19-4271

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 FOR APPELLEE

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PRELIMINARY STATEMENT

The National Bank Acts of 1863 and 1864 authorized the grant of national charters to institutions engaged in the "business of banking," 12 U.S.C. § 27, and created a federal agency to exercise that authority, the Office of the Comptroller of the Currency (OCC). Throughout the nineteenth and twentieth centuries, it was understood that accepting deposits was an indispensable component of the "business of banking" within the meaning of the National Bank Act (NBA). By contrast, for non-depository institutions, the authority to regulate the transmission of money and to protect citizens from usury has long rested with the States.

OCC has now determined that it will issue national bank charters to financial technology ("fintech") companies that do not hold deposits. The United States District Court for the Southern District of New York correctly vacated OCC's assertion of authority over these institutions. Such entities are not banks, and in offering bank charters to them, OCC exceeded its statutory authority under the NBA. This Court should affirm.

Both the text and history of the NBA demonstrate that deposit-taking has always been an indispensable part of the "business of banking" under that statute. The NBA repeatedly refers to deposit-taking in defining the financial institutions that are subject to OCC's jurisdiction. And in debates over federal banking regulation going back to the founding, the supporters of the NBA and its predecessors repeatedly referred to deposit-taking as the defining feature of a bank—one that distinguished banks from other commercial ventures, and that accordingly warranted a unique regime of federal oversight. Beyond the NBA, multiple other banking statutes also confirm that only depository institutions will receive federal bank charters, such as by requiring that all national banks obtain deposit insurance.

The district court was thus correct to hold that OCC had exceeded its statutory authority here in deciding to issue federal bank charters to nondepository fintech companies. And the court properly ordered the relief that the Administrative Procedure Act (APA) expressly authorizes for unlawful agency action: vacatur. There is no basis for OCC's argument that the district court was compelled to impose geographic limitations on the scope of that vacatur. The plain text of the APA allows a court to set aside unlawful agency action, full stop; and courts have consistently interpreted that language to authorize vacatur without the limitations urged by OCC.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), 5 U.S.C. § 701 et seq. (Administrative Procedure Act), and 28 U.S.C. § 2201 (Declaratory Judgment Act). As discussed in detail *infra* Point I, DFS has standing and the matter is ripe for judicial review.

The district court entered final judgment in DFS's favor on October 21, 2019 (J.A. 298-299). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether this challenge to OCC's decision to accept applications for fintech charters is ripe, and whether New York's Department of Financial Services has standing to bring such a challenge.

2. Whether OCC lacks authority to issue charters to fintech companies that do not receive deposits because they are not engaged in the "business of banking" within the meaning of the National Bank Act.

3. Whether the district court properly entered judgment vacating OCC's unlawful action under the Administrative Procedure Act without limiting the geographic scope of that vacatur.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The National Bank Act (NBA)

The National Bank Acts of 1863 and 1864 created OCC and vested it with authority to issue national bank charters. *See* Act of Feb. 25, 1863 ("1863 Act"), ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99 ("1864 Act"). Specifically, Congress granted OCC the authority to issue federal charters to "associations for carrying on the business of banking," 1863 Act § 5. To form a federally chartered bank, an association was required to present to OCC a certificate with, among other things, the name of the bank and "[t]he place where its operations of discount and deposit are to be carried on." *Id.* § 6.[1] After receiving a charter, the federally chartered bank was authorized to "to carry on the business of

[1] In the banking context, "discounting" refers to a bank's practice of purchasing promissory notes or bills of exchange before their maturity dates, at discounted rates.

banking." *Id.* § 11. The statute listed the powers granted to banks, including receiving deposits; discounting bills of debt; circulating currency; buying and selling precious metals and coins; and lending money on security. *Id.* Every chartered bank was required to "at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its outstanding notes of circulation and its deposits." *Id.* § 41. The 1864 Act slightly reworded the business-of-banking clause but retained the same substantive description. 1864 Act § 8.

The business-of-banking clause is currently codified at 12 U.S.C. §§ 24 (Seventh) & 27. As in the original NBA, OCC must determine whether an association "is lawfully entitled to commence the business of banking," *id.* § 27(a), and once OCC grants a federal charter the association acquires

> 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[.]

Id. § 24 (Seventh).

2. Subsequent enactments

In 1913, the Federal Reserve Act created federal reserve banks and empowered them to participate in the business of banking, but otherwise did not alter the business-of-banking clause. *See* Act of Dec. 23, 1913, § 2, 38 Stat. 251, 253. The same enactment also removed what had once been one of the principal functions of national banks—namely, the issuance of official currency—and reassigned that responsibility to the Federal Reserve. *See id.* c. 6, § 16 (*codified at* 12 U.S.C. § 411). As OCC's website explains, the word "Currency" in OCC's own name is a legacy from the era of (private) national banks' now-extinguished role in issuing currency. Office of the Comptroller of the Currency, *History: 1914-1935, Years of Transition* (internet).[2]

Two decades later, the Banking Act of 1933 created the Federal Deposit Insurance Corporation (FDIC), and provided that henceforth "no national bank in the continental United States shall be granted a certificate by the Comptroller of the Currency authorizing it to commence the business of banking until it becomes a member of the Federal Reserve

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[2] For internet citations, full URLs are provided in the table of authorities.

System and a class A stockholder of the [FDIC].” Act of June 16, 1933, § 8, 48 Stat. 162, 169. Only a “depository institution which is engaged in the business of receiving deposits other than trust funds . . . may become an insured depository institution” by the FDIC. 12 U.S.C. § 1815(a)(1).

More than a century after the NBA was enacted, Congress amended the business-of-banking provisions to authorize OCC to grant national bank charters to two specific types of financial institutions that would not previously have qualified as engaged in the business of banking. First, in 1978, Congress authorized OCC to issue charters to trust companies; the amended statute provides that a national bank “is not illegally constituted solely because its operations are or have been required . . . to be limited to those of a trust company and the activities related thereto.” Pub. L. No. 95-630, § 1504, 92 Stat. 3641, 3713 (codified at 12 U.S.C. 27(a)). Second, in 1982, Congress authorized OCC to issue charters to so-called bankers’ banks—banks that are owned by other banks and provide services only to other banks. Specifically, the 1982 amendment provides that OCC may issue a national charter “to commence the business of banking pursuant to this section to a national banking association which is owned exclusively . . . by other depository institutions or depository institution holding companies and is organized to engage exclusively in providing services to or for other depository institutions." Pub. L. No. 97-320, § 404(a), 96 Stat. 1469, 1511 (codified at 12 U.S.C. 27(b)(1)).

3. National bank charters and the Office of the Comptroller of Currency (OCC)

The issuance of a national bank charter has significant consequences for bank oversight in the American "dual banking system." *Atherton v. FDIC*, 519 U.S. 213, 221 (1997). As OCC stated in a 2004 rulemaking notice, the "typical" description of the dual banking system is that "[d]epository financial institutions in the United States . . . are unique in that their incorporators and/or management have a choice between state and federal charters, regulatory authorities, and governing statutes." 69 Fed. Reg. 1895, 1896 n.5 (Jan. 13, 2004) (quotation marks omitted). "No other industry" aside from depository institutions, OCC accurately noted then, has the ability to elect into "separate and distinct" federal regulation rather than state regulation. *Id.* (quotation marks omitted).

Under the dual banking system, a State may exercise plenary oversight of any financial institution within its jurisdiction that is not a nationally chartered bank, including by exercising visitorial powers—such as inspecting its books and records on demand for any reason or for no reason at all. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 535 (2009). But once a financial institution obtains a national bank charter, only OCC may exert visitorial powers over that bank. *See* 12 U.S.C. § 484(a).

In February 2003, OCC published a notice of proposed rulemaking (NPRM) in the Federal Register that proposed to amend several regulations to greatly expand OCC's own regulatory authority. 68 Fed. Reg. 6363 (Feb. 7, 2003). One amendment, which was finalized in January 2004, sought to define "visitorial powers" in 12 U.S.C. § 484(a) so broadly that States would be precluded not only from inspecting national banks on demand, but also from ensuring such banks' compliance with the States' general laws. *See* 69 Fed. Reg. at 1895, 1897-1900. In 2009, the Supreme Court held that OCC had overstepped its authority and struck down the visitorial-powers rule to the extent that it sought to bar States from using ordinary law enforcement tools, such as judicial proceedings, to enforce their general laws against banks. *See Cuomo*, 557 U.S. at 536.

In the same NPRM that proposed the visitorial-powers rule, OCC also announced its intent to authorize itself to issue national bank charters to certain "limited purpose" institutions; OCC finalized that amendment in December 2003. *See* 68 Fed. Reg. 70,122, 70,126 (Dec. 17, 2003). Specifically, OCC proposed to amend 12 C.F.R. § 5.20(e)(1) to provide that "a limited purpose national bank may exist with respect to activities other than fiduciary activities"—a reference to trust activities, *see* 12 U.S.C. § 92a—"provided the activities in question are within the business of banking," 68 Fed. Reg. at 6371. The proposed version would have added a sentence to § 5.20(e)(1) stating: "The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking." *Id.* at 6373.

After commenters objected that OCC's proposal "had the potential to exclude from state oversight entities conducting activities only loosely related to banking," OCC admitted in a December 2003 final rule that "further clarification" was necessary. 68 Fed. Reg. at 70,126. The final rule added the following language to § 5.20(e)(1):

> The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities

> must conduct at least one of the following three core banking functions: receiving deposits; paying checks; or lending money.

Id. at 70,129.

As OCC admits, it has never exercised its asserted power under amended § 5.20(e)(1) to issue a national bank charter to a nondepository institution. (Br. for Defs.-Appellants (OCC Br.) 6-7.)

B. OCC's Decision to Grant National Bank Charters to Financial Technology ("Fintech") Companies

1. OCC's proposal to extend its regulatory reach "outside the banking industry" by issuing fintech charters

For more than a decade after the 2003 amendment to § 5.20(e)(1), OCC made no attempt to exercise its newly asserted power to authorize limited purpose banks. But in March 2016, then-Comptroller of the Currency Thomas J. Curry issued a white paper describing his desire to expand OCC's regulatory reach to "nonbank innovators." OCC, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective* (Mar. 2016) (Joint Appendix [J.A.] 37). The white paper identified a number of financial services products that the comptroller wanted to bring under OCC's wing: "[m]obile payment services and mobile wallets," "distributed ledger technology," "[m]artketplace lending," "automated systems" providing financial advice, and "crowdfunding sites" (J.A. 36). OCC added: "Many of these innovations are taking place outside the banking industry" (J.A. 36).

Six months later, citing amended § 5.20(e)(1), OCC announced that it was "considering whether a special purpose charter could be an appropriate entity for the delivery of banking services in new ways." 81 Fed. Reg. 62,835, 62,837 (Sept. 13, 2016). Shortly thereafter, OCC issued a second white paper specifically on its intent to issue national bank charters to fintech companies. *See* OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016) (J.A. 46-62). OCC defined the concept of "fintech companies" loosely to cover a wide range of companies providing financial services, typically online or through other digital platforms; but it confirmed that it included within that definition companies that "do[] not take deposits" (J.A. 48). OCC stated that federal bank charters issued to such companies would preempt state laws, including state licensing requirements (J.A. 51).

2. Comments on OCC's initial proposal by the Department of Financial Services (DFS) and other organizations with experience regulating fintechs

In a January 2017 letter to the Comptroller, the New York Department of Financial Services (DFS) expressed its opposition to OCC's proposal. DFS explained that "[t]echnology is not new to financial services and thus using the term 'fintech' to potentially sweep all nonbank financial services companies not authorized by the National Bank Act into a new regulatory regime is highly problematic" (J.A. 64). DFS also pointed out that OCC, in suggesting that federal regulation was needed for fintech companies, had failed to "discuss, or even mention, the existing state regulatory regime covering these areas or identify any deficiency in this regime that needs to be filled" (J.A. 64).

DFS explained that it already regulates more than "2,000 banking and nonbanking institutions, a significant number of which are nonbanking financial entities" (J.A. 64). DFS pointed to the likelihood that fintech companies would "seek to avoid important state consumer protection laws" by relying on their OCC charters (J.A. 68).

DFS emphasized that certain financial technology businesses presented particularly grave risks, such as the payday lending industry, whose participants often charge usurious interest rates "in excess of 1,000 percent" (J.A. 68). DFS argued that OCC's experience supervising nationwide banks had little relevance to supervising nondepository institutions, which usually "are cash intensive businesses that have frequent changes to their product mix, location and beneficial owners" (J.A. 68). By contrast, "DFS has dedicated staff that specializes in licensing, supervising and examining nondepository institutions" (J.A. 69).

Other organizations joined DFS in criticizing OCC's proposal. The Conference of State Bank Supervisors (CSBS) argued that: (1) OCC lacks statutory authority under the NBA to issue charters to fintech companies; (2) national charters for fintech companies would "distort the marketplace for financial services, with a federal agency arbitrarily picking winners and losers"; (3) such charters would "create[] tremendous uncertainty and risks pertaining to access to critical government resources, including the payments system and the federal safety net"; and (4) the "preemptive effect" of such charters would "nullif[y] the states' ability to protect consumers" (J.A. 73). The Independent Community Bankers of America (ICBA) agreed, and expressed particular concern that OCC had proposed to usurp the States' role in regulating fintech companies without providing any indication of what OCC's own regulatory procedures would be (J.A. 101, 104).

3. OCC's response to comments and publication of a draft charter application process

In March 2017, then-Comptroller Curry gave a speech at a trade conference for fintech companies in New York, announcing: "We will be issuing charters to fintech companies engaged in the business of banking because it is good for consumers, businesses, and the federal banking system." J.D. Alois, *Comptroller of the Currency Thomas J. Curry: "We Will Be Issuing Charters to Fintech Companies"*, Crowdfund Insider (March 7, 2017) (internet).

Shortly thereafter, OCC published a response to the public comments from DFS and others (J.A. 118-133). In response to the many commenters who pointed out OCC's lack of statutory authority to charter nondepository institutions, OCC did not address the text of the NBA or any relevant precedent, but merely pointed to the agency's own 2003 rulemaking amending 12 C.F.R. § 5.20(e)(1) (*see* J.A. 132-133). Accompanying the comments was the draft supplement that the

Comptroller had referred to, setting forth the application procedures for fintech charters (J.A. 135-158).

In April 2017, DFS again wrote to OCC expressing its opposition (J.A. 160-163). DFS reminded OCC that the NBA charges OCC only with regulating the "business of banking," and that the NBA "does not broadly authorize the OCC to regulate the entire financial system in this country" (J.A. 160-163). DFS explained that it had been understood since the NBA's enactment that there is a dual-banking system for banks but that non-bank companies are regulated by States (J.A. 161).

4. DFS's first lawsuit

In May 2017, DFS filed a lawsuit under the Administrative Procedure Act (APA) seeking annulment of OCC's decision to issue fintech charters. *See* Complaint, No. 17-cv-3574 (S.D.N.Y. May 12, 2017), ECF No. 1. In December 2017, the United States District Court for the Southern District of New York (Buchwald, J.) dismissed the lawsuit for lack of subject matter jurisdiction because the supplement setting forth the procedure for applying for fintech charters remained in draft form, and OCC's decision to issue fintech charters therefore was not final agency action. *See* Mem. & Order at 1, No. 17-cv-3574 (S.D.N.Y. December

12, 2017), ECF No. 30. The district court emphasized that its dismissal was without prejudice, and that once OCC issued a final determination that it would accept applications for fintech charters, the case would warrant prompt adjudication. *Id.* at 26.

5. OCC's final adoption of a procedure for fintech charter applications

The final determination anticipated by the district court came just a few months later. In July 2018, Comptroller Joseph M. Otting issued a statement that OCC "will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking" (J.A. 165) ("Fintech Charter Decision"). The final version of the licensing manual supplement was published the same day as Otting's announcement (J.A. 165, 172-191).

The final supplement set forth the rules for "the OCC's consideration of applications from fintech companies to charter a special purpose national bank that would engage in one or more of the core banking activities of paying checks or lending money, but would not take deposits and would not be insured by the Federal Deposit Insurance Corporation (FDIC)" (J.A. 175).

On the same day, OCC also issued an official policy statement declaring: "It is the policy of [OCC] to consider applications for national bank charters from companies conducting the business of banking," including "special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits" (J.A. 167). The statement announced: "The OCC is issuing this policy statement to clarify its intent to exercise its existing chartering authority" (J.A. 167).

In September 2018, a trade publication published an op-ed from Comptroller Otting, in which he touted "[t]he decision by [OCC] to begin accepting applications for special purpose national bank charters from fintech companies." Joseph M. Otting, *BankThink*, Am. Banker (Sept. 18, 2018) (internet). Otting noted that industry interest in the novel charters was "robust" and that "we expect multiple applications by the end of the year." *Id.*

C. Procedural History

In September 2018, DFS commenced the present suit (J.A. 10-32). DFS asked the district court to set aside, as contrary to law, OCC's Fintech Charter Decision because the NBA's "business of banking" clause does not give OCC authority to issue federal bank charters to nondepository institutions (J.A. 11-12).

The complaint explained that DFS currently regulates "approximately 600 non-bank financial services firms, with assets of approximately $1 trillion" (J.A. 14). DFS explained that federal bank charters issued pursuant to the Fintech Charter Decision would "negate[] New York's strict interest-rate caps and anti-usury laws," inhibiting DFS's ability to prevent predatory payday lending (J.A. 26).

After DFS's complaint was filed, Comptroller Otting asserted that the lawsuit would not stop OCC from issuing fintech charters. In a speech to a fintech event, Otting announced that "[a] number of entities have decided that it's still worth going forward, and so I think that we will issue charters independent of [the] action." Hannah Lang, *Fintechs Interested in OCC Charter Despite Lawsuits: Otting*, Am. Banker (Nov. 17, 2018) (internet) (quotation marks omitted). Otting told event participants that "[a] number of institutions are currently going through the application process." *Id.*

OCC moved to dismiss the complaint on several grounds (J.A. 216). In May 2019, the district court (Marrero, J.) denied OCC's motion (J.A. 225-281). The court held that DFS had standing because under the longstanding "dual banking system" in the United States, "any entity that is not a deposit-receiving bank—including non-depository fintech companies—is left largely to the prerogatives of the state to regulate" (J.A. 245-246). Consequently OCC's decision to issue fintech charters "extends federal banking law's blanket preemption to numerous areas currently subject to New York laws and supervision," and therefore "[t]he threats to New York's sovereignty are . . . clear" (J.A. 246-248). The district court also rejected OCC's argument that the case would not be ripe for adjudication until OCC issues its first charter (J.A. 248-251). The court observed that "OCC spent numerous years developing the Fintech Charter Decision" and thus "has the clear expectation of issuing [fintech] charters" (J.A. 250).

On the merits, the district court held that the NBA's business-of-banking clause "unambiguously requires receiving deposits as an aspect of the business" (J.A. 262). The court noted that at the time of the NBA's enactment during the Civil War, receiving deposits was understood as fundamental to what it meant to be a bank (J.A. 264-268). Not once, the court observed, had OCC relied on the business-of-banking clause to charter a nondepository institution (J.A. 268). Only where Congress had enacted some separate provision—applicable to a specific type of institution (see *supra* at 7-8)—had OCC ever previously asserted any authority to charter a nondepository institution (J.A. 268).

The court found OCC's new interpretation implausible, given that the agency suddenly "claimed the power to charter non-depository institutions as national banks in 2003, some 140 years after the adoption of the statutory language that is that power's putative source" (J.A. 270). OCC's claim to be able to orchestrate "federal preemption of the state banking regulatory scheme nationwide" is such a "dramatic disruption of federal-state relationships" that it was highly unlikely that Congress contemplated giving the agency such authority (J.A. 270-271).

The parties conferred and agreed that the opinion's legal holdings resolved all of the issues in the case and that a stipulated final judgment should be entered in DFS's favor. The parties submitted nearly identical proposed final judgments to the district court (*compare* J.A. 285-286 [plaintiff's proposed judgment], *with* J.A. 292-294 [defendant's proposed judgment]). There was only one difference between the two. Although both proposed judgments stated that OCC's 2003 amendment to § 5.20(e)(1) "is set aside with respect to all fintech applicants seeking a national bank charter that do not accept deposits" (J.A. 286, 293), OCC sought to include additional language limiting the judgment's effect to applicants "that have a nexus to New York State, *i.e.*, applicants that are chartered in New York or that intend to do business in New York" (J.A. 293).

In October 2019, the district court adopted DFS's proposed judgment (J.A. 295-301). The court recognized that the ordinary relief under the APA when a regulation is found to be contrary to law is simply to set aside the regulation. The court held that "OCC has failed to identify a persuasive reason to deviate from ordinary administrative law procedure on this score" (J.A. 297). Noting that OCC sought to "justif[y] this proposed limitation with a lengthy argument about the propriety of nationwide injunctions," the court observed that it was "not providing injunctive relief of any kind, nationwide or otherwise" (J.A. 296).

STANDARD OF REVIEW

As sovereigns, "States are not normal litigants for the purposes of invoking federal jurisdiction," and are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). "To have standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (quotation marks omitted). "Future injuries" suffice "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (quotation marks omitted). When a change in government policy is the cause of the threatened harm, a party that will be injured as "the predictable effect of Government action" has standing to sue. *Id.* at 2566.

This Court reviews de novo a district court's determination as to standing. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017). This Court also reviews de novo a district court's denial of a motion to dismiss for failure to state a claim. *See Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 261 (2d Cir. 2015).

SUMMARY OF ARGUMENT

I. DFS's challenge to the Fintech Charter Decision is justiciable. OCC's principal objection to both standing and ripeness is that DFS will not suffer a present injury in fact to its sovereign regulatory interests until OCC actually issues a federal bank charter to a fintech company. But standing and ripeness exist not only when injury has already occurred, but also when it is imminent or when there is a substantial risk of harm. And here, OCC has actively solicited the fintech industry to apply for charters and has represented that companies had begun the application process until the district court issued its decision below. Moreover, one of OCC's stated objectives in the Fintech Charter Decision is to allow fintech companies that receive federal bank charters to escape state regulation. Under these circumstances, the injury to DFS's sovereign interests is far from speculative, and is sufficiently impending to support both standing and ripeness.

II. The district court correctly held that an institution must receive deposits to be in the "business of banking" within the meaning of the NBA. At the time the NBA was enacted in 1863, banks were understood to be depository institutions. That understanding is reflected in the NBA itself, which repeatedly refers to banks' depository responsibilities, as well as in the lengthy history of banking from pre-Colonial Europe through the Founding Era, and ample case law throughout the nineteenth century and beyond. The broader statutory scheme applicable to banks—including the Federal Reserve Act, the Federal Deposit Insurance Act, and Bank Holding Company Act—also presume that the banks regulated by OCC will be depository institutions. By contrast, on the two occasions when Congress has authorized OCC to charter nondepository institutions, it has done so by amending the NBA (and other banking statutes), outside of the business-of-banking clause, to confer this novel authority on OCC.

III. The district court correctly declined to add special language to the judgment limiting the geographic scope of the court's vacatur of the Fintech Charter Decision. Both the plain language of the APA and directly applicable precedent hold that when a court finds a regulation contrary to law, the regulation must be set aside. OCC's attempt to invoke the ongoing debate over nationwide injunctions has no relevance here because the district court ordered relief under the APA and issued no injunctive relief.

ARGUMENT

POINT I

DFS HAS STANDING, AND ITS CLAIMS ARE RIPE

The district court correctly held that DFS has standing and that its challenge to OCC's authority to issue national bank charters to nondepository fintech companies is both constitutionally and prudentially ripe for adjudication.

A. This Case Presents a Live Controversy Because OCC's Fintech Charter Decision Threatens Imminent Injury to DFS's Regulatory and Pecuniary Interests.

OCC concedes (Br. 21-22) that DFS will unquestionably have standing and a ripe claim when OCC actually issues a charter to a fintech that does business in New York. But OCC asserts that, until it does so, DFS is powerless to challenge OCC's authority to issue such a charter because DFS has not yet suffered any present injury in fact. (OCC Br. 20-21.) The district court correctly rejected this argument and found DFS's challenge to the Fintech Charter Decision to be justiciable. (J.A. 244-252)

It is well-settled that States suffer direct injury to one of their most fundamental "sovereign interests" when a federal agency seeks to preempt their "power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Baez*, 458 U.S. 592, 601 (1982); *see also Cuomo*, 557 U.S. at 535-36; *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241-42 (10th Cir. 2008). And it is equally well-settled that Article III standing and ripeness exist not only when injury has already occurred, but also when it is imminent. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation marks omitted).

The Fintech Charter Decision here threatens just this type of future injury to DFS. One of OCC's expressly stated purposes in the Fintech Charter Decision is to preempt the States' authority to license and supervise nondepository fintech companies, and to replace that longstanding state role with (as-yet unspecified) OCC regulation instead (J.A. 51). Charters issued by OCC pursuant to the Fintech Charter Decision will thus weaken DFS's ability to enforce New York's consumer-protection and usury laws against chartered fintech companies, including online lenders that are driving the recent "dramatic rise in small dollar loans to consumers at high interest rates, which loans are then securitized and sold" (J.A. 14). And in anticipation of this loss of supervisory authority, DFS will be forced to incur regulatory costs *before* any issuance of a charter—both to complete enforcement actions before a fintech company can seek immunity from OCC, and to monitor fintechs nationwide for potential incursion into the New York marketplace. *Cf. Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.) ("An agency need not suffer the flood before building the levee."). These prophylactic enforcement costs are the type of "pocketbook injury" that confer standing on States. *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018); *see also Texas v. United States*, 787 F.3d 733, 748 (5th Cir. 2015).

DFS will also suffer direct pecuniary injury if OCC is granted the authority to issue federal bank charters to fintech companies. New York levies an annual assessment on all institutions that DFS supervises, and that revenue is used to fund DFS itself. *See* N.Y. Fin. Servs. Law § 206. In 2016, DFS collected more than $13.5 million in assessments from fintechs such as money transmitters and check cashers (J.A. 28). If those companies were to become national banks, DFS would lose the revenue from those assessments—an independent basis for standing. *See Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992).

There is a substantial risk that DFS will suffer these injuries to its regulatory and pecuniary interests because OCC not only made clear that it will accept fintech companies' applications for national bank charters—it also openly invited and solicited such applications, and indeed publicly touted the fact that that several such companies were "currently going through the application process." Lang, *supra*. As the district court correctly recognized (J.A. 249), it is reasonable to presume that after OCC took such pains to create the application process and market it to the relevant industry, it will actually issue fintech charters. And given the demonstrated interest in the fintech industry, it is "a hardly-speculative exercise in naked capitalism to predict" that some fintech companies will seek to escape state supervision by claiming the protection of a federal bank charter that OCC has openly advertised. *NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014). OCC cannot announce its ambition to create a nationwide network of chartered fintechs free from state oversight, and yet defeat standing and ripeness on the implausible chance that it will never issue such a charter.

It is thus immaterial that OCC has not yet received a fintech charter application. (OCC Br. 26.) At the time DFS's lawsuit was filed, the Comptroller was assuring the industry that he expected multiple applications imminently. Otting, *supra*. Just two months later, while this litigation was pending, the Comptroller announced that "[a] number of entities have decided that it's still worth going forward," and pledged that OCC would issue charters notwithstanding this litigation. Lang, *supra*. Only the district court's decision below halted what was already active implementation of the Fintech Charter Decision.

OCC is also wrong to argue that Article III will not be satisfied until OCC has issued a charter to a fintech company "with a nexus to New York." (OCC Br. 18.) As a threshold matter, New York's preeminent role in the financial industry and enormous consumer base makes it exceedingly unlikely that OCC will *never* charter a fintech company with a New York nexus. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 73 (2006) (noting New York's "preeminence as a commercial and financial capital"). More fundamentally, the nature of fintech companies is that they market their financial services without regard to geography (J.A. 14). As OCC itself recognized, many fintech companies offer their services through smartphone apps, not "large brick-and-mortar infrastructures" (J.A. 36-37). There is no indication that a fintech company with a national charter (and immunity from state supervision) would decline to provide its services to New York's substantial market.

OCC also wrongly contends that DFS will suffer no cognizable injury because the Fintech Charter Decision will only "reduce the number of entities subject to certain New York laws by creating a federal chartering alternative," and "would not invalidate [New York's] laws." (OCC Br. 24.) Agency action that expands the preemptive scope of an existing federal statute causes a cognizable injury to States. *See Wyoming ex rel. Crank*, 539 F.3d at 1242; *Alaska v. United States Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989); *Ohio ex rel. Celebrezze v. United States Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). OCC cites no support for its remarkable and incorrect suggestion that only complete invalidation of New York's laws would be a cognizable injury.

Finally, OCC's reliance on its lengthy approval process for issuing federal bank charters is unavailing. OCC's suggestion that DFS will suffer no injury until a fintech company receives "final approval of the charter application" (OCC Br. 29) is belied by OCC's own recent litigation position in a separate dispute involving DFS. Just a few years ago, DFS was actively investigating a state-chartered bank's connection to money laundering when the bank suddenly applied for an OCC national bank charter—and OCC granted conditional approval in little more than a week, ignoring DFS's requests for a delay to complete its investigation. *See* Def. DFS's Opp'n to Pl.'s Mot. to Dismiss at 13-14, *Bank of Tokyo-Mitsubishi UFJ, Ltd. v. Vullo*, No. 17-cv-8691 (S.D.N.Y. May 26, 2018), ECF No. 44. OCC then argued in an amicus brief that DFS's regulatory authority over the bank had ceased at the moment of conditional approval—notwithstanding conditions that the bank had yet to meet. *See* Br. for Amicus Curiae OCC at 1, 20, *Bank of Tokyo-Mitsubishi UFJ, Ltd. v. Vullo*, No. 17-cv-8691 (S.D.N.Y. Mar. 26, 2018), ECF No. 35-1. And OCC went further and argued that, upon conditional approval, DFS had been stripped of authority even "over pre-conversion conduct"—in other words, DFS could seek no relief even for malfeasance committed years earlier while the bank was still a state-chartered bank. *Id.* at 23. This recent example undercuts OCC's assurances here that DFS will face no imminent harm from OCC's fintech chartering decisions.

B. The Prudential Ripeness Doctrine Is Inapplicable.

The district court also correctly rejected OCC's prudential ripeness arguments. The prudential ripeness doctrine is designed to prevent premature adjudication and thus turns on "whether [this Court] would benefit from deferring initial review until the claims we are called on to consider have arisen in a more concrete and final form." *Connecticut v. Duncan*, 612 F.3d 107, 112-13 (2d Cir. 2010). This inquiry "involve[s] the exercise of judgment, rather than the application of a black-letter rule." *Id.* at 113 (quotation marks omitted).

That doctrine has no application here. OCC does not dispute that the Fintech Charter Decision is "final" under the APA because it "mark[s] the consummation of the agency's decisionmaking process" and determines "rights or obligations." *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quotation marks omitted). And the validity of the Fintech Charter Decision presents a pure question of law that requires no development of the administrative record: specifically, whether OCC has lawfully interpreted the "business of banking" to include nondepository institutions. Indeed, OCC recognized that no further factual development was necessary here when it agreed (*see* J.A.

287) that the district court's legal holdings in its denial of OCC's motion to dismiss left nothing to be done but enter final judgment.

As the district court rightly observed (J.A. 250), the narrowness of the question at issue means that this case—far from being unripe—deserves immediate adjudication to conserve time and money for all stakeholders, including not only agencies such as DFS but also the fintech companies that would apply for these newly available charters. A final decision holding that OCC exceeded its authority ensures that OCC will not expend further resources to review applications for charters it has no authority to issue, that nondepository institutions will not expend resources to apply for national charters they cannot have, and that DFS will not expend resources to mitigate harm from the proliferation of practices currently unlawful under New York law.

POINT II

NONDEPOSITORY INSTITUTIONS ARE NOT ENGAGED IN THE "BUSINESS OF BANKING" WITHIN THE MEANING OF THE NATIONAL BANK ACT AND THUS CANNOT RECEIVE FEDERAL BANK CHARTERS

The district court correctly held that OCC exceeded its statutory authority under the NBA when the agency decided to grant federal bank charters to nondepository fintech companies. Under the business-of-banking clause, the NBA authorizes OCC to issue a national bank charter only to an entity that is "lawfully entitled to commence the business of banking." 12 U.S.C. § 27(a). OCC claims that the absence of an explicit definition for "business of banking" requires this Court to defer to the agency's interpretation of that phrase. (OCC Br. 32.) But as the Supreme Court held in *Cuomo*, which rejected OCC's interpretation of the statutory phrase "visitorial powers," the mere fact that there is "some ambiguity as to the meaning of the statutory term . . . does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act." 557 U.S. at 525. Here, as in *Cuomo*, "[e]vidence from the time of the statute's enactment, a long line of our own cases, and application of normal principles of construction to the National Bank

Act," *id.*, unambiguously foreclose OCC's attempt to extend national bank charters to nondepository institutions.[3]

A. The Banking Statutes Unambiguously Demonstrate That a Financial Institution Must Receive Deposits to Be in the "Business of Banking" and Thus Eligible for a Federal Bank Charter.

1. The longstanding understanding of the NBA was that only depository institutions would be federally regulated as banks.

At the time the NBA was adopted, the "business of banking" clearly required the taking of deposits. The Supreme Court has recognized that terms in the NBA should be given the ordinary meaning they had in the 1860s, and that both dictionaries and case law from that time are informative. *See Cuomo*, 557 U.S. at 526. As the district court noted, 1860s dictionaries understood a bank to be "[a]n establishment for the *custody* and issue of money."[4] (J.A. 264 (emphasis added) (quoting Joseph

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[3] Because OCC's action is invalid under the unambiguous meaning of the NBA, its interpretation to the contrary is not entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

[4] The language about national banks issuing money (or circulating notes) refers to their prior function of printing and circulating bank notes. Congress removed that function from national banks in 1913 and transferred it to the Federal Reserve. See *supra* at 6. OCC is thus wrong

Worcester, *Dictionary of the English Language* 112 (1860)).) Indeed, to the extent that banks engaged in other activities, such as making loans or investing, the dictionaries observed that the banks did so using "such sums as may be temporarily deposited in their hands, by others, for safekeeping" (J.A. 264 (quoting Worcester, *Dictionary of the English Language*)). Accepting deposits was thus indispensable for banks because those funds were the foundation of banks' other activities.

Consistent with this understanding of "business of banking," the National Bank Act has since its adoption been replete with phrases that evince the understanding that a "bank" is an institution that receives deposits. "[R]eceiving deposits" has always been one of a national bank's enumerated powers. 12 U.S.C. § 24 (Seventh). See also *supra* at 5. And OCC's regulation of banks has consistently focused on their deposits. Thus, when the NBA was first enacted, the minimum capitalization requirements for a bank were defined in terms of "the aggregate amount of [the bank's] outstanding notes of circulation and deposits." See *supra*

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to suggest (Br. 36) that modern national banks' non-participation in currency issuance implies that deposit-taking is optional; unlike with note circulation, Congress has never divested national banks of the responsibility to accept deposits.

at 5. To this day, one of the basic pieces of information that must appear on every charter is "[t]he place where [the bank's] operations of discount and deposit are to be carried on." 12 U.S.C. § 22. Once the charter is issued, the business of that bank "shall be transacted in the place specified in its organization certificate."[5] 12 U.S.C. § 81. As these passages show, Congress assumed that banks would receive deposits and that OCC's regulation would focus on those deposits.

Until the Fintech Charter Decision, OCC's consistent practice adhered to this understanding of "business of banking." In the final rule adopting the visitorial-powers rule, OCC explained that "depository institutions" are "unique" in their ability to elect into federal bank

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[5] OCC argues that the court should not have cited the 1863 Act because that Act was repealed the following year by the 1864 Act. (OCC Br. 35.) But of the provisions the district court cited, the only one unique to the 1863 Act was the capitalization requirement; the remaining provisions, including the "operations of discount and deposit" language, were reenacted verbatim in the 1864 Act and persist to this day. In any event, the 1864 Act continued the existence of all banks, currencies, and institutions created under the 1863 Act. *See* 13 Stat. at 118. The 1863 Act—which, as noted, created OCC itself (see *supra* at 4)—has thus always been understood as the original version of the NBA. *See* Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 698 (1983) ("The Act currently characterized as the National Bank Act was originally adopted in 1863 as the National Currency Act.").

regulation. See *supra* at 8. And as the district court found, OCC has not identified a single instance in which a nondepository institution has been deemed to be a bank "on the strength of the NBA's 'business of banking' clause" (J.A. 268). Indeed, even after amending 12 C.F.R. § 5.20(e)(1)—the regulation under which OCC now claims authority to issue charters to fintech companies—OCC has never relied on it to issue a charter to an institution "that does not accept deposits." (OCC Br. 7.)

A final indication that Congress did not intend to cover nondepository institutions with the phrase "business of banking" is that, when Congress *did* intend to extend OCC's regulatory jurisdiction over such institutions, it expressly amended the NBA to do so. Specifically, on two occasions more than a century after the NBA was first enacted, Congress has authorized OCC to regulate certain institutions not covered by the original business-of-banking clause. *See* 12 U.S.C. § 27(a)(final sentence) (trust banks); *id.* § 27(b) (bankers' banks). See *supra* at 7-8 (summarizing 1978 and 1982 amendments). As the district court rightly observed, "it is unclear why [Congress] would have acted to confer upon OCC an authority that [it] believed OCC already possessed. (J.A. 269).

OCC's attempts to downplay the significance of these amendments are unpersuasive. OCC asserts that the statutory amendment regarding trust banks merely confirmed its existing power under the business-of-banking clause, but it is incorrect. (OCC Br. 39.) The sole judicial decision predating the 1978 amendment authorizing OCC to regulate trust banks held that OCC could *not* grant a charter to an institution that was limited to trust activities; on appeal from that decision, the Third Circuit came to the opposite conclusion only because Congress had amended the NBA during the pendency of the appeal to confer that authority on OCC. *See National State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 231-32 (3d Cir. 1979). In doing so, the Third Circuit rejected the argument that the amendment merely confirmed existing powers, recognizing that such an interpretation would render Congress's 1978 amendment "virtually meaningless." *Id.* at 231. Instead, the court recognized that the amendment conferred on OCC for the first time regulatory authority over so-called trust-only companies that were not merely operations of a national bank "conduct[ing] the general banking business of receiving deposits and making loans *in addition to* their fiduciary activities." *Id.* (emphasis added). Congress's explicit authorization for OCC to regulate trust-only companies not otherwise engaged in deposit-taking thus indicated that OCC previously lacked the authority to regulate such nondepository institutions.

OCC's explicit authority to regulate bankers' banks—banks that provide services only to other depository institutions and not to consumers—likewise confirms that Congress has always understood deposit-taking to be indispensable to the business of banking. As the FDIC has recognized, prior to the statutory amendment, there was confusion about whether an institution must accept deposits from the "general public" to be a deposit-taking institution, or whether that requirement could be satisfied by deposits received from another institution. 66 Fed. Reg. 20,102, 20,103 (Apr. 19, 2001). Accordingly, Congress modified both the NBA and the FDIA to confer on OCC the authority to charter banks whose only accounts were with other banks, rather than with the general public. *See* Pub. L. No. 97-320, § 404(a), (d), 96 Stat. at 1511.[6] But there would have been no need for Congress to

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[6] The amendment to the NBA, codified at 12 U.S.C. § 27(b), gave OCC the authority to charter bankers' banks and to waive certain statutory requirements—such as the need for FDIC insurance—for bankers' banks only. *See* Pub. L. No. 97-320, title IV, § 404(a). The

enact this statute if, as OCC currently asserts, no deposits of *any* kind were required for a financial institution to receive a federal bank charter from OCC.

2. The history and purpose of the NBA confirm that federally regulated banks have always been understood to be depository institutions.

The history of banking regulation, both in New York and at the federal level, further confirms that the phrase "business of banking" in the NBA includes as an indispensable feature the taking of deposits. Financial institutions providing financial services (such as lending and insurance) have existed for centuries, and in this country have largely been regulated by the States. But the concept of the "business of banking"—and the regulatory structure that grew around it—arose to address a distinct function separate from general commerce or finance. And deposit-taking has long been considered the key feature that has distinguished banking from other commercial ventures.

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amendment to the FDIA redefined the term "bank" for purposes of that act to include "a national banking association which is owned exclusively . . . by other depository institutions." *See id.* § 404(d).

In Europe in the centuries preceding American independence, banks first drew the concern of governments because the banks held significant percentages of their nations' assets on deposit, while separately engaging in speculative ventures that endangered those very deposits. Symons, *supra*, at 685. To solve that problem, governments began to enforce a separation between depository institutions—i.e., banks—and other commercial operations. *Id.* "The early history of banking suggests, therefore, that banks have consistently been identified as institutions engaging in deposit taking." *Id.*

During the Founding Era of the United States, the risks of commingling banking and commerce were very much in mind, with many founders categorically skeptical of banks as an institution due to the unique risks that their speculation posed to the deposits that they held. John Adams, for example, thought banks were "contrived to enrich particular Individuals at the public Expence," and although he conceded that a national bank was necessary, he argued that deposit-taking should be the *only* power afforded to banks. Letter from John Adams to Benjamin Rush (Aug. 28, 1811) (internet). At least, Adams argued, a bank should be prohibited from lending money in an amount exceeding its deposits: "Every dollar of a bank Bill that is issued beyond the quantity of Gold and Silver in the Vaults represents nothing and is therefore a cheat upon Somebody." Letter from John Adams to François Adriaan van der Kemp (Feb. 16, 1809) (internet). Thomas Jefferson's views were more hostile still; he argued that banks were so dangerous that any state official who cooperated with a national bank should be "adjudged guilty of high treason and suffer death accordingly by the judgment of the state courts." Letter from Thomas Jefferson to James Madison (Oct. 1, 1792) (internet).

This hostility required those who advocated for banks to define precisely the reason that banks should exist. The early Republic's chief advocate for banking, Secretary of the Treasury Alexander Hamilton, focused on the proposition of a bank as a critical depository for the federal government's own funds. *See* Fed. Reserve Bank of Philadelphia, *The First Bank of the United States* 1, 5 (June 2009) (internet). When Hamilton sought to persuade President Washington and Congress of the "principal advantages" of banks in order to advocate creation of the First Bank of the United States, Hamilton took as his first principle that banks are depository institutions. *See* Alexander Hamilton, *Final Version of the*

Second Report on the Further Provision Necessary for Establishing Public Credit (Dec. 13, 1790) (internet) (emphasis omitted).

Specifically, Hamilton argued that the "augmentation of the active or productive capital of a country" occurs when commodities such as gold or silver are not used "merely as the symbols of exchange and alienation . . . but when deposited in banks." *Id.* A bank, Hamilton argued, would enable the commingling of public deposits and private deposits in one institution that could draw on either sector to extend credit to the other. *Id.* To the extent that banks engaged in other functions, such as making loans, "the prevailing philosophy of the time was that loans and deposits were related: more deposits meant more loans (and more paper currency in circulation)." Fed. Reserve Bank of Philadelphia, *supra*, at 8.

Defending proposed banking legislation a few months later from charges by Jefferson and others that the bill was unconstitutional, Hamilton argued that "the simplest and most precise idea of a bank, is, a deposit of coin or other property, as a fund for circulating a credit upon it, which is to answer the purpose of money." Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791) (internet) (emphasis omitted). In other words, a bank was an institution that accepted deposits and used those deposits to back other credits—currency being one example of such a credit. The First Bank of the United States worked in this way, receiving both government deposits and private deposits from the general public, and using those deposits to back the bank's other functions, including granting credit and issuing the nation's first stable currency. Fed. Reserve Bank of St. Louis, *The First Bank of the United States: 1791-1811* (internet).

After the First and Second Banks of the United States closed, for a period of time all American banks were state banks. In 1838, New York enacted the Free Banking Act, the first statute to use the phrase "the business of banking." 1838 N.Y. Laws ch. 260, § 18. Like the future NBA—which would be modeled on the New York statute—the Free Banking Act specified that banks would be "offices of discount, deposite [sic] and circulation," and would be required to specify in their charters "[t]he place where the operations of discount and deposite [sic] of such association are to be carried on." *Id.* § 15, 16(2).

Notwithstanding this plain language, some entities in New York after 1838 illegally created "banks of circulation only . . . which had no banking house, and transacted no business of discount or deposit." *People* *v. Metropolitan Bank*, 7 How. Pr. 144, 152 (Sup. Ct. N.Y. County 1852). In order to "break up th[is] practice of issuing circulation merely for the purpose of redeeming at a discount that afforded a profit," *id.* at 152-53, the New York Legislature in 1848 enacted a clarification that all banks "organized under the provisions of the [Free Banking Act] . . . shall be banks of discount and deposit as well as of circulation" and must conduct all of their business at the location named in the charter. 1848 N.Y. Laws ch. 340, § 1.

In 1852, the New York Court of Appeals recognized that, under New York's Free Banking Act, the "most important operations" of "the business of banking" are "issuing and receiving deposits," and that other activities, such as borrowing money, are "the incident and result" of those core activities. *Curtis v. Leavitt*, 15 N.Y. 9, 53 (1857) (emphasis omitted); *see also Talmage v. Pell*, 7 N.Y. 328, 348 (1852) (New York banks "possess only authority to carry on the business of banking in the manner and with the powers specified in the said act."). As scholars have explained, the *Curtis* and *Talmage* decisions described New York's Free Banking Law as expressing the historical consensus regarding "the customs and usages of banking over many centuries, thereby limiting the business of banking to a coherent and principled group of activities." Symons, *supra*, at 697. It is that historical consensus over the powers of a bank—including the central importance of accepting deposits—that makes an institution a bank rather than some other commercial entity. *Id.* at 697-98.

When Congress returned to the question of national banks, it chose to model the National Bank Act of 1863 and 1864 on New York's Free Banking Act and, in doing so, again confirmed the indispensable nature of deposit-taking. The 1863 enactment of the NBA borrowed the phrase "business of banking" from New York's Free Banking Act and was substantively indistinguishable from the New York law. *Compare* 1863 Act § 11, *with* 1838 N.Y. Laws, ch. 260, § 18; *see also* Symons, *supra*, at 699. As the representative from New York who sponsored the federal bill explained, the NBA "in all its essential features is like the free banking law of the State of New York, which has been in successful operation in that state since 1838." Cong. Globe, 37th Cong., 3d Sess. 1114 (Feb. 19, 1863).

OCC acknowledges that the NBA was modeled on the New York statute. (OCC Br. 42.) But in an effort to distinguish the two, OCC points to the 1848 amendment to the New York statute that clarified that all banks must be "banks of discount and deposit as well as of circulation," and argues that it is meaningful that the federal statute did not adopt this exact language. (*Id.* (quotation marks omitted)). But by the time Congress enacted the NBA, the 1848 amendment to the New York statute had been in place for fifteen years, and New York's highest court had interpreted the statute to define deposit-taking as the essential element of banking. *Curtis*, 15 N.Y. at 53. When the New York representative in 1863 urged Congress to follow his State's lead, he was pointing to the success of New York's policies at a time when it had been made clear that New York banks must be depository institutions. There is no indication that Congress in 1863 sought to incorporate an obsolete version of New York's law, rather than the contemporaneous version that had been settled law in New York for more than a decade.

Thus, from the earliest days of this country, banking regulation has been based on the principle that "the separation of banking and commerce promoted the safety and soundness of deposits." Symons, *supra*, at 685. OCC itself was created against this historical backdrop—the agency owes its existence to the same 1863 statute that created the business-of-banking clause. Although Congress has on certain occasions authorized depository institutions to expand the services that they may offer, Congress has never authorized OCC to expand the agency's own regulatory reach by abandoning the distinction between depository institutions and ordinary commercial enterprises.

This historical background carries significant weight here. The unbroken understanding that "business of banking" requires deposit-taking has limited OCC's jurisdiction to specific types of financial institutions that merited special attention—and a distinct federal regulatory regime—due to the unique characteristics of the banking industry. Without that limitation, OCC's powers would extend to a vast number of firms providing financial services of all types, as DFS's comment letter explained. See *supra* at 13-14, 16. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation marks and citation omitted).

Skepticism of OCC's authority to expand its own authority is particularly warranted here when OCC has relied on the NBA's "business of banking" clause to authorize itself to regulate what it has itself admitted to be "nonbank" companies operating "outside the banking industry" (J.A. 36-37). And the preemptive consequences of OCC's action provide yet more reason to question its novel interpretation of "business of banking." The presumption against preemption is "particularly strong" when a State faces a narrowing of its "historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). OCC does not, and cannot, dispute that regulating nondepository financial services companies is an area of historic state regulation. And the Supreme Court has previously recognized "the incursion that [OCC's] regulation makes upon traditional state powers." *Cuomo*, 557 U.S. at 534.

Thus, the historical understanding of "business of banking," OCC's consistent practice, and the preemptive consequences of an overbroad reading of OCC's regulatory jurisdiction all weigh heavily against the Fintech Charter Decision's novel extension of OCC's powers to nondepository institutions.

3. Beyond the NBA, the broader federal statutory scheme confirms that "the business of banking" refers to institutions that receive deposits.

The requirement of deposit-taking is confirmed by numerous other federal statutes that complement the NBA. As the district court correctly recognized, treating nondepository institutions as banks would give them a "strained and anomalous role" in "the wider statutory scheme of national banking regulation" (J.A. 271, 273).

First, as discussed (see *supra* at 6-7), the Federal Reserve Act requires every nationally chartered bank to become a member of the Federal Reserve System and to obtain insurance from the FDIC. *See* 12 U.S.C. § 222. But under the Federal Deposit Insurance Act, only a "depository institution which is engaged in the business of receiving deposits other than trust funds . . . may become an insured depository institution." *Id.* § 1815(a)(1); *see also* 12 C.F.R. § 303.14 (defining "receiving deposits other than trust funds"). The Federal Reserve Act thus expressly requires that national banks accept deposits. The only exceptions to this requirement are the special purpose national banks that Congress specifically approved to be regulated by OCC despite their ineligibility for FDIC insurance: trust banks (see *supra* at 7), and bankers' banks (see *supra* at 7-8).[7] Nondepository fintech companies thus cannot qualify as banks because they will never satisfy the requirements of 12 U.S.C. § 222.

In its brief to this Court, OCC argues that § 222 was never intended as an "independent deposit insurance requirement" but was intended only to transition certain territorial banks into the Federal Reserve System "in contemplation of Alaska joining the Union." (OCC Br. 48-49.) But that reading is not a plausible interpretation of § 222, which states that "[e]very national bank in *any* State" must join the Federal Reserve, "upon commencing business *or* within ninety days after admission into the Union of the State in which it is located." 12 U.S.C. § 222 (emphasis added). If Congress had intended the statute to apply only to banks located in newly admitted States, it would have said so explicitly rather than using language that applies to national banks that "commenc[e] business" even today. *See id.*

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[7] OCC cites (Br. 49-50) to statutory provisions that reference non-FDIC-insured banks to suggest that such deposit insurance is not a prerequisite for membership in the Federal Reserve System, but those provisions merely accommodate trust banks and bankers' banks. None of the statutes that OCC cites is itself a source of authority for new types of nondepository institutions.

Fintech companies themselves are clearly aware that the Federal Reserve Act poses a meaningful obstacle to their ability to operate as national banks. The head of one fintech company has publicly complained about the failure of OCC to secure from the Federal Reserve a promise that fintech companies will be admitted to the Federal Reserve System. *See* Lydia Beyoud, *Fintech Charter Seekers Shouldn't Fret About Fed Access: Otting*, Bloomberg Law (Jan. 16, 2019) (internet). In public, the Comptroller has been dismissive of the issue, telling stakeholders, "I don't view that as an impediment," but has not explained how the plain requirement of the law can be avoided. *Id.* And a former Comptroller essentially admitted the requirement, urging Congress to repeal the language that "require[s] a national bank both to become a member of the Federal Reserve and to be insured by the FDIC." *The Economic and Regulatory Paperwork Reduction Act*, 104th Cong. 91-92 (May 2 and 3, 1995) (appendix to prepared statement of Comptroller of the Currency).

Second, the Bank Holding Company Act (BHCA)—which requires a company that seeks to acquire a bank to first obtain permission from the Federal Reserve Board—specifically defines a "bank" as a depository institution. *See* 12 U.S.C. § 1841(c)(1)(A), (B). Congress passed the BHCA in 1956 to ensure that national banks could not circumvent restrictions on local bank branches by forming a holding company (not itself a bank) that would then own multiple banks. Fed. Reserve Bank of St. Louis, *Bank Holding Company Act of 1956* (internet). Once again, policymakers were seeking to preserve separation of banking and commerce. In the decades preceding the BHCA, holding companies often would "own nonbank firms, such as manufacturing, transportation, or retail businesses, in addition to banks," which "led to concerns that holding companies could use deposits in their bank subsidiaries to make loans to their other businesses, giving them an unfair advantage." *Id.* The BHCA addressed this by not only by requiring the Federal Reserve to approve acquisitions but also by restricting bank holding companies to owning only banks, 12 U.S.C. § 1843(a), and companies whose activities are "so closely related to banking as to be a proper incident thereto," *id.* § 1843(c)(8).

As the district court correctly observed (J.A. 272), the Fintech Charter Decision—contrary to the BHCA—would allow OCC to create an entirely new class of putative national banks whose acquisition would not require Federal Reserve approval. Although the BHCA exempts specific types of nondepository institutions from the statute's scope—for example, trust banks—none of those exemptions contemplate fintechs. *See* 12 U.S.C. § 1841(c)(2). The BHCA's definitions provide further confirmation that Congress understands deposit-taking to be an essential part of the business of banking.

OCC argues (Br. 50-51) that the BHCA cannot restrict its power to charter banks under the NBA because the BHCA was enacted later. But the district court did not hold that Congress limited OCC's pre-existing powers with the BHCA. Rather, it correctly reasoned that Congress's understanding of a "bank" under the BHCA should be read as consistent with, and explanatory of its earlier understanding of "banking" under the NBA. By contrast, OCC's position here would introduce a disparity in the meaning of the same statutory term.

B. Courts Have Consistently Recognized That Only a Depository Institution Qualifies as a Bank.

Courts too have long held that, under both federal and state law, the essential feature distinguishing banks from other commercial ventures is banks' holding of deposits. In *In re Prudence Co.*, this Court considered whether an investment company—organized under the New York Banking Law and supervised by the Banking Department (DFS's predecessor agency)—was a bank and thus ineligible for voluntary bankruptcy under federal law. 79 F.2d 77, 79 (2d Cir. 1935). Under New York law, an investment company could apply to exercise the powers of a bank. *Id.* But this Court noted that the investment company at issue did not qualify as a bank because it "never did obtain the power to receive deposits . . . which is generally recognized as the essential characteristic of a banking business." *Id.* This Court added that all known precedents under the federal bankruptcy law also "have regarded the legal power to receive deposits as the essential thing." *Id.*

This Court is not alone. Numerous federal and state courts have concluded that only depository institutions may be banks. *See Warren v. Shook*, 91 U.S. 704, 710 (1875) ("Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker."); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 723 (9th Cir. 2012) ("The deposit and withdrawal of funds are services provided by banks since the days of their creation. Indeed, such activities define the business of banking" (quotation marks omitted).); *Gamble v. Daniel*, 39 F.2d 447, 451 (8th Cir 1930) ("In short, while there may be other attributes which a bank may possess, yet a necessary one is the receipt of deposits which it may use in its business."); *In re Cash Currency Exch., Inc.*, 37 B.R. 617, 623-24 (N.D. Ill. 1984) (noting "the consistent judicial agreement that the hallmark of a bank is the ability to accept deposits" and that therefore business that "cash checks and issue money orders" without taking deposits are not banks), *aff'd sub nom. Matter of Cash Currency Exch., Inc.*, 762 F.2d 542 (7th Cir 1985); *City Nat'l Bank v. City of Beckley*, 213 W. Va. 202, 205 (2003) ("The essential nature of the banking business is the receipt of deposits" (quotation marks omitted).); *Morris v. Marshall*, 172 W. Va. 405, 410 (1983) ("Here, we have only the lending of money from its own assets by a private corporation which has no depositors. We do not believe that this alone constitutes the banking business.").

By contrast, the precedents that OCC cites address, not the core features of the "business of banking," but rather its outer limits. That is, OCC's cases all concern whether institutions *already* understood to be banks—and that indisputably accepted deposits—could also engage in various non-core banking activities. For example, the main Supreme Court case on which OCC relies, *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, concerned whether an institution agreed by all parties to be involved in the business of banking could, in addition, sell annuities as an activity "incidental" to the business of banking. 513 U.S. 251, 254 (1995). But that ruling is inapposite here because, whatever the maximum sweep of a bank's business may be, this case is instead about the minimum requirements an entity must satisfy to be in the business of banking.

For similar reasons, OCC's reliance on a late-nineteenth century Supreme Court decision, *Oulton v. German Savings and Loan Society*, 84 U.S. (17 Wall.) 109 (1872), is also unavailing. Oulton recognized that "[s]trictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution." 84 U.S. at 118. And the Court emphasized that "[o]riginally the business of banking consisted *only* in receiving deposits." *Id.* (emphasis added). But *Oulton* accurately observed that banks' "business, in the progress of events, was extended," first to lending and then to issuing currency. *Id.* Although *Oulton* thus acknowledged that the powers of banking had been "extended" beyond deposit-taking, it never said that deposit-taking was accordingly rendered unnecessary—nor did it have reason to say so, because that question was not presented to it. *Id.* at 118-19.

OCC thus gains no traction from its observation (Br. 43-45) that banks have, over time, been permitted to engage in an expanding range of activities that were not originally permitted to banks. DFS has never disputed that banking has evolved and that banks may now offer services beyond receiving deposits. But OCC has been unable to point to an instance in which a court has deemed an institution that does not take deposits as at least one of its activities to be a bank under the NBA's business-of-banking clause.

Equally unavailing is OCC's reliance (Br. 15, 36-37) on the D.C. Circuit's decision in *Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System*, 820 F.2d 428 (D.C. Cir. 1987) ("*ICBA*"). That case did not concern the question of whether a nondepository institution could qualify as a national bank. Instead, it addressed whether a South Dakota statute permitting out-of-state banks to acquire South Dakota credit-card banks was inconsistent with the NBA. The D.C. Circuit held that an institution, already established to be national bank, could acquire a bank in South Dakota with a limited charter to run as a credit-card bank. *See* 820 F.2d at 439. Because those credit-card banks were chartered to engage in deposit-taking as well as lending and checking, *see id.*, the case did not present any question of whether institutions that do not take deposits or engage in other core banking functions could be national banks. As the district court here correctly put it, "the proposition that deposit-receiving, specifically, is optional, does not follow" from the D.C. Circuit's decision (J.A. 274).

OCC attempts to downplay the depository nature of the banks in *ICBA* by denying that the D.C. Circuit "placed any weight on that nominal activity." (OCC Br. 37.) But the court had no need to discuss deposit-taking extensively in the opinion because there was no dispute about the entity's status as a bank—not because deposit-taking was unimportant to that status. Prior to the *ICBA* litigation, the Federal Reserve Board had already determined that the bank to be acquired was a national bank precisely *because* it took deposits. *See* Bd. of Governors of the Fed. Reserve Sys., *Orders Under Section 3 of Bank Holding Company Act, CitiCorp, New York, New York*, 67 Fed. Res. Bull. 181, 182-83 (Feb. 1, 1981). To secure Federal Reserve approval, the target bank had specifically promised that it would establish itself as a depository and lending institution and provide those services upon customer request. *Id.* Thus, neither the facts nor reasoning of *ICBA* supports OCC's view that deposit-taking is a dispensable feature of a national bank.

C. Even if the Business-of-Banking Clause Were Ambiguous—and It Is Not—OCC's Interpretation Would Be Unreasonable.

As we have explained, OCC's interpretation fails at *Chevron* step one because Congress has spoken clearly in requiring national banks to be depository institutions. But even if this Court reaches *Chevron* step two, it should affirm, because OCC's interpretation is not based on a reasonable construction of the statute.

OCC's entire *Chevron* step two argument (*see* Br. 45-48) rests on a single, inapposite statute: the McFadden Act of 1927, which governs the establishment of bank branches. But this Act has nothing to do with the initial chartering of banks. And it is an especially odd source of authority for OCC to rely upon to expand its authority to charter national banks—and thus preempt state supervision—because the statute was passed to *limit* national bank branching and thus *protect* state supervisory authority.

Under the McFadden Act, "[a] national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches" within the State in which the bank is located, only if the State's law would allow a state-chartered bank to branch under the same circumstances. 12 U.S.C. § 36(c). As the Supreme Court has explained, the McFadden Act restricts rather than expands OCC's power; Congress feared that "national banks might obtain monopoly control over credit and money if permitted to branch." *Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 401-02 (1987). Accordingly, the McFadden Act's primary function is to empower the States, not OCC. *Id.*; *see also ICBA*, 820 F.2d at 435.

Assuming state law would permit a national bank to form a branch at all, each branch of that national bank must be a place "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). From the presence of the word "or" in this statute governing the formation of branches of existing banks, OCC seeks to infer the power to grant a nationwide charter application to any institution that engages in one of the three listed activities. (OCC Br. 46-48.) But that interpretation is not a reasonable one. Nothing about § 36(j)'s descriptions of the power of a bank branch suggests that Congress intended to remove an essential characteristic of the bank itself. To the contrary, the question of whether an institution is a national bank precedes the question of what powers its branches may have. Only "[a] national banking association may . . . establish and operate new branches." 12 U.S.C. § 36(c); *see also Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 951-52 (D.C. Cir. 1976) (to show that a facility is a "branch" under McFadden Act, a party must prove the facility was established by a national bank).

Section 36(j) thus says only that a lawfully chartered national bank may open a local branch that engages in less than the full range of banking activities, provided that the branch offers at least one of the listed three services. There is no support for OCC's assertion that when Congress authorized a branch to provide only limited services, it intended to allow the national bank itself to also provide only the same limited services. And OCC merits no deference for its interpretation of § 36(j) either because Congress has expressly denied OCC the authority to interpret § 36 via rulemaking. *See* 12 U.S.C. § 93a.

Finally, OCC's reliance on the *Clarke* decision (see Br. 46-48) is misplaced. The question in *Clarke* was whether two institutions—both already established to be national banks—could acquire non-chartered discount brokerage offices without those offices being considered branches under the McFadden Act (and thus subject to the Act's restrictions). 479 U.S. at 390-92. The Supreme Court construed the McFadden Act to require competitive equality between state and national banks only in "core banking functions," and held that "it suffices, to decide this case, to hold that the operation of a discount brokerage service is not a core banking function." *Id.* at 409. In so holding, the Court had no occasion to decide the relationship between the three activities mentioned in § 36(j)[8]—deposit-taking, check-paying, or money-lending—and the minimum requirements to be in the business of banking. The question presented in *Clarke* was what makes a branch, not what makes a bank.

Clarke stands only for the proposition that if a facility owned by a national bank is not engaged in any of the § 36(j) activities, further inquiry is required to determine whether the facility qualifies as a branch under the McFadden Act. In fact, OCC's own brief to the Supreme Court in *Clarke* argued that "'the essence of banking is the ability to receive deposits.'" Br. for the Fed. Pet'r, *Clarke v. Securities Indus. Ass'n*, 479

[8] Because the statute has been reordered since the time of *Clarke*, references in *Clarke* to 12 U.S.C. § 36(f) should be understood today as references to the current § 36(j).

U.S. 388 (1987) (Nos. 85-971, 85-972), 1986 WL 728047, at *38 (quoting S. Rep. 95-1073, 95th Cong., 2d Sess. 8, 1978 WL 8699 (1978)).[9]

POINT III

THE DISTRICT COURT PROPERLY VACATED THE FINTECH CHARTER DECISION WITHOUT LIMITING THE GEOGRAPHIC SCOPE OF THAT VACATUR

The district court appropriately vacated the Fintech Charter Decision upon finding that OCC had exceeded its statutory authority. Contrary to OCC's characterization, the district court did not grant DFS special "nationwide" relief. Under the express terms of the APA, the

[9] The Senate report OCC cited in *Clarke* pertained to the International Banking Act (IBA) of 1978. *See* S. Rep. 95-1073. That Act specifically distinguishes between an "agency" of a foreign bank and a "branch" of a foreign bank, with the only difference between the two being that an agency cannot accept deposits and a branch can. *Compare* 12 U.S.C. § 3101(1) *with id.* §3101(3); *see also CSBS v. Conover*, 715 F.2d 604, 623-27 (D.C. Cir. 1983) (agency of foreign bank cannot receive deposits from either Americans or foreigners). The Senate report, in turn, expressed concern that, under existing law, full-fledged branches of foreign banks had a competitive advantage over domestic state banks because the foreign banks could receive deposits—"the essence of banking"—across state lines. 1978 WL 8699 at *8. The Senate report stated that a foreign agency's inability to accept deposits would be the sole characteristic distinguishing the agency's function from the function of a bank. *See id.* at *3. This distinction further confirms that deposit-taking is an essential characteristic of banks.

proper remedy when, as here, an agency has acted "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations" is to "set aside [the] agency action." 5 U.S.C. § 706(2)(A), (C). The district court thus merely granted the relief that the APA specifies.

The cases cited by OCC to contest this remedy are inapposite because they involved district court injunctions, rather than APA vacatur. (OCC Br. 53-54.) OCC does not point to even one instance of a federal court imposing a geographic limit on relief under § 706. To the contrary, there is ample authority squarely holding that, under the APA, "'the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" *National Mining Ass'n v. United States Army Corps. of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)); *see also Guertin v. United States*, 743 F.3d 382,388 (2d Cir. 2014) (the "usual" rule is that agency action held illegal under the APA must be vacated); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 672 (S.D.N.Y.) (same), *affd in relevant part*, 139 S. Ct. 2551 (2019). Thus, the debate over nationwide injunctions that OCC references (Br. 54-55) "is not implicated . . . where the Court is vacating an agency action pursuant to the APA, as opposed to enjoining it as a violation of the Constitution or other applicable law." *National Ass'n for the Advancement of Colored People v. Trump*, 315 F. Supp. 3d 457, 474 n.13 (D.D.C. 2018).

Nor is OCC correct that the district court's order is substantively the same as an injunction. (OCC Br. 52.) Both the Supreme Court and circuit courts have expressly distinguished vacatur under the APA from injunctive relief. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). Indeed, the Supreme Court has recognized that setting aside agency action under the APA is "a *less drastic* remedy" than the "extraordinary relief of an injunction." *Monsanto*, 561 U.S. at 165-66 (emphasis added). When a court grants an injunction, it runs the risk that it will "foreclose even the possibility" of a partial course correction by the agency, which must take care not to violate a continuing judicial order. *Id.* at 165. By contrast, the standard APA remedy of vacatur does not place the agency under any ongoing order or court supervision; once the court sets aside the agency action as unlawful, "the court's inquiry is at an end." *Palisades Gen. Hosp., Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C.

Cir. 2005). And the agency is free to make another effort to achieve its desired result.

By contrast, OCC's request that the district court craft special geographically limited language for the final judgment would have presented significant challenges of administration. The language OCC sought to have added to the district court's judgment would have limited the judgment to "applicants that are chartered in New York or that intend to do business in New York (including through the Internet) in a manner that would subject them to regulation by DFS" (J.A. 293). That language—which does not appear to have been drawn from any existing statute or OCC regulation—would have raised serious ongoing questions about interpretation and administration. As explained earlier (see *supra* at 30-31), the location of a fintech company at the time it is chartered has little relevance to its ultimate effect on New York, because an OCC charter confers nationwide preemption. Thus, even if an applicant did no business in New York at the time of its charter application, approval of the charter would allow it to offer services to New York customers at any time without DFS oversight. The special limitation sought by OCC—in addition to having no basis in the text of the APA or in a single cited case—would simply have engendered more litigation involving third parties. The district court's decision to apply the APA's straightforward vacatur remedy sensibly avoided these problems.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
July 23, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,960 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *William P. Ford*