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 PROFESSOR DAVID ZARING AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS OFFICE OF THE COMPTROLLER OF THE CURRENCY AND JOSEPH M. OTTING

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INTEREST OF *AMICUS CURIAE*[1]

Amicus David Zaring is a professor at the Wharton School of the University of Pennsylvania. He is a scholar of financial regulatory institutions and has written in particular about the Office of the Comptroller of the Currency (OCC)'s chartering practices, including the special purpose charter program for financial technology (fintech) companies challenged in this case. *See* David Zaring, *Modernizing the Bank Charter*, 61 Wm. & Mary L. Rev. 1397 (forthcoming, 2020). He has no financial or other interest in this case.

INTRODUCTION

This Court should hold that the OCC has the authority to issue special purpose national bank charters for financial technology (fintech) companies pursuant to the National Bank Act and 12 C.F.R. § 5.20(e)(1).

Pursuant to the National Bank Act, codified at 12 U.S.C. § 21 *et seq*., the OCC has the authority to charter national banks with incidental powers to carry on the "business of banking." In 2003, the OCC amended

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[1] This brief is filed pursuant to consents obtained from all parties. No person other than *amicus* and his counsel authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. *Amicus* thanks Jennifer Corcoran of Penn Law School for research assistance.

its regulations—12 C.F.R. § 5.20(e)(1)—to allow the issuance of special purpose national bank (SPNB) charters. The purpose of the amendment was to "clarify that a limited purpose national bank may exist with respect to activities other than fiduciary activities, provided the activities in question are within the business of banking."[2] This regulation, struck down by the District Court, was published in the Federal Register pursuant to the governing procedures for a notice of proposed rulemaking (NPRM).[3] In response to comments received that the "business of banking" provision was defined too broadly for the SPNB charters, the OCC amended 12 C.F.R. § 5.20(e)(1) to allow national banks to obtain an SPNB charter so long as they conduct at least one of three enumerated functions—(1) receive deposits, (2) pay checks, or (3) lend money. DFS's position that being in the "business of banking" requires receiving deposits is thus inconsistent with the plain text of this regulation. The regulation's definition did not appear from thin air—the OCC borrowed it from another section of the U.S. Code regarding the functions of bank

[2] Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6371 (Feb. 7, 2003).

[3] *Id*. at 6370 n.23.

branches.[4] A bank branch is "any branch place of business … at which deposits are received, *or* checks paid, *or* money lent."[5]

The regulation's definition of banking was not challenged after promulgation, nor in the years that followed. In fact, the first legal challenge was raised fifteen years later by the plaintiff here, when the OCC decided to rely upon the existing regulation to offer SPNBs to fintech companies.

In December 2016, the OCC published a white paper, "Exploring Special Purpose National Bank Charters for Fintech Companies,"[6] which argued that the OCC's chartering authority was established under the National Banking Act and 12 C.F.R. 5.20(e)(1) and could be applied to offer a limited banking charter to fintech firms. It took comment on the white paper. It then issued a draft supplement to its Licensing Manual proposing how it might charter fintechs, and again took comment.

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[4] Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 70,122, 70,126 (Dec. 17, 2003).

[5] 12 U.S.C. § 36(j) (emphasis added).

[6] OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016), https://www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html.

Finally, the OCC produced a licensing manual supplement—*Considering Charter Applications from Financial Technology Companies*—to provide guidance in navigating the process of applying for a charter, and invited applications, although it has received none.[7] This lengthy consultative process lasted through the tenures of the last three Comptrollers, appointed by presidents of different parties, all of whom have endorsed the fintech charter, as did the Treasury Department in its 2018 review of the state of American financial regulation.[8]

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[7] OCC, *Comptroller's Licensing Manual Supplement: Considering Charter Applications From Financial Technology Companies* (July 2018), https://www.occ.gov/publications-and-resources/publications comptrollers-licensing-manual/files/considering-charter-apps-from-fin-tech-companies.html.

[8] Steven T. Mnuchin & Craig S. Phillips, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* 83–84 (July 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf (recommending that "the OCC move forward with prudent and carefully considered applications for special purpose national bank charters"); Dan Cohen, *Comptroller Otting: A New Ally for a Fintech Charter?*, FinTech L. Watch (Jan. 10, 2018), https://www.fintechlawblog.com/2018/01/comptroller-otting-a-new-ally-for-a-fintech-charter/ ("there's a space there that a technology solution can solve" (internal quotation marks omitted)); Keith A. Noreika, Acting Comptroller of the Currency, Remarks before the Exchequer Club 5 (July 19, 2017), https://www.occ.gov/news-issuances/speeches/2017/pub-speech-2017-82.pdf ("[C]ompanies that offer banking products and services *should* be

This careful, considered process should reassure this Court that the OCC's 2003 regulation is a reasonable interpretation of the National Bank Act, which the agency is charged with applying. The familiar *Chevron* standard of review applies here because the dispute in this case turns on the validity of the 2003 regulation, a duly promulgated rule carrying the force of law and issued after notice and comment. That regulation makes clear on its face that an institution can be eligible for an OCC charter despite not taking deposits, while DFS's position is that being in the "business of banking" requires taking deposits. The District Court, agreeing with DFS that the regulation is contrary to the statute, vacated the regulation.[9] As this Court has recently explained, "an agency's interpretation of a statutory provision is entitled to *Chevron* deference when it is promulgated in a form that carries 'the force of law,'

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allowed to apply for national bank charters so that they can pursue their businesses on a national scale if they choose, *and* if they meet the criteria and standards for doing so."); Thomas J. Curry, Comptroller of the Currency, Remarks at LendIt USA 2017 5 (Mar. 6, 2017), https://www.occ.treas.gov/news-issuances/speeches/2017/pub-speech-2017-27.pdf ("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.").

[9] JA297 (ordering "vacatur of the Regulation").

such as a regulation promulgated pursuant to notice-and-comment rulemaking."[10]

Chevron requires courts to accept a federal agency's construction of a statute it administers when the statute is ambiguous and the agency's construction is reasonable.[11] This Court should uphold the OCC's 2003 regulation as a reasonable interpretation of the National Bank Act.

First, the District Court erroneously rejected the OCC's authority to issue special purpose national bank charters for non-depository institutions, holding that the term "business of banking," as used in the National Bank Act, "unambiguously requires receiving deposits as an aspect of the business." JA262. The court reached this conclusion after conceding that the Supreme Court had concluded the opposite in *NationsBank*—that the "business of banking" encompassed more than one meaning, and that *Chevron* deference should be extended to the OCC's efforts to define that business. *NationsBank of N.C., N.A. v.*

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[10] *Starr Indem. & Liab. Co. v. Water Quality Ins. Syndicate*, 775 F. App'x 4, 6 (2d Cir. 2019) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)). Below, the District Court and both parties agreed that the *Chevron* framework applied. JA260–61.

[11] *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 538 (2009) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984))

Variable Annuity Life Ins. Co., 513 U.S. 251, 254 (1995) (holding that the OCC bears "primary responsibility for surveillance of 'the business of banking'" authorized by 12 U.S.C. § 24 (Seventh)). Almost no cases have held that firms must take deposits if they want to obtain a bank charter, and there are plenty of chartered institutions that do not.

Second, in determining that deposits are essential to engage in the "business of banking," the District Court overlooked the OCC's reasoned approach to charters. Contrary to the court's assertion that it is "not aware of OCC ever having chartered a non-depository entity as a national bank" in the absence of congressional amendment to the National Bank Act, JA268, the OCC currently issues special purpose national bank charters to credit card banks, which are non-depository institutions, and trust banks, which hold collateral rather than deposits.

Third, allowing fintech companies to do something other than seek licenses at the state level does not upset the "balance of the dual banking system" as claimed by DFS. JA246. Rather, complying with fifty different state licensed lender or money transmitter requirements poses challenges for these firms, which deliver their services via the internet,

which does not stop at state borders. Fintech firms in particular would benefit from having the option of a single, nationwide regulator.

Fourth, the United States' patchwork fintech regulation has placed the nation at a competitive disadvantage compared with international peers. Countries around the world have allowed fintech companies to obtain specialized fintech licenses in order to offer their products and services to the general public. The OCC's decision to cautiously develop a national fintech charter application process—and as yet, it has not issued a charter to a single fintech—is consistent with the approach of sophisticated financial regulators in other countries.

Fifth, challenges to the OCC's chartering decisions are exceedingly rare and have been met with a form of super-deference that courts have never clearly explained. The Court should clarify that the agency's decisions to charter banks are reviewable under ordinary principles of administrative law.

ARGUMENT

I. Taking Deposits Is Not Required To Engage In The "Business of Banking."

The issue is, what is banking?[12] To answer that question, the District Court opened a copy of Webster's Dictionary, 1861 edition, and concluded that receiving deposits is essential to the "business of banking" as defined in the National Bank Act.[13] It then applied this nineteenth-century definition to twenty-first century banking technology and held that the OCC cannot issue a special purpose national bank (SPNB) charter to a fintech company that does not receive deposits. The District Court's reliance on old dictionaries is misplaced because the "National Bank Act did not freeze the practices of national banks in their nineteenth century forms .... [T]he powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 563 (9th Cir. 2002), *as amended on denial of r'hrg and r'hrg en*

[12] *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue is, what is chicken?") (Friendly, J.).

[13] JA264–65.

banc (Dec. 20, 2002) (quoting *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977)).

A. The OCC Bears Primary Responsibility for the Surveillance of the "Business of Banking."

The National Bank Act (NBA), codified at 12 U.S.C. § 21 *et seq.*, vests the OCC with the authority to charter national banks. OCC-chartered national banks have five specifically enumerated powers—they can: (1) discount and negotiate evidences of debt; (2) receive deposits; (3) buy and sell money; (4) make loans; and (5) obtain, issue, and circulate notes. *See* 12 U.S.C. § 24 (Seventh). In addition to these enumerated powers, the National Bank Act also grants national banks "all such incidental powers as shall be necessary to carry on the business of banking."[14]

In *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, the Supreme Court considered whether a national bank could sell annuities as part of the "business of banking." The Court said they could, because selling annuities is an "'incidental power … necessary to carry on the business of banking'" under 12 U.S.C. § 24 (Seventh).[15] Even though

[14] 12 U.S.C. § 24 (Seventh).

[15] *NationsBank*, 513 U.S. at 256.

"annuities" appear nowhere in the National Bank Act, the Court explicitly rejected the notion that the "business of banking" confines national banks to the five activities specifically enumerated in § 24 (Seventh). Siding with the OCC's interpretation of the Act, the Court reasoned that the OCC is the "administrator charged with supervision of the National Bank Act … [and] bears primary responsibility for surveillance of the 'business of banking;'" it afforded the OCC *Chevron* deference for its interpretation that annuity sales could be so included.[16]

In 2003, the OCC promulgated 12 C.F.R. § 5.20 pursuant to the National Bank Act to permit the issuance of special purpose national bank charters. A SPNB charter allows a special-purpose bank to conduct fiduciary activities or core banking functions, which includes (1) receiving deposits, (2) paying checks, or (3) lending money. Until the present action, the OCC's creation of SPNB charters permitting non-depository institutions to engage in the "business of banking" was not challenged—either through the notice-and-comment period or in litigation in the fifteen-plus years since enactment.

[16] *Id.*

That there were no challenges to the agency's regulation makes sense. The "business of banking" is susceptible to more than one meaning. In *NationsBank*, the Supreme Court reasoned that Congress intended that "'the business of banking'" was "*not confined to the examples specifically enumerated*" in the statute. 513 U.S. at 259 (emphasis added). The OCC "may authorize additional activities if encompassed by a reasonable interpretation of § 24 (Seventh)." *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000); *see also Bank of Am.*, 309 F.3d at 562.

Despite this precedent, the District Court found that the "business of banking" *must* involve the exercise of one specific enumerated power—the receipt of deposits. In circumscribing banking as a strictly nineteenth-century activity, the District Court ignored how banking has evolved with new technology. *See, e.g., Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 7 (2007) (incidental powers include real estate mortgage lending); *Bank of Am.*, 309 F.3d at 562 (incidental powers include operating automated teller machines). As this Court has put it, the agency's chartering "regulation reflected the OCC's interpretation of national banks' powers under the NBA § 24 (Seventh) in light of the '*ever-*

changing and growing' business of banking that had 'developed rapidly during recent years' and that called for more flexibility in national banks' ability to structure their banking activities." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 317 (2d Cir. 2005) (emphasis added).

The District Court also diverged from this Court's understanding of the relationship between the National Bank Act's five enumerated powers and incidental powers. *See Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 742 F.3d 37, 41 n.4 (2d Cir. 2014) ("We have interpreted [such incidental powers as shall be necessary to carry on the business of banking] … to refer to activities convenient and useful in connection with the performance of an express power.") (internal quotation marks omitted).

Against this appellate and high court recognition that the "business of banking" could evolve over time, there is barely any precedent for the essentialist holding by the District Court that taking deposits is a *sine qua non* of what "banking" is.[17] A Florida district court held in 1985 that

[17] For the deference cases, *see NationsBank*, 513 U.S. at 259–60 (holding that the National Bank Act is consistent with permitting a bank to sell annuities); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 404, 409 (1987) (finding "'the general business of each national banking association'" to be ambiguous, warranting deference).

"the core of the business of banking as defined by law and custom is accepting demand deposits and making commercial loans," meaning that operating a business that did not do both things would be inconsistent with the National Bank Act.[18] Another district court held in 1979 that a trust bank that did not both make loans and accept deposits could not be chartered as a national bank because it was not engaged in the business of banking, a decision that was undone by Congress.[19] After these decisions were issued, the OCC developed its special chartering program, chartered a limited number of non-deposit-taking institutions, and regularly has been affirmed by appellate courts when it has expanded the charter to allow banks to offer modern services like ATMs or useful offerings like annuities contracts.

B. The OCC Already Issues Bank Charters to Non-Depository Institutions.

Understanding that the OCC already issues special purpose banking charters to non-deposit-taking institutions, the decision to issue

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[18] *Indep. Bankers Ass'n of Am. v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529, at *30 (M.D. Fla. Feb. 15, 1985).

[19] *See Nat'l State Bank of Elizabeth, N.J. v. Smith*, No. 76-1479, 1977 U.S. Dist. LEXIS 18184, at *20, *24 (D.N.J. Sept. 16, 1977), *rev'd as superseded by statute*, 591 F.2d 223 (3d Cir. 1979), *as amended on denial of r'hrg* (Feb. 5, 1979).

SPNB charters to fintech companies is reasoned and consistent with the agency's longstanding practice.

Special purpose banks are institutions whose activities fall within the "business of banking" in the National Bank Act and 12 C.F.R. § 5.20. Special purpose banks "offer only a small number of products, target a limited customer base, incorporate nontraditional elements, or have narrowly targeted business plans."[20] Trust banks and credit card banks are allowed to receive SPNB charters, and yet neither receives deposits.

Trust banks' operations are limited to those of a "fiduciary, meaning the bank will act as trustee, executor, administrator, registrar of stocks and bonds."[21] Trust banks are not considered banks for the purposes of the Bank Holding Company Act because they either do "not accept demand deposits" or these deposits are "in trust funds and are received in a bona fide fiduciary capacity."[22] But they are in the business of banking for the purposes of the NBA.

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[20] OCC, *Licensing Manual: Charters* 50 (Oct. 2019), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/licensing-booklet-charters.html.

[21] *Id.* at 54.

[22] *Id.*

The most obvious example of an SPNB charter that was ignored by the District Court is a credit card bank. Courts have recognized that these non-bank institutions engage in the "business of banking." *See Limited, Inc. v. Comm'r*, 286 F.3d 324, 333 (6th Cir. 2002) ("WFNNB is a nationally chartered bank that issues credit cards. As such, it extends credit and receives payment for those loans.") A credit card bank is an institution whose primary business line is the issuance of credit cards and the generation of credit card receivables.[23] Some credit card banks are also not "banks" as defined under the Bank Holding Company Act because they are *prohibited* from receiving demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties.[24]

In sum, there is no reason to conclude that a fintech company must accept deposits to engage in the "business of banking," because the OCC already issues similar SPNB charters to non-depository institutions. Indeed, a decision requiring these institutions to take deposits if they wanted to hold on to their charters would be destabilizing.

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[23] *Id.* at 51.

[24] *Id.* at 51–52.

II. The OCC's Track Record When It Comes To Chartering Is Cautious.

The OCC is not trying to hide an elephant in a mousehole or expand the definition of the "business of banking" out of all recognition in a way that would permit commercial firms to open banking subsidiaries vaguely linked to the internet. Instead, the OCC's record on allowing unconventional businesses to hold banking charters has been careful and consistent. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (affirming regulatory interpretations within the agency's statutory powers "as long as interpretive changes create no unfair surprise").

First, the agency has a record of keeping large commercial firms out of participation in the business of banking. In the last decade alone, it has encouraged commercial entities with long-standing lending arms to divest or restructure them.[25] Commercial firms that wanted to get into the business of banking avoided the agency, and instead (usually

[25] *See MetLife Completes Spin-Off of Brighthouse Financial*, MetLife (Aug. 7, 2017), https://www.metlife.com/about-us/newsroom/2017/august/metlifecompletesspin-off-of-brighthouse-financial/; Kaja Whitehouse, *GE Dismantles GE Capital, Plans $90B to Investors*, USA Today (Apr. 10, 2015, 4:20 PM), https://www.usatoday.com/story/money/business/2015/04/10/ge-selling-real-estate-assets/25564855/.

unsuccessfully) pursued industrial loan company charters issued by the states.

Second, since promulgating its 2003 special purpose banking charter regulation, the OCC has approached special purpose charters cautiously—perhaps ultra-cautiously. Of the more than 4000 banks in the United States, fewer than 70 hold national special purpose bank charters.

The fintech charter exemplifies the agency's sober approach. The OCC has said that qualifying fintech companies will need to comply with all the laws, rules, regulations, and federal supervision that apply to all national banks.[26] This includes complying with rigorous anti-money laundering regulations pursuant to the Bank Secrecy Act, economic sanctions obligations as required by the Office of Foreign Assets Control, and risk-based capital requirements.[27]

Obtaining banking charters is difficult, and nothing like obtaining a corporate charter. In deciding whether to issue a fintech charter, the

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[26] OCC, *Comptroller's Licensing Manual Supplement, supra* note 7, at 3.

[27] *Id*. at 7–8.

OCC considers whether the proposed bank "has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair treatment of customers, and will ensure compliance with laws and regulations."[28] The OCC also scrutinizes the fintech company's business plan, which includes a description of proposed activities and an analysis of the permissibility of those activities.[29] Indeed, fintech charter applicants, as the manual supplement shows, have to provide all the information a de novo bank charter applicant has to provide the agency, along with all the materials required by the fintech supplement. Fintechs are scrutinized more carefully than ordinary applicants, not less carefully.

This all takes time—as much as two years.[30] Nor does it appear that the OCC's scheme will radically expand its jurisdiction—not a single

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[28] *Id.* at 5.

[29] *Id.* at 6–7.

[30] Penny Crosman, *What Lendingclub And Radius Saw in Each Other*, Am. Banker (Feb. 20, 2020, 2:13 PM), https://www.americanbanker.com/news/inside-the-lendingclub-radius-bank-merger ("The deal will be subject to a regulatory review that could take 12 to 15 months," after a year-long engagement with regulators).

application for a fintech charter has been received by the agency. OCC Brief at 2–3.

Moreover, the agency's past practice with special charters illustrates its caution. Its oldest (since 2003) special charter has been used by the subsidiaries of ordinary banks that want to offer their customers credit cards in addition to the usual deposit and loan offerings. Credit card banks were permitted to obtain federal charters if they engaged only in credit card operations and did not accept deposits, meaning that they would not need to obtain deposit insurance from the FDIC.[31] A nationally chartered credit card bank usually exists as a bank affiliate that is not subject to state usury laws, which set maximum rates of interest for loans that credit card issuers can exceed; the OCC's national preemption power makes this possible. But as of January 31, 2018, only nine banks had taken the opportunity to become credit card banks, and most of these are affiliates of other OCC-regulated banks.[32]

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[31] For a guide on the supervision that credit card banks face, *see* OCC, *Credt Card Lending* (Jan. 2017), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/credit-card-lending/index-credit-card-lending.html.

[32] For the current list of credit card banks, *see* OCC, *Financial Institution Lists* (Mar. 31, 2020), https://www.occ.treas.gov/topics/

More popular has been the special trust charter—although it has not been much more popular. Fifty-three banks hold the trust charter; again, these are usually affiliates of other banks.[33] Trust banks are special purpose entities designed to hold assets identified in a contract between two private parties.[34] Their profits come from fees charged to manage the assets held in trust; trust companies have a fiduciary obligation to put the interests of the beneficiaries of the trust ahead of their own. Trust banks are not insured by the FDIC in most cases, a fact that may have induced the OCC to stop chartering trust banks for years, worried about the prospect of being on the hook for their failure.[35]

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licensing/national-banks-fed-savings-assoc-lists/index-active-bank-lists.html. Moreover, the OCC is permitted to charter a credit card bank that is exempt from requirements of the Bank Holding Company Act. *See* OCC, *Licensing Manual: Charters*, *supra* note 20, at 51–54.

[33] For the current list of national trust banks, *see* OCC, *Financial Institution Lists*, *supra* note 32.

[34] As Omarova and Tahyar have put it, "[t]rust companies generally engage in the business of holding and managing money in a fiduciary or representative capacity." Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 Rev. Banking & Fin. L. 113, 173 (2011).

[35] For the FDIC's approach to trust banks, *see* FDIC Trust Examination Manual § 10 (Dec. 6, 2013), https://www.fdic.gov/regulations/examinations/trustmanual/section_10/section_x.html.

In the wake of the financial crisis, the OCC created a "shelf charter," allowing investor groups to prequalify for a national bank charter so that the groups could compete in an auction for a failed bank. But the shelf charter, like the other special charters issued by the OCC, did not enjoy much take-up, perhaps because the OCC made obtaining a shelf charter quite difficult—managing officers of the would-be bank had to be identified and available, and shelf charter applicants underwent rigorous oversight.[36]

The OCC also has chartered in the past community development financial institutions, which are designed to encourage growth in underserved or low-income areas, and cash management banks, which are banking subsidiaries that manage the cash flow of larger business customers.[37]

The modesty of these forays into special purpose charters underscores the OCC's care and caution regarding unconventional

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[36] Thomas P. Vartanian & Gordon L. Miller, *2009 Developments in FDIC Failed Bank Resolutions,* A.B.A. Bus. L. Newsl. 5–6 (Nov. 2009), http://www.abanet.org/buslaw/newsletter/0089/materials/pp2b.pdf.

[37] OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies*, *supra* note 6, at 3 n.5.

charters. The OCC has met the needs of credit card banks and trust banks, or, more accurately, the needs of nationally-chartered banks to operate credit card or trust affiliates, and the market for those needs is admittedly not large—but it has not waded into shadow banking with charters available to all who wish, suggesting that it is unlikely to change this with the special purpose fintech charter.

It is true that the fintech charter would allow nonbanks to provide some—but not all—banking services, under the protection of a banking charter. In that sense it is different from the special purpose charters that extant banks with national charters used to create credit card and trust affiliates. But it is not so different from community development financial institutions, and they are eligible for a special purpose charter. Moreover, the theory behind chartering fintechs is similar to the one behind chartering community development financial institutions: in both cases, it is hoped, the nonbanks will be serving nontraditional clients. As Comptroller Thomas Curry observed in 2016, "[f]intech companies hold great potential to expand financial inclusion, empower consumers, and help families and businesses take more control of their financial

matters," which was one of the reasons he endorsed the special purpose charter.[38]

Moreover, the alternative to the special purpose charter is that those fintech companies operate outside the regulated rails, or they struggle to exist on a national scale via a 50-state licensing regime that is not only costly and time-consuming for the fintech but does not provide the kind of supervision and oversight that the OCC offers. Consumers would be better off transacting with a federally regulated fintech company, especially if safety and soundness is at issue, than a company with a variety of state licenses.

III. Online Firms Should Not Be Required To Tailor Their Businesses by State Borders.

The United States has a dual banking system, which means that banks can charter under federal or state laws.[39] Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been a "bedrock precept

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[38] Thomas J. Curry, Comptroller of the Currency, Remarks Regarding Special Purpose National Bank Charters for Fintech Companies 3–4 (Dec. 2, 2016), https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf.

[39] Julia Stackhouse, *Why America's Dual Banking System Matters*, On The Economy Blog (Sept. 19, 2017), https://www.stlouisfed.org/on-the-economy/2017/september/americas-dual-banking-system-matters.

of our constitutional law" that federally-chartered national banks are not subject to state supervision and regulation, just as state-chartered banks are not subject to federal supervision and regulation.[40] Indeed, the "very core of the dual banking system is the simultaneous existence of different regulatory options that are *not* alike in terms of statutory provisions, regulatory implementation and administrative policy."[41]

Few industries benefit more from regulation at the national level than industries that exist on the internet. Complying with varying state chartering or money transmitter licensing requirements poses unique challenges for fintech companies. Some states require a brick and mortar presence before a state banking charter can be obtained, but fintech lenders have business plans premised on the ability to avoid these sorts of institutional investments.[42] For a firm that is doing business across

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[40] OCC, *National Banks and the Dual Banking System* 1 (Sept. 2003), https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/national-banks-and-the-dual-banking-system.html.

[41] Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation,* 30 Stan. L. Rev. 1, 41 (1977).

[42] *See, e.g.*, Victoria Pallien, *The Modern-Day Banking Experience: Brick & Mortar vs. Digital*, Fintech News (July 12, 2019), https://www.fintechnews.org/the-modern-day-banking-experience-brick-mortar-vs-digital/.

state lines, compliance with varying rules concerning interest rates, payment terms, and other consumer-protection-oriented services poses problems.[43] An OCC fintech charter would preempt these various state laws, conditional on some limitations on federal preemption created by Congress in the wake of the financial crisis.[44]

Fintech companies vary in their engagement with the credit system as regulated in the United States. Some fintech companies are money transmitters like Western Union—they do not take deposits or make loans, but do hold money for customers, which is something that banks do. Others are payment processors like PayPal, but do not really let their customers hold balances.[45] Others are online lenders like SoFi, Prosper, and Lending Club, and seek to make loans.

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[43] *See* Garrett Fischer & Sarah Wade, *Fintech: Internet Banking Across State Borders Triggers Compliance Challenges for State Banks*, Thompson Coburn LLP (Jan. 20, 2017), https://www.thompsoncoburn.com/insights/blogs/bank-check/post/2017-01-20/fintech-internet-banking-across-state-borders-triggers-compliance-challenges-for-state-banks.

[44] Under that statute, consumer protection laws are generally not preempted, though preemption of such laws may be done on a case-by-case basis. *See* 12 U.S.C. § 25b (2015).

[45] Though, to be sure, "PayPal is regulated by numerous states as a money transmitter or money service business." 10A Frederick H. Miller & Sarah Jane Hughes, Hawkland U.C.C. § 6:51 (2019).

As a matter of technology, these fintech companies need not distinguish between states in making business decisions—they exist on the internet and can serve anyone with internet access, and the internet does not respect state boundaries.

Marketplace lenders, including peer-to-peer and other unorthodox lenders, might be "attracted to an OCC special purpose national bank charter because it would reduce licensing and regulatory cost[s] by consolidating supervision under one primary national regulatory structure," as the Treasury Department observed in 2018.[46] Payments companies like Stripe, Square, and PayPal/Venmo might "look to the charter to obviate the need to obtain money transmission licenses in all 50 states."[47] Almost all fintech companies need these licenses, which are issued exclusively at the state level—unless they obtain a national banking charter that would preempt the state requirements.

[46] Steven T. Mnuchin & Craig S. Phillips, *supra* note 8, at 71.

[47] *Id.*

As Faisal Khan has observed, "[O]btaining money transmitter licenses is no easy feat. It involves a large amount of paperwork, money and time. It can take up to two years to amass all 50 state licenses."[48]

Other circuits have found the option of a national charter standardizing regulations to be a reasonable option for a regulator to offer industry. "When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness." *Nat'l City Bank of Ind. v. Turnbaugh,* 463 F.3d 325, 332–33 (4th Cir. 2006) (upholding the OCC's interpretation of a regulation issued pursuant to the National Bank Act). The OCC's reasoning behind a national regulation is compelling because:

> [t]he application of multiple, often unpredictable, different state or local restrictions and requirements prevents [banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions.

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[48] Faisal Khan, *How to Get Money Transmitter License Coverage for Your Startup?*, Blog Faisal Khan (Sept. 9, 2016), https://blog.faisalkhan.com/money-transmitter-license-application-d9dd32286871.

Id. The Supreme Court itself has remarked that in the years since the National Bank Act's enactment, "federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

Giving fintech companies a federal special-purpose charter does not quite allow them to do all the things that banks do, including, most notably, taking deposits. But it does federalize the law that these businesses must comply with in a way that is consistent with their internet presence. Moreover, of course, nothing about the national charter precludes states from developing alternatives, as Wyoming, for example, has done with cryptocurrency banking.[49]

IV. Other Countries Offer Special Fintech Charters, Suggesting That It Would Be Reasonable For The OCC To Do So As Well.

The existence of these federal and state regulatory regimes has resulted in a fragmented and patchwork approach to fintech regulation. The legal uncertainties of navigating this patchwork have cost the United

[49] Kellie Mejdrich, *Wyoming—Yes, Wyoming—Races to Fill Crypto-Banking Void*, Politico (Nov. 21, 2019, 6:19 PM), https://www.politico.com/news/2019/11/21/wyoming-cryptocurrency-banking-072727.

States dearly in investment in financial technology.[50] A nationwide fintech charter could help the United States to catch up to the rest of the world and accordingly is a reasonable exercise of the OCC's powers.

In 2018, the United Kingdom attracted $16.1 billion in fintech investment, compared to $14.2 billion in the United States.[51] In contrast to the United States, the United Kingdom utilized its national banking regulator, the Financial Conduct Authority (FCA), to reach out to fintech companies and help them "navigate the regulatory framework and apply for a business license."[52] The FCA also allowed fintech companies to operate in a "regulatory sandbox," whereby they could "experiment with products in a modified regulatory framework, either in a controlled testing environment or through regulatory relief whereby agencies

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[50] Memorandum from Staff Counsel, Senate Banking Comm., Harvard Law School, to Staffers to Senators Smith (R) and Roberts (D) 11 (Feb. 6, 2019), https://projects.iq.harvard.edu/files/financialregulation/files/fintech_charter_2019.pdf.

[51] Consultancy.uk, *UK Tops US for FinTech Investment, KPMG Study Shows* (Aug. 14, 2018), https://www.consultancy.uk/news/18291/uk-tops-us-for-fintech-investment-study-shows.

[52] Pew Trusts, *How Can Regulators Promote Financial Innovation While Also Protecting Consumers?* (Aug. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/reports/2018/08/02/how-can-regulators-promote-financial-innovation-while-also-protecting-consumers.

suspend certain regulations for novel business practices."[53] This allowed the FCA to observe a fintech product's "effect on consumers and engage with new market participants regarding products that do not fit neatly into the existing regulatory structure."[54] The FCA Innovate program is still ongoing and continues to provide dedicated regulatory support and advice to fintech companies.[55]

In China, accommodative regulations implemented by the Chinese central bank created a booming fintech sector.[56] In 2018, nine out of 27 fintech companies with valuations exceeding $1 billion were Chinese, including the most valuable fintech in the world, Ant Financial.[57] An initial "relatively lax" regulatory environment[58] has recently been

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[53] *See id.*

[54] *See id.*

[55] *FCA Innovation — Fintech, Regtech And Innovative Businesses* (2020), https://www.fca.org.uk/firms/innovation.

[56] Memorandum from Staff Counsel, Senate Banking Comm., Harvard Law School, *supra* note 50, at 12.

[57] *See id.*

[58] *See id.* (internal quotation marks omitted).

supplemented with new capital-reserve and risk-management regulations.[59]

Regulatory sandboxes have also helped fintech companies navigate banking regulations in Australia, Canada, Switzerland, Japan, and Singapore.[60] In Australia, fintech companies can obtain an Australian financial services license or an Australian credit license.[61] In Canada, fintech companies can register with the Canadian Securities Administrators or obtain exemptive relief from securities laws requirements "under a faster and more flexible process."[62] In Switzerland, the 2018 Swiss Financial Services Act created a new fintech license which has less restrictive requirements than a traditional

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[59] Stella Yifan Xie & Chao Deng, *China to Tighten Rules on Five Financial Giants,* Wall St. J. (Nov. 3, 2018), https://www.wsj.com/articles/china-to-tighten-rules-on-five-financial-giants-1541246489.

[60] Robert Savoie, Philip (PJ) Hoffman, *The Evolving Regulatory Response to Innovation: Special Purpose National Bank Charters, Regulatory Sandboxes, and No-Action Letters*, 74 Bus. Law. 527, 531–32 (2019).

[61] ASIC, *Testing Fintech Products and Services Without Holding an AFS or Credit Licence* (Aug. 2017), https://download.asic.gov.au/media/4420907/rg257-published-23-august-2017.pdf.

[62] *CSA Regulatory Sandbox* (2009), https://www.securities-administrators.ca/industry_resources.aspx?id=1588.

banking license.[63] In Singapore, the Monetary Authority of Singapore began issuing five different types of wholesale and digital banking licenses to fintech companies.[64] Japan has also created a regulatory sandbox for fintech companies.[65]

In a world where special regimes designed to provide tailored regulatory frameworks for fintech businesses are increasingly the norm, and are, in the case of the UK and China, paired with a fast growing fintech sector, it is simply good policy for the OCC to keep up by developing its own fintech regime.

V. The OCC's Chartering Decisions Are Reviewable.

If appropriate, this Court should clarify that chartering decisions by the OCC are, in fact, reviewable, just as are the agency's amendments

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[63] Kaspar Landolt & Matthias Kuert, *FinTech Licenses Now Part of Switzerland's Financial Law Framework* (June 2018), https://www.lexology.com/library/detail.aspx?g=2b6933c8-f0e4-44c4-83ed-571654e22893.

[64] Angely Mercado, *Banking Licenses an Opportunity to Create Fintech Hub in Singapore,* Bank Innovation (Jan. 21, 2020), https://bankinnovation.net/allposts/operations/comp-reg/banking-licenses-an-opportunity-to-create-fintech-hub-in-singapore/.

[65] JETRO, *New Regulatory Sandbox Framework in Japan* (June 6, 2018), https://www.jetro.go.jp/ext_images/en/invest/incentive_programs/pdf/Detailed_overview.pdf (Japanese government's slides announcing the sandbox).

to what counts as the business of banking. Courts have articulated a variety of grounds to evaluate the agency's chartering decisions, including some that, for all practical purposes, deny review, even though the Supreme Court reminded courts long ago that the OCC's chartering decisions are subject to review. *Camp v. Pitts,* 411 U.S. 138, 142 (1973).

One reason to clarify that the OCC's chartering decisions are reviewable lies in the extraordinary record of the agency during the ten years between 2010 and 2018, when it almost never approved a charter application by a would-be new bank—a policy that it never articulated—and yet was never sued over its denials or delays by frustrated charter applicants.[66] In contrast, between 2003 and 2010, the agency received 236 new charter applications and approved or conditionally approved 190.[67] The agency never explained the change in policy, though the

[66] While more than 800 commercial banks vanished between 2007 and 2013, "[t]he OCC only granted six bank charters in that period," and between then and 2017, only three more. The FDIC granted "even fewer deposit insurance applications." Michael S. Barr et al., *Financial Regulation: Law and Policy* 168 (2d ed. 2018).

[67] *See* David Zaring, *Modernizing the Bank Charter*, 61 Wm. & Mary L. Rev. 1397 (forthcoming 2020).

failure rate of new banks during the financial crisis looks like the proximate cause.

As Margaret Tahyar has put it, "a generation has grown to accept that the granting of bank charters is so up to the discretion of the bank regulators that the regulator need not even give reasons for a denial."[68] But there is no reason for this assumption that chartering decisions are reviewed so deferentially as to not even be worth litigating.

The Supreme Court affirmed a "curt" letter rejecting a charter application in *Camp v. Pitts* in 1973, holding that "the Comptroller's action is subject to judicial review under the Administrative Procedure Act" under the arbitrary and capricious standard. 411 U.S. at 140, 143.

But before and after *Pitts,* the standard applied to review chartering decisions has rarely been articulated, and, when articulated, has been articulated inconsistently. The Eighth Circuit upheld a chartering decision that was "certainly not without some support in the record." *First Nat'l Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974). The Fifth Circuit may have endorsed the idea that "the

[68] Margaret E. Tahyar, *Are Bank Regulators Special?* Clearing House (2018), https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/ are-bank-regulators-special.

Comptroller's decision is entitled to a presumption of regularity." *First Nat'l Bank of Southaven v. Camp*, 333 F. Supp. 682, 686 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972). Michael Barr, Tahyar, and Howell Jackson have called it "extraordinary deference."[69]

Distinguishing between degrees or types of deference is difficult, and the Supreme Court has generally preferred to apply simple and consistent standards to all agencies.[70] Rather than characterizing review of OCC chartering decisions as barely extant, the better approach would be to treat the agency the way other agencies are treated—there is nothing in its statute that provides for anything different.

[69] *See, e.g.*, Barr et al., *supra* note 66, at 169.

[70] *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55–56 (2011).

CONCLUSION

For the reasons set forth above, this Court should reverse 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 6,805 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: April 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 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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