No. 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, No. 18-cv-8377

BRIEF OF NATIONAL ASSOCIATION OF CONSUMER CREDIT ADMINISTRATORS AND AMERICAN CONFERENCE OF UNIFORM CONSUMER CREDIT CODE STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES LINDA A. LACEWELL AND THE NEW YORK STATE DEPARMENT OF FINANCIAL SERVICES

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INTEREST OF AMICUS CURAE[1]

Amicus National Association of Consumer Credit Administrators (NACCA) is an association of state agencies that regulate the consumer credit industry. NACCA was established in 1935 and its members represent all 50 states, as well as Puerto Rico and the District of Columbia. NACCA was created to improve the supervision of non-depository consumer credit companies, to facilitate the administration of laws governing these companies, and to coordinate the efforts of individual states towards developing sound consumer credit laws and policies. NACCA members license, regulate, and supervise non-depository consumer credit institutions such as installment lenders, payday lenders, and pawnshops. NACCA members examine these institutions to ensure compliance with state licensing and consumer protection laws, bring enforcement actions to enforce these state laws, and collect revenue from licensed institutions.

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[1] This brief is filed pursuant to consents obtained from all parties. No person other than amicus and counsel authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

Like the New York State Department of Financial Services (DFS), NACCA's members are state agencies that would suffer injury if the Office of the Comptroller of the Currency (OCC) is allowed to create a special purpose national bank charter for non-depository financial institutions. NACCA is well-suited to address the issues in this case because its members have spent decades enforcing state consumer financial protection laws and because its members have witnessed first-hand the negative consequences of the OCC's aggressive efforts to preempt state law.

Amicus American Conference of Uniform Consumer Credit Code States (ACUCCCS) is an association of states which have adopted, in whole or in substantial part, the Uniform Consumer Credit Code (UCCC) in either the 1968 or 1974 versions. Its membership includes Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming. Most members of ACUCCCS are also members of NACCA, and the members of both associations share a broad interest in and experience with licensing non-depository consumer credit institutions and enforcing state consumer financial laws.

INTRODUCTION

This Court should affirm the district court's conclusion that the OCC does not have the authority to create a special purpose national bank charter for non-depository financial institutions by invoking the provisions of the National Bank Act, Title LXII of the Revised Statutes (codified, in part, at 12 U.S.C. § 21 *et seq*.) (NBA), that authorize the OCC to charter national banks. This Court should also hold that the OCC's decision to issue these charters is invalid because this decision expands the scope of NBA preemption and the OCC ignored the NBA's required process for preempting state laws.

The OCC amended its chartering regulations in 2003 and interpreted the NBA as authorizing the OCC to charter special-purpose national banks that perform "at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money." 12 C.F.R. § 5.20(e)(1)(i); 68 Fed. Reg. 70122, 70126 (Dec. 17, 2003). Once an entity is a special-purpose national bank charter, it would enjoy broad preemption of state laws, including state licensing and consumer protection laws. The OCC took further steps to expand the scope of NBA preemption when, in 2004, it adopted sweeping regulations that preempted many state consumer financial laws addressing abusive bank practices related to mortgages, credit cards, and other consumer financial products. *OCC Ignores Dodd-Frank Act's Repeal of 2004 Preemption Regulations*, National Consumer Law Center (May 2011). Congress responded to the OCC's overreach in 2010 with The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank amended the NBA's preemption provisions and expressly curtailed the OCC's authority to preempt state consumer financial laws. *Id.*

Despite the new restrictions Dodd-Frank placed on the OCC's authority to preempt state laws, including a mandatory review process, the agency announced in a 2016 white paper its intent to introduce a new special-purpose national bank charter designed specifically for non-depository financial technology companies ("fintechs" or "non-depositories"). OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies*, (Dec. 2016). The OCC's white paper invoked 12 C.F.R. § 5.20(e)(1)(i) as the source of the authority to issue this new, limited-purpose national bank charter to fintechs that make loans or provide money transmission (i.e., "paying checks" in the language of 12 C.F.R. 5.20(e)(1)(i) but do not receive deposits (the "Fintech Charter"). *Id.*

The OCC finalized its decision to accept applications for the proposed Fintech Charter in July 2018 by releasing a final Licensing Manual Supplement and Policy Statement (collectively, the "Fintech Charter Decision"). OCC, *Comptroller's Licensing Manual Supplement*, (July 2018); OCC, *Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters* (July 2018).

Throughout this process the OCC has relied on its interpretation of the NBA's chartering provisions and insisted that a fintech that lends money but does not receive deposits is eligible for a Fintech Charter. But many of these fintechs are presently licensed by state regulators of non-depository consumer financial services including DFS and the members of NACCA and ACUCCCS.[2] Recipients of a Fintech Charter would benefit from NBA preemption of state laws and would effectively be able to opt-out of the state regulations that currently apply to their businesses. Yet the OCC has not adequately addressed the preemptive

[2] The existing state-licensed entities potentially eligible for the Fintech Charter includes not only non-depository consumer loan companies but also, for example, licensed mortgage lenders and licensed money transmitters. While many members of NACCA and ACUCCCS also license and regulate these entities, this brief will focus primarily on the Fintech Charter's impact on non-depository consumer lenders.

effect of the Fintech Charter Decision or complied with the NBA's processes governing the preemption of state consumer financial laws.

This Court should affirm the district court's conclusion that the OCC exceeded its statutory authority in promulgating 12 C.F.R. § 5.20(e)(1)(i) and in issuing the Fintech Charter Decision because the OCC's decision flouted Congress' intent for states to retain their leading role in regulating non-depository fintech companies by attempting to preempt state consumer financial laws without following the mandatory process required by the NBA.

First, DFS has standing and its claims are ripe because the Fintech Charter Decision caused an injury-in-fact to DFS's legally protected interest in the balance of power inherent in the dual banking system. The OCC's actions have interfered with DFS' authority to regulate licensed non-depository consumer financial institutions and to enforce state consumer protection laws, so DFS's injuries are both imminent and actual unless the Court holds that 12 C.F.R. § 5.20(e)(1) and the Fintech Charter Decision are invalid.

Second, the Fintech Charter Decision improperly attempts to override Congress' express intent that states should maintain their traditional, central role in regulating and supervising non-depository financial services companies such as those eligible for the Fintech Charter.

Third, the proposed Fintech Charter is invalid because the OCC promulgated a decision that greatly expands the scope of NBA preemption of state consumer financial laws without first following the NBA's mandatory procedures for making such a preemption determination.

ARGUMENT

I. DFS Has Standing and Its Claims Are Ripe Because the Fintech Charter Decision Has Infringed DFS' Quasi-Sovereign Interest in the Dual-Banking System.

The Fintech Charter has caused DFS to suffer an injury-in-fact and DFS therefore has standing. A plaintiff may establish standing by showing three elements: first, an injury-in-fact; second, causation; and third, redressability. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74 (2008). To satisfy the injury-in-fact requirement, the plaintiff "must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (internal quotation marks and alterations omitted) ("*Spokeo*"). State plaintiffs like DFS also warrant "special solicitude" in the standing analysis and are entitled to sue the federal government defend their "sovereign" and "quasi-sovereign" interests. *See Massachusetts v. EPA*, 549 U.S. 497, 518, 520 n. 17 (2007). The OCC's proposal to expand its chartering authority will necessarily reduce DFS' authority to regulate non-bank financial services and preempt state laws DFS enforces, and the OCC has already allowed non-depository financial institutions to apply for a Fintech Charter. The OCC's actions have therefore disturbed the balance of power in the dual banking system and caused an injury-in-fact to DFS' quasi-sovereign interests.

A. DFS has a quasi-sovereign interest in the balance of power inherent in the dual banking system.

The United States has a "dual banking system." This system allows the state and federal governments to charter and supervise banks and acknowledges the parallel exercise of chartering authority by the state and federal governments. The carefully crafted balance of power inherent in the dual banking system is among the quasi-sovereign interests of state banking and financial services regulators like DFS. *See, e.g., Nuesse v. Camp*, 385 F.2d 694, 700–01 (D.C. Cir. 1967) (holding that state bank regulator had standing to intervene and challenge OCC action).

The dual banking system embodies a fundamental of choice: new banks can choose to be governed by state or federal law and regulators, and existing banks can elect to convert and operate under a different set of laws and regulators. But engaging in the business of banking requires a state or national bank charter. State and federal banking laws prohibit engaging in the business of banking without obtaining a bank charter. *See* 12 U.S.C. § 378(a)(2); TEX. FIN. CODE § 31.004(a). Neither a natural person nor a legal entity formed to carry on any lawful business in general may conduct the business of banking without a charter.

These unauthorized banking laws are bedrock elements of the U.S. bank regulatory system because they restrict entry to the business of banking. These laws prevent encroachment upon the banking franchise by defining banking in functional terms. In so doing, they uniformly identify one function as the exclusive privilege of banks: receiving deposits. *See, e.g., id*. A bank charter is unnecessary unless the business seeks to engage in receiving deposits and, similarly, a bank has never been chartered that did not intend to engage in receiving deposits because "state banks" are, by definition, depository institutions. 12 U.S.C. § 1813(a)(2). And, as DFS established in its brief, federal law also requires national banks to be depository institutions.

Aside from receiving deposits, all the activities banks engage in may be conducted by a legal entity organized to carry on any lawful general business purpose and would be unregulated without additional state regulatory action. *See* F. Ward McCarthy Jr., *The Evolution of the Bank Regulatory Structure: A Reappraisal*, 70 FED. RES. BANK RICHMOND ECON. REV. 1, 6 n.15 (1984). State authorities long ago invoked their broad police powers to fill this void and require the licensing and regulation of non-depository financial institutions. In this sense state non-depository regulation and state and federal banking regulation represent two sides of the same coin; state regulation of non-depository financial institutions is a key component of the dual banking system and, as the District Court noted, the balance of power therein.

Congress, by not requiring or permitting non-depository financial institutions to obtain bank charters, has deferred to state standards with respect to non-depository financial regulation. Congress has also repeatedly encouraged states to license and regulate non-depository financial institutions and services. *See, e.g.*, the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, Pub. L. No. 110–289, tit. V, § 1501, 122 Stat. 2810 (2008) (codified at 12 U.S.C. §§ 5101 *et. seq.*) (mortgage loan originators); the Money Laundering Suppression Act of 1994, Pub. L. No. 103–325, tit. IV, § 407, 108 Stat. 2247 (1994) (codified at 31 U.S.C. § 5311 note) (money services businesses).

More recently, Congress reaffirmed through the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. 111–203, 124 Stat. 1376 (2010), that federal consumer financial law serves as a floor for consumer protection and states are free to enact laws providing more stringent consumer protections than those in federal law. 12 U.S.C. § 5551(a). Congress simultaneously preserved the authority of state regulators over "any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law," except for national banks, including the authority to enforce state and federal consumer laws. 12 U.S.C. § 5552(a)(1).

DFS has a quasi-sovereign interest in drawing the line that separates bank and non-depository financial regulation, specifically how state and federal laws define the scope of the business of banking. The OCC's decision to unilaterally redraw this line shifts the balance of the power in the dual banking system and diminishes the scope of DFS's jurisdiction as a non-depository financial regulator by preempting its regulatory authority.

The Fintech Charter has already shifted this balance of power by interpreting the NBA to permit non-depository financial institutions to obtain national bank charters and sidestep the oversight of state regulators like DFS, despite not being required or permitted to obtain a bank charter under federal or state banking laws.

B. The Fintech Charter's proposed preemption of New York laws actually and imminently injures DFS by interfering with DFS' regulatory authority.

The Fintech Charter creates an imminent injury to DFS by preempting DFS' authority to administer its existing regulatory regime. An injury is "actual or imminent" if the "threatened injury must be certainly impending" or there is a "substantial risk that the harm will occur." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 409, 414 n.5 (2013) (emphasis removed) (internal quotations omitted). Plaintiffs need not show "that it is literally certain that the harms they identify will come about," *Id.* at 414 n.5. It is sufficient to establish a "reasonable probability" that the harm will occur. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010). Courts have also concluded that a "substantial risk" of a threatened injury exists after relying on evidence to "predict" how third parties would likely respond to government action. *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 576 (S.D.N.Y. 2019), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551, (2019), *and appeal dismissed*, No. 19-212, 2019 WL 7668098 (2d Cir. Aug. 7, 2019). The principal purpose of the Fintech Charter is to enable licensed non-depository financial institutions use NBA preemption to bypass state regulation. This give the court sufficient evidence to predict the characteristics and incentives of potential applicants and to recognize the reasonable probability that the OCC's decision to accept applications for the Fintech Charter will harm DFS.

The OCC has described the fintech charter as an "option" for non-depository companies seeking an alternative to state licensing and regulation. *See* Press Release, OCC, OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies (July

31, 2018). The Fintech Charter only presents an "option" compared to state licensing because it offers the perks of federal preemption; the only incentive for a non-depository company to apply for the Fintech Charter is to embrace federal preemption and avoid compliance with state consumer financial laws and state regulation. A non-depository company whose business activities do not require state licensing would have no reason to apply for a Fintech Charter because there would be no state licensing or consumer protection laws to preempt. This "option" would be most appealing to companies that operate in numerous states because it would eliminate the need to identify and comply with multiple sets of laws and regulations.

Indeed, the entire existence of the state system of non-depository financial regulation is a reflection of institutions choosing to forego engaging in receiving deposits, despite deposits being a relatively cheap and stable form of funding, in order to avoid the all-encompassing, cradle-to-grave mode of regulation that apply to national and state-chartered banks. The fact that non-depository financial institutions would now choose to be subject to OCC regulation but continue to refrain from engaging in receiving deposits underscores that the primary incentive for obtaining the Fintech Charter is to benefit from the preemption that applies to national banks under the NBA.

Because the sole rationale of the Fintech Charter is avoiding state licensing and regulation, DFS' injury is already imminent. There is no need to identify a particular applicant with specific link to New York. As noted above, non-depository companies active nationwide and licensed in numerous states stand to gain the most from the Fintech Charter and have the greatest incentive to apply. The OCC's 2018 Policy Statement even admits that it is offering the Fintech Charter because "[t]he national bank charter provides a framework of uniform standards" and applying this framework to non-depository companies "will help promote consistency in the application of laws and regulations across the country." *Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters*, *supra* at 2. This gives the court more than enough evidence to find it reasonably probable that the OCC's decision to accept applications for the Fintech Charter will interfere with DFS' regulatory activities and enforcement of state laws.

The district court also correctly concluded that DFS has standing based on previous preemption cases. The OCC has unequivocally stated its intent to issue Fintech Charters, but argues that DFS lacks standing because the Fintech Charter Decision did not preempt any state laws. The OCC's failure to address the preemptive effect of the Fintech Charter Decision undermines its validity, as discussed below in section III. But courts have regularly found states to have standing based on federal preemption without imposing the exacting standard that a federal agency inform an individual state that the agency's actions would preempt a particular state law. *See Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); *Texas v. EEOC*, 827 F.3d 372, 378, 379 (5th Cir. 2016), *withdrawn on other grounds*, 838 F.3d 511 (5th Cir. 2016) (state had standing even though agency guidance did not identify specific state laws preempted and agency lacked authority to enforce guidance). In *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 442–43 (1989), the court found standing based on an informal warning to states that an element of state regulation was preempted. The preemptive effect of the Fintech Charter Decision is more than sufficient to entitle DFS to standing in this case.

DFS has therefore established an imminent injury caused by the Fintech Charter Decision without the OCC accepting or approving an application.

C. DFS' injuries are concrete and particularized because the Fintech Charter is final and it intends to abridge DFS' authority to regulate non-depository financial institutions.

The Fintech Charter has caused DFS to suffer concrete, particularized injuries. For an injury to be concrete "it must actually exist." *Spokeo*, 136 S. Ct. at 1548. "[I]ntangible injuries can nevertheless be concrete." *Id.* at 1549. An injury is particularized when it affects "the plaintiff in a personal and individual way." *Id.* at 1548 (internal quotations omitted).

DFS' injury may be intangible, but it is also concrete. As discussed above, the Fintech Charter disrupts the balance of power in the dual banking system to the detriment of DFS and all other state regulators. The OCC's interference with DFS' quasi-sovereign interests will substantially reduce DFS' ability to enforce its own laws. This impact on DFS' quasi-sovereign interest constitutes a concrete injury.

This injury is also particularized. The OCC has made it clear that it is ready to receive applications from these non-depositories and that it fully expects to issue Fintech Charters. Some of these companies may have multiple licenses with DFS alone based on the financial services they offer and the associated licensing requirements, and many non-depositories eligible for a Fintech Charter already operate nationwide with licenses in all or most states. These nationwide companies have the greatest incentive to seek a Fintech Charter and are most likely to do so. And the Fintech Charter provides a uniform regulatory regime for non-depositories presently licensed and regulated by DFS. This invalid intrusion into DFS' existing regulatory structure causes a particularized injury to DFS.

This court should affirm the district court's conclusion that DFS has standing due to the Fintech Charter Decision and that DFS' claims are ripe.

II. The Fintech Charter decision violates Congress' intent that state consumer financial laws should govern the regulation and supervision of non-depository financial services.

For over 200 years, the states have exercised predominant control over consumer protection and non-banking consumer finance laws. The

OCC's proposed fintech charter threatens to trample centuries of state consumer financial regulatory and licensing regimes, not only the laws DFS administers but also those of every state. This will upend the careful balance of consumer protections and access to credit that the New York State Assembly—like all other state legislatures—has honed over centuries.

A. State law has historically overseen consumer protection and the regulation of non-depository financial services.

The founding fathers took care to note that the powers delegated to the federal government would be "few and defined," and those powers which would remain to the states would be "numerous and indefinite." *See* THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter ed., 2003). One of the powers left to the states since the colonial era is consumer protection. Consider the long history of state laws enacted to limit interest rates and prohibit usury. *See* Brief for Professor Adam J. Levitin as Amicus Curiae Supporting Appellants at 7, *Rent-Rite Super Kegs West, Ltd. v. World Business Lenders*, L.L.C., No. 1:19-cv-01552-REB (D. Colo. Sept. 10, 2019), 2019 WL 4569774. Usury has historically been viewed through a moral and public policy lens as a practice that negatively impacts the most vulnerable of citizens. *See The History of Usury*, AMS. FOR FAIRNESS IN LENDING (citing James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61 (1981)). States have long addressed the interrelated moral and policy considerations regarding usury and the availability of credit within their own communities, resulting in the nationwide body of state usury laws that continue to protect consumers by prohibiting lenders from charging illegal interest rates. *See* 12 U.S.C. § 25b(b)(1)(B), (b)(3).

Congress has repeatedly recognized that the state consumer financial laws the Fintech Charter jeopardizes are best left to the states and, when Congress has acted in the realms of usury and consumer protection laws, has taken pains to preserve state consumer financial laws whenever possible. The history of the Uniform Consumer Credit Code (UCCC) and the Truth in Lending Act (TILA) is illustrative.

Beginning in the 1960s, an emerging trend toward increased access to consumer credit and deregulation of consumer financial services prompted states to modernize their consumer financial laws. As part of this trend, the Uniform Law Commission published the first model consumer financial act in 1968 and released an amended draft in 1974.

The UCCC was intended to simplify, clarify, and modernize the law governing retail installment sales, consumer credit, small loans, and usury. U.C.C.C. § 1.102(2)(a) (UNIF. LAW COMM'N 1974). Oklahoma was the first state to enact the law, in 1969, and currently eleven states have adopted all or most of the UCCC. *Consumer Credit*, LEGAL INFO. INST. (2020). These states adopted the UCCC pursuant to their historic police powers to foster competition in the consumer credit industry and protect the welfare of their citizens—the same powers all states rely on when legislating on these matters. Brief for National Association of Consumer Credit Administrators and the American Conference of Uniform Consumer Credit Code States as Amici Curiae Supporting Defendant-Appellees, *Greenwood Trust Co. v. Massachusetts*, Nos. 91-2205, 91-8096, 92-1065 (1st Cir. Apr. 7, 1992), 1992 WL 12577405. This is also true of the majority of states that did not adopt the UCCC but continue to rely on their police powers to regulate consumer credit and enforce consumer protection laws.

As the UCCC was being developed, Congress in 1968 passed the Consumer Credit Act which included TILA. Congress intended TILA as a limited and complementary addition to existing substantive consumer credit regulation embodied in state consumer financial laws, including the UCCC. *See* BORROWING TO LIVE: CONSUMER AND MORTGAGE CREDIT REVISITED 113 (Nicholas P. Retsinas & Eric S. Belsky eds., 2008). TILA's purpose was to create uniform consumer credit disclosures that lenders must provide to inform consumers of the cost of credit, and "many provisions of" TILA and its implementing regulation, Regulation Z, "are traceable to the" UCCC. U.C.C.C., Prefatory Note (UNIF. LAW COMM'N 1974). In a rare and unique concession of federal authority, Congress acknowledged the established role states play in regulating consumer credit and included in TILA an option for states to opt-out of TILA's disclosure provisions and retain state-specific disclosure laws. And Congress declined to intrude on substantive state laws with respect to interest rates and fees permitted in consumer credit transactions. *See* BORROWING TO LIVE, *supra*. TILA is silent on these points. The Consumer Credit Protection Act of 1968 even directed a federal commission to study whether Congress should create a federal charter for non-depository consumer lenders. The Consumer Credit Protection Act of 1968, Pub.L. No. 90–321, 82 Stat. 146 (1968). No such charter has been approved.

Congress recently reemphasized its intent for the states to retain their traditional power to regulate consumer finance in the Dodd-Frank Act's revisions to the OCC's ability to preempt to state laws. After the 2008 financial crisis, there were broad concerns that the OCC's aggressive preemption of state consumer financial laws contributed to the crisis. *See e.g.,* Gregory D. Omer, *Federal Banking Law Preemption in the Post-Dodd Frank World: A Review of Significant Developments*, ABA BANKING L. COMM. J. (Apr. 1, 2019). Some observers contend that national banks played a significant role in the type of predatory lending that arguably led to the crisis, and that federal preemption "effectively gut[ted] states' ability to legislate against predatory lending practices." Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2275 (2004). Congress responded to these and other concerns by passing Dodd-Frank, Sections 1041 and 1044 of which specifically address preemption issues.

The effects of the 2008 financial crisis have finally begun to wane, and state financial regulation was essential during the 2008 financial crisis and the subsequent economic recovery. Congress has recognized that bank regulatory laws and consumer protection laws serve different purposes and guard against different potential harms. Business activities that are legal, safe, and profitable for national banks may nonetheless be harmful to individual consumers and, in the aggregate, to the economy and society. The widespread abrogation of state consumer financial laws contributed directly to the 2008 financial crisis. Today the United States is facing a new phase of economic uncertainty due to the Covid-19 pandemic, making this a particularly inauspicious moment to expand the preemption of state consumer financial laws and weaken the consumer protections available to the citizens of every state and the attendant protections to our broader economy and society. Now more than ever the regulatory authority of the states in this field must be preserved.

B. The Fintech Charter must be authorized by Congress.

The Fintech Charter poses a fundamental challenge to the traditional state-based approach to consumer protection and non-depository financial regulation—a challenge on which Congress has not yet weighed in. An entity that receives a Fintech Charter would be authorized to engage solely in consumer lending, without the need to receive deposits or engage in any other banking activities, and to do business nationwide without adhering to any state consumer financial laws. This could override not only the consumer financial laws DFS administers, but the entire state system of consumer protection regulation. These laws may present a patchwork to fintech companies operating nationwide or online, but the mere fact that these companies consider it burdensome to comply with state laws and would prefer a national standard is not a justification for preempting those laws.

Preemption analysis begins by looking "to the purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). This analysis also assumes "that the State's historic police powers are not preempted" unless that was clearly Congress's purpose. *See Lusnak v. Bank of America*, 883 F.3d 1185, 1191, 1197 (9th Cir. 2018) (quoting *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) (holding that state escrow interest laws do not satisfy this standard and are not preempted) ("*Lusnak*"). And because consumer protection laws are a field traditionally regulated by the states, "compelling evidence of an intention to preempt is required" when preemption of a state consumer protection law is at issue. *Id.* at 1191. The preemptive effect of the NBA thus turns on whether Congress "intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 30 (1996) ("*Barnett Bank*").

The history of federal consumer protection legislation demonstrates that Congress knows how to address preemption and the role of state law in regulating non-depository consumer finance companies, including the passage of TILA and Dodd-Frank's check on the OCC's use of preemption of state consumer financial laws. Dodd-Frank embodies clear Congressional intent that the states should retain sovereign power over consumer protection law.

Dodd-Frank placed three important restrictions on the OCC's authority to adopt regulations that preempt state consumer financial laws. First, it stipulated that the OCC may only preempt "[s]tate consumer financial laws" after the OCC establishes, with compelling evidence, that the state consumer financial law in question "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). Second, it requires the OCC to follow specific procedures when making any preemption determination, including making "case-by-case" determinations about the impact of particular state consumer financial laws. 12 U.S.C. § 25b(b)(1)(B), (b)(3).

Third, it specified that the OCC's preemption determinations are entitled only to *Skidmore* deference, not *Chevron* deference. *See* 12 U.S.C. § 25(b)(5)(A). Congress thereby issued a "stinging rebuke" to the OCC and curtailed its preemption powers. *See OCC Ignores Dodd-Frank Act's Repeal of 2004 Preemption Regulations*, NAT'L CONSUMER LAW. CTR. (May 2011) Congress affirmed that states play a leading role in regulating consumer financial products and protecting the health of the financial services sector.

Congress has also shown that it knows how to address national bank powers and the availability of limited-purpose national bank charters. It amended 12 U.S.C. § 27(a) in 1978 to authorize the OCC to charter national banks that engage exclusively in trust activities. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 1504, 92 Stat. 3641 (1978). Congress enacted this change in response to the OCC's decision to charter a national bank engaged solely in trust activities despite the lack of statutory authorization for such a charter. *See National State Bank of Elizabeth v. Smith*, No. 76-1479 (D.N.J. Sept. 16, 1977), *rev'd on other grounds*, 591 F.2d 223 (3d Cir. 1979) (challenging the legality of a limited-purpose national bank organized exclusively to perform trust activities). This amendment confirmed that the NBA does not provide for limited-purpose national bank charters unless expressly authorized by statute. And while Congress recently amended the NBA to limit the OCC's ability to preempt state law, it has not amended the NBA to authorize special-purpose national banks like the Fintech Charter.

Considering Congress' express intent for the states to retain their central role in administering usury laws and regulating non-depository consumer financial services, it is improper for the OCC to attempt such a sweeping policy change unilaterally rather than following the legislative process. The decision to preempt state consumer financial laws and authorize the Fintech Charter must be the result of Congress following the established policymaking process and exercising its considered judgment. Until Congress expresses the intent to authorize the Fintech Charter and to displace state consumer financial laws, this court should defer to Congress' manifest intent and preserve the role of state laws governing non-depository consumer financial services.

III. The Fintech Charter does not override state law because the OCC issued its decision without following the required procedure for determining that the NBA preempts state consumer financial laws are preempted.

As mentioned above, Dodd-Frank placed three important restrictions on the OCC's authority to adopt regulations that preempt state consumer financial laws. First, it stipulated that "[s]tate consumer financial laws" are preempted "only if" the OCC establishes, with compelling evidence, that the state consumer financial law in question "prevents or significantly interferes with the exercise by the national bank of its powers", and that this determination must satisfy the legal test enumerated in *Barnett Bank*. *See* 12 U.S.C. § 25b(b)(1)(B). Second, it required the OCC to follow specific procedures when making any preemption determination. 12 U.S.C. § 25b(b)(1)(B), (b)(3). Third, it directed the OCC to review preemption determinations at least once every five years. 12 U.S.C. § 25b(d).

The Fintech Charter's unprecedented expansion of existing NBA preemption to non-depository consumer lenders triggers these requirements. An agency's interpretation expanding the scope of an existing regulation may have preemptive effect. *Alaska v. Dep't. of*

Transp., 868 F.2d 441 (D.C. Cir. 1989). The Fintech Charter does not invoke the NBA to preempt state usury and consumer loan licensing laws; the OCC previously deemed these state laws preempted with respect to national banks. *See, e.g.*, 12. C.F.R. § 7.40008(d)(1), (10). Instead the Fintech Charter makes a national bank charter available to non-depository fintech companies, traditionally regulated by the states, thereby inviting these entities to "convert" to a national bank and reap the benefits of NBA preemption—without having to incur the regulatory burdens associated with receiving consumer deposits. The Fintech Charter may also cause new state laws to be preempted.

The OCC failed to follow the statutorily mandated process for preempting state consumer financial laws before determining that it has the authority to charter fintech companies as special-purpose national banks and thereby preempt state licensing and consumer protection laws. *See generally, Exploring Special Purpose National Bank Charters for Fintech Companies*, *supra*; *Comptroller's Licensing Manual Supplement*, *supra*. State laws are preempted only if a preemption determination is made in compliance with all requirements under Dodd-Frank. And because the Fintech Charter Decision has preemptive effect, the OCC's interpretation of the NBA and 12 C.F.R. § 5.20(e)(1)(i) "are entitled only to *Skidmore* deference," meaning the OCC must persuade the court that its preemption determinations are correct. *See Lusnak*, 883 F.3d at 1192–93 (discussing the significance of Dodd-Frank's decision to reduce the deference applicable to the OCC's preemption determinations). The Fintech Charter Decision fails on both counts and is therefore invalid.

A. The OCC disregarded the NBA's mandatory process to determine that state consumer financial laws are preempted.

The OCC has given short shrift to preemption considerations throughout this process. The agency ignored the procedural requirements Dodd-Frank imposed before issuing its conclusion that existing regulations authorize it to issue special purpose national bank charters to non-depository fintech companies. These mandatory procedures include, first, a "case-by-case" determination by the OCC that a state consumer financial law prevents or significantly interferes with national bank powers; and, second, individually evaluating state consumer laws in consultation with the Consumer Financial Protection

Bureau ("CFPB") before making any preemption determinations. 12 U.S.C. §§ 25b(b)(3), b(c), b(d).

The requirement for the OCC to make preemption determinations on a case-by-case basis means that the OCC must assess the impact of particular state consumer financial laws on national bank operations before determining that the laws are preempted. The NBA also directs the Comptroller to make preemption determinations in the form of a regulation or order subject to notice and comment and supported by "substantial evidence" on the record. 12 U.S.C. §§ 25b(b)(3), b(d), (b)(1)(B), (b)(6).

None of the publications issued by the OCC throughout this process showed any signs of the first statutory requirement, the "case-by-case" determination. The OCC glossed over any preemption concerns, stating that it would do no more than "look to the relevant statutes (including the preemption provisions Dodd-Frank added to the National Bank Act), regulations (including the OCC's preemption regulations), and federal judicial precedent to determine if or how state law applies." *See Exploring Special Purpose National Bank Charters for Fintech Companies*, *supra*, at 5. The OCC's preemption analysis in its December 2016 white paper merely regurgitated the pre-Dodd-Frank list of preempted state laws and stated that "[e]xamples of state laws that would generally apply to national banks include state laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, and torts." *Id.* The closest the OCC came to satisfying the requirement to analyze discrete state laws for possible preemption was noting that it "would consider on a case-by-case basis the permissibility of a new activity that a company seeking a special purpose charter wishes to conduct." *Id.* at 4.

Despite the OCC's flimsy reassurances, the NBA's preemption requirements are not limited to examining only "new activities" proposed by a national bank. The OCC noted that "under [Dodd Frank's preemption provisions], state laws would not apply if they would require a national bank to be licensed in order to engage in certain types of activity or business." *Id.* at 5. The Fintech Charter therefore could preempt—nationwide—state licensing laws that currently apply to fintech companies. *See, e.g.*, N.Y. BANKING LAW § 340 (McKinney 2019); CONN. GEN. STAT. ANN. § 36a-556 (West 2020); IOWA CODE § 536.1 (2019); TEX. FIN. CODE ANN. § 342.051 (West 2019); WYO. STAT. ANN. § 40-14-348 (West 2020); WASH. REV. CODE § 31.04.045 (2019). It could also expand the scope of NBA preemption with respect to state usury laws. *See, e.g.*, IOWA CODE § 537.2401 (2019); TEX. FIN. CODE ANN. § 342.201 (West 2019); WYO. STAT. ANN. § 40-14-342 (West 2020); WASH. REV. CODE § 19.52.010 (2019).

This brief, non-exhaustive list of state laws that could arguably be preempted by the Fintech Charter highlights the OCC's unwillingness to expend the required effort before attempting to preempt state laws. The OCC's troubling failure to make "case-by-case" preemption determinations with respect to any state consumer financial statutes defies Congress' clear intent on this point.

These standards also apply on an ongoing basis to preemption determinations made prior to Dodd-Frank. The OCC must review all preemption determinations, whenever made, at least once every five years. The OCC did not thoroughly perform its five-year preemption review. *See generally Exploring Special Purpose National Bank Charters for Fintech Companies, supra*. It also did not thoroughly review its earlier preemption determinations related to the national bank charter as required in light of Dodd-Frank's new preemption standard but "merely reaffirmed that its list of preempted state laws . . . remain[ed] consistent with the standard for conflict preemption in" *Barnett Bank*. *Clark v. Bank of America, N.A.*, No. CV SAG-18-3672, 2020 WL 902457, at *5 (D. Md. Feb. 24, 2020) (internal quotation omitted). The OCC therefore did not adequately review the preemption determination applicable to 12 C.F.R. § 5.20(e)(1)(i) following the passage of Dodd-Frank. The regulation the Fintech Charter relies on has not been sufficiently reviewed and it therefore lacks preemptive effect.

The OCC also ignored the second statutory requirement to consult with the CFPB, never mentioning whether the agency had completed or planned to complete the required consultation. The only mention of the CFPB appeared in the white paper, which noted that "A special purpose national bank that engages in an activity that is regulated under a federal consumer financial law, as defined by Dodd-Frank, may also be subject to oversight by the Consumer Financial Protection Bureau" and outlined how the OCC would coordinate regulation with the CFPB. *See Exploring Special Purpose National Bank Charters for Fintech Companies*, *supra*, at 7–8.

Heedless of Congress' instructions to curtail the preemption of state consumer financial laws, the OCC persevered in issuing the Fintech

Charter Decision. And it did so even though the purpose of the Fintech Charter is to drastically expand the scope of existing NBA preemption to include non-depository financial services long governed by state law. But the OCC's uniform disregard for the process the NBA requires before the agency may determine that a state consumer financial law is preempted fatally undermines the Fintech Charter. This court should therefore affirm the district court's conclusion that Fintech Charter is invalid.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULE 30(g)(1)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 32.1(a)(4) because this brief contains 6,426 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

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Dated: July 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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