granted Custodia a charter under its SPDI statute, which it drafted to effectuate its policy that banks focused on digital assets deserved charters. Op. 11;

see p. 4, *supra*. But because the Fed has denied Custodia a master account—evidently because it distrusts SPDIs in general—Custodia cannot use those powers. The panel's decision thus functionally preempts Wyoming's SPDI statute: unless the Fed cooperates, SPDIs like Custodia cannot exercise their charter rights.[2]

A State's power to charter banks is "of profound local concern." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). Given the implications of the question presented for state authority, en banc review is warranted.

2. The question is also exceptionally important because the panel's holding threatens the Federal Reserve System's constitutionality. The panel's statutory interpretation creates serious Article II problems by making the presidents of regional Federal Reserve Banks "officers"—likely "principal officers"—"of the United States."

Under Article II of the Constitution, presidents of regional Federal Reserve Banks cannot perform duties that would make them "Officers of the United States." U.S. Const. Art. II, § 2, cl. 2. That is because the

[2] Nor is this problem unique to Wyoming. In 2023, for example, the Federal Reserve Bank of San Francisco denied a master account to an Idaho bank, PayServices. PayServices also sued, and its case is currently pending before the Ninth Circuit. *See PayServices Bank* v. *Federal Reserve Bank of San Francisco*, Civ. No. 23-305, 2024 WL 1347094, at *4 (D. Idaho Mar. 30, 2024), *appeal filed*, No. 24-2355 (9th Cir. Apr. 15, 2024).

Appointments Clause "prescribes the exclusive means" of appointing officers of the United States: only the President may appoint "principal" officers, and "[o]nly the President, a court of law, or a head of department" may appoint "inferior" officers. *Lucia* v. *SEC*, 585 U.S. 237, 244 & n.3 (2018). Presidents of regional Federal Reserve Banks, however, are not selected in any of these ways. Instead, six members of each Reserve Bank's board "appoint" the Bank's president, "with the approval of the Board of Governors of the Federal Reserve System." 12 U.S.C. § 341. Accordingly, regional presidents cannot perform duties reserved for officers of the United States, whether principal or inferior. *See Melcher* v. *Federal Open Market Committee*, 644 F. Supp. 510, 520 (D.D.C. 1986).

By giving the regional presidents unbounded discretion over Custodia's master account application, the panel ran headlong into the Appointments Clause. *First*, the panel's holding makes the regional presidents at least "inferior" officers. To qualify as an "inferior" officer, a federal official must (1) "occupy a 'continuing' position established by law" and (2) "'exercise[] significant authority pursuant to the laws of the United States.'" *Lucia*, 585 U.S. at 245 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). And under the panel's statutory holding, regional presidents tick both boxes: they hold a "continuing" position, and they wield the "significant" power to decide which banks can access the payment system. *Id.*

Second, the panel's holding likely makes the regional presidents "principal" officers. A "principal officer" is an officer with no superior, and thus with the "power to render a final decision" himself. *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 14 (2021) (citation omitted). Regional presidents, per the panel, fit that bill too: they make "final decision[s]" on master account applications, without further review. Op. 23. The panel's decision thus apparently promoted regional presidents to principal-officer status, and so raised a serious Appointments Clause concern.

The panel did not acknowledge those difficulties. Instead, it tried to dodge them, suggesting that Custodia had forfeited the "argu[ment] that the appointment process for a Reserve Bank president violates the Appointments Clause" by failing to brief it on appeal. Op. 46. But Custodia's briefs specifically argued that the "delegation to Reserve Banks" effected by the Fed's interpretation of the MCA was "improper under the Appointments . . . Clause[]." Br. of Appellant 55-56; *see* Reply Br. of Appellant 17-18. And even if Custodia had forfeited a freestanding Appointments Clause claim, it would not have thereby forfeited a constitutional-avoidance argument supporting its *statutory* claim that the MCA did not delegate such power. *See Lebron* v. *National Railroad Passenger Corp.*, 514 U.S. 374, 379 (1995). Nor would any such forfeiture have empowered the panel to interpret the MCA in ways that created constitutional problems. Rather, "[h]aving undertaken to decide"

whether the MCA gave Custodia a right to a master account, the panel was obliged to decide that question "proper[ly]"—without ignoring the Appointments Clause. *Kamen* v. *Kemper Financial Services*, 500 U.S. 90, 99 (1991).

For all these reasons, rehearing en banc is warranted.

B. The Panel's Decision Is Incorrect

The panel also erred on the merits, as Judges Tymkovich and Bacharach have recognized. The panel's statutory interpretation conflicts with the text of the MCA—which gives Custodia the right to a master account—and ignores Fed officials' admission that they have sufficient tools to "control" master account holders' risk. *See* Waller Interview at 4:17-55. It also departs from the Fed's historic views and contravenes principles of state sovereignty and constitutional avoidance.

1. The MCA instructs the Fed to develop a fee schedule for certain "payment services." 12 U.S.C. § 248a(b). It then tells the Fed how it must provide and price those services: "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." 12 U.S.C. § 248a(c)(2).

"Depository institution" is itself a defined phrase. It includes "any bank which is eligible" to apply for FDIC insurance. 12 U.S.C. § 461(b)(1)(A)(i). A "nonmember depository institution" is thus a bank that is eligible for FDIC

insurance but that has not joined the Federal Reserve System. *Cf.* 12 U.S.C. § 221 (defining "member bank").

As Judge Tymkovich explained, that language resolves this case, imposing a nondiscretionary duty on the Fed to provide Custodia with a master account. Diss. Op. 10-17. Custodia is a "nonmember depository institution," as it is eligible to apply for FDIC insurance. 12 U.S.C. § 248a(c)(2). The Fed therefore "shall" provide it—*i.e.*, carries a "discretionless obligation[]" to provide it, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001)—with the "bank services covered by [its] fee schedule." 12 U.S.C. § 248a(c)(2). And the Fed cannot fulfill that obligation unless it gives Custodia a master account, for a master account is both a "service" under Section 248a(c)(2) and necessary to access the other "services" that provision mentions. Hence, Section 248a entitles Custodia to a master account: as a "nonmember depository institution," it "shall" receive one. 12 U.S.C. § 248a(c)(2).

In holding otherwise, the panel began by observing that, under the 1913 Federal Reserve Act, the Fed could refuse deposits from banks like Custodia. Op. 29-30 (citing 12 U.S.C. § 342). But the 1980 MCA amended the Federal Reserve Act, and it did so precisely to *remove* the Fed's discretionary authority over "payment services." 12 U.S.C. § 248a(b). So the Federal Reserve Act does not show that, today, the Fed retains discretion over Custodia's master account.

The panel also found it significant that, on the whole, the MCA focuses more on pricing for payment services than on the availability of those services. Op. 30-32. But the relevant language from the MCA unequivocally addresses service availability, providing that "all" applicable services "shall be available" and then specifying how the services "shall be priced." 12 U.S.C. § 248a(c)(2). There is no basis to read that express availability mandate to mean something other than what it says; as Judge Tymkovich noted, "[c]ontext does not override the plain text of the statute." Diss. Op. 15.

The panel also asserted that Section 248a(c)(2) "does not say that services must be available to *all* nonmember depository institutions," just that those services must be available to nonmember institutions "*as a class*." Op. 32. But Section 248a(c)(2) incorporates Section 461's definition of "depository institution," which covers "*any* bank which is eligible" to apply for FDIC insurance. 12 U.S.C. § 461(b)(1)(A)(i) (emphasis added). As Judge Tymkovich explained, Section 248a(c)(2) thus requires the Fed to make its payment services available to "*any*" bank eligible for them—*i.e.*, to all nonmember banks. Diss. Op. 11. The panel's reading, by contrast, adds a word to the MCA, reading it to say that "[a]ll Federal Reserve Bank services . . . shall be available to [*some*] nonmember depository institutions." 12 U.S.C. § 248a(c)(2). By analogy, suppose that Congress instructed schools to provide "all listed services to students with disabilities." A school could not assert unlimited

discretion to deny services to disabled students because it had provided all listed services to *one* disabled student, and so had made the services available to disabled students "as a class." Op. 32.

The panel also attempted to distinguish Section 248a by emphasizing that it speaks to the Board of Governors, not regional Reserve Banks. Op. 30-31. But the Board can set general policies that Reserve Banks must apply when making master account decisions. 12 U.S.C. § 248(j). Just so here: Section 248a(c)(2) directs the Board to set a policy—statutory access to master accounts—that the Reserve Banks must heed. Once an account is open, the Fed can deploy the many tools available to it to manage accountholder risk. *See* Waller Interview at 4:17-55.

Finally, the Toomey Amendment says nothing about the Fed's discretion to withhold account access. Op. 33-34 (discussing 12 U.S.C. § 248c(b)(1)). As the Amendment's principal sponsor—former Senator Patrick J. Toomey—explained, Congress passed the Amendment merely to "gather information" about the Fed's account administration practices. Diss. Op. 20 (citing Toomey Br. 12).

In short, "[Section] 248a(c)(2) contains two clear commands: (1) provide universal access, and (2) at equal prices." Diss. Op. 13. The panel's contrary reading was incorrect.

2. Statutory context—including decades of regulatory history, plus principles of federalism and constitutional avoidance—confirms Judges Tymkovich and Bacharach's reading of Section 248a(c)(2).

As Judge Bacharach explained in *Fourth Corner*, the panel's reading of Section 248a(c)(2) departs from decades of Federal Reserve practice. *See* 861 F.3d at 1070. Before 2015, the Fed "uniformly interpreted" the MCA to "extend Federal Reserve services to all 'depository institutions.'" *Id.* Indeed, between the passage of the MCA and 2015, the Fed *never* denied *any* legally eligible bank a master account. J.A. 766-767. Only in 2015 did the Fed "discover . . . an unheralded power to regulate a significant portion of the American economy." *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014) (citation omitted). "[W]e typically greet" such discoveries "with a measure of skepticism." *Id.*

So too, the panel's reading of Section 248a conflicts with States' historic authority to charter banks and with principles of constitutional avoidance, for the reasons given above. *See* pp. 7-12, *supra*. As to the States, the panel gave the Fed an effective veto over States' bank chartering decisions—the kind of interference with traditional state functions that requires clear congressional authorization. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Likewise, principles of "constitutional avoidance" dictate that a court "should not read [a] statute in a way that makes the current method of appointment . . .

unconstitutional if [the court] can reasonably read it otherwise." *Kennedy* v. *Braidwood Management, Inc.*, 606 U.S. 748, 775 (2025).

To justify its contrary interpretation, the panel pointed to two Fed policy documents it read (really, stretched) to say that "Reserve Banks have discretion with respect to master account access." Op. 41. But one of those documents is from 2023, postdating the Fed's denial of Custodia's application and saying nothing about the Fed's longstanding practices. And the other—from 1998—just states the truism that banks cannot access master accounts without approval by a Reserve Bank; it says nothing about why a Reserve Bank can withhold such approval. *Id.*

The panel also emphasized that, from 1980 onwards, the Fed has understood itself to have "the authority to protect its payment systems from risk." Op. 40. But the Fed admits it can easily protect itself under Custodia's reading of the MCA; for instance, it can block banks from using master account features that it deems particularly risky. Waller Interview at 4:17-4:55, 8:05-8:40. In the words of one Fed governor, the Fed can "tailor" the "structure" of its master accounts to fit the "risk profile" of each bank, and thus "control" the risk to which it is exposed. *Id.* at 4:17-4:55.

In any event, authority to protect against risk is not a blank check. The panel's decision vests absolute, unreviewable power in the Fed to debank

banks. Congress did not give the Fed that boundless authority, and the en banc Court should say so.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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DECEMBER 15, 2025

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for petitioner Custodia Bank, Inc. and a member of the Bar of this Court, certify that this petition complies with Federal Rule of Appellate Procedure 40(d)(3) and Tenth Circuit Rule 32 because it is proportionally spaced, has a typeface of 14 points or more, and contains 3,899 words, excluding the parts exempted by Fed. R. App. P. 32(f).

/S/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

DECEMBER 15, 2025