No. 22-529

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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September 13, 2023

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The government's brief agrees with much of what our petition says: It agrees that the Second Circuit's decision is incorrect, that there is a split, and that National Bank Act preemption under Dodd-Frank is an important issue. Yet the government asks the Court to deny certiorari to allow for percolation because the Solicitor General has now disavowed the contrary position taken by the Office of the Comptroller of the Currency in its brief below. But even if percolation were desirable to allow lower courts to "engage with the arguments raised in [the government's] brief," U.S. Br. 20, the best and fairest way to accomplish that objective would be to grant the petition, vacate the decision below, and remand for further consideration in light of the position taken in the Solicitor General's brief. It would not be to deny the petition. That would be unfair to the petitioners, leaving them unable to benefit from the government's change of position in their own case.

1. The government's brief represents a sea change in the federal government's position on NBA preemption. In the Second Circuit, the OCC advocated for a broad view of *Barnett Bank* preemption—the same view it had pressed for years—and filed a brief urging the court to hold that state escrow-interest laws are categorically preempted as to national banks. The Second Circuit then adopted the OCC's view. The court emphasized in the introduction to its opinion that the "federal government[]" had "taken the position that New York's law is preempted" by the NBA, and expressly agreed with the agency regarding the scope of *Barnett Bank* preemption. Pet. App. 5a, 24a.

Now it is clear that the OCC's brief does *not* represent the views of the United States—and that the federal government's position is in fact *contrary* to the OCC's.

After this Court's invitation, "the Solicitor General considered the question presented and concluded that" the "categorical approach to preemption" urged by the OCC and adopted by the Second Circuit is "particularly flawed" and contravenes the statutory text, structure, and history and this Court's precedents. U.S. Br. 8, 9 n.2, 13. Determining preemption under *Barnett Bank*, as codified in Dodd-Frank, instead "requires a practical inquiry into the degree to which [the] state law impedes the exercise of national banks' powers." *Id.* at 10. By so thoroughly repudiating the OCC's position, the government's brief only confirms the incorrectness of the decision below.

2. The brief also confirms other points that we made in our petition. It agrees that there is a "conflict" between the Second Circuit's decision in this case and the Ninth Circuit's decision in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). U.S. Br. 20. And it acknowledges that the scope and meaning of NBA preemption under Dodd-Frank is an "important" national issue. *Id.*

3. Nevertheless, the Solicitor General asks the Court to deny certiorari and leave in place the Second Circuit's erroneous decision and the split that it creates. It does so primarily on the ground that the split is "shallow," and that further percolation of the issues would allow courts to "engage with the arguments raised in [the government's] brief." *Id.* But this Court routinely grants certiorari in cases presenting 1-1 splits, including in *Barnett Bank* itself. *See* Reply Br. 3. And here, because of the split, there is considerable uncertainty as to whether national banks must comply with state escrow-interest laws—and now, considerable uncertainty as to whether they must comply with various other state laws that the OCC had previously sought to preempt by bureaucratic fiat. *See* U.S. Br. 9 n.2.

Granting certiorari and answering the question presented would go a long way to eliminating that uncertainty.

But should the Court agree with the government that percolation would be beneficial, there is a ready-made way to achieve the benefits of percolation while eliminating the circuit conflict: The Court could grant the petition, vacate the decision below, and remand for further consideration in light of the position taken in the government's brief. A GVR can be appropriate to allow a lower court to consider "positions newly taken by the Solicitor General," and is particularly appropriate here given "the equities of the case" and the "reasonable probability" that the Second Circuit would reconsider its position. *See Lawrence v. Chater*, 516 U.S. 163, 166–68, 174 (1996) (per curiam) (citing examples); *see also, e.g.*, *Marin v. Garland*, 143 S. Ct. 2653 (2023); *Lewis v. United States*, 137 S. Ct. 1583 (2017); *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006). The government's change in position is not "part of an unfair or manipulative litigation strategy," and giving the petitioners "a chance to benefit from it furthers fairness by treating [them] like other" plaintiffs whose claims are pending or have not yet been filed. *Lawrence*, 516 U.S. at 168, 175. Further, a GVR would create the real possibility that there would never again be a split on the question presented, preserving this Court's resources. And if a circuit split on the question were to reemerge in the future, a GVR would ensure that it is a considered one.

4. Finally, the government agrees that *Flagstar Bank* is a "flawed vehicle" for answering the question presented. U.S. Br. 22. Yet the government claims that this petition is more flawed because one petitioner (Alex Cantero) has a mortgage that predates Dodd-Frank, so his case raises an issue that is not "the subject of a circuit conflict." *Id.*

The government's vehicle argument is misplaced. For one thing, the mortgage at issue in the Ninth Circuit's *Lusnak* case likewise predated Dodd-Frank, so Cantero's claim does in fact implicate the circuit split. For another, Dodd-Frank expressly codifies *Barnett Bank*, and no one has ever argued that there are two different *Barnett Bank* standards—one before Dodd-Frank, and one after. In any event, the government does not deny that the other petitioners here (from the separately filed *Hymes* action) have a mortgage that is covered by Dodd-Frank. Granting this petition would thus allow the Court to resolve the circuit split while also answering the question in a way that has relevance going forward. But should the Court wish to do so, it could grant plenary review only as to the *Hymes* petitioners, while holding the petition as to Cantero.

CONCLUSION

The petition for certiorari should be granted.

September 13, 2023

Respectfully submitted,

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