19-4271-cv

United States Court of Appeals

for the

Second Circuit

LINDA A. LACEWELL, in her official capacity as Superintendent of the New York State Department of Financial Services,

Plaintiff-Appellee,

– v. –

OFFICE OF THE COMPTROLLER OF THE CURRENCY, JOSEPH M. OTTING, in his official capacity as U.S. Comptroller of the Currency,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRTY-THREE BANKING LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

Amici, thirty-three experts in banking law and financial regulation identified in the Addendum hereto, are interested in ensuring that banking agencies stay within their statutory mandates and work in the public interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

The proposal by the Office of the Comptroller of the Currency ("OCC") to charter nondepository financial technology ("fintech") firms is a dangerous power grab premised on the novel claim that banking is just another word for lending. Banking often involves lending, but mere lending does not constitute banking. When a bank makes a loan, it posts a credit in the amount of the loan to the borrower's deposit account. It need not have any cash on hand. By contrast, before a nonbank lender can lend, it must procure cash or its equivalent. Thus, while nonbank lenders "deal" in money, "banks do not merely deal in[,] but are actually a source of, money." *United States v. Philadelphia Nat'l Bank*, 374 U.S.

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[1] All parties consent to the filing of this brief. No party or its counsel authored the brief in whole or in part, and no person other than *amici* or their counsel contributed money intended to fund preparing or submitting the brief.

321, 326 (1963). This is a basic principle of economics. *See, e.g.*, N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 347 (5th ed. 2009) ("*[B]anks create money*." (emphasis in original)). Bank deposits constitute the bulk of our nation's money supply, and it is for this reason that banks are subject to strict federal oversight.

In an effort to dramatically expand its authority, the OCC asks this Court to conflate banks' *permissible* activities with their *essential* activities. While banks are *permitted* to conduct a wide range of financial activities, the OCC does not have the power to charter entities that are not in the deposit—that is, money creation—business.[2] Once upon a time, the OCC recognized this limitation. *See, e.g.*, Reply Br. for the Fed. Pet., Robert L. Clarke, Comptroller of the Currency, in *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987), 1986 WL 728049, at *5–6 (identifying "depository . . . services" as an "essential attribute[]" of the "business of banking").

The OCC's new position contravenes the National Bank Act ("NBA"), the organic statute governing the OCC and national banks, and

[2] Nondeposit trust companies, discussed below in II.B., are the sole exception—an exception expressly authorized by Congress.

runs counter to its purpose. It is also inconsistent with the federal banking law in which the NBA is embedded, including the Federal Deposit Insurance Act, the Bank Holding Company Act, and the Federal Reserve Act, the last of which it would undermine by giving nondepository companies that play no role in monetary policy direct access to, and governance rights over, our nation's central bank.

And its ill effects would not stop there. They would extend far beyond money and banking, creating an alternative, OCC-controlled system of business organization available to a huge range of companies. That regime would be exempt from federal securities and investment company laws and possibly even the Bankruptcy Code. And it would invade traditional domains of state law against the wishes of Congress.

ARGUMENT

I. BANKS CREATE MONEY

Banking and lending are not synonymous. Banking often involves lending, but anyone can lend. Creating deposit dollars is a delegated sovereign privilege—an extremely sensitive activity that justifies federal chartering, regulation, and supervision. *See* S. Rep. No. 1482, 89th Cong., 2nd Sess., 5 (1966) (justifying the OCC's robust enforcement powers on

the grounds that the "banking system is a fundamental part of our monetary system and the Nation's $130 billion of demand deposits represents the principal element in the Nation's money supply").

Banks create money using the "bookkeeper's pen," increasing deposit account balances by making loans to customers or purchasing assets. Milton Friedman, *The Euro-Dollar Market: Some First Principles*, 7 FED. RES. BANK OF ST. LOUIS 16, 17 (1971). Deposit account balances are debts owed by banks, which customers can use for subsequent transactions. Only banks and certain other chartered "depository institutions" can maintain these sorts of deposits, and issuing them in the course of lending or investing is the special domain and core activity of banking.

The Supreme Court has long defined the "business of banking" in monetary terms. *See, e.g.*, *Noble State Bank v. Haskell*, 219 U.S. 104, 112-13 (1911) (concluding that the "public interest[]" in "mak[ing] the *currency of checks* secure" is "sufficient to warrant the state in taking *the whole business of banking* under its control") (emphases added); *see also Davidson v. Lanier*, 71 U.S. 447, 454 (1866) (treating banking and money augmentation synonymously); *Philadelphia Nat'l Bank*, 374 U.S. at 374

(Harlan, J., dissenting on other grounds) ("The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of 'money[]'. . . . Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions.").

So has this Circuit. *See In re Prudence Co.*, 79 F.2d 77, 79 (2d Cir.), *cert. denied*, 296 U.S. 646 (1935) ("[T]he power to receive deposits . . . is generally recognized as the essential characteristic of a banking business.").

II. THE OCC HAS NO AUTHORITY TO CHARTER NONDEPOSITORY NATIONAL BANKS

With one expressly specified exception, the OCC has no authority to charter associations that do not take deposits. The OCC's contrary interpretation of "the business of banking" is inconsistent with the purpose of the NBA and its plain meaning. It is also inconsistent with the larger federal statutory framework for banking, which either defines banks in terms of deposits or assumes that entities with national bank charters take deposits and are thus covered by laws that apply to "depository institutions."

A. The OCC's Position Contravenes the Purpose of the NBA

The NBA's purpose is and always has been monetary. In the nineteenth century, banks created two kinds of money: paper bank notes and deposit balances. In the twentieth century, the Federal Reserve (the "Fed") took over paper note issuance, leaving national banks to create just one form of money: deposits.

Monetarily, there is no difference between bank notes and deposits. Both are media of payment that function as cash substitutes. *See, e.g.*, Albert Gallatin, *Considerations on the Currency and Banking System of the United States* (1831), *in* 3 THE WRITINGS OF ALBERT GALLATIN 231, 267–68 (Henry Adams ed. 1879) ("The bank-notes and the deposits rest precisely on the same basis . . . . We can in no respect whatever perceive the slightest difference between the two; and we cannot, therefore, but consider the aggregate amount of credits payable on demand, standing on the books of the several banks, as being part of the currency of the United States."); Charles F. Dunbar, *Deposits as Currency*, 1 Q. J. ECON. 401, 402–03 (1887); JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 1081 (1954) ("[T]he obvious truth [is] that deposits and banknotes are fundamentally the same thing.").

The functional equivalence of bank notes and deposits is essential to understanding the NBA's purpose. When Congress passed the NBA, it had in mind "restor[ing] to the federal authority . . . control over the monetary function." BRAY HAMMOND, BANKS AND POLITICS IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR 724 (1957); *see also id.* at 734 ("In principle and intent" the NBA "was a resounding victory for the federal control of the monetary supply."); ANDREW MCFARLAND DAVIS, THE ORIGIN OF THE NATIONAL BANKING SYSTEM 103 (1910) (noting that "securing of a uniform currency was [Salmon Chase's] uppermost thought" in championing the NBA). The NBA left no doubt about this monetary purpose, proclaiming itself "An Act to provide a National Currency." Ch. 106, 13 Stat. 99 (1864). The government official charged with overseeing this system was (and still is) the comptroller of the *currency*. *Id.* at 100; 12 U.S.C. § 1.

The new system of national banks was designed to create money. As Treasury Secretary Salmon Chase explained, "The central idea of the proposed measure is the establishment of one sound, uniform circulation . . . ." U.S. TREASURY SECRETARY, REPORT ON THE FINANCES 17 (1862). Senator John Sherman, the floor leader for the NBA in the Senate, said

the law was "designed to establish a uniform national currency" and described the new national banks as having "the power to issue or to coin money." CONG. GLOBE, Feb. 10, 1863, at 840, 844. Senator Charles Sumner remarked, "The primary object of this bill is . . . to secure the national currency. For the sake of the currency[,] a system of national banks is to be established; . . . the end sought is an improved currency." CONG. GLOBE, May 5, 1864, at 2128. Representative Samuel Hooper, who guided the legislation through the House, said it restored the "sovereign right of furnishing and controlling the currency." CONG. GLOBE, Apr. 6, 1864, at 1451.

The NBA's framers spoke mainly about bank notes because that was the leading form of bank-issued money at the time. But they understood that deposit balances were equally "currency" or "circulation." *See, e.g.*, REPORT ON THE FINANCES, *supra*, at 14 (explaining that deposits "answer very many of the purposes of circulation" and grouping them with bank notes in the nation's money supply); CONG. GLOBE, Apr. 26, 1864, at 1874 (remarks of Sen. John Sherman) (noting that in large cities "deposits are really the circulation"). The NBA recognized this equivalence by requiring each national bank to maintain

base money reserves in proportion to "its notes in circulation and its deposits." NBA § 31, 13 Stat. at 108.

By the early twentieth century, deposit balances had overtaken bank notes as the main form of bank-issued money. Congress updated the banking laws accordingly. First, it created the Fed and charged it with issuing paper money, gradually phasing out national bank notes. H.R. Rep. No. 63-69, at 16–19, 22–25 (1913). It also designed the Fed to operate as a clearinghouse for checks drawn on national banks by their depositors. *See* Federal Reserve Act § 16, 38 Stat. 251, 268 (1913) (codified at 12 U.S.C. § 411 *et seq.*); H.R. Rep. No 63-69, at 55–56.

Second, Congress established the Federal Deposit Insurance Corporation (FDIC) and restricted entry into the deposit business, making it a crime for unregulated entities to receive deposits. Banking Act of 1933 § 21(a)(2), 48 Stat. 162, 189 (codified at 12 U.S.C. § 378(a)(2)). At that point, the identification of deposit-taking as the essential function of banking was beyond dispute. *See* Cynthia Crawford Lichtenstein, *Defining Our Terms Carefully and in Context: Thoughts on Reading (and in One Case, Rereading) Three Books*, 31 REV. BANKING & FIN. L. 695, 698 (2012) (explaining that the "Banking Act of 1933 [in § 21(a)(2)] . . . clearly

defines the word 'bank' as an institution that takes 'deposits' and is regulated by and examined by either a state or federal banking authority"); RICHARD S. CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF FINANCIAL INSTITUTIONS 124 (6th ed. 2017) (explaining that accepting deposits is "an activity off limits to [nonbank] firms"). The Supreme Court agrees. *Philadelphia Nat'l Bank*, 374 U.S. at 326 ("Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits.").

B. The OCC's Position Contravenes the Plain Meaning of the NBA

The purpose of the NBA's framers is reflected unambiguously in the statute's text. 12 U.S.C. § 27(a) empowers the OCC to charter nondeposit trust companies.[3] Congress added this language in 1978.[4] If the OCC already possessed the general power to charter nondepository entities, that amendment was redundant. Under the canon against surplusage, and the associated canon of *expressio unius est exclusio alterius*, the OCC's claim of unrestricted authority to issue nondepository charters

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[3] Trust funds are not treated as deposits in federal banking law. *See, e.g.*, 12 U.S.C. §§ 92a(d), 461(b), 1813(a)(2) & 1815(a)(1).

[4] Pub. L. 95-630, Title XV § 1504, 92 Stat. 3713 (Nov. 10, 1978).

must be rejected. *See Indep. Ins. Agents of Am. v. Hawke*, 211 F.3d. 638, 641-45 (D.C. Cir. 2000) (statutory authorization for national banks to sell insurance in towns with populations not greater than five thousand precludes national banks from selling crop insurance in larger communities); *Am. Land Title Ass'n v. Clarke*, 968 F.2d 150, 155-57 (2d Cir. 1992) (similarly holding that national banks cannot sell title insurance in larger communities), *cert. denied*, 508 U.S. 971 (1993).

Appellants argue that Congress in 1978 merely "confirm[ed], rather than create[d]" the OCC's authority to charter nondeposit trust companies, in reaction to a federal court ruling that held otherwise.[5] This logic is dubious.[6] But even if true, the only thing Congress "confirmed" was the OCC's narrow authority to charter entities whose operations are "limited to those of a trust company and activities related thereto." The

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[5] OCC Br. 39 (referencing *Nat'l State Bank v. Smith*, 1977 U.S. Dist. LEXIS 18184 (D.N.J. Sept. 16, 1977), *rev'd*, 591 F.2d 233 (3d Cir. 1979) (basing its decision on the 1978 legislation)).

[6] *Cf. Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments . . . may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

precisely crafted 1978 amendment does not remotely confirm a long-dormant, sweeping power to charter nondepository businesses.[7]

Section 27(a) has a further provision that reinforces this conclusion. It permits the OCC to charter only firms that are "lawfully entitled to commence the business of banking." The OCC attempts to construe that provision by pointing to 12 U.S.C. § 36, which has nothing to do with chartering and does not even use the phrase "the business of banking." Section 36—which was not added to the NBA until 1927—stipulates the conditions under which national banks may establish branches. Section 36 defines a "branch" as a location "at which deposits are received, or checks paid, or money lent." The OCC emphasizes the disjunctive "or" in that definition. But a branch is a *subset* of a bank, and Section 36 merely authorizes a branch to exercise a subset of banking powers. That a national bank may lawfully establish a *branch* that does not accept deposits has no bearing on whether the OCC may lawfully charter nondepository *banks*.

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[7] Contrary to the claim of OCC's *amicus* (*see Amicus* Br. of David Zaring 7), credit card banks chartered by the OCC are depository institutions. *Cf.* OCC, COMPTROLLER'S LICENSING MANUAL: CHARTERS 52 (Oct. 2019) (noting that "[a] credit card bank must maintain its status as an insured depository institution").

The OCC conspicuously avoids addressing the NBA's most important provision, one that *does* say something about "the business of banking." 12 U.S.C. § 24 (Seventh) describes the enumerated powers of national banks, authorizing them "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes." Inconveniently for Appellants, Section 24 (Seventh) uses the conjunctive "and," suggesting that all the enumerated activities are required[8] or, at the very least, that not all of them are optional. The NBA's monetary purpose, discussed above, confirms that depository activities are required.

We suspect the main reason the OCC chose not to construe Section 27(a) by reference to Section 24 (Seventh) is that it would expose the audacity of its power grab. For over half a century, the OCC has pushed for the most expansive possible reading of Section 24 (Seventh). And the

[8] National banks' power to issue notes, which was vestigial for decades, was formally eliminated in 1994. Pub. L. 103-325, §§ 602(e)-(f), 108 Stat. 2292, 2294 (Sept. 23, 1994).

federal courts have largely acceded. *See, e.g.*, *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). Those cases have considered the outer limits of national banks' *permissible* activities, rather than their essential activities. The OCC's attempt to decouple its chartering powers from the *essential* depository function of national banks would permit the OCC to claim that it can supply federal charters to a huge swath of the American economy. We describe how damaging this would be in Part III.

C. The OCC's Position Contravenes the Text, Structure, and Purpose of the Other Principal Federal Banking Laws

The OCC's interpretation of the NBA is in fundamental conflict with the statutory scheme governing money and banking. This section examines four statutes—although doubtless there are more—where Congress legislated with the understanding that the NBA did not permit nondepository national banks, with the limited (and limiting) exception of trust companies. These four statutes, together with the NBA, embody most of the federal law of money and banking. They are (1) the Federal Deposit Insurance Act (FDIA), (2) the Bank Holding Company Act (BHCA), (3) the Banking Act of 1933, and (4) the Federal Reserve Act (FRA). Those statutes define the business of banking in terms of deposit-

taking or are written in ways that do not make sense in a world that includes all manner of nondepository national banks. The OCC's scheme would also disrupt monetary policymaking and upset the competitive balance in the nonbank financial sector by giving technology firms direct access to Fed services as well as a say in Fed governance.

1. The Federal Deposit Insurance Act, the Bank Holding Company Act, and the Banking Act of 1933 Define Banks as Depository Institutions

The FDIA, the BHCA, and the Banking Act of 1933 uniformly define banking in terms of deposits. These statutes are *in pari materia* with the NBA.

First, the FDIA—the definitions of which are referenced by numerous other statutes—expressly defines banking in terms of deposits. It distinguishes between two types of banks: "insured banks" whose deposits are insured and "noninsured banks," defined not as any bank without insured deposits but as "any bank *the deposits of which* are not insured." 12 U.S.C. § 1813(h) (emphasis added). Deposits are definitional to banking.

Second, the BHCA defines a "bank" as an entity whose deposits are insured by the FDIC or that "accepts demand deposits or deposits that

the depositor may withdraw by check or similar means for payment to third parties or others." 12 U.S.C. § 1841(c)(1). Deposits are again definitional to banking.

Third, the Banking Act of 1933 gives banks and similarly regulated institutions a monopoly privilege on "the business of receiving deposits" subject to payment on demand and imposes criminal penalties on unauthorized persons who maintain demand deposits. 12 U.S.C. § 378(a)(2).[9] A bank is that which takes deposits.

Courts should interpret the NBA in conjunction with the rest of the federal banking laws:

> [I]t is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes:
>
> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. . . . If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute . . . ; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will

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[9] Unusually for a statute of the early 1930s, Section 21(a)(2) provides no exception for purely intrastate businesses, indicating that Congress based its legislative authority on the Constitution's monetary provisions, *see, e.g.*, Art. 1, § 8, cl. 5, rather than contemporary understandings of the Commerce Clause.

> amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

Branch v. Smith, 538 U.S. 254, 281 (2003) (quoting *United States v. Freeman*, 44 U.S. 556, 564-65 (1845)).

2. The Federal Reserve Act Presupposes that National Banks Are Depository Institutions

The OCC's claim of a general authority to charter nondepository national banks contravenes the Federal Reserve Act and the structure of the Federal Reserve System, which presuppose that national banks are depository institutions.

The FRA mandates that federal reserve notes (cash) "shall be receivable by all national and member banks." 12 U.S.C. § 411. Congress designed this provision to ensure that cash would be "payable . . . to any [national or state member] bank for *deposit purposes*," thereby establishing national banks as agencies or "quasi-redemption facilities" for the Fed's monetary operations. H.R. Rep. No. 63-69, at 26, 54-55 (1913) (emphasis added). Congress thus understood that "all" national banks were depository institutions.

The FRA's lender-of-last-resort powers also presuppose that national banks are depository institutions. Section 10B of the FRA allows

the Fed to lend to "any member bank." 12 U.S.C. § 347b(a). On account of being national banks, nondepository firms chartered by the OCC would automatically be member banks of the Fed, *see id.* § 222, and consequently eligible for these "discount window" loans (as they are called). Although Section 10B constrains the Fed's ability to lend to undercapitalized institutions and provides that the Fed has "no obligation" to make discount window loans, these crucial limits apply *only* to discount window loans *to depository institutions*. *See id.* §§ 347b(b)(1) & (b)(4). Did Congress really mean to permit a class of nondepository member "banks" that would enjoy *more* access to the discount window than depository institutions have? Surely not. The only sensible reading of Section 10B is that Congress equated member banks with depository institutions.

The structure of the Federal Reserve System bolsters this conclusion. National banks and other member banks enjoy a privileged relationship with the Fed. By virtue of being depository institutions, they are integral to our monetary system. The Fed conducts monetary policy by setting a target for the federal funds rate, which is the interest rate at which depository institutions borrow and lend to each other overnight.

See FEDERAL RESERVE SYSTEM, PURPOSES & FUNCTIONS 23 (10th ed. 2016). To influence this rate, the Fed adjusts the rate of interest it pays on the bank accounts, called "master accounts," that depository institutions maintain with it. *See id.* at 40. In addition to giving depository institutions access to discount window loans, the Fed also gives them direct access to its real-time payment system and its securities custody services. *See id.* at 42–46, 131–33. Because depository institutions are so central to monetary policy, the Fed describes them as playing "important roles in the Federal Reserve System's core functions." *Id.* at 17. So closely are Fed services identified with depository institutions that the Fed uses the terms bank and depository institution "interchangeably." *Id.* at 38.

The OCC's proposal would throw a wrench into this system. Since nondepository firms chartered by the OCC would automatically be Fed member banks, the Fed would be obligated to treat them just like other (depository) member banks. *See* 12 U.S.C. § 301 (requiring the Fed to administer its affairs "fairly and impartially and without discrimination in favor of or against any member bank"). The OCC's new fintech "banks" would therefore be entitled to Fed master accounts. *See* 12 U.S.C. § 342

(authorizing the Fed to supply its accounts to member banks). The fintechs would also gain access to Fedwire, the nerve center of the U.S. payments system. Currently unavailable to nonbank businesses, Fedwire provides real-time payments and guaranteed payment finality, and its participants routinely receive intraday overdraft credit from the Fed. *See* PURPOSES & FUNCTIONS, *supra,* at 146–47. These perks would give OCC-chartered fintech "banks" major advantages over any of their competitors that did not have the charter. Moreover, the new fintech "banks" would have a reasonable argument for being entitled to receive interest on their balances on the same terms as other member banks.[10] There is no public policy justification for the Fed (and hence the American public) to offer central bank accounts and associated services and to pay interest to nondepository "banks" that play no role in monetary policy. Yet some if not all of these perverse consequences would follow from the OCC's position here.

As noted above, nondepository fintech firms chartered by the OCC would also be eligible for discount window loans from the Fed. *See* 12

[10] The Fed is authorized to pay interest on balances maintained by depository institutions, *see* 12 U.S.C. § 461(b), and the FRA requires the Fed to treat all member banks the same, *id.* § 301.

U.S.C. § 347b(a); *id.* § 301 (nondiscrimination provision). Indeed, the Fed would arguably be legally obligated to extend these loans to fintech firms, even when it would not make the same loan to a depository institution. *See id.* § 347b(b)(4). Public sector support via the discount window is designed to support the liquidity of institutions with runnable deposits, not nondepository fintech companies. Today, *nondepository* institutions can receive loans from the Fed only under "unusual and exigent circumstances."[11] *Id.* § 343. The OCC's proposal would upend this vital distinction, giving federally chartered fintech firms unmatched access to loans from the American public.

Moreover, member banks elect six of the nine directors of each of the twelve regional Federal Reserve Banks ("FRBs"). *See* 12 U.S.C. § 304. They thus wield influence over monetary policy and national economic policy. The OCC's "fintech charter" would give technology firms that play *no* role in monetary policy a say in selecting FRB presidents, five of whom vote on the Federal Open Market Committee (the body that sets interest rates and makes other monetary policy decisions).

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[11] There is an exception for loans secured by U.S. Treasury or agency securities. 12 U.S.C. § 347c.

3. The Mandate that National Banks Maintain Federal Deposit Insurance Presupposes That National Banks Are Depository Institutions

National banks are required to obtain federal deposit insurance, and a national bank that fails to obtain deposit insurance forfeits its charter. *See* 12 U.S.C. §§ 222, 501a. This statutory mandate, traceable to the origins of federal deposit insurance in 1933,[12] presupposes that national banks are in the deposit business. The mandate does not apply to federally chartered nondeposit trust companies, which are not permitted to have deposit insurance. *See* 12 U.S.C. § 1815(a).

Despite the unambiguous language of 12 U.S.C. § 222, Appellants evidently believe national banks are not required to carry deposit insurance. OCC Br. 48. That would be news to leading experts in banking law. *See* MICHAEL P. MALLOY, BANKING LAW & REGULATION § 1B.04 (2020) ("Under the Federal Deposit Insurance Act . . . national banks are required to obtain deposit insurance from the FDIC"); CARNELL, MACEY & MILLER, *supra*, at 226 ("The federal government requires [federal deposit insurance] for federally chartered banks.").

[12] *See* Act of June 16, 1933, § 8, 48 Stat. 162, 168-70; Act of Aug. 23, 1935, § 101, 49 Stat. 684, 687.

III. The Fintech Charter Would Undermine Numerous Other Federal and State Regulatory Regimes

Allowing the OCC to charter nondepository "banks" would have damaging consequences that extend far beyond the world of banking. It would open the door to federal control of corporate formation and governance, traditionally the domain of state law. It would also disrupt federal securities and investment company laws, potentially bypass the Bankruptcy Code, and allow the OCC to assert sweeping authority to preempt state laws that regulate the tech industry.

A. The Fintech Charter Would Permit General Incorporation at the Federal Level, Transforming American Law

It is a bedrock principle of American business law that corporate formation and governance are the province of state, not federal, law. While reformers have repeatedly urged Congress to federalize the law of business organizations, Congress has declined. *See* Louis Loss, Joel Seligman & Troy Paredes, 1 Securities Regulation 1.C (6th ed. 2018) (describing such proposals from the Progressive Era to today). State regulation of business enterprise is a core feature of American federalism. The federal courts have refused to override "established state policies of corporate regulation" absent clear congressional intent. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *see also Business*

Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (rejecting SEC's incursion into an area "that is concededly a part of corporate governance traditionally left to the states").

As instrumentalities of the federal government's monetary power, national banks are the most significant exception to this principle. The federal government acts as chartering sovereign. Accordingly, national banks fall outside the jurisdiction of any state's corporate laws. Although the OCC has chosen to incorporate by reference state "corporate governance procedures" for national banks, *see* 12 C.F.R. § 7.2000, it can adopt whatever corporate governance procedures it likes for them, just as it has already done for the federal savings associations it charters, *see id.* § 5.21. And while the Supreme Court has clarified that there is no federal common law of fiduciary duty applicable to directors and officers of federally chartered banks, *see Atherton v. FDIC*, 519 U.S. 213 (1997), there is nothing to stop the OCC from adopting by regulation its own bespoke fiduciary duties for national banks.

The OCC's proposed fintech charter sounds modest, limited only to entities that "conduct[] at least one of the following core banking functions: Receiving deposits, paying checks, or lending money." *See* 12

C.F.R. § 5.20(e)(1). But that limitation is wholly self-imposed; the OCC can easily discard it. *See* II.B. *supra*. Moreover, it is illusory. Virtually all large businesses "conduct" the "function" of "lending money." (Ordinary accounts receivable are loans of money.)

And once chartered, these nondepository "banks" would be free to engage in most financial activities. *See NationsBank*, 513 U.S. at 258 n. 2 (holding that, for purposes of determining the outer limits of national banks' powers, the "business of banking" is not limited to the enumerated powers in Section 24 (Seventh) and that "the Comptroller . . . has discretion to authorize activities beyond those specifically enumerated" so long as those activities are related to "dealing in financial investment instruments"). If the OCC were empowered to charter nondepository firms, it would have carte blanche to invite much of the finance, insurance, and real estate sector—the single largest industry in the U.S. economy, comprising 21.7% of GDP[13]—into a federal charter. Payment

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[13] Finance, Insurance, and Real Estate (FIRE) is larger than the entire manufacturing sector and larger than the retail, transportation, health care, and entertainment sectors combined. *See* Bureau of Economic Analysis, News Release: 2019 Gross Domestic Product by Industry, April 6, 2020. Depository institutions are just a small fraction of this sector, comprising less than 3% of GDP. *See id.*

processors, credit card networks, investment advisers, hedge funds, private equity funds, securities exchanges, derivatives clearinghouses, finance companies, payday lenders, securitization vehicles, and mortgage Real Estate Investment Trusts, to name just some of the categories, could all seek federal charters as "banks." *See generally* OCC, *Activities Permissible for National Banks and Federal Savings Associations, Cumulative* (Oct. 2017). It is already happening. *See* ABA Banking Journal Podcast, *OCC's Brooks Plans to Unveil 'Payments Charter 1.0' This Fall*, (June 25, 2020).

Why stop with the financial sector? The OCC asserts that "the business of banking" includes "act[ing] as a finder, bringing together interested parties to a transaction." 12 C.F.R. § 7.1002. Offering an electronic marketplace for nonfinancial products—such as used cars—is such a finder activity, according to the OCC. *See Activities Permissible for National Banks*, *supra*, at 74. Taken at face value, this covers a large swath of Silicon Valley. Aren't Uber and Lyft finders?

And, if deposit-taking were optional, the OCC's chartering authority would presumably extend to many manufacturing and other commercial businesses because national banks are entitled to conduct

activities "incidental" to the business of banking. For example, if a retail or manufacturing business provides financing to its customers (as many do), the OCC could seek to characterize its commercial activities as "incidental" to its lending, in which case the OCC could offer a federal "bank" charter to the consolidated commercial enterprise. (In 2007, Ford lost $5.0 billion in its automotive operations but made $1.2 billion in its financial services operations. *See* Ford Motor Co., 2007 Form 10-K, at FS-60-61 (n.25). Was Ford in the "business of banking" that year? Were cars merely an "incidental" activity?)

There is more. The OCC's grants and denials of charter applications can be overturned only if they are arbitrary, capricious, or an abuse of discretion. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). The NBA provides no other limiting criteria. Who will the OCC charter? Who will it not charter? And why? This Court should not permit the OCC to assume the mantle of plenary chartering agency and promulgator of corporate law for America's nondepository financial sector and perhaps even large portions of its nonfinancial sector.

B. The Fintech Charter Would Undermine Federal Securities and Investment Company Laws

Securities issued or guaranteed by national banks are exempt from registration under the federal securities laws, *see* Securities Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2), and their securities offerings are exempted from the civil liability provisions of Section 11 and Section 12(a)(2) of the Securities Act, *see* 15 U.S.C. §§ 77k & 77l(a)(2). Because registered offerings are one of the triggers for periodic reporting obligations under the Securities Exchange Act of 1934 ("Exchange Act"), *see* Exchange Act § 15(d), 15 U.S.C. § 78o(d), and because the Exchange Act itself gives banks lenient size thresholds for registering and deregistering, *see* Exchange Act §§ 12(g), 15(d), 15 U.S.C. §§ 78l(g), 78o(d), national banks also receive special treatment when it comes to the panoply of reporting and other obligations imposed by the Exchange Act. These exemptions from the federal securities laws are predicated at least in part on the stringent regulatory and safety and soundness standards that apply to national banks. Many of the most important of these standards, including the crucial safety and soundness obligations, *see* 12 U.S.C. §§ 1831p-1 & 1818(b), and capital requirements, *see* 12 U.S.C. §§ 3907 & 3902, are limited to depository institutions and therefore would not apply to the

nondepository "banks" that the OCC seeks to charter. Although the OCC has chosen to impose securities-offering rules on national banks that mirror those under the Securities Act, *see* 12 C.F.R. § 16.1-16.33, it is under no statutory obligation to do so.

The same goes for the federal investment company laws. U.S. bond mutual funds and bond exchange traded funds ("ETFs") manage over $5.5 trillion in assets, and equity mutual funds and ETFs manage another $13.9 trillion. *See* INVESTMENT COMPANY INSTITUTE, INVESTMENT COMPANY FACT BOOK (60th ed. 2020), tbls. 3 & 11. Mutual funds are subject to an array of disclosure, governance, and conflict-of-interest regulations under the Investment Company Act of 1940 and the rules promulgated by the SEC thereunder. They are also subject to SEC oversight and enforcement and criminal sanctions for willful violations of these laws. Those obligations are onerous, and entities frequently fight to avoid them. *See, e.g.*, *SEC v. Fifth Avenue Coach Lines, Inc.*, 289 F. Supp. 3 (S.D.N.Y. 1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970). Although no one would refer to investment companies as "banks"—they do not accept deposits but instead issue redeemable *equity* claims—there is no doubt that bond investing is a permissible activity for a national bank. *See* 12

U.S.C. § 24 (Seventh). And the OCC claims that national banks may invest in equity securities in connection with financial intermediation activities. *See* OCC Interpretive Letter No. 892 (Sept. 2000). If the OCC prevails in this case, it will have free rein to offer federal charters for mutual funds and ETFs, which are currently organized under state law as corporations or business trusts. Any investment company that the OCC organized as a nondepository national bank would be exempted from the entire edifice of federal investment company regulation. *See* 15 U.S.C. § 80a-3(c). Did Congress really intend to empower the OCC in this fashion?

C. The Fintech Charter Risks Creating an End Run Around the Bankruptcy Code

The Bankruptcy Code exempts "banks" and other specified depository institutions from its scope. 11 U.S.C. § 109(b)(2). The Code does not define "bank." This Circuit has adopted a functional test for determining whether the "bank" exemption applies. That test does not accept the label given by the state chartering authorities as dispositive and instead focuses on whether the institution has "the power to receive deposits, which is generally recognized as the essential characteristic of a banking business." *In re Prudence Co.*, 79 F.2d 77, 79 (2d Cir.), *cert.*

denied, 296 U.S. 646 (1935). Nondepository national banks would not be considered "banks" under this test. As this Court explained in *Prudence*: "Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution."[14]

The OCC must disagree, since it just created a new federal regulation governing the insolvency of nondepository firms. 12 C.F.R. § 51. The OCC might argue that *Prudence* only addressed the issue of state-chartered companies and did not consider the status of nondepository national banks, which are, after all, defined as banks under federal law. If the OCC's fintech charter can displace federal securities law and investment company statutes, why not the Bankruptcy Code as well?

If the OCC were to win this argument, many creditors would lose. The NBA's ancient bankruptcy scheme provides for a mandatory liquidation without reorganization, lacks an automatic stay, and does not refer to intellectual property licensing or most executory contracts. The

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[14] *Id.* (quoting *Oulton v. German Savings & Loan Soc.*, 84 U.S. 109, 118 (1872)); *see also In re Cash Currency Exchange*, 762 F.2d 542 (7th Cir. 1985) (holding that currency exchanges that did not accept deposits were *not* "banks" and were not exempted from the Bankruptcy Code, and citing cases decided under the prior Bankruptcy Act).

NBA's preference provision is archaic. 12 U.S.C. § 91. The OCC's new insolvency regulation is skeletal, relies on old law, and does nothing to remedy the shortcomings of the NBA's insolvency provisions. 81 Fed. Reg. 92594, 92595 (Dec. 20, 2016) (citing the "substantial body of case law" interpreting those provisions). That case law may be substantial, but it is fossilized. *See, e.g.*, HIRSCH BRAVER, LIQUIDATION OF FINANCIAL INSTITUTIONS (1936).

D. The Fintech Charter Would Dramatically Expand the Scope of Preemption of State Laws

Finally, the OCC's proposed fintech charter would preempt state laws. The OCC asserts the authority to preempt any state law that "prevents or significantly interferes" with the operations of its banks. 76 Fed. Reg. 43549, 43556 (July 21, 2011) (citing *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996)).

The OCC's present gambit follows numerous failures by nondepository fintech companies to persuade Congress to abrogate a longstanding federal policy of permitting states to regulate lending within their borders. *See, e.g.,* 12 U.S.C. §§ 5551-5552; *Meade v. Avant of Colo., LLC*, 307 F. Supp. 3d 1134 (D. Colo. 2018); *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781 (S.D. W. Va. 2009). As Appellee has

alleged, the OCC's fintech charter would extend federal preemption far beyond what Congress has authorized, vitiating state regulatory regimes governing licensing and supervision of nondepository lenders, debt collection, and usury rates. JA 11, 14, 24–27 (Compl. ¶¶ 3, 11, 42–48).

As Appellee has pointed out, the "preemption of state law governing mortgage lenders and servicers" by the OCC and other federal regulators during the 1990s and 2000s, together with those regulators' failure to protect consumers from predatory lending practices, "was a root cause of the global financial collapse." JA 14 (Compl. ¶ 12); *see* S. Rep. No. 111-176, at 11–18, 175–76 (2010); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services,* 36 J. CORP. L. 893, 897–919 (2011).

Moreover, Congress has repeatedly declined to act on proposals to extend the benefits of federal interest rate preemption to fintech companies by allowing national banks to rent their charters to nondepository lending companies. *See, e.g.*, H.R. 10, 115th Cong. § 581 (2017); H.R. 3299, 115th Cong. (2017); H.R. 4439, 115th Cong. (2017). What the OCC has done in this case is nothing less than what the Supreme Court rejected in *Utility Air*—"laying claim to extravagant

statutory power over the national economy," in this case the power to regulate all lending, "without clear congressional authorization," indeed, in the wake of numerous failed efforts to amend the law. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

CONCLUSION

The OCC argues that terms like the "business of banking" must evolve to keep up with innovations in science and technology—and *Amici* agree. The OCC should be permitted to charter entities that create new forms of deposit money. But there is nothing new about lending. The OCC has never before tried to charter a nondepository lender, and for good reason. It has no authority to do so. To hold otherwise would be a grave mistake. *Amici* respectfully urge this Court to affirm the judgment of the district court.

Dated: July 29, 2020
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4). As measured by the word processing system used to prepare this brief, there are 6903 words in the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the addendum identifying *amici*.

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Dated: July 29, 2020

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