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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, **v.** **THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, et al.,** Defendants.	Case No. 4:20-CV-05200-JSW **PLAINTIFFS' NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: March 19, 2021 Time: 9:00 a.m. Courtroom: Oakland Courthouse, Courtroom 5 – 2nd Floor Judge: The Honorable Jeffrey S. White Action Filed: July 29, 2020

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that the undersigned shall, and do herein, move this court, at the Ronald V. Dellums Federal Building & United States Courthouse, Courtroom 5 – 2nd Floor, 1301 Clay Street, Oakland, CA 94612, on March 19, 2021, at 9:00 a.m. for an order granting summary judgment to Plaintiffs the People of the State of California, the People of the State of Illinois, and the People of the State of New York (collectively, "Plaintiffs") pursuant to Fed. R. Civ. P. 56 on the basis of the administrative record and for the reasons stated below.

Plaintiffs ask the Court to declare that the Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred ("Rule"), 85 Fed. Reg. 33,530-36, issued by the Office of the Comptroller of the Currency on June 2, 2020, violates the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs further ask the Court to hold unlawful and set aside the Rule and to grant other relief as the Court deems just and proper.

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SUMMARY OF ARGUMENT

States have long used interest-rate caps to prevent predatory lending. In light of the comprehensive federal regulatory regime to which national banks are subject, Congress exempted them from compliance with state rate caps in the National Bank Act ("NBA"). 12 U.S.C. § 85 (allowing national banks to "take, receive, reserve, and charge" interest in excess of state law); *see also* 12 U.S.C. § 1463(g)(1) (same for federal savings associations). The Office of the Comptroller of the Currency's ("OCC") rule unlawfully extends preemption of state rate caps to any entity—bank or not—that buys loans from a national bank. Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530-36 (June 2, 2020).

The rule's interpretation of §§ 85 and 1463(g)(1) would allow non-bank loan buyers to charge interest in excess of state law. This interpretation conflicts with the unambiguous statutory text, which preempts state rate caps in favor of national banks alone. *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 296 (3d Cir. 2005). Additional provisions of the NBA confirm that Congress did not extend the benefits of § 85 to non-banks. *E.g.*, 12 U.S.C. §§ 25b, 86.

The OCC also ignored the procedural requirements Congress imposed on its rulemaking authority. *See* 12 U.S.C. § 25b. Among other things, the OCC failed to apply the "significant interference" standard for NBA preemption. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); 12 U.S.C. § 25b(b)(1)(B). The Court may not uphold a rule on grounds the agency failed to consider, *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007), and in any case, the OCC would not meet this standard because application of state rate caps to non-banks does not significantly interfere with national banks' power to charge interest under § 85, *Madden v. Midland Funding*, 786 F.3d 246, 251 (2d Cir. 2015).

Finally, the OCC's action is arbitrary and capricious because the agency failed to address important aspects of the problem its rule is intended to address (including the rule's facilitation of "rent-a-bank" schemes and its creation of a regulatory vacuum), and the rule rests on contentions that run counter to the evidence and conflicts with prior OCC interpretations. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). For all these reasons, the OCC's rule violates the Administrative Procedure Act. 5 U.S.C. § 706(2).

INTRODUCTION

The Office of the Comptroller of the Currency ("OCC") seeks to unlawfully extend the reach of interest-rate privileges that Congress granted exclusively to federally chartered banks. Provisions of the National Bank Act ("NBA") and Home Owners' Loan Act ("HOLA") exempt national banks and federal savings associations ("National Banks")[1] from compliance with state interest-rate caps. 12 U.S.C. §§ 85, 1463(g)(1). The OCC's Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred ("Non-bank Interest Rule" or "Rule") extends this preemption of state law to any entity that acquires loans from a National Bank, allowing non-bank assignees to charge interest in excess of rates permitted by state law. 85 Fed. Reg. 33,530-36 (June 2, 2020) (codified at 12 C.F.R. §§ 7.4001(e) and 160.110(d)).

The Rule violates the Administrative Procedure Act ("APA") because it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; is in excess of the OCC's statutory jurisdiction, authority, and limitations, and short of statutory right; and was promulgated without observance of procedure required by law. 5 U.S.C. § 706; *see also* Compl. [Dkt. No. 1] ¶¶ 212-224. Plaintiffs are entitled to summary judgment on all their claims because (1) the NBA and HOLA limit preemption under §§ 85 and 1463(g)[2] to National Banks, and the OCC lacks authority to deem otherwise; (2) the OCC failed to comply with the procedural requirements set forth in § 25b of the NBA; and (3) the OCC failed to consider relevant factors, explain contradictory policy positions, and provide adequate evidentiary support for the Rule.

BACKGROUND

I. STATE RATE CAPS AND NATIONAL BANKS

State interest-rate caps (also called usury caps) have long played a central role in the financial protection of consumers and small businesses. *See Griffith v. State of Conn.*, 218 U.S. 563, 569 (1910). Rate caps protect consumers from the debt traps of high-cost loans, scrupulous

[1] National banks and federal savings associations are subject to parallel statutory provisions that the OCC states "should be interpreted coextensively," 85 Fed. Reg. at 33,533, so this brief refers to both national banks and federal savings associations collectively as National Banks.

[2] Statutory citations refer to sections of Title 12 of the current U.S. Code unless otherwise noted.

creditors (like landlords, suppliers, or auto lenders) from the threat of non-payment by debtors driven to insolvency by predatory lending, and taxpayers from the need to support families whose resources have been consumed by unsustainable interest payments. Administrative Record ("AR")[3] [Dkt. No. 35] at 317-18, 614-15, 703-04, 747-66; *see also* Compl. ¶¶ 3, 119, 122. For these reasons, the vast majority of states cap the rates creditors may charge. AR 371. For example, New York imposes a 16% rate cap on most consumer loans and criminalizes charging interest above 25%. N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Banking Law § 14-a; N.Y. Penal Law §§ 190.40, 190.42; *see also* Cal. Fin. Code §§ 22303-22306 (California rate caps).

Unlike most creditors, which must abide by state rate caps, National Banks are subject to a distinct federal regime that governs the interest rates they may charge. 12 U.S.C. §§ 85, 1463(g)(1). National Banks are chartered and regulated directly by the federal government and owe their existence to financial concerns arising out of the Civil War. Congress passed the NBA in 1864 to create a centralized federal banking system and finance the federal government's war efforts, giving rise to a system of federally chartered national banks—or "associations," as they are called in the NBA's original text—subject to the federal government's oversight through the OCC. 12 U.S.C. § 21 *et seq.*; AR 359-60. To prevent discrimination against these federally chartered banks by hostile states, Congress preempted state law and placed national banks in the position of most-favored creditor. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 10 (2003); AR 718-19. Under § 85, "any association [*i.e.*, national bank] may take, receive, reserve, and charge" interest up to the highest of three statutory limits: (1) "the rate allowed by the laws of the State . . . where the bank is located"; (2) a floating rate set by the regional Federal Reserve Banks; or (3) the highest rate permitted for state-chartered banks. The first option governs in practice. In 1989, Congress enacted HOLA, extending this same interest-rate privilege to federally chartered savings associations in language that mirrors that of § 85. 12 U.S.C. § 1463(g)(1).

National Banks rely on §§ 85 and 1463(g)(1) to charge interest at rates above those permitted by the law of the states where their borrowers live. Because a National Bank is

[3] Relevant pages of the Administrative Record are identified throughout by the significant digits at the end of each Bates stamp. For example, "AR 614" refers to OCC-AR-00000614.

"located" in "the place specified in its organization certificate," National Banks often "locate" themselves strategically in states with high, or no, interest-rate caps. 12 U.S.C. § 81; *Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 310 (1978); Compl. ¶ 30 (Citibank and Wells Fargo Bank are "located" in South Dakota, which has no interest-rate cap for banks); Answer [Dkt. No. 36] ¶ 30 (admitting same). Sections 85 and 1463(g)(1) allow those National Banks to charge the interest rates permitted in their "home" states—*i.e.*, any rates the banks choose—and to "export" those rates to borrowers in states that have interest-rate caps. *Marquette Nat. Bank*, 439 U.S. at 310-11, 314-15, 318-19.

II. THE PROBLEM OF RENT-A-BANK SCHEMES

Although Congress exempted only National Banks from state rate caps, some non-bank lenders have formed sham "rent-a-bank" partnerships designed to evade state law. *E.g.*, AR 369-70. In these schemes, the bank acts as a mere pass-through with no financial risk or substantive interest in the resulting loans. *Id.* The non-bank partner identifies potential borrowers, sets the underwriting criteria, provides the capital, purchases the resulting loans shortly after the bank ostensibly "originates" them, and goes on to charge and collect all interest payments. *Id.*

High-cost lenders have increasingly sought out these sham bank partnerships in response to state efforts to regulate predatory lending. *See, e.g.*, AR 302, 372-76. For example, following California's recent enactment of a new interest-rate cap, a number of high-cost lenders announced plans to evade those caps through rent-a-bank schemes. *See, e.g.*, AR 69-72 (letter from members of the Senate Committee on Banking, Housing, and Urban Affairs regarding proposed rule); *see also* Compl. ¶¶ 89-94. By exempting buyers of National-Bank-originated loans from state rate caps, the OCC's Rule encourages and facilitates these evasive schemes.

III. *MADDEN V. MIDLAND FUNDING* AND SUBSEQUENT INDUSTRY ACTIONS

As the OCC acknowledges, the aim of its Rule is to overturn the Second Circuit's construction of § 85 in *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015). AR 843, 847; *see also* OCC, National Banks and Federal Savings Associations as Lenders ("True Lender Rule"), 85 Fed. Reg. 68,742, 68,743 (Oct. 30, 2020) (describing Non-bank Interest Rule as the "*Madden*-fix" rulemaking). In *Madden*, the Second Circuit rejected non-bank debt buyers'

argument that, because they bought loans from National Banks, § 85 preemption allowed them to charge interest above New York's usury cap. 786 F.3d at 250-53.

The court began with the standard framework describing the limited circumstances in which federal law displaces state law: (1) "Congress has expressly preempted state law"; (2) the relevant federal law "occupies an entire field of regulation and leaves no room for state law"; or (3) the federal law "conflicts with state law." *Madden*, 786 F.3d at 249. Two out of three—express and field preemption—did not apply: Congress, in § 85, expressly preempted state law only as to National Banks and declared in another provision that "[the NBA] does not occupy the field in any area of State law." 12 U.S.C. § 25b(b)(4); *see also id.* §§ 85, 1465(b) (no field preemption under HOLA). The court considered whether conflict preemption blocks application of New York's usury cap to debt buyers and held it does not. *Madden*, 786 F.3d at 249-53.

The Second Circuit explained, "To apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA." *Id.* at 250 (citing *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)). Application of state rate caps to non-bank debt buyers, who are not subject to OCC oversight, does not meet this standard: Non-bank assignees act "solely on their own behalves, as the owners of the debt," not on behalf of National Banks. *Id.* at 251. State rate caps do not prevent National Banks from selling debt to non-banks, and even if they might decrease the price debt buyers are willing to pay, that does not amount to significant interference. *Id.* As the court explained, "extending [§ 85's] protections to third parties would create an end-run around usury laws for non-national bank entities[.]" *Id.* at 252.

Despite the Second Circuit's straightforward application of the NBA's text and standard preemption principles, financial-industry interest groups coalesced around *Madden* as a vehicle to expand NBA preemption. The *Madden* defendants, with mass interest-group support, requested rehearing and, later, certiorari, warning that *Madden* "threatens to cause significant harm to [credit] markets, the banking industry, and the millions of families and businesses they serve." Brief of the Clearing House Association et al. as Amici Curiae in Support of Reh'g and Reh'g En Banc 1, *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015) (No. 14-2131-cv), 2015 WL

4153963; Petition for Writ of Certiorari 3, *Midland Funding v. Madden*, 136 S. Ct. 2505 (2016) (No. 15-610), 2015 WL 7008804. The Second Circuit denied rehearing, the Supreme Court denied certiorari, and, despite the industry's warnings, no catastrophic consequences came to pass. *Midland Funding v. Madden*, 136 S. Ct. 2505 (2016); Order Denying Pet. for Reh'g En Banc, *Madden v. Midland Funding*, 14-2131 (2d Cir. Aug. 12, 2015); AR 336-37. Unsatisfied, interest groups sought to overturn *Madden* via legislative action, to no avail.[4]

IV. THE OCC'S RULEMAKING

In November 2019, the OCC issued a proposed rule with language nearly identical to the failed legislation: "Interest on a loan that is permissible under 12 U.S.C. 85 [or 1463(g)(1)] shall not be affected by the sale, assignment, or other transfer of the loan." AR 89. The OCC received numerous comments criticizing the proposed rule's dubious legality, failure to comply with procedural requirements, and facilitation of rent-a-bank schemes. *E.g.*, AR 333-52, 353-452; *see also* AR 816-17. Despite these concerns, the OCC failed to address the questions raised, took no steps to comply with its procedural obligations, and made no changes to the proposed rule. On June 2, 2020, the OCC published the Rule, which took effect on August 3, 2020. AR 842-48.

LEGAL STANDARD

"Summary judgment . . . serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Tolowa Nation v. United States*, 380 F. Supp. 3d 959, 963 (N.D. Cal. 2019). "In other words, the district court acts like an appellate court, and the entire case is a question of law." *Id.* (internal quotation marks omitted).

"The Court must first review the construction of the . . . [a]ct giving the [agency] discretion to operate" and must set aside any interpretation unsupported by the "unambiguously expressed intent of Congress." *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018). It must

[4] The Protecting Consumers' Access to Credit Act of 2017 would have extended §§ 85 and 1463(g) to cover any "third party" to whom a National-Bank-issued loan "is subsequently sold, assigned, or otherwise transferred"; but the Senate took no action, allowing the bill to expire. *See* H.R. 3299, 115th Cong. (2017-18), https://www.congress.gov/bill/115th-congress/house-bill/3299/text; S. 1642, 115th Cong. (2017-18), https://www.congress.gov/bill/115th-congress/senate-bill/1642/all-info?r=2&s=2.

"hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or taken "without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(A), (C), (D). "An agency rule is arbitrary and capricious when the agency 'has relied on factors which Congress has not intended it to consider,' 'entirely failed to consider an important aspect of the problem,' 'offered an explanation for its decision that runs counter to the evidence before the agency,' 'or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Tolowa Nation*, 380 F. Supp. 3d at 963 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. THE NON-BANK INTEREST RULE IS CONTRARY TO THE STATUTORY SCHEME CONGRESS ENACTED AND IS BEYOND THE OCC'S POWER TO PROMULGATE

"An agency's power to promulgate legislative regulations is limited to the authority delegated to it by Congress." *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (internal quotation marks omitted). "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In order to "displace state laws[,]" the agency "must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (internal quotation marks omitted). Whatever the statutory source, an agency may not alter the regulatory landscape if "Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

The OCC invokes only two statutory provisions as the bases for its Rule: § 85, which governs the interest "any association [*i.e.*, national bank] may take, receive, reserve, and charge on any loan"; and § 1463(g)(1), which governs the same with respect to federal savings

associations.[5] The language of § 1463(g)(1) mirrors that of § 85, the OCC states that "section 1463(g) should be interpreted coextensively with section 85," and the Rule focuses on § 85. AR 845. Thus, the arguments below focus on § 85 but apply with equal force to § 1463(g)(1). *See* 12 U.S.C. § 1465(a) (rules issued under HOLA must conform to the same "laws and legal standards applicable to national banks regarding the preemption of State law").

Because neither statute bears the agency's interpretation, the Rule must be set aside.

A. The Non-bank Interest Rule Conflicts with the Plain Language of § 85

Sections 85 and 1463(g) expressly apply to National Banks only. The OCC claims its Rule resolves "legal uncertainty" about whether non-bank assignees may benefit from § 85 preemption. But there is no uncertainty; Congress supplied the answer directly in the statute's text: "Any *association* [*i.e.*, national bank] may take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located[.]" 12 U.S.C. § 85 (emphasis added); *id.* § 1463(g)(1) ("Notwithstanding any State law, *a savings association* may charge interest on any extension of credit . . . at the rate allowed by the laws of the State in which such savings association is located") (emphasis added). As the Third Circuit explained, § 85 "appl[ies] only to national . . . banks, not to non-bank purchasers"—the NBA "'regulates national banks and only national banks, which can be identified by the word 'national' in their name.'" *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 296 (3d Cir. 2005) (quoting *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 687 (E.D.Pa. 1973)); *Colorado ex rel. Salazar v. Ace Cash Exp.,* 188 F. Supp. 2d 1282, 1284 (D. Colo. 2002) (quoting same).

By extending National Banks' power to "take, receive, reserve, and charge" interest at rates above state caps to any entity—bank or not—that buys a loan from a National Bank, the OCC's Rule would permit non-bank buyers, assignees, and transferees to shelter in § 85's protection from state rate caps. The Rule effectively amends § 85 to read, "Any association [*or the buyer,*

[5] AR 843 (Non-bank Interest Rule stating, "Section 85 is the sole provision that governs the interest permissible on a loan made by a national bank"), 845 ("This rulemaking addresses . . . the meaning of section 85."), *id.* ("With respect to the comments arguing that neither section 24(Third) nor section 24(Seventh) provides the OCC with authority to preempt state usury law, the OCC does not cite these statutes for this purpose."); *id.* n.50 ("[T]he OCC does not cite [§ 24(Third) and (Seventh)] as direct authority for this rule or for their preemptive effect.").

assignee, or transferee of any loan made by any association] may take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located[.]" But Congress specifically chose to protect from state law only National Banks—not whatever entity happens to acquire their loans.

Rather than contend with § 85's text, the OCC characterizes the Non-bank Interest Rule as addressing "the ongoing permissibility of [a loan's] interest term after a bank transfers [the] loan." AR 842; *accord* AR 843, 844. This framing misleadingly suggests § 85 applies to certain loans (that is, loans issued by National Banks) regardless of who holds them.

But that's not how § 85 works. Section 85 does not bless the terms of certain *loans*; rather, it gives specific *entities*—National Banks—the power to charge interest in excess of otherwise applicable state law. This distinction is important. Congress exempted National Banks from state rate caps, placing them in the position of most-favored creditor, principally because they are subject to a comprehensive federal regulatory scheme. 12 U.S.C. § 85; 12 C.F.R. § 4.2; *see also Beneficial Nat. Bank*, 539 U.S. at 10 (noting "the special nature of federally chartered banks").

The OCC claims non-bank loan buyers may charge rates above state caps because "contractual rights may be assigned[.]" AR 843. But rate-cap preemption under § 85 is not a contractual right; it is a statutory right granted only to federally chartered National Banks. 12 U.S.C. § 85; AR 361, 629. The sale of property is not enough to transfer rights statutorily conferred on specific entities. A licensed driver may sell her car, but the new owner will need his own license to drive it. *E.g.*, Cal. Veh. Code § 12500. Similarly, credit unions are exempt from federal income tax, but other entities do not become tax exempt when they buy a credit union's loans. *See* 26 U.S.C. § 501(c)(14)(A). Charging interest on a loan, of course, requires a contract; but charging interest *above* state rate caps *also* requires a statutory right. Congress granted that right only to duly chartered National Banks.

Crafting the NBA and HOLA, Congress chose to preempt state law in favor of these heavily regulated federal entities, not in favor of the loans they issue. Sections 85 and 1463(g) are clear: They apply to National Banks, and the OCC lacks the power to decree otherwise. Because the Rule conflicts with Congress's unambiguous answer to the interpretive question at hand—to

which entities does § 85 apply—it is contrary to law and must be set aside.

B. The OCC Ignores Additional NBA Provisions that Demonstrate § 85 Applies Only to National Banks

In addition to flouting the plain language of §§ 85 and 1463(g), the OCC's Rule fails to "account for both the specific context in which . . . language is used and the broader context of the statute as a whole." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (internal quotation marks omitted). Recent NBA amendments confirm Congress's intent that § 85 apply only to National Banks. A savings clause added by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 provides, "No provision of [the NBA] shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest *by a national bank* at the rate allowed by the laws of the State . . . where the bank is located[.]" 12 U.S.C. § 25b(f) (emphasis added); Pub. L. 111-203, 124 Stat. 1376 (2010). This provision reaffirms § 85's scope: It applies only to "the charging of interest by a national bank," not by third-party assignees. Other provisions in Section 25b make clear that the NBA—which includes § 85—does not preempt state law even as to subsidiaries, affiliates, or agents of National Banks. 12 U.S.C. § 25b (b)(2), (e), (h)(2); *see* OCC Interpretive Letter No. 1132, 2011 WL 2110224, at *1 (May 12, 2011) ("The Act eliminates preemption of state law for national bank subsidiaries, agents, and affiliates"). Yet the OCC's Rule would extend § 85 preemption, not just to National Bank affiliates (in conflict with § 25b), but even further afield to non-bank assignees that are entirely unaffiliated with a National Bank. This is contrary to the scheme Congress enacted.

Section 86 of the NBA and § 1463(g)(2) of HOLA, which provide penalties for National Banks that charge interest in excess of that permitted by §§ 85 or 1463(g)(1), further demonstrate Congress's intent that only National Banks benefit from preemption of state rate caps. Section 86 focuses exclusively on National Banks, imposing a penalty "twice the amount of the interest . . . from the *association* [*i.e.*, national bank] taking or receiving the same." 12 U.S.C. § 86 (emphasis added). The parallel provision in HOLA likewise provides a remedy against any "*savings association* taking or receiving . . . [unlawful] interest" (emphasis added). These provisions house the exclusive remedies for violations of §§ 85 and 1463(g)(1). *Beneficial Nat. Bank*, 539 U.S. at

9-11 (addressing § 85). By providing remedies for violations of §§ 85 and 1463(g)(1) only as to National Banks, Congress further indicated these provisions apply only to National Banks.

C. Further Legislative Activity Confirms Congress Intentionally Declined To Preempt State Interest-Rate Caps as to Non-bank Debt Buyers

Congress knows how to preempt state rate caps for loan buyers when it wants to. It did so with respect to a limited class of highly (and federally) regulated loans—first-lien residential mortgage loans—in § 501 of the Depository Institutions Deregulation and Monetary Control Act ("DIDA"), Pub. L. No. 96–221, 94 Stat 132 (1980) (codified at 12 U.S.C. § 1735f-7a). Unlike §§ 85 and 1463(g)(1), which expressly apply to specific federally regulated entities (National Banks), DIDA § 501 preemption expressly applies to the loans themselves (specifically, first-lien mortgage loans), even after they are sold to other entities.

Notably, in a different provision of DIDA, § 521, Congress used language modeled on § 85 to preempt state rate caps with respect to state-chartered banks. 12 U.S.C. § 1831d (codifying DIDA § 521). That is, while Congress expressed its intent to exempt certain *loans* in § 501, it expressed its intent to exempt certain *entities* in § 521—just like it did in §§ 85 and 1463(g)(1). Accordingly, "[s]ection[] 85 . . . of the NBA and Section 521 of the DIDA apply only to national and state chartered banks, not to non-bank purchasers[.]" *In re Cmty. Bank of N. Virginia*, 418 F.3d at 296; *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1144–45 (D. Colo. 2018) (DIDA § 521 "does not on its face regulate interest or charges that may be imposed by a non-bank, including one which later acquires or is assigned a loan made or originated by a state bank").

Congress also declined to pass legislation nearly identical to the OCC's Rule. The Protecting Consumers' Access to Credit Act of 2017, a bill introduced following *Madden* but before the OCC proposed its Rule, contained language very similar to the Non-bank Interest Rule and would have extended preemption under §§ 85 and 1463(g)(1) to non-bank loan buyers. H.R. 3299, 115th Cong. (2017-2018). The Senate took no action on the bill, allowing it to expire. *See* S. 1642, 115th Cong. (2017-2018). This legislative context indicates Congress meant the words it chose in §§ 85 and 1463(g)—preemption under those statutes applies only to National Banks.

D. Courts Have Consistently Recognized that § 85 Preemption Applies Only to National Banks

Courts have consistently recognized that for § 85 preemption of state rate caps to apply, a National Bank must be the real party in interest that "take[s], receive[s], reserve[s], and charge[s]" interest on a loan. The Second Circuit noted in *Madden* that the NBA "expressly" grants interest-rate privileges to National Banks. 786 F.3d 246 at 250. Because this express preemption is limited to National Banks, the court considered whether conflict preemption prevents application of state rate caps to non-bank loan buyers. *See id.* It held § 85 preemption does not extend to non-bank buyers because they act "solely on their own behalves, as the owners of the debt"; extending rate cap preemption to loan purchasers, the court noted, "would create an end-run around usury laws for non-national bank entities[.]" *Id.* at 251, 252.

Courts focus on who holds the underlying interest in the loans because, as the Third and Eighth Circuits have likewise affirmed, § 85 applies only to National Banks. *In re Cmty. Bank of N. Virginia*, 415 F.3d at 296; *Krispin v. May Dept. Stores Co*., 218 F.3d 919, 924 (8th Cir. 2000) ("the NBA governs only national banks"); *see also Goleta Nat. Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D.N.C. 2002) ("the NBA patently does not apply to non-national banks"). Due to the complexity of modern commerce and some lenders' attempts to evade state law, courts have grappled with whether, under various circumstances, a National Bank holds the loan at issue—that is, whether the bank is the entity charging interest on the loan. Until the OCC issued its Rule, however, courts consistently held that § 85 preemption governs National Banks alone.

In *Krispin*, a case often noted for its distinctive facts, the National Bank was a wholly owned subsidiary of a department store, established to offer credit to the store's customers. Although the store daily purchased the resulting accounts receivable—*i.e.*, the income stream of due and pending loan payments—it was "the bank, and not the store, that issue[d] credit, processe[d] and service[d] customer accounts, and set[] such terms as interest and late fees." *Krispin*, 218 F.3d at 924. Thus, the court held, § 85 applied. *Id.* That is, in order for § 85 to preempt state rate caps, a National Bank must remain "the real party in interest" to the loan. *Id.*; *see also, e.g., Cohen v. Capital One Funding*, No. 19-CV-3479, 2020 WL 5763766, at *15

(E.D.N.Y. Sep. 28, 2020) (§ 85 applies when National Bank "retains ownership and control [of the loan], remains the entity that lends money . . . , charges fees and interest . . . and receives principal and interest payments"); *In re Cmty. Bank of N. Virginia*, 415 F.3d at 297 (the NBA does not preempt state law where loans "were, in fact, made and serviced by" a non-bank and "were then bought by" another non-bank)*; Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1202 (N.D. Cal. 2012) (denying non-bank's motion to dismiss on NBA preemption grounds because "it is not clear whether or to what extent [the National Bank] retained any significant stake in or control over [the underlying] loan"); *Peel v. Brooksamerica Mortgage Corp.*, No. SACV 11-00079, 2014 WL 12589317, at *4 (C.D. Cal. Nov. 13, 2014) ("due to the passage of Dodd-Frank," NBA preemption does not apply to loans obtained "from an operating subsidiary of a national bank or federal savings association"); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp. 2d 1191, 1205 (N.D. Okla. 2004) (§ 85 did not apply because "[a]lthough the loan proceeds are paid to borrowers by checks purportedly drawn from County Bank," non-bank partner "exerts ownership and control over these loans . . . carries out all interaction with the borrowers, accepts the ultimate credit risk, collects and pockets virtually all of the finance charges and fees, and owns and controls the branding of the loans").[6]

The OCC's Rule would extend rate-cap preemption to situations in which a National Bank has "sold [loans] outright to a new, unrelated owner, divesting itself completely of any continuing interest in them[.]" *Madden*, 786 F.3d at 252 n.2. In such cases, it is the non-bank buyers that "take, receive, reserve, and charge" the resulting interest, and §§ 85 and 1463(g) do not apply.

E. The OCC Lacks Authority To Issue Rules Meant To Regulate Non-banks

The OCC also lacks authority to issue the Non-bank Interest Rule because the Rule governs only the conduct of non-banks. As the agency itself described, "[t]he OCC . . . supervises national banks under the National Bank Act of 1864 and federal savings associations under the Home Owners' Loan Act of 1933. Absent several exceptions not relevant here, Congress vested the

[6] Only one court has held to the contrary: In a bankruptcy appeal, a Colorado district court relied on the Rule—without any analysis as to its validity—to hold that a parallel statute preempting rate caps as to state-chartered banks also applied to non-bank loan assignees. *In re Rent-Rite SuperKegs W. Ltd.*, No. 19-CV-01552, 2020 WL 6689166, at *6 (D. Colo. Aug. 12, 2020).

Comptroller of the Currency with authority 'to prescribe rules and regulations' governing these entities' business operations." OCC Defendants' Response to Administrative Motion to Consider Whether Cases 4:20-cv-05200-JSW and 3:20-cv-05860-CRB Should Be Related [Dkt. No. 25] at 2 (quoting 12 U.S.C. § 93a) (internal citations omitted). The OCC has regulatory authority only over "the institutions and other persons subject to its jurisdiction"—that is, the National Banks it regulates and supervises. 12 U.S.C. § 1; *see also id.* § 93a; 12 C.F.R. § 4.2; AR 122. But the Non-bank Interest Rule regulates the interest rate a *non*-bank may charge "*after* a bank transfers a loan" to it. AR 842 (emphasis added). This is beyond the OCC's jurisdiction and so the Rule must be set aside. 5 U.S.C. § 706(2)(C).[7]

F. The OCC's Constructions of §§ 85 and 1463(g)(1) Are Not Entitled to *Chevron* Deference

Even if the Court determines § 85 is ambiguous as to who may "take, receive, reserve, and charge" interest in excess of state law, it may not defer to the OCC's interpretation but must instead independently assess the validity of it. 12 U.S.C. § 25b(b)(5)(A). While most agencies' interpretations of the statutes they administer are, if reasonable, entitled to judicial deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the OCC's statutory constructions regarding the NBA and HOLA's preemption of state law are not. Congress declared that these interpretations are "entitled only to *Skidmore* deference," under which "an agency's views are 'entitled to respect' only to the extent that they have the 'power to persuade[.]'" *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1192 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018) (citing 12 U.S.C. § 25b(b)(5)(A) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); 12 U.S.C. § 1465(a) (same requirements for rulemaking under HOLA). The Court

[7] The OCC also lacks authority to issue the Rule because judicial construction of a statute trumps a subsequent agency interpretation when the court's construction "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Empire Health Found. for Valley Hosp. Med. Ctr. v. Azar*, 958 F.3d 873, 884 (9th Cir. 2020). The Second Circuit implicitly construed the unambiguous terms of § 85 in *Madden*, exploring whether conflict preemption displaces state rate caps as applied to non-banks because § 85's express language does not. 786 F.3d at 250-51. The OCC has not identified any ambiguity in § 85; it unlawfully offers an interpretation contrary to the statute's text and to *Madden*'s construction of it.

may not defer to the OCC; it must instead "assess the validity of [the OCC's] determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant[.]" 12 U.S.C. § 25b(b)(5)(A).

Because the OCC's constructions of §§ 85 and 1463 lack thorough consideration and support, proceed from invalid reasoning, and (as discussed below) are inconsistent with prior OCC positions without explanation, the Court must disregard them and set aside the Rule.

G. The OCC's Extratextual Concerns Cannot Alter the Statutory Scheme

In support of its Rule, the OCC recites a number of principles, concerns, and motivations that run counter to the text of §§ 85 and 1463(g) and—in light of the agency's own stated foundations for the Rule—constitute no more than extratextual considerations and the OCC's wishful thinking about how the statutory scheme could be rather than how it is. However, it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Reg. Grp.*, 573 U.S. at 328; *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (an agency may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy"). "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton*, 140 S. Ct. 1731, 1737 (2020).

For example, the OCC contends that allowing § 85 preemption to travel with transferred loans will improve National Banks' liquidity and strengthen their ability to make and sell loans because loans sold to non-banks will fetch higher prices. AR 842-45. But these justifications are extraneous to § 85, which has nothing to do with the powers to make and sell loans: Section 85 only pertains to what interest a National Bank may charge. As the OCC has admitted in other recent rulemaking, National Banks "do not obtain their lending authority from section 85 or 12 U.S.C. 1463(g)." True Lender Rule, 85 Fed. Reg. at 68,743. The powers to make and sell loans arise from § 24(Third) and (Seventh) of the NBA and § 1464(c) of HOLA. But the OCC disclaims that its Rule construes or relies on those statutes in attempt to avoid procedural hurdles

set by Congress. AR 845 n.50; *infra* Section II. n.12. Instead, it relies solely on § 85 and parallel language in § 1463(g)(1). The OCC may not read atextual propositions into § 85 because they will somehow enhance other powers it has chosen not to construe. The OCC's view that National Banks would be better off if § 85 preemption were in fact transferable to non-bank buyers cannot justify rewriting the statute's clear terms.

Likewise, the OCC's erroneous interpretation of two nineteenth-century common-law cases that supposedly stand for a "valid-when-made" principle cannot override the plain text of § 85. *See* AR 844 (citing *Nichols v. Fearson,* 32 U.S. 103, 109 (1833) and *Gaither v. Farmers' & Mechs.' Bank of Georgetown,* 26 U.S. 37, 43 (1828)); *see also* Compl. ¶¶ 55-68. The OCC contends these cases stand for the common-law principle that a loan's buyer could never be liable for usury if the initial lender complied with applicable law. AR 844. As a number of comments note, the OCC's interpretation of the mid-1800s common law of usury is incorrect. AR 131-32, 362-63, 493-95, 583-86; *see also* Compl. ¶¶ 64-68. Moreover, it is irrelevant to the interpretation of § 85. Indeed, in recent rulemaking, the OCC has denied that "section 85 incorporates the common law of usury as of 1864." True Lender Rule, 85 Fed. Reg. at 68,743. It also admits that it "is not citing these tenets [of archaic common law] as independent authority for [the Non-bank Interest Rule.]" AR 844.[8] While the OCC's dubious reading of antique cases may represent how it *wishes* the statutory scheme worked, its citation to them cannot override § 85's text.

* * *

Because the OCC relied on extratextual considerations, failed to account for important statutory and legislative context, ignored the plain text of §§ 85 and 1463(g), and issued a Rule that conflicts with precedent and is beyond its authority, the OCC's action is arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, authority, and limitations, and short of statutory right. 5 U.S.C. § 706(2)(A), (C). Plaintiffs are thus entitled to summary judgment. *Id.*; *see also* Compl. ¶¶ 212-19.

[8] The OCC further lacks authority to preempt state law based on nineteenth-century federal courts' exposition of common law because, as the Supreme Court has held since its 1938 decision in *Erie v. Tompkins*, "[t]here is no federal general common law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)); AR 583-86.

II. THE OCC FAILED TO APPLY THE *BARNETT BANK* STANDARD AND TO FOLLOW THE PROCEDURAL STEPS REQUIRED BY CONGRESS

A court's "review of an agency's procedural compliance is exacting[.]" *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). It must ensure "statutorily prescribed procedures have been followed" and need not defer to the agency's own view of whether it complied. *Id*. (quotations and citations omitted). The OCC complied with none of the obligations Congress prescribed for rules that preempt state consumer finance laws. *See* 12 U.S.C. § 25b.

Following the 2008 mortgage crisis, the Senate Committee on Banking, Housing, and Urban Affairs found that the OCC had "actively created an environment where abusive mortgage lending could flourish without State controls" with rules that preempted state anti-predatory lending laws. Senate Report. No. 111-176, at 15-17 (2010).[9] In response, Congress cabined the OCC's power to issue rules preempting state law. Before the OCC issues regulations that will preempt state consumer finance laws, it must (1) establish that the state laws "prevent[] or significantly interfere[] with the exercise by [a] national bank of its powers," as set forth in *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); (2) consider, on a "case-by-case basis," the impact of particular state laws on National Banks; (3) consult with the Consumer Financial Protection Bureau ("CFPB") and take its views into account; and (4) adduce "substantial evidence, made on the record of the proceeding," that "supports the specific finding regarding the preemption" of state law in accordance with *Barnett Bank*. 12 U.S.C. § 25b(b), (c); *id.* § 1465 (same requirements for rulemaking under HOLA); *Lusnak,* 883 F.3d at 1191-94.

Because the OCC ignored all these requirements, its Rule must be set aside. *See W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir.), *opinion amended on denial of reh'g*, 819 F.2d 237 (9th Cir. 1987) (rules issued without adherence to the procedures set by Congress are generally void); *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1350 (Fed. Cir. 2011) ("failure to comply with notice-and-comment procedures, when required, is grounds for invalidating a rule").

[9] https://www.govinfo.gov/content/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf (also stating that federal regulators "routinely sacrificed consumer protection for short-term profitability of banks").

A. The OCC Ignored the *Barnett Bank* Standard Required by § 25b

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369. Congress stated its intent in the Dodd-Frank Act. OCC regulations may construe statutes to preempt state consumer financial laws only in three narrow circumstances:

> (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 [state-chartered banks];
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court . . . in *Barnett Bank* . . . , the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers . . . ; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than [the NBA].

12 U.S.C. § 25b(b)(1). There is no doubt state rate caps are state consumer financial laws,[10] and the Rule's sole legal effect is to preempt their application to non-banks that purchase National Bank loans. *See* AR 848. Preemption options (A) and (C) are inapplicable: The OCC does not contend application of state rate caps to non-banks would have a discriminatory effect on National Banks, nor does it claim that any law other than the NBA preempts state rate caps.[11]

Thus, before it could issue a rule construing § 85 to preempt state rate caps as to non-banks, the OCC was required to apply *Barnett Bank* to determine whether application of those rate caps to non-banks would "prevent[] or significantly interfere[] with" National Banks' exercise of their powers. 12 U.S.C. 25b(b)(1)(B); *see also Lusnak*, 883 F.3d at 1191-92. The OCC, however, refused to conduct this analysis, claiming *Barnett Bank* and the other requirements of § 25b do not apply to its rulemaking. AR 845. The Rule states two arguments for this position. Both fail.

First, the OCC claims that rules meant to construe the substantive meaning of § 85 need not comply with § 25b; in its view, only rules that "focus on preemption" are bound by these limits.

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[10] A "state consumer financial law" is a state law "that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction . . . or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). State rate caps regulate the terms of consumer financial transactions by limiting the interest that may be charged and thus fit squarely within this definition. The OCC's Rule makes no claim to the contrary.

[11] These points likewise apply to HOLA, which is equivalently limited per 12 U.S.C. § 1465.

AR 845. This distinction is specious. All rules preempting state law must derive from the substantive meaning of a statute; an agency "literally has no power" to preempt state law except through statutory authority granted by Congress. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

Even if the OCC would rather not "focus on preemption," the Rule's straightforward effect—indeed, its only purpose—is to preempt otherwise applicable state interest-rate caps; thus, § 25b and *Barnett Bank* apply. *Lusnak*, 883 F.3d 1185, 1191-92. Section 25b(b)(1) governs all cases in which OCC-administered statutes may preempt state consumer financial laws. Congress could not have been clearer: "State consumer financial laws are preempted, only if" one of the three stated conditions is met. 12 U.S.C. § 25b(b)(1). Additionally, any doubt about the Non-bank Interest Rule's preemptive purpose is answered by the titles of the regulations the Rule amends: One amendment falls under "Subpart D—Preemption" and the other is titled "Most favored lender usury preemption for all savings associations." AR 848. As the Supreme Court put it, if a rule with preemptive effect contained in the "preemption" section of OCC regulations "is not pre-emption, nothing is." *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 535 (2009).

Second, the OCC claims that a Dodd-Frank savings clause, which states that "[n]o provision of [the NBA] shall be construed as altering or otherwise affecting the authority conferred by [§ 85] for the charging of interest *by a national bank*," exempts the Rule from § 25b. 12 U.S.C. § 25b(f) (emphasis added); AR 845. The OCC's puzzling interpretation of this savings clause also fails. As discussed above in Section I, § 25b(f) confirms that § 85 grants authority "for the charging of interest" only to National Banks. But the OCC interprets it to mean that the rest of § 25b's requirements—including application of *Barnett Bank*—do not apply because the Rule interprets § 85. In other words, as long as a rule claims to interpret § 85, no matter how broad or unreasonable its preemptive effect, the OCC is free to ignore its procedural obligations. That is a willful misreading of § 25b(f), which does nothing more than preserve § 85 preemption for the only entities entitled to it: National Banks.[12]

[12] The OCC's misinterpretation of § 25b(f) as exempting rules construing § 85 (but *only* rules construing § 85) from compliance with § 25b's requirements also explains why it disclaimed reliance on the NBA provisions that give National Banks the power to sell loans in § 24. Despite

Moreover, regardless of § 25b(f), the OCC was required to apply *Barnett Bank* because that has long been the applicable standard for determining when the NBA preempts state law, irrespective of Dodd-Frank. As the Ninth Circuit explained, "with respect to NBA preemption, [Dodd-Frank] merely codified the existing standard established in *Barnett Bank*[.]" *Lusnak*, 883 F.3d at 1188. Whatever authority § 25b(f) preserved, it did not free the OCC from its obligation to analyze its Rule under *Barnett Bank*'s significant-interference standard.[13]

No matter how the OCC attempts to characterize the Rule and its authority, *Barnett Bank* and § 25b govern its rulemaking process. Congress and case law are clear: Whenever an OCC rule will preempt state consumer financial laws, the agency must perform the analysis required by *Barnet Bank* and Dodd-Frank. 12 U.S.C. § 25b(b)(1). The OCC failed to do so here.

B. The OCC Failed To Comply with All Other Requirements of § 25b

In addition to disregarding *Barnett Bank*, the OCC also unlawfully ignored all other procedural requirements governing rules that preempt state consumer finance laws. Under the Dodd-Frank Act, the OCC was required to (1) evaluate, on a "case-by-case basis," "the impact of a particular State consumer financial law on any national bank that is subject to that law" before issuing a rule preempting that state law; (2) consult the CFPB about the Rule and take its views "into account"; and (3) support its Rule with "substantial evidence, made on the record of the proceeding, [that] supports the specific finding regarding the preemption of [state law] in accordance with the legal standard of [*Barnett Bank*]." 12 U.S.C. § 25b(b)-(c); *id.* at § 1465. It is undisputed that the OCC did not comply with any of these requirements. *See* AR 845 (stating the

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repeatedly justifying the Rule on the grounds that it will enhance National Banks' ability to make and sell loans, the OCC denies that the Rule rests on the NBA provisions that actually grant those powers. AR 843 (citing 12 U.S.C. § 24(Third) and (Seventh) as providing National Banks' powers to make and sell loans); AR 845 n.50 (stating § 25b requirements do not apply because the OCC "does not cite [§ 24(Third) and (Seventh)] as direct authority for this rule or for their preemptive effect"). The OCC wants it both ways, claiming its Rule is about the ability to make and sell loans while denying reliance on the sections providing those powers.

[13] If the Court determines *Barnett Bank* does not govern the Rule, it must employ the standard presumption against preemption, which protects states' historic police powers. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) ("the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress"); *Griffith*, 218 U.S. at 569 (interest-rate caps are among states' historic police powers).

OCC's view that § 25b requirements "are inapplicable to this rulemaking").

By declining to follow the procedures set forth in § 25b and perform the analysis required by *Barnett Bank*, the OCC's Rule is action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Its failure to make the showings required by statute and case law renders the Rule "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). And its promulgation of the Rule without regard for these requirements is agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). Plaintiffs are thus entitled to summary judgment.

III. THE RULE IS WITHOUT SUPPORT IN THE RECORD, AND THE OCC FAILED TO CONSIDER RELEVANT FACTORS BEFORE ISSUING IT

A. The Court Cannot Rely on the *Barnett Bank* Standard, or Any Other Grounds Rejected or Not Cited by the OCC, To Uphold the Rule

A court "may only sustain an agency's action on the grounds actually considered by the agency." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007). It "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43. Any argument or evidence not relied on by the OCC during the rulemaking process cannot now be considered as grounds for sustaining the Rule. For example, because the OCC denies any reliance on statutory provisions authorizing National Banks to make and sell loans and does not claim interference with those powers as a basis for its Rule, AR 845 n.50 (disclaiming reliance on § 24(Third) and (Seventh)), the Court may not uphold the Rule on these grounds. Similarly, because the OCC claims § 25b does not apply to this Rule and performed no analysis pursuant to the *Barnett Bank* standard, *see* AR 845, the Court may not uphold the Rule based on that standard.

Even if the OCC had applied *Barnett Bank*, it made no findings that could support its Rule under that standard. *See* AR 305-06, 309-10, 366. The OCC merely speculates that the *Madden* decision has caused "uncertainty" in some secondary credit markets. *E.g.*, AR 842. That is not enough. "As Congress provided in Dodd-Frank, the operative question is whether [the state law] *prevents* [a National Bank] from exercising its national bank powers or *significantly interferes* with [its] ability to do so. Minor interference with federal objectives is not enough." *Lusnak*, 883

F.3d at 1194 (emphasis in original; citation omitted). Once a loan has been sold, the buyers act not on behalf of National Banks but "on their own behalves, as the owners of the debt," *Madden*, 786 F.3d at 251, and application of state rate caps to those buyers does not affect the interest National Banks "may take, receive, reserve, and charge" under § 85. The OCC's Rule cites no evidence to the contrary and fails even to substantiate its weaker claim of "uncertainty." *See* AR 128-29, 133, 305-06, 313-14, 576.

Moreover, application of state rate caps to non-banks does not significantly interfere with National Banks' ability to make and sell loans. As the Second Circuit explained, "state usury laws would not prevent consumer debt sales by national banks to third parties." *Madden*, 786 F.3d at 251. At most, they "might decrease the amount a national bank could charge for its consumer debt in certain states (*i.e.*, those with firm usury limits, like New York), [but] such an effect would not 'significantly interfere' with the exercise of a national bank power." *Id.* National Banks can also already sell their loans to more than 5,200 other federal and state banks, all of which benefit from preemption under § 85 or parallel provisions. AR 128-30. With respect to making loans, the OCC also ignored the FDIC's finding in its parallel rulemaking that "[it] is not aware of any widespread or significant negative effects on credit availability having occurred to this point as a result of the *Madden* decision." AR 630, 1195. Despite these facts and the Second Circuit's insights, the OCC fails to explain how its Rule resolves any "significant interference" with National Banks' powers. *E.g.*, AR 309-10, 366, 576.

The OCC makes oblique reference to "[t]wo commenters [who] provided empirical studies analyzing the effects of the *Madden v. Midland Funding* decision[.]" AR 842-43. The Court cannot rely on these studies to sustain the Rule. The Rule does not identify these studies by name or author and provides no discussion of the methods used, the studies' results, or the substantive role, if any, they played in the OCC's consideration of the Rule. AR 842. The Court may not supply those missing links on the agency's behalf. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43. Indeed, because the OCC failed to explain whether and how its conclusions rest on these studies, its reliance on them is itself arbitrary and capricious. *Id.* (agency must explain its reliance on relevant data).

B. The OCC Failed To Consider Relevant Factors and Important Aspects of the Issue Its Rule Addresses

Agency action is lawful only if it rests on "a consideration of the relevant factors" and must be set aside if the agency "entirely failed to consider an important aspect of the problem[.]" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42-43. Because the OCC failed to consider significant aspects of the problem its Rule is meant to address, the Rule must be set aside.

1. The OCC Failed To Consider the Rule's Facilitation of Rent-a-Bank Schemes

The Rule's facilitation of rent-a-bank schemes is an "important aspect of the problem" of interest-rate transferability that the OCC was legally bound to consider. In these schemes, non-bank lenders seek to evade state rate caps by "partnering" with banks that serve as mere pass-through entities for high-cost loans and that bear no substantial financial interest in the loans. *See, e.g.*, AR 348-49, 369-70. These schemes rely on precisely the type of transaction covered by the Rule: origination of a loan by a bank and subsequent sale of that loan to the "partner" non-bank.

The record is replete with evidence showing that the Rule will facilitate rent-a-bank schemes and result in borrower harm from predatory loans. *E.g.*, AR 313-14, 318, 338, 354-56, 373-402, 630-31, 732-38; *see also* AR 817 (OCC acknowledging many "commenters argued that this rulemaking would facilitate predatory lending through rent-a-charter relationships"). For instance, commenters cited research stating that the Rule "could encourage 'rent-a-bank' schemes where payday and other high-cost lenders launder their loans through banks," described how the Rule "opens the door more widely for high-interest nonbank lenders to operate in ways that contravene state protections for borrowers," and detailed how borrowers targeted by rent-a-bank schemes are likely to be harmed by the Rule. AR 586, 318, 388, 391-402, 747-61.

Despite these comments and other evidence in the record, the OCC ignored the rent-a-bank issues its Rule raises, merely asserting that it "has consistently opposed predatory lending, including through relationships between banks and third parties" and claiming that it has issued guidance that will prevent predatory schemes. AR 846. This is not enough. The OCC must engage with the evidence that its Rule will facilitate rent-a-bank schemes and explain how it has taken the likely facilitation of these schemes into account. *See E. Bay Sanctuary Covenant v.*

Barr, 964 F.3d 832, 854 (9th Cir. 2020) (rule limiting asylum access was arbitrary and capricious because agency's "explanation in no way addresses the special vulnerability of unaccompanied minors and the failure of the Rule to take that vulnerability into account"). The OCC must engage with all aspects of the Rule—the problems it creates, as much as those that, in the OCC's view, it solves. *Id.* at 861 ("Having compiled a record that contained extensive evidence of safety concerns . . . the agencies were required to give the safety issues more consideration than a single paragraph in the rulemaking that does not meaningfully engage with the critical question") (Miller, J., concurring in part and dissenting in part). The OCC failed to do so. *See* AR 384-86.

The OCC also refused to consider the related question of whether and how the "true lender" doctrine applies to the Rule, despite numerous comments asking the OCC to address the issue. *E.g.*, AR 300-02, 558, 743-45, 817 (OCC stating "[s]everal commenters requested that the OCC address true lender in its regulatory text"). In response to the growth of sham partnerships designed to evade state law, courts have relied on a test known as the true lender doctrine, which recognizes an entity as the true lender of a loan only when it holds "the predominant economic interest in the transaction." *E.g.*, *CFPB v. CashCall*, No. CV 15-7522, 2016 WL 4820635, at *6 (C.D. Cal. Aug. 31, 2016); *accord CashCall v. Morrisey*, No. 12-1274, 2014 WL 2404300, at *14-15 (W. Va. May 30, 2014); *Flowers*, 307 F. Supp. 2d at 1205. Whether this test applies to loan sales covered by the Rule bears directly on the Rule's facilitation of rent-a-bank schemes—if a National Bank is not the true lender, § 85 would not apply at all, irrespective of a later loan sale. Nevertheless, in response to comments asking the OCC to address the true lender doctrine as it applies to loans covered by its Rule, the agency merely stated that the question "raise[d] issues distinct from, and outside the scope of, this narrowly tailored rulemaking." AR 847.[14]

[14] After issuing the Rule, the OCC promulgated its True Lender Rule, which is the product of a distinct rulemaking process and deems a National Bank the "true lender" so long as it is named as the lender in loan documents *or* funds the loan. True Lender Rule, 85 Fed. Reg. 68,742-47. While the separate True Lender Rule cannot satisfy the OCC's obligation to consider the important aspects of the Non-bank Interest Rule, the OCC acknowledged the two rules will "operate[] together" to facilitate National Banks' transfer of § 85 preemption to non-banks. *Id.* at 68,743. In short, the Non-bank Interest Rule, rent-a-bank schemes, and the true lender doctrine are related elements of the same problem, which the OCC was bound to consider in this rulemaking.

Because rent-a-bank schemes and the applicability of the true lender doctrine are important issues concerning which transactions between National Banks and non-banks result in § 85 preemption—the very problem the Rule purports to address—the OCC's failure to consider them is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

2. The OCC Failed To Consider that the Rule Creates a Regulatory Vacuum

The OCC failed to consider that its Rule would place some lending outside any meaningful regulation. *See* AR 134-35. Congress exempted National Banks from state rate caps to place them in the position of most-favored creditor and correspondingly imposed a comprehensive federal regulatory regime, including regular supervisory visits. *See* 12 U.S.C. § 85; 12 C.F.R. § 4.2. Non-bank loan buyers are not subject to federal regulation (except in very limited circumstances unrelated to their mere purchase of loans), yet the OCC would grant them the same right to ignore state rate caps. The Rule threatens to undermine state oversight of non-bank loan buyers, many of which already argue that state oversight or licensing requirements do not apply when they partner with National Banks. AR 301-02, 557-58. The absence of meaningful oversight is heightened further by predatory lenders' use of off-shore entities, entirely removed from any American regulatory authority, that purchase loans to charge and receive the resulting interest. AR 134-35 (describing California lender's use of a Cayman Islands special-purpose vehicle to purchase assets from bank partners in a rent-a-bank scheme). But despite comments bringing these issues to the OCC's attention, the OCC failed entirely to consider this crucial aspect of its Rule.

Additionally, as noted above in Section I.B., the exclusive remedies for violations of §§ 85 and 1463(g)(1) apply specifically to National Banks. 12 U.S.C. § 86 (penalty is "twice the amount of the interest thus paid from the association [*i.e.*, national bank]"); 12 U.S.C. § 1463(g)(2) (same as to savings associations). The OCC has not considered whether those provisions apply to non-bank buyers covered by its Rule. This creates uncertainty about what, if any, remedies apply when those entities charge rates in excess of that permitted by §§ 85 and 1463(g)(1).

Because the OCC failed to consider the Rule's consequences as well as important aspects of the problem it seeks to address, the Rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

C. The Rule Conflicts with the OCC's Longstanding Interpretation of § 85

When an agency departs from a previously held policy position, it "must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal quotation marks omitted). "[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Id.* (quoting *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

Prior to the present rulemaking, the OCC held the position that the preemptive power of § 85 applies only to National Banks and cannot be transferred to others. As it explained in 2002,

> The benefit that national banks enjoy by reason of [§ 85 preemption] cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.

AR 340 (quoting public remarks). The OCC expressed concern about rent-a-bank schemes, which it called "an abuse of the national charter" that gives rise to "safety and soundness problems at the bank." AR 340-41, 404. The OCC confirmed in a 2018 Bulletin that it "views unfavorably an entity that partners with a bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing state(s)." AR 385; *see also* Compl. ¶ 181.[15]

The Rule conflicts with the agency's long-held policy, and the OCC has failed to explain why its stance has changed, rendering the Rule arbitrary and capricious. 5 U.S.C. § 706(2)(A).

CONCLUSION

The OCC's Rule is unsupported by and contrary to the plain text of the NBA and HOLA; the OCC ignored required rulemaking procedures; and the Administrative Record and the agency's reasoning undermine, rather than support, the Rule. For all of these reasons, the Non-bank Interest Rule violates the APA and must be held unlawful and set aside. 5 U.S.C. § 706(2).

[15] The OCC rescinded this Bulletin in May 2020, less than two weeks before it published the Non-bank Interest Rule. The rescission announcement neither acknowledged nor explained any change in policy. OCC Bulletin 2020-54, *Small-Dollar Lending: Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 20, 2020), https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-54.html; Compl. ¶ 181; Answer ¶ 181.

Dated: December 10, 2020

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, **v.** **THE OFFICE OF THE COMPTROLLER OF THE CURRENCY**, et al., Defendants.	Case No. 4:20-cv-05200-JSW **[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND VACATING DEFENDANTS' RULE**

On March 19, 2021 at 9:00 a.m., the Court heard the Motion for Summary Judgment brought by Plaintiffs the People of the State of California, the People of the State of Illinois, and the People of the State of New York (collectively, "Plaintiffs"), asking that that the Court hold unlawful and set aside Defendant the Office of the Comptroller of the Currency's ("OCC") Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred ("Non-bank Interest Rule" or "Rule"), 85 Fed. Reg. 33,530-36 (June 2, 2020) (codified at 12 C.F.R. §§ 7.4001(e) and 160.110(d)). Having considered the Administrative Record [Dkt. No. 35], all papers filed in support of and in opposition to summary judgment, oral arguments of counsel, and all other pleadings and papers filed herein, the Court grants summary judgment in Plaintiffs' favor and vacates the Non-bank Interest Rule.

States have long used interest-rate caps to prevent predatory lending. *See Griffith v. State of Conn.*, 218 U.S. 563, 569 (1910). In light of the comprehensive federal regulatory regime to which national banks and federal savings associations (collectively, "National Banks") are subject, Congress exempted them from compliance with state rate caps in the National Bank Act ("NBA") and Home Owners' Loan Act ("HOLA"). 12 U.S.C. § 85 (allowing national banks to "take, receive, reserve, and charge" interest in excess of state law); 12 U.S.C. § 1463(g)(1) (same for federal savings associations); *see also Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9-10 (2003). The OCC's Rule unlawfully extends preemption of state rate caps to any entity—bank or not—that buys loans from a National Bank. 85 Fed. Reg. 33,530-36.

The Rule's interpretation of §§ 85 and 1463(g)(1) would allow non-bank loan buyers to charge interest in excess of state law. This interpretation conflicts with the unambiguous statutory text, which preempts state rate caps in favor of National Banks alone. *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 296 (3d Cir. 2005). Additional provisions of the NBA confirm that Congress did not extend the benefits of § 85 to non-banks. *E.g.*, 12 U.S.C. §§ 25b, 86; *see also id.* § 1463(g)(2).

The OCC also ignored procedural requirements Congress imposed on its rulemaking authority. *See* 12 U.S.C. §§ 25b, 1465(a). The Rule preempts state consumer finance laws and thus the OCC was required to apply the "significant interference" standard for NBA preemption. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); 12 U.S.C. § 25b(b)(1)(B). The Court may not uphold a rule on grounds the agency failed to consider. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007). In any case, the Administrative Record demonstrates that application of state rate caps to non-banks does not significantly interfere with National Banks' exercise of their powers. The OCC also failed to comply with the other requirements of 12 U.S.C. § 25b: It failed to (1) evaluate, on a "case-by-case basis," "the impact of a particular State consumer financial law on any national bank that is subject to that law" before issuing its Rule, which preempts that state law; (2) consult the Consumer Financial Protection Bureau about the Rule and take its views "into account"; and (3) support its Rule with "substantial evidence, made on the record of the proceeding, [that] supports the specific finding

regarding the preemption of [state law] in accordance with the legal standard of [*Barnett Bank*]." 12 U.S.C. § 25b(b)-(c); *id.* § 1465.

Finally, the OCC's action is arbitrary and capricious because the agency failed to address important aspects of the problem its Rule is intended to address, including the Rule's facilitation of "rent-a-bank" schemes and its creation of a regulatory vacuum. The Rule also rests on contentions that run counter to the evidence in the Administrative Record and conflicts with prior OCC interpretations of National Banks' interest-rate preemption authority. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

For these reasons, the Court finds that the OCC's Non-bank Interest Rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; is in excess of statutory jurisdiction, authority, and limitations, and short of statutory right; and constitutes agency action taken without observance of procedure required by law. The Rule thus violates the Administrative Procedure Act, 5 U.S.C. § 706(2), and must be set aside.

Good cause appearing therefore, **IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' Motion for Summary Judgment is **GRANTED;** and
2. The Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530-36 (June 2, 2020) (codified at 12 C.F.R. §§ 7.4001(e) and 160.110(d)) is **VACATED.**

Dated:

By: _____
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, and BRIAN P. BROOKS, in his official capacity as Acting Comptroller of the Currency,

Defendants.

Case No. 4:20-cv-05200-JSW

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: March 19, 2021
Time: 9:00 a.m.
Place: Oakland Courthouse, Courtroom 5
Before: Judge Jeffrey S. White

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on March 19, 2021, at 9:00 a.m. in Courtroom 5, 2d Floor, of the United States Courthouse, 1301 Clay Street, Oakland, California, before the Honorable Jeffrey S. White, the Office of the Comptroller of the Currency and Acting Comptroller of the Currency Brian Brooks ("Defendants") will respectfully move this Court for an order granting summary judgment to the OCC, pursuant to Federal Rule of Civil Procedure 56. As demonstrated in the accompanying memorandum of points and authorities, and the Administrative Record, the challenged Final Rule is supported by the Record. The Final Rule is neither arbitrary or capricious, nor contrary to law, is consistent with the OCC's authority, and in compliance with applicable procedural requirements. Defendants ask the Court to grant Defendants' Motion for Summary Judgment and deny Plaintiffs' Cross-Motion for Summary Judgment.

SUMMARY OF ARGUMENT

Loan transfers support the orderly function of markets and credit by providing liquidity and alternative funding sources and allowing banks to manage concentrations, improve financial performance ratios, and more efficiently meet customer needs. Recent developments, including the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), have created legal uncertainty regarding the effect of a transfer on a loan's permissible interest rate. Consistent with its regulatory and supervisory authority, and to address this legal uncertainty, the Office of the Comptroller of the Currency ("OCC" or Agency") issued a Final Rule, after notice and comment, interpreting § 85 of the National Bank Act to clarify that a national bank or savings association may transfer a loan without affecting the permissible interest term. *See* Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33530-36. (June 2, 2020) ("Final Rule").

Plaintiffs' challenges to the Final Rule are meritless. *First*, the OCC is the primary regulator of the national banking system and has authority to interpret the National Bank Act. Reflecting the authority—and consistent with the National Bank Act's text and structure—the Final Rule reasonably interprets the "gap" in § 85 concerning what happens when a national bank sells, assigns, or transfers a loan. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Moreover, the Final Rule is consistent with § 85's purpose of facilitating national banks' ability to operate their nationwide lending programs. *Second*, 12 U.S.C. §25b does not apply to the Final Rule because it is not a "preemption determination" of a "state consumer financial law." The Supreme Court has recognized that "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute" is distinct from "the question of *whether* a statute is pre-emptive." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996). Here, the Final Rule addresses only the *meaning* of § 85 and specifies the interest rate that applied when a loan was made, does not change when a bank sells, assigns, or transfers a loan. And Congress has expressly exempted OCC's interpretations of § 85 from § 25b's requirements. *See id.* at § 25b(f)). *Finally*, in issuing the Final Rule, the OCC made an informed and reasoned decision, based on the evidence in the record, including the issues raised in the public comments, and its own expertise. Thus, the Court should defer to the OCC's judgments and uphold the Final Rule.

BACKGROUND

A. The Office of the Comptroller of the Currency

The Office of the Comptroller of the Currency ("OCC" or "Agency") is an independent bureau of the U.S. Department of the Treasury headquartered in Washington, D.C. Under the National Bank Act of 1864, the OCC has primary regulatory and supervisory responsibility over the national banking system. 12 U.S.C. § 1 *et seq*, as amended. Specifically, the National Bank Act charges the OCC with maintaining the safety and soundness of national banks and ensuring that institutions subject to its jurisdiction abide by applicable laws and regulations, offer fair access to financial services, and provide fair treatment of customers. *Id.* § 1(a); *see also* 12 C.F.R. § 4.2. The OCC also has regulatory and supervisory authority over federal savings associations pursuant to the Home Owners' Loan Act of 1933 ("HOLA"). 12 U.S.C. § 1461 *et seq.*, as amended.

To accomplish these mandates, Congress vested the Comptroller of the Currency with authority "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. Reflecting this broad authority, Courts have accorded "great weight" to the OCC's reasonable interpretations of the National Bank Act. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws." (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987)). This deference extends to the OCC's interpretations of 12 U.S.C. § 85, which, *inter alia*, empowers national banks to charge interest at the maximum rate "allowed by the laws of the State, Territory, or District where the bank is located."[1] Section 85, in tandem with 12 U.S.C. § 86, establish the comprehensive statutory scheme governing interest permitted on national bank-originated loans. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003).

[1] Twelve U.S.C. § 1463(g) also provides, *inter alia*, savings associations with authority to charge interest as permitted by the laws of the state in which the association is located. Congress modeled § 1463(g) on § 85 in order to place savings associations on equal footing with their national bank competitors, and the OCC interprets these provisions *in pari materia*. AR at 845; *see also Gavey Props./762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988). Though this memorandum focuses its discussion on § 85 and national banks, the analysis applies equally to § 1463(g) and savings associations.

B. The OCC's Rulemaking

On November 21, 2019, the OCC published a Notice of Proposed Rulemaking ("NPR") proposing to codify that when a national bank or savings association sells, assigns, or otherwise transfers a loan, interest permissible before the transfer remains permissible after the transfer. Administrative Record ("AR") at 86-89. The NPR observed that

> Federal law authorizes national banks and savings associations . . . to charge interest at the maximum rate permitted to any state-chartered or licensed lending institution in the state where the bank is located. Pursuant to Federal law, national banks and Federal savings associations may also enter into contracts. Inherent in this authority is the authority to assign such contracts. In addition, well-established authority authorizes banks to sell, assign, or otherwise transfer their loans.

AR at 87.

"Despite these clear authorities," the NPR acknowledged that recent developments, including the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), had "created uncertainty" about the ongoing validity of a loan's interest term after a national bank sells, assigns, or otherwise transfers a loan. AR at 87. After analyzing the relevant provisions of the National Bank Act and HOLA, the OCC reasonably concluded that when a national bank or savings association "sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer." *Id.* To that end, the OCC sought comment on its proposal to codify this conclusion by amending two of its regulations; specifically, by adding paragraphs to each regulation stating that interest on a loan that is permissible under §§ 85 and 1463(g)(1), respectively, "shall not be affected by the sale, assignment, or other transfer of the loan."[2] AR at 88.

The OCC received over sixty comments on all aspects of the NPR. *Id.* at 86, 89, 112-813. Many commenters supported the proposed rule, observing that legal certainty on this issue would benefit financial institutions and markets by promoting better liquidity, diversification, and risk management practices. *See, e.g.*, *id.* at 259-64, 266-68, 278-81, 285-94, 320-28, 504-15, 598-603. These commenters also agreed that the OCC had authority to address this issue by regulation and that the Agency's proposed rule reflected a permissible interpretation of federal banking laws. *See, e.g.*, *id.* at 261-63,

[2] 12 C.F.R. §§ 7.4001 (pertaining to national banks) and 160.110 (pertaining to savings associations).

323-24, 507-11, 601. Others opposed, arguing that the OCC lacked authority to issue the proposed rule and questioning its necessity. *See, e.g.*, *id.* at 120-201, 333-52, 353-452, 573-89. These commenters also maintained that the OCC's proposal was subject to, but did not comply with, the substantive and procedural provisions contained in 12 U.S.C. § 25b and the Administrative Procedure Act ("APA"). *See, e.g.*, *id.* at 123-33, 339-50, 363-65, 575-80. Finally, several commenters stated that the NPR would facilitate predatory lending by promoting rent-a-charter relationships and allowing nonbanks to evade otherwise applicable state law. *See, e.g.*, *id.* at 134-36, 348-49, 373-83, 586-89.

After evaluating all comments, the OCC published the Final Rule on June 2, 2020. AR at 842-48. The OCC reiterated that the Final Rule aims "to clarify that a bank may transfer a loan without impacting the permissibility or enforceability of the interest term in the loan contract, thereby resolving the legal uncertainty created by the *Madden* decision." *Id.* at 843. Based on its supervisory experience, the OCC concluded that the Final Rule was necessary because "unresolved legal uncertainty about this issue may disrupt banks' ability to serve consumers, businesses, and the broader economy efficiently and effectively, particularly in times of economic stress." *Id.* at 842. The OCC further stated that "enhanced legal certainty may facilitate responsible lending by banks, including in circumstances when access to credit is especially critical." *Id*; *see also id.* at 109 (memorandum from OCC Bank Supervision Policy group) (stating that *Madden* "has likely contributed to uncertainty for potential investors and diminished the liquidity of certain markets for distressed loans," and that "[e]liminating such uncertainty will allow banks to more proactively engage in historically sound processes for managing their balance sheets").[3]

As authority for the Final Rule, the OCC relied on 12 U.S.C. § 85, which authorizes national banks to "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank

[3] Several courts have also recognized the legal uncertainty resulting from the *Madden* decision. *See Cohen, et al. v. Capital One Funding, LLC, et al.*, No. 19-cv-3479 (KAM)(RLM), 2020 WL 5763766, at *12 (E.D.N.Y. Sept. 28, 2020); *Peterson, et al. v. Chase Card Funding, LLC, et al.*, No. 1:19-cv-00741-LJV-JJM, 2020 WL 5628935, at *5-7 (W.D.N.Y. June 6, 2019). These courts have also implicitly recognized the OCC's authority to resolve this legal uncertainty under the National Bank Act. *See Cohen*, 2020 WL 5763766, at *10; *Peterson*, 2020 WL 5628935, at *5-6. Indeed, the 9th Circuit also recently recognized the legal uncertainty that the *Madden* decision has created. *See McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 892 (9th Cir. 2020) (citing research articles noting that, in the wake of the *Madden* decision, lenders made fewer and smaller loans to higher-risk borrowers in Connecticut and New York).

is located." The OCC noted that federal law "grants national banks broad authority to engage in the business of banking" and, as relevant here, with the power to "make contracts," "lend money," and "transfer loans." AR at 843; *see also* 12 U.S.C. §§ 24(Third), 24(Seventh), 371. The National Bank Act also provides national banks with "all such incidental powers as shall be necessary to carry on the business of banking." AR at 843 (quoting 12 U.S.C. § 24(Seventh)). Section 85, however, "does not expressly address how the exercise of a national bank's authority to transfer a loan and assign the loan contract affects the interest term." *Id.* Because loan transfers form "a fundamental aspect of the business of banking," the OCC concluded that § 85's "silence in this regard is 'conspicuous[],'" and that it possessed authority to interpret § 85 "to resolve this silence." *Id.* (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

The OCC reasonably construed § 85 consistent with the National Bank Act. The provisions of the National Bank Act and other federal law that empower national banks to lend money and make contracts, 12 U.S.C. §§ 24(Third), (Seventh), 371, "highlight[ed] the silence in § 85" and also "inform[ed] the OCC's efforts to resolve this silence." AR at 844. Similarly, the OCC also noted that § 85 "facilitates national banks' ability to operate lending programs on a nationwide basis" and that Congress had emphasized the importance of this authority by extending such authority to savings associations, state-chartered insured depository institutions, and insured credit unions. *Id.* Given this framework, the OCC concluded that "[r]eading § 85 as applying only to loans that a national bank holds to maturity" would "undermine this statutory scheme." *Id.*

The OCC also reasoned that several foundational common law and contract law principles—namely, those concerning the assignability of contracts—informed its reasonable interpretation of § 85. *See* AR at 844-45. For example, the OCC noted that "[w]ell before the passage of the [National Bank Act], the Supreme Court recognized that 'a contract, which in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.'" *Id.* at 845 (quoting *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833)) (this principle is frequently referred to as "valid-when-made"). The OCC also observed that courts have held the inverse—*i.e.*, that a loan that is usurious in its inception remains usurious until purged by a new contract. *Id.* Read together, the OCC viewed these cases as

supporting the "broad proposition" that "the usurious or non-usurious character of a contract endures through assignment." *Id.* at 844.

Finally, the OCC emphasized that it has "consistently opposed predatory lending, including through relationships between banks and third parties." AR at 846. Although "third-party relationships play an important role in banks' operations and the economy," the OCC explained that "[n]othing in this rulemaking in any way alters the OCC's strong position on this issue, nor does it rescind or amend any related OCC issuances." *Id.* Similarly, the OCC also emphasized that § 85 "incorporate[s], rather than eliminate[s]," state interest caps. *Id.* "[T]hese statutes require that a bank refer to, and comply with, the interest cap established by the laws of the state where the bank is located." *Id.* Accordingly, the OCC observed that "disparities between the interest caps applicable to particular bank loans result primarily from differences in the state laws that impose those caps." *Id.* The Final Rule "does not change that." *Id.*

LEGAL STANDARD

Under the APA, an agency's decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of its statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "without observance of procedure required by law," *id.* § 706(2)(D). A court's review under the arbitrary and capricious standard is "narrow and deferential," *California v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020) (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019)), "presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision." *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir.2000)). Thus, courts may not substitute their judgment for that of the agency, *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008), and they "must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made," *Azar*, 950 F.3d at 1096 (quoting *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016)). Unlike substantive challenges, de novo "review of an agency's procedural compliance is

exacting, yet limited . . . to ensuring that statutorily prescribed procedures have been followed." *Kern Cty. Farm Bureau*, 450 F.3d at 1076. (citation and internal quotation marks omitted).

ARGUMENT

I. THE FINAL RULE SHOULD BE UPHELD AS A VALID INTERPRETATION OF THE NATIONAL BANK ACT

The Supreme Court has repeatedly deferred to OCC regulations interpreting the National Bank Act, including 12 U.S.C. § 85. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); *NationsBank of N.C., N.A.*, 513 U.S. at 256-57; *Clarke*, 479 U.S. at 403-04. In assessing the OCC's most recent regulation interpreting that provision, courts apply the two-step analysis set forth in *Chevron*, 467 U.S. 837. Under that framework, courts initially consider whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, Congress' resolution of the issue controls. *Id.* But if the statute leaves a "gap" or is "ambigu[ous]" on the question at hand, courts grant "the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuzzo Speed Techs. v. Lee*, 136 S. Ct. 2131, 2142 (2016); *see also Chevron*, 467 U.S. at 843 (stating that courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). The Final Rule warrants this deferential treatment because the National Bank Act "contains . . . a gap": namely, whether interest charged on loans originated pursuant to § 85 remains permissible when the national bank exercises its authority to sell, assign, or transfer these loans to third parties. *See Cuzzo Speed Techs.*, 136 S. Ct. at 2142.

A. The OCC Has Authority to Issue Rules Governing National Banks and Savings Associations

As the agency bearing primary responsibility for the supervision and regulation of the national banking system, the OCC has comprehensive authority over the chartering, supervision, and regulation of virtually every aspect of the operation of national banks. *See* 12 U.S.C. §§ 1 *et seq*. (national banks), 1461 *et seq.* (federal savings associations). Reflecting this authority, the OCC also has broad discretion to interpret statutes governing these institutions' business operations. *See Chevron*, 467 U.S. at 843; *see*

also Inv. Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants [deference] with respect to his deliberative conclusions as to the meaning of these laws."). As relevant to this rulemaking, federal law empowers national banks to lend money, make contracts, and transfer loans. *See* 12 U.S.C. §§ 24(Third), 24(Seventh), 371; *see also id.* § 1464. These powers carry with them the power of assignment. *See Planters' Bank of Miss. v. Sharp*, 47 U.S. 301, 322-23 (1848). Similarly, federal law authorizes national banks to charge interest at the maximum rate "allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. Section 85, however, does not expressly address its application when a national bank sells, assigns, or transfers its loans to third parties. Because § 85 remains "silent or ambiguous with respect to th[is] specific issue," *see Chevron*, 467 U.S. at 843, the OCC may reasonably exercise its delegated authority to fill this statutory gap, *see Smiley*, 517 U.S. at 746.

Given this comprehensive regulatory framework, the OCC possesses clear authority to issue the Final Rule. The Final Rule reasonably interprets § 85's silence to clarify the scope of permissible banking activities for the institutions it regulates and facilitate the safe and sound operation of the national banking system. As courts recognize, loan transfers were a fundamental aspect of the business of banking even before Congress enacted the National Bank Act. *See Planters' Bank of Miss.*, 47 U.S. at 323. And as the Plaintiffs recognize, the OCC is authorized to issue regulations related to national bank business operations. Pls.' Mem. of Points and Authorities in Support of Mot. for Summ. J. at 13 (hereinafter, "Pls.' Mem."). Accordingly, the OCC possesses clear authority to interpret § 85 to resolve the silence and issue a final rule clarifying the effect of a national bank's sale, assignment, or transfer of a loan on the interest term of the loan contract.

For similar reasons, Plaintiffs' contention that the OCC lacks authority to issue the Final Rule because it governs the conduct of "non-banks" is specious. Specifically, Plaintiffs argue that the OCC lacks authority to issue the Final Rule because it would regulate the interest rate that a non-bank may charge "after a bank transfers a loan" to the non-bank. *Id*. at 12-13. But the Final Rule does not govern the conduct of non-banks; rather, it clarifies § 85's meaning and only applies to the lending activities of

entities the OCC regulates. Reflecting this, the Final Rule is consistent with §85's purpose to facilitate national banks' ability to operate lending programs on a nationwide basis. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315-18 (1978) (concluding that Congress was aware of, and intended to facilitate, interstate lending when it enacted § 85). Therefore, despite Plaintiffs' mischaracterization of the Final Rule as the "Non-bank Interest Rule," Plaintiffs' claim that the OCC lacks authority to issue the Final Rule is baseless and must be rejected. *See* Pls.' Mem 13.

Moreover, Plaintiffs' assertion that the Second Circuit's *Madden* decision divests the OCC's authority to issue the Final Rule is based on their misreading of that court's holding. Pls.' Mem. at 13. In *Madden*, the Second Circuit confronted a narrow legal issue: whether the National Bank Act preempted New York State usury law. 786 F.3d at 249. Although the Second Circuit cited 12 U.S.C. § 85—which incorporates, rather than replaces, states' usury laws—it did not address or analyze that provision's substantive scope. *See id.* at 250. Nor did the Second Circuit conclude that § 85 unambiguously forecloses national banks from relying on that provision to support the ongoing permissibility of a loan's interest terms after the loan's transfer to a third party. *See id.* Instead, the Second Circuit merely concluded that "application of the state law on which [the] claim relies" did not conflict with a national bank's "ability to exercise its powers under the [National Bank Act]." *Id.* Accordingly, the Second Circuit made no finding that § 85's language unambiguously addresses the statutory "gap" identified in the Final Rule, *see id.*; *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (requiring that "judicial precedent hold[ ] that the statute unambiguously forecloses the agency's interpretation"). Therefore, the OCC retains authority to fill this "gap" in the National Bank Act. *See NationsBank of N.C., N.A.*, 513 U.S. at 813.

B. The National Bank Act Does Not Unambiguously Address 12 U.S.C. § 85's Applicability to Loans Sold, Assigned, or Transferred to Third Parties

The Final Rule satisfies *Chevron* Step One because neither § 85 nor any other provision of the National Bank Act "unambiguously directs" how the sale, assignment, or transfer of national bank-originated loan affects the loan's interest term. *See Cuzzo Speed Techs.*, 136 S. Ct. at 2142. When analyzing statutes at *Chevron* Step One, a reviewing court "should not confine itself to examining a

particular statutory provision in isolation." *Fed. Drug Admin. v. Brown & Williamson Tobacco Corp.*, 259 U.S. 120, 133 (2000). Instead, courts should apply "traditional tools of statutory construction" to "read the words of statutes in their context and with a view to their place in the overall statutory scheme." *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1031, 1165 (9th Cir. 2007) (citations and quotation marks omitted); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Starting with the text, § 85 is the sole provision that governs the interest permissible on a loan made by a national bank. 12 U.S.C. § 85; *see also* AR at 842. No other provision "sets forth the substantive limits on the rates of interest" on national bank-originated loans. *See Beneficial Nat'l Bank*, 539 U.S. at 9. Similarly, 12 U.S.C. § 86 provides the exclusive remedy for violations of § 85. Together, these two provisions "constitute the comprehensive statutory scheme governing the interest permitted on national bank loans." AR at 842; *see also Farmers' & Mechs. Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875) ("In any view that can be taken of [§ 86], the power to supplement it by State legislation is conferred neither expressly nor by implication."). But neither provision "expressly address[es] how the exercise of a national bank's authority to transfer a loan and assign the loan contract affects the interest term." *See* AR at 842. This silence "means that Congress has . . . likely delegate[ed] gap-filling power to the agency." *United States v. Home Concrete & Supply, LLC*, 556 U.S. 478, 488 (2012).

Other National Bank Act provisions magnify § 85's silence on this question. For example, the National Bank Act empowers national banks to make contracts. *See* 12 U.S.C. §§ 24(Third). "Among the essential rights associated with this power is the right to assign some or all of the benefits of a contract to a third party." *See* AR at 843 (citing Restatement (Second) of Contracts § 317 (Am. Law Inst. 1981)). The National Bank Act expressly empowers national banks to "loan[] money on personal security" and "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. §§ 24(Seventh), 371(a); *see also* 12 C.F.R. §§ 7.4008, 34.3. The National Bank Act also provides national banks with "all such incidental powers as shall be necessary to carry on

the business of banking." 12 U.S.C. § 24(Seventh). These powers "necessarily" include the authority to transfer loans. *See, e.g.*, *Planters' Bank of Miss.*, 47 U.S. at 322.

These powers highlight one of the National Bank Act's primary goals: the facilitation of "a 'national banking system'" that recognizes, endorses, and furthers "the interstate nature of American banking." *Marquette Nat'l Bank*, 439 U.S. at 314-15 (quoting Cong. Globe, 38th Cong., 1st Sess. 1451 (1864)). These powers also highlight § 85's "conspicuous[]" silence on whether a national bank-originated loan's interest rate remains permissible once sold, assigned, or transferred to third parties within that interstate system. *See Baldwin v. United States*, 921 F.3d 836, 842 (9th Cir. 2019) (concluding that statutory provision was "conspicuously silent" as to whether it incorporated or displaced a common-law rule); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009) (stating that "silence is meant to convey nothing more than a refusal to tie the agency's hands").

Congress also passed the National Bank Act "in part to create a *market* for the loans of the General government." *See Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 411 (1873) (emphasis added). Congressional debates surrounding the enactment of § 85 also "occurred in the context of a developed interstate loan *market*." *Marquette Nat'l Bank*, 439 U.S. at 317 (emphasis added); *see also Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 590 (1839) ("[N]umerous banks established by different states are in constant habit of contacting and dealing with one another."). Reflecting this, Congress understood that loan assignments and transfers were—and would continue to be—essential to the business of banking. *See Planters' Bank of Miss.*, 47 U.S. 323 ("[Banks] must be able to assign or sell [their] notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house."). Taken together, these authorities further accentuate the statutory "gap" reflected in § 85 and addressed by the Final Rule.

Plaintiffs either ignore or downplay these authorities, asserting instead that § 85's reference to "associations" renders it unambiguous on these points. Pls.' Mem. at 7-9. This overly narrow reading misconstrues § 85's close relationship to other federal banking provisions. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). Even so, § 85's reference to "associations" does not "directly addres[s] the precise question

at issue," *i.e.*, whether interest permissible on a national bank-originated loan remains permissible once sold, assigned, or transferred to third-parties.[4] *See Chevron*, 467 U.S. at 843; *cf. Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 959 n.12 (9th Cir. 2005) (observing that "[t]he absence of any reference to operating subsidiaries in the [National] Bank Act does not unambiguously provide that national banks may not create and perform banking functions through such entities").

C. The Final Rule Represents a Reasonable Interpretation of § 85 and Should Be Upheld

Because §85 is silent on the question at hand, the Court must determine whether the OCC's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see also Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1089 (9th Cir. 2016) (stating that when the statutory text "does not preclude the agency's challenged interpretation, it must be said that Congress has not spoken to the issue" (quoting *S.J. Amoroso Constr. Co. v. United* States, 981 F.2d 1073, 1075 (9th Cir. 1992))); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 773 (9th Cir. 2011) (observing that *Chevron* Step Two requires courts to "determine if the agency's interpretation of the statute is 'a reasonable policy choice for the agency to make'" (quoting *Brand X.*, 545 U.S. at 986 (2005))). The Final Rule meets this "generous" standard. *See Or. Rest. & Lodging Ass'n*, 816 F.3d at 1089.

First, the Final Rule represents a reasonable interpretation of § 85 when viewed alongside national banks' authority to make and assign contracts. As the Final Rule explains,

> [T]he OCC does not agree that the interest term of the contract should be treated differently, nor does it believe that the enforceability of an assigned interest term should depend on the licensing status of the assignor or assignee. Upon assignment, the third-party assignee steps into the shoes of the national bank and may enforce the rights the bank assigned to it under the contract. To effectively assign a loan contract and allow the assignee to step into the shoes of the national bank assignor, a permissible interest term must remain permissible and enforceable notwithstanding the assignment. The loan should not be considered usurious after the assignment simply because a third party is enforcing the contractually agreed-upon interest term. Furthermore, an assignment should not change the borrower's obligation to repay in any material way.

AR at 844 (citations omitted); *see also Planters' Bank of Miss.*, 47 U.S. at 322-33 (stating that banks' ability "to assign or sell . . . notes" has been "an American rule for centuries").

[4] For similar reasons, 12 U.S.C. § 86's parallel reference to "association[s]" does not address "the precise question at issue" and further highlights § 85's ambiguity on this point.

Second, the Final Rule conforms with Congress's goal of "provid[ing] a symmetrical and complete scheme" for national bank operations. *See Easton v. Iowa*, 188 U.S. 220, 231 (1903). As discussed in the Final Rule, the National Bank Act enabled—and the Final Rule furthers—the interstate operation of national bank lending programs, "a characteristic fundamental to national banks since their inception." AR at 846 (collecting cases). The Supreme Court has consistently held that § 85 is an "enabling" statute protecting national banks from state legislatures seeking to bind national banks to lower interest rates applicable to other state institutions. *See Tiffany*, 85 U.S. at 413 ("National banks have been national favorites."). Given these goals, any interpretation of § 85 providing state legislatures—especially states that are strangers to the original transaction—with a backdoor method for doing so warrants skepticism. *See Marquette Nat'l Bank*, 439 U.S. at 314 ("Whatever policy of 'competitive equality' has been discerned in other sections of the National Bank Act, . . . [§ 85] ha[s] been interpreted for over a century to give advantages to National banks over their State competitors." (citations and quotation marks omitted)). Similarly, any interpretation of § 85 suggesting that national banks cannot respond to and serve the modern "business needs of the country" lacks persuasive force. *See Merchants' Nat'l Bank v. State Nat'l Bank*, 77 U.S. 604 (1870); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (noting that courts should avoid statutory interpretations that would "defeat [the] plain purpose" of a statute).

Third, longstanding common law principles regarding the assignability of loan contracts provide further support for the OCC's interpretation of § 85. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."). As the OCC explained in the Final Rule, "[w]ell before the passage of the [National Bank Act]," the Supreme Court recognized the so-called "valid-when-made" principle, namely, that "'a contract, which in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.'" AR at 844 (quoting *Nichols*, 32 U.S. (7 Pet.) at 109). The OCC observed that courts have held the inverse of this principle, namely "that a loan that is usurious in its inception remains usurious until purged by a new contract." *Id.* (collecting cases).

Thus, the OCC did not reference the "valid-when-made" principle in an effort to "override the plain text of § 85." Pls.' Mem. at 15. Rather, the OCC relied on cases establishing the "valid-when-made" principle—and those establishing the inverse—as support for a broader proposition, situated within a common law historical framework, to "inform its reasonable interpretation of section 85." AR at 844. When viewed alongside national banks' authority to make and assign contracts, the OCC's interpretation is "'a reasonable policy choice for the agency to make'" to which the Court should defer. *Sharemaster v. U.S. Sec. & Exch. Comm'n*, 847 F.3d 1059, 1067 (9th Cir. 2017) (quoting *Brand X*, 545 U.S. at 986).[5]

Finally, the OCC's interpretation promotes national banks' safe and sound operations. *See* 12 U.S.C. §§ 1 (charging the OCC with "assuring the safety and soundness" of institutions subject to its supervision); 93a (authorizing the Comptroller "to prescribe rules and regulations to carry out the responsibilities of the office"). For centuries, courts have recognized that the ability to transfer loans forms an important tool to manage banks' liquidity and enhance their safety and soundness. *See Planters' Bank of Miss.*, 47 U.S. at 301. "Although the banking system has evolved significantly in the 150 years since *Planters' Bank*, national banks of all sizes continue to routinely rely on loan transfers to access alternative funding sources, manage concentrations, improve financial performance ratios, and more efficiently meet customer needs." AR at 845; *see also, e.g.*, *Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735, 745 (Cal. Ct. App. 1979) (concluding that the assignee of a bank note could continue to receive the rate the assigning bank could, because to conclude otherwise would "prohibit-make uneconomic-the assignment or sale by banks of their commercial property to a secondary market[, which] would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance"); *LFG Nat'l Capital, LLC v. Gary, Williams, Finney, Lewis, Watson & Sperando P.L.*, 874 F. Supp. 2d 108, 125 (N.D.N.Y. 2012) (stating the same). The Final Rule supports these considerations.

[5] Plaintiffs also contend that the OCC's interpretation of the valid-when-made principle is incorrect. Pls.' Mem at 15. Contrary to Plaintiffs' contention, however, the OCC's interpretation is amply supported in case law. *See*, *e.g.*, AR at 855.

Based on an overly narrow reading of § 85, Plaintiffs contend that safety and soundness considerations are extraneous to the statute, and the OCC wrongly considered them when issuing the Final Rule, because "Section 85 only pertains to what interest a National Bank may charge." Pls.' Mem at 14. But Plaintiffs' reading completely ignores that the Final Rule is consistent with § 85's—and the National Bank Act's—facilitation of a national, interstate banking system. *See* AR at 844; *see also Marquette Nat'l Bank*, 439 U.S. at 315-18 (1978) (concluding that Congress was aware of, and intended to facilitate, interstate lending when it enacted § 85). As the record shows, the Final Rule's clarification that when a bank transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer, is an important component of supporting banks' safety and soundness within the context of such nationwide lending. AR at 845.[6] As the prudential regulator charged with "assuring the safety and soundness" of institutions subject to its supervision, 12 U.S.C. § 1, it is more than reasonable for the OCC to interpret the silence in § 85 in a manner that is consistent with safety and soundness principles. Accordingly, Plaintiffs' contention that such principles are extraneous to § 85 must be rejected.

1. Plaintiffs' Interpretation Does Not Reflect Congress' Unambiguous Intent

Plaintiffs raise several arguments supposedly foreclosing the OCC's authority to interpret § 85's silence on national bank loan sales, assignments, and transfers to third parties. Pls.' Mem. at 6-14. None have merit; each argument either relies on statutory provisions irrelevant in this case, misconstrues caselaw and/or other authority supporting the OCC's interpretation, or mischaracterizes the way the OCC relied on these authorities when issuing the Final Rule.[7]

[6] *See*, *e.g.*, AR at 275 ("Loan assignments are an important choice to manage liquidity and often may be the best course of action. Banks also rely on assignments in secondary market securitization to manage concentrations of credit and access other funding sources. All these tools are used to effectively manage financial institutions and meet customers' needs."); *id.* at 507 ("The Proposed Rule would increase the safety and soundness of the financial system by allowing national banks and federal savings associations the flexibility to easily liquidate loans in times of stress."); *see also* AR at 109, 260, 519.

[7] Plaintiffs' assertion that 12 U.S.C. § 25b forecloses the OCC's authority to interpret § 85 is erroneous. Pls.' Mem. at 9. As detailed below, *see infra* pp. 18-20, § 25b is not relevant to this case because the Final Rule does not represent a "preemption determination" triggering this provision's requirements. Moreover, 12 U.S.C. § 25b(f) expressly preserves national banks' authority to charge interest pursuant to § 85. In taking this action, Congress reaffirmed § 85's continued importance to the modern national

As an initial matter, Plaintiffs' claim that national banks cannot assign their right to charge interest authorized pursuant to § 85, *see* Pls.' Mem. at 8, ignores core elements of contract law reflected in—not displaced by—the National Bank Act, *see* 12 U.S.C. §§ 24(Third), (Seventh). Well-settled authorities confirm that an assignee succeeds to all the "rights and remedies possessed by or available to the assignor" and "stands in the shoes of the assignor." 6 Am. Jur. 2d Assignments § 108; *see also Dean Witter Reynolds Inc. v. Var. Annuity Life Ins. Co.*, 373 F.3d 1100, 1110 (10th Cir. 2004) (stating the same). Under this rule, the non-usurious character of a loan does not change when the loans is assigned; the assignee merely enforces the rights of the assignor. *See* AR at 843 (quoting 29 Williston on Contracts § 74:10, 74:23 (4th ed.) (all contractual rights may be assigned except in limited circumstances)). Therefore, Plaintiffs' suggestion that the right to collect interest under § 85 follows the national bank rather than the loan agreement does not reflect legal precedent or historical practice. *See Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 286, 289 (7th Cir. 2005) (holding that "the assignee of a debt . . . is free to charge the same interest rate that the assignor . . . charged the debtor," even if, unlike the assignor, "the assignee *does not have a license that expressly permits the charging of a higher rate*" (emphasis added)); *see also* 1 William Blackstone, Commentaries on the Laws of England 379-80 n.32 (18th ed., W.E. Dean 1838) (observing that "usury must be part of the contract in its inception"). So long as assignors are authorized to charge the higher rate of interest, "the common law kick[s] in and g[ives] the assignees the same right, because the common law puts the assignee in the assignor's shoes, whatever the shoe size." *Olvera*, 431 F.3d at 289.

Moreover, Plaintiffs' misplaced reliance on cases discussing "§ 85 preemption" ignores the nature of the statutory "gap" addressed in the Final Rule. *See* Pls.' Mem. at 11-12. When analyzing previous OCC interpretations of § 85, the Supreme Court expressly noted that "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute" is distinct from "the question of *whether* a statute is pre-emptive." *Smiley*, 517 U.S. at 744. The Final Rule only "addresses the former question."

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banking system. And irrespective of this congressional endorsement, § 25b(f) mirrors the statute it references: the provision does not identify or discuss § 85's applicability to national bank loans sold, assigned, or transferred to third parties. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (quoting *Brown & Williamson*, 529 U.S. at 133)).

AR at 843. Even so, Plaintiffs' cited cases are factually distinguishable. None addressed the precise issue identified in the Final Rule; namely, whether interest permissible under § 85 remains permissible when sold, assigned, or transferred to a third party and the national bank retains no ongoing interest in the credit relationship. *See, e.g.*, *In re Cmty. Bank of N. Va.*, 415 F.3d 277, 297 (3d Cir. 2005) (observing that the loans at issue "were, in fact, made and serviced by . . . a non-depository institution" and then bought by "a non-bank"); *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000) (noting that the third party "purchased the bank's receivables on a daily basis" and that the national bank retained an interest in the loans); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) ("[N]either party offers persuasive authority as to whether Section 85 . . . expressly preempts state law claims against a loan servicer that is alleged to have actually "made" the loan, rather than the bank named on the loan document.").[8]

2. Plaintiffs' Other Authorities Do Not Render § 85 Unambiguous

Plaintiffs' related claim that statutory provisions outside the National Bank Act render § 85 unambiguous—namely, two provisions within the Depository Institutions Deregulation and Monetary Control Act ("DIDA"), codified at 12 U.S.C. §§ 1735f-7a and 1831d—lacks merit. Pls.' Mem. at 10. Plaintiffs' assertion—that § 1735f-7a applies to transferred loans and thus somehow shows that Congress knew how to exempt specific loans from state rate caps but did not make comparable allowances in §§ 1831d and 85—ignores how § 1831d, by design, echoes the same ambiguities found in § 85 concerning loan transfers. [9]

[8] *See also Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1205-06 (N.D. Okla. 2004) (finding that national bank was not the "true lender" of the loan at issue); *Cohen v. Capital One Funding*, No. 19-CV-3479, 2020 WL 5763766, at *15 (E.D.N.Y. Sept. 28, 2020) (observing that the national bank "retains ownership and control of the relevant credit card accounts"); *Peel v. Brooksamerica Mortg. Corp.*, No. SACV 11-000079, 2014 12589317, at *4 (C.D. Cal. Nov. 13, 2014) (discussing Dodd-Frank Act provision related to operating subsidiaries, 12 U.S.C. § 25b(e), and making no mention of § 85 or the Dodd-Frank Act's express preservation of that provision's terms in 12 U.S.C. § 25b(f)).

[9] The FDIC directly supervises state-chartered banks and savings associations that are not members of the Federal Reserve System. The FDIC has authority to interpret § 1831d.

Starting with § 1735f-7a, "while the OCC agrees that [§] 1735f-7a applies to certain loans that have been transferred, this is not by virtue of express statutory language addressing loan transfers."[10] AR at 844. Rather, this provision "implicitly applies to transferred loans, notwithstanding its silence on this issue, for reasons similar to why the OCC concludes that [§] 85 applies to transferred loans." *Id.* Even if § 1735f-7a expressly applied to loan transfers, "it would further highlight the ambiguity created by the silence in [§] 85." *Id.* The fact that §§ 85 and 1831d do not use the same language as § 1735f-7a is not, as Plaintiffs argue, dispositive of the issue as "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.* to leave the question to agency discretion." *Cheney R. Co., Inc. v. Interstate Commerce Comm'n*, 902 F.2d 66, 69 (D.C. Cir. 1990). "Such a contrast (standing alone) can rarely if ever be the 'direct[]' congressional answer required by *Chevron*." *Id.*; *see also In Def. of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep't of Interior*, 751 F.3d 1054, 1067 (9th Cir. 2014) ("'[S]ilence . . . may signal permission rather than proscription,' and can suggest that Congress has left a 'question to agency discretion.'" (quoting *Catawba Cty., N.C. v. Envtl. Prot. Agency*, 571 F.3d 20, 36 (D.C. Cir. 2009))). Plaintiffs' interpretation would also upset "the principle of competitive equality between state and national banks" that forms a "cornerstone" of the dual banking system and National Bank Act. *See Indep. Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 932 (D.C. Cir. 1976); *see also Federal Interest Rate Authority*, 85 Fed. Reg. 44,146, 44,158 (July 8, 2020) (observing that § 1831d promotes "parity" between national and state banks).

Likewise, Plaintiffs' references to congressional *inaction* relating to legislative proposals with arguably similar effects to the Final Rule, Pls.' Mem. at 10, also "lacks persuasive significance." *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). "[S]everal equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Id.* For these reasons, courts frequently hold that "the silence of a later Congress says nothing about the intent of the earlier Congress that spoke directly to the question

[10] This provision preempts state law interest rate limits with respect to certain mortgage loans but does not expressly state whether it applies after a loan's sale, assignment, or transfer. 12 U.S.C. § 1735f-7a.

here at issue." *First Nat'l Bank & Tr. Co. v. Nat'l Credit Union Admin.*, 909 F.3d 525, 530 (D.C. Cir. 1996); *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (observing that "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others"); *Hagen v. Utah*, 610 U.S. 399, 400 (1994) ("[S]ubsequent history is less illuminating than the contemporaneous evidence.").

II. SECTION 25B DOES NOT APPLY TO THE FINAL RULE

In § 25b, Congress codified preemption standards and established procedural requirements that apply when the Comptroller concludes that certain state laws are preempted. 12 U.S.C. § 25b. As explained in the Final Rule, *see* AR at 845, § 25b applies only when the Comptroller makes a "preemption determination," that is, only after the Comptroller determines, on a case-by-case basis, that a "state consumer financial law" is preempted pursuant to the standard for conflict preemption set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). *Id*. at § 25b(b)(1)(B); *see also* OCC Interpretive Letter 1173 (Dec. 18, 2020) (announcing legal interpretation of 12 U.S.C. § 25b's preemption standards and procedural requirements); *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,555 (July 21, 2011) (explaining that § 25b "does not create a new, stand-alone 'prevents or significantly interferes' preemption standard, but rather, incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court's *Barnett* decision"). Despite Plaintiff' assertions to the contrary, Pls.' Mem. at 16-20, § 25b does not apply to the Final Rule for three reasons.

First, § 25b does not apply unless the OCC concludes that the National Bank Act preempts a "state consumer financial law." *See* 12 U.S.C. § 25b(a)(2) (defining term "state consumer financial law"). Here, the OCC has not concluded that any state consumer financial law is being preempted. As explained *supra*, the Final Rule clarifies the meaning of § 85, which permits a national bank to charge interest on any loan at the rate permitted by the laws of the state where the bank is located. Thus, § 85 incorporates, rather than eliminates, state law and provides a choice of law framework for determining which state's law applies to a loan's interest rate term. *See generally Marquette Nat'l Bank*, 439 U.S. 299. Therefore, the Agency was not required to engage in a § 25b preemption analysis.

Second, § 25b does not apply because the Final Rule is not a "preemption determination" that triggers § 25b's substantive and procedural requirements. 12 U.S.C. § 25b. The Comptroller did not make a preemption determination; rather, the Final Rule is an interpretation of the substantive scope and meaning of § 85, and as such § 25b is inapplicable. *See Smiley*, 517 U.S. at 747 (recognizing distinction between a rule interpreting the meaning of statute from the question of whether the statute has preemptive effect); OCC Interpretive Letter 1173.

In *Smiley,* petitioner, a credit card holder who resided in California, sued a national bank located in South Dakota, alleging that the bank's excessive late charges on the credit card violated California law. 517 U.S. at 737-38. During the pendency of the lawsuit, the Comptroller issued a final regulation, after notice and comment, defining the term "interest" as set forth in the National Bank Act, 12 U.S.C. § 85. *Id.* at 737-741; *see also* 12 C.F.R. §7.4001(a). The petitioner argued that the Comptroller's interpretation of the term was not entitled to deference because § 85 is a provision that preempts state law. *Smiley*, 517 U.S. at 743. In rejecting that argument, the Supreme Court recognized a distinction between "the substantive (as opposed to pre-emptive) *meaning* of a statute" from "the question of *whether* a statute is pre-emptive." *Id.* at 744 (emphasis in original). The same reasoning is applicable here. In the challenged Final Rule, the Comptroller amended the same regulation upheld in *Smiley* as a valid interpretation of the National Bank Act entitled to deference, and clarified that the interest rate that applied when a loan was made, does not change when a bank sells, assigns, or transfers a loan. Like the regulation upheld in *Smiley*, this Final Rule addresses only the "substantive [ ] *meaning*" of § 85" by articulating the Comptroller's view of the scope of authority granted to banks under the National Bank Act. *See* AR at 845. As such, the Final Rule is clearly not a "preemption determination" that triggers § 25b. *See also* 12 U.S.C. § 25b(b)(5)(B) ("[N]othing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation" of federal law, including the National Bank Act).

Third, Congress expressly exempted OCC's interpretations of § 85 from § 25b's requirements. *See* 12 U.S.C. § 25b(f)). Section 25b(f) provides that "[n]o provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85." Section 25b

is in title 62 of the Revised Statutes, and therefore, because the Final Rule is an interpretation of § 85—specifically, that as a matter of law, banks may transfer their loans without impacting the permissibility or enforceability of the interest rate—it is not subject to § 25b's preemption determination requirements. *See* AR at 845; OCC Interpretive Letter 1173 at 5.

Therefore, Plaintiffs' assertions that the Final Rule is invalid because the OCC did not engage in §25b's procedural and substantive requirements is simply erroneous. *See* Pls' Mem. at 16-21.

III. THE FINAL RULE SHOULD BE UPHELD BECAUSE IT IS SUPPORTED BY THE RECORD, BASED ON THE OCC'S SUPERVISORY EXPERTISE, AND THE OCC PROPERLY CONSIDERED THE RELEVANT FACTORS

A. The OCC's Basis for Issuing the Final Rule Is Supported by the Record and the OCC's Judgment and Expertise

The Final Rule should be upheld because it is supported by (1) evidence in the record of the legal uncertainty the *Madden* decision created and (2) the OCC's supervisory expertise regarding how to resolve the potential long-term effects of that uncertainty. "[T]he touchstone of 'arbitrary and capricious' review under the APA is 'reasoned decisionmaking.'" *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1080 (9th Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)), *cert. denied*, 207 L. Ed. 2d 1078 (June 22, 2020). Thus, agency action will be upheld where the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *State Farm*, 463 U.S. at 43). Further, when assessing an agency's explanation for its action, a reviewing court will "defer to the agency's expertise in interpreting the record" and to "the agency's predictive judgment on relevant questions." *Azar*, 950 F.3d at 1096 (internal quotations omitted); *see id*. ("[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, so long as they are reasonable." (citation omitted)).

The administrative record contains ample evidence, including numerous comments, demonstrating that the *Madden* decision created legal uncertainty about the ongoing permissibility of a loan's interest term after a bank transfers it and that, if left unresolved, might disrupt national banks'

ability to serve consumers, businesses, and the broader economy efficiently and effectively, particularly in times of economic stress. *See*, *e.g.*, AR at 263 ("The disruption and uncertainty caused by *Madden* has persisted for far too long [and] has prevented banks from being able to manage their lending activities with the full range of tools normally used by financial institutions to operate prudently and in a safe and sound manner"); *id.* at 292 ("*Madden* fundamentally disrupted banks' reliance on loan assignment as a tool for financing and risk management, creating significant uncertainty in the credit markets."); *id.* at 523-24 ("The *Madden* decision created substantial uncertainty in the financial markets in which national banks and Federal savings associations participate.").[11] Relying on this evidence of legal uncertainty, and its supervisory judgment and expertise, the OCC made a rational and informed decision that issuing the Final Rule reduces this uncertainty and facilitates responsible lending by banks, including in circumstances when access to credit is especially critical. *See* AR at 842, 843, 845-846.

Moreover, members of Congress recognized the legal uncertainty the *Madden* decision created and raised concerns about *Madden*'s effect on financial markets with the OCC which, in part, led to the NPR and the Final Rule. *See* AR at 41-42 (Congressmembers noting that "*Madden* has caused significant uncertainty and disruption in many types of lending programs" and that this "uncertainty hinders the efficient and effective operation of credit markets and impedes fintech innovation"); *See also id*. at 74, 86-88.

Plaintiffs erroneously assert that the Final Rule is arbitrary and capricious because the OCC failed to provide evidence of the uncertainty or to discuss any empirical data or studies. Pls.' Mem. at 21. However, the APA does not require the OCC "to develop or adduce empirical or other data to support its conclusions about the importance of issuing this rule, nor must the OCC wait for the additional problems to materialize before taking action." AR at 846. Indeed, "[t]he APA imposes no general obligation on agencies to produce empirical evidence [and] agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise[.]" *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009); *see also Chamber of Commerce of U.S. v. Sec. &*

[11] *See also* AR at 90, 104, 105-06, 109, 206-07, 211-12, 214, 221-22, 241, 246-47, 260, 267, 322, 507-08, 532-33, 552, 563, 568, 594-95, 599-602, 604, 606, 610, 636, 651, 701, 712, 842-43, 845-47, 852, 860-61, 1190, 1194-96, 1207.

Exch. Comm'n, 412 F.3d 133, 142 (D.C. Cir. 2005) (holding that the SEC did not have to conduct an empirical study in support of its rulemaking where it based its decision on "its own and its staff's experience, the many comments received, and other evidence, in addition to the limited and conflicting empirical evidence"). Rather, the OCC may rely on its supervisory judgment and expertise to identify, anticipate, and address the problems that may arise from the legal uncertainty the *Madden* decision created. AR at 846; *Fed. Commc'ns Comm'n v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813–14 (1978) (when making "judgmental or predictive" factual determinations agency does not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency").

Here, the OCC made an informed and reasoned decision, based on the evidence in the record and on its own expertise, to issue the Final Rule to address the legal uncertainty following *Madden*. Because these are matters within the OCC's discretion and expertise, the Court should defer to the OCC's judgments and uphold the Final Rule. *See Azar*, 950 F.3d at 1096.

B. The OCC Considered the Relevant Factors and Important Aspects of the Problem

The OCC properly considered the relevant aspects of the problem in this narrowly tailored rulemaking, including those raised in the comments from the NPR. Thus, Plaintiffs' contentions that the OCC failed to consider important aspects of the problem—namely that, in their view, the Final Rule would facilitate "rent-a-bank schemes," ignores the "true lender" doctrine, and would create a "regulatory vacuum"—are without merit and should be rejected. *See* Pls.' Mem. at 22-23.

"An 'important aspect of the problem' is not simply whatever plaintiffs would like the [agency] to consider." *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1087 (N.D. Cal. 2018) (citing *N.C. Bus. Enters. Program v. United States*, 110 Fed. Cl. 354, 363 (2013)). Rather, "[w]hether an agency has overlooked 'an important aspect of the problem' . . . turns on what a relevant substantive statute makes 'important.'" *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996); *cf. N.C. Bus. Enters. Program*, 110 Fed. Cl. at 363 (stating that a court "is not free to invent 'important' things out of thin air and require the agency to consider them").

As explained *supra,* 12 U.S.C. § 85 "sets forth the substantive limits on the rates of interest" on national bank-originated loans. *Beneficial Nat'l Bank*, 539 U.S. at 9. Thus, by its plain terms, "the interest permissible on a loan made by a national bank," AR at 843, is what § 85 makes "important." *Or. Nat. Res. Council*, 92 F.3d at 798. And the Final Rule resolves a discrete issue specific to § 85 by addressing the "legal uncertainty [resulting from *Madden*] by clarifying and reaffirming the longstanding understanding that a bank may transfer a loan without affecting the permissible interest term." AR at 842.

Moreover, the OCC did not act arbitrarily or capriciously by deeming issues related to determining a loan's "true lender" separate from the Final Rule. As the OCC explained, addressing issues related to the "true lender" doctrine in the Final Rule "raise issues distinct from, and outside the scope of, this narrowly tailored rulemaking." *Id.* at 847. Indeed, the record demonstrates that the OCC specifically considered whether it needed to address these issues and that the OCC reasonably determined that it did not. *See* AR at 846; *see also*, *e.g.*, AR at 280, 293, 529, 551, 570, 594. Thus, the OCC did not fail to consider an important aspect of the problem when issuing this narrowly tailored Final Rule.

The OCC strongly believes that the true lender question, and issues derived therefrom, are important issues within the larger banking regulatory framework. The OCC has not ignored the potential risks that can arise when banks form lending relationships with third parties. Indeed, "the agency has consistently opposed predatory lending, including through relationships between banks and third parties. Nothing in this rulemaking in any way alters the OCC's strong position on this issue, nor does it rescind or amend any related OCC issuances." AR at 846. Plaintiffs' disagreement with *how* the OCC addressed these issues does not mean that the OCC failed to consider them.

When dealing with complex regulatory problems, "[n]othing prohibits federal agencies from moving in an incremental manner." *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009); *see also Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 524 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. . . [t]hey instead whittle away at them over time, refining their preferred approach as circumstances change and as

they develop a more nuanced understanding of how best to proceed." (internal citation omitted)). And that is what the OCC has reasonably done here. In fact, on October 27, 2020, the Agency issued a separate rule to address the true lender issue. *See National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 68,742 (Oct. 30, 2020).[12] Thus, the True Lender Rule resolves the very issues that Plaintiffs have raised. In sum, the Court should find that the OCC did not fail to consider an important aspect of the problem.

C. The Final Rule Does Not Conflict with the OCC's Longstanding Interpretation of § 85

Finally, Plaintiffs' contention that the Final Rule conflicts with the OCC's past interpretation of § 85 lacks support. Pls' Mem at 25. Plaintiffs assert that the Final Rule breaks with the OCC's longstanding interpretation of § 85 because the Final Rule purportedly authorizes the transfer of preemptive powers to non-banks. As explained above, the Final Rule, does not authorize the transfer of preemptive powers to non-banks. Rather, it clarifies the application of § 85 to national bank loans after they are transferred. Because the OCC has never previously addressed this issue when interpreting § 85, there is no "longstanding" interpretation with which the Final Rule conflicts.

Plaintiffs also appear to contend that the Final Rule conflicts with the OCC's past statements regarding "rent-a-charter" schemes. But, as the OCC explained *supra*, nothing in the record supports this contention because the OCC "has consistently opposed predatory lending," AR at 846. Accordingly, Plaintiffs' contention that the Final Rule conflicts with the OCC's longstanding interpretation of § 85 is erroneous.

[12] As Acting Comptroller Brian P. Brooks explained in written testimony before the Committee on Financial Services of the U.S. House of Representatives regarding the True Lender Rule: "[i]n addition to defining 'true lender,' the rule clarifies that if a bank is the 'true lender' of a loan it is ultimately accountable for the applicable compliance obligations attached to the origination of that loan. Thus, the rule negates the ability for banks to originate and walk away from the responsibility for those loans. This will result in eliminating the greatest risk associated with abusive rent-a-charter." *Hearing on Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity and Accountability of Depository Institutions during the Pandemic Before the U.S. House Comm. on Fin. Servs.*, 116 Cong. (Nov. 12, 2020) (Statement of Brian P. Brooks, Acting Comptroller of the Currency) (available at https://democrats-financialservices.house.gov/UploadedFiles/HHRG-116-BA00-Wstate-BrooksB-20201112.pdf).

CONCLUSION

For these reasons, this Court should grant Defendants' Motion for Summary Judgment and deny Plaintiffs' Cross-Motion for Summary Judgment.

Dated: January 14, 2021

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, v. THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, and BRIAN P. BROOKS, in his official capacity as Acting Comptroller of the Currency, Defendants.	Case No. 4:20-cv-05200-JSW **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

For the reasons set forth in Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, it is hereby ORDERED that Defendants' Motion for Summary Judgment is Granted and Plaintiffs' Motion for Summary Judgment is Denied. It is further ORDERED that the Final Rule is Upheld.

IT IS SO ORDERED.

Dated: _____, 2021

_____
JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE