UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and JOSEPH M. OTTING, in his official capacity as Comptroller of the Currency, Defendants.	)	Civil Action No. 1:18-CV-02449 (DLF)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

The essential legal question raised by Plaintiff Conference of State Bank Supervisors ("CSBS") presents a narrow issue of statutory construction: whether the National Bank Act authorizes the Office of the Comptroller of the Currency ("OCC") to issue a national bank charter to companies that pay checks or lend money, but do not take deposits (hereinafter, "Special Purpose National Bank Charter" or "SPNB Charter"). The OCC—and, one may safely presume, CSBS—acknowledges that an authoritative resolution of this question would benefit the parties and the banking industry as a whole. But the Court's ability to resolve this dispute—and the statutory interpretation issue that underlies it—must wait. For the second straight year, CSBS has acted prematurely and has once again filed a lawsuit that should be dismissed due to lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). At the present time, the OCC has not approved any application for an SPNB Charter, the regulatory milestone that the Court held must first be reached before CSBS has standing to sue. *See CSBS v. OCC*, 313 F. Supp. 3d 285 (D.D.C. 2018) ("*CSBS I*").

Looking past this clear jurisdictional bar, the issue of whether the Comptroller of the Currency may reasonably construe the National Bank Act fits within a much broader historic legacy of the OCC adapting to address the evolution of the industry that it regulates. Courts have accorded the Comptroller of the Currency the necessary and appropriate level of flexibility in the interpretation of the OCC's authority "to permit the use of new ways [to] conduc[t] the very old business of banking." *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977). Many services or products that we now take for granted, such as ATMs, remote check capture, and online banking, were at one time cutting-edge advances. Innovation in the banking industry is inevitable, and "[t]he federal banking system must adapt to the rapid

technological changes taking place in the financial services industry to remain relevant and vibrant and to meet the evolving needs of the consumers, businesses, and communities it serves."[1]

The OCC respectfully submits that, at such time as the Court has jurisdiction to reach the merits, the Court should conclude that the OCC's longstanding special purpose bank chartering regulation, 12 C.F.R. § 5.20(e)(1), is a reasonable construction of the National Bank Act that is entitled to *Chevron* deference. The conclusion that a national bank need only be engaged in one of the three core banking functions—receiving deposits, paying checks, *or* lending money—in order to be engaged in the "business of banking" aligns with the context and structure of the National Bank Act and controlling Supreme Court and D.C. Circuit caselaw. CSBS's other arguments based upon the Administrative Procedure Act ("APA") and the Tenth Amendment are similarly without force. Therefore, CSBS's claims should be appropriately dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

I. OCC CHARTERING AUTHORITY AND LIMITED PURPOSE NATIONAL BANKS

The OCC is an independent bureau of the U.S. Department of the Treasury, with primary supervisory responsibility over national banks under the National Bank Act of 1864, codified at 12 U.S.C. § 1 *et seq.*, as amended. The OCC is charged with the responsibility of ensuring that national banks (and other institutions subject to its jurisdiction) operate in a safe and sound

[1] OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS (2018) ("Policy Statement"), attached hereto as Exhibit A.

manner, comply with applicable laws and regulations, offer fair access to financial services, and provide fair treatment of customers. *Id.* § 1(a). As the agency with the authority to charter national banks, a key part of the OCC's mission includes receiving applications and, when appropriate, granting charters to associations that are formed to carry out the "business of banking." *See id.* §§ 21, 26, 27. In implementing the OCC's chartering authority, "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." *Id.* § 93a.

Under the National Bank Act, the OCC may grant a charter "[i]f . . . it appears that such association is lawfully entitled to commence the business of banking." 12 U.S.C. § 27(a). Reflecting the variety of ways an association seeking a charter can engage in the "business of banking," national banks may be chartered to carry out differing activities. New banks may be chartered to carry out a full complement of the powers accorded to national banks under the National Bank Act or they may seek authority for more focused "special purpose" operations, such as those of trust banks, credit card banks, bankers' banks, community development banks, cash management banks, and other business models based on limited activities.[2] In some instances, such as the limited purpose charter granted to trust banks, 12 U.S.C. § 27(a), Congress has expressly recognized and ratified the OCC's authority to grant a limited purpose national bank charter. In other instances, the OCC properly relies upon its broad discretion to interpret the National Bank Act in order to determine whether a particular set of banking activities is consistent with the statutory meaning of being engaged in the "business of banking" for the purpose of granting a limited or special purpose charter.

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[2] OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL, CHARTERS 1 (2016) ("Charters Booklet"), https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf (last accessed Jan. 3, 2019).

Fifteen years ago, the OCC adopted the current version of its regulation that sets forth the OCC's authority to grant a national bank charter to an institution that is engaged in some, but not all, of the core banking functions. 68 Fed. Reg. 70122 (Dec. 17, 2003). This regulation provides that the OCC may charter a "special purpose bank" that conducts activities other than fiduciary activities if it engages in at least one "core banking function"—receiving deposits, paying checks, or lending money. The regulation states:

> The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 *et seq*. The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money.

12 C.F.R. § 5.20(e)(1). Since its adoption, the OCC has not used 12 C.F.R. § 5.20(e)(1) to charter a national bank that engages in one of the two core banking activities of paying checks or lending money, but does not take deposits. *See* Declaration of Stephen A. Lybarger, Deputy Comptroller for Licensing, Office of the Comptroller of the Currency, in Support of the OCC's Motion to Dismiss ("Lybarger Decl."), at ¶ 7, attached hereto as Exhibit B.

II. THE OCC'S FINTECH INITIATIVE

On July 31, 2018, the OCC announced that it would start accepting applications from financial technology companies ("fintechs") for special purpose bank charters for national banks that engage in one of the two core banking activities of paying checks or lending money, but do not take deposits. *See Press Release, Office of the Comptroller of the Currency, The OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies* (July 31, 2018) ("July 31 Announcement"), attached hereto as Exhibit C. The OCC's application of its established chartering authority to grant special purpose bank charters in the fintech area emerged out of an initiative launched in 2015 by former Comptroller of the Currency Thomas J.

Curry. This initiative examined the broader question of how the OCC could best support responsible innovation in the financial services industry. In December 2016, the OCC published a white paper on the topic, *Exploring Special Purpose National Bank Charters for Fintech Companies*.[3] The OCC solicited comments on its white paper and, after reviewing the comments that it received, the agency issued the *Comptroller's Licensing Manual Draft Supplement*[4] in March 2017, again inviting public comment.

The OCC's July 31 Announcement coincided with a report issued by the Department of the Treasury ("Treasury Report")[5] that expressed strong support for the OCC's efforts in the fintech area. The Treasury Report noted the advantages to the OCC's SPNB Charter, concluding that it "may provide a more efficient, and at least a more standardized, regulatory regime than the state-based regime in which [fintech companies] operate." Treasury Report at 70. The Department of Treasury recommended that "the OCC move forward with prudent and carefully considered applications for special purpose national bank charters." *Id.* at 73, 201.

The OCC's July 31 Announcement was accompanied by a finalized version of the *Comptroller's Licensing Manual Supplement*, *Considering Charter Applications from Financial*

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[3] OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016), https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf (last accessed Jan. 3, 2019).

[4] OFFICE OF THE COMPTROLLER OF THE CURRENCY, EVALUATING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (2017), https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf (last accessed Jan. 3, 2019).

[5] U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES – NONBANK FINANCIALS, FINTECH, AND INNOVATION (2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf (last accessed Jan. 3, 2019).

Technology Companies ("Licensing Manual Supplement"), attached hereto as Exhibit D, as well as a statement of OCC policy, *Policy Statement on Financial Technology Companies Eligibility to Apply for National Bank Charters* ("Policy Statement"), *see* Exhibit A, that enunciates the OCC's regulatory approach and expectations associated with SPNB Charters.

III. PRIOR LITIGATION BROUGHT BY CSBS

This case represents CSBS's second attempt to challenge the OCC's SPNB chartering authority in this forum. On April 30, 2018, the Court dismissed CSBS's first challenge for lack of constitutional standing as well as lack of prudential ripeness. *See CSBS I*, 313 F. Supp. 3d at 299-300. The Court noted that in the case of representational standing, as asserted by CSBS, there is a "baseline requirement to identify a particular member of the organization that was injured." *Id.* at 299. The Court concluded that neither CSBS nor its members would suffer any cognizable harm until the OCC grants final approval for an SPNB Charter. *Id.* at 299-300.

The Court only needed "to reach the first requirement [for establishing standing]—injury in fact—to resolve this case." *Id*. at 295. The Court noted that Supreme Court authority emphasized that threatened injury must be "certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Id.* (citation omitted). Against this standard, the Court reviewed CSBS's allegations of threatened injury: "risks to traditional areas of state concern," "disrupt[ion]" of the system of "dual bank enforcement," obstruction of state enforcement and regulation abilities, and threats to state sovereign interests. *Id.* at 296. The Court characterized CSBS's allegations as "filled with speculative and conclusive language." *Id.* The Court further acknowledged that the averred harms might state an injury in fact once realized, but noted that "each of those harms is contingent on whether the OCC charters a Fintech." *Id.* (citing to a similar observation by the district court for the Southern District of

New York in the related case *Vullo v. OCC*, No. 17 Civ. 3574, 2017 WL 6512245, at *7-8 (S.D.N.Y. Dec. 12, 2017)). The Court also observed that

> [s]everal contingent and speculative events must occur before the OCC charters a Fintech: (1) the OCC must decide to finalize a procedure for handling those applications; (2) a Fintech company must choose to apply for a charter; (3) the particular Fintech must substantively satisfy regulatory requirements; and (4) the OCC must decide to grant a charter to the particular Fintech.

Id. Because the OCC had not yet decided to "grant a charter to [a] particular Fintech" this "chain of speculative events" failed to clear the bar posed by the "certainly impending" test or the alternative "substantial risk" test. *Id.* at 297.

The Court also distinguished cases where regulatory injuries like preemption may satisfy the tests because "the OCC's national bank chartering program does not conflict with state law until a charter has been issued." *Id.* at 298. In addition, even if CSBS could show that the OCC "w[as] sufficiently likely to issue a charter to some particular Fintech, the complaint would remain inadequate" because of CSBS's failure to identify which particular member of its organization had been harmed. *Id*. at 298-99.

Separately, the Court also concluded that the case was constitutionally unripe for the same reason that CSBS lacked standing, and that considerations of prudential ripeness weighed in favor of deferring adjudication. *Id.* at 299-300. "This dispute would benefit from a more concrete setting and additional percolation. In particular, this dispute will be sharpened if the OCC charters a particular Fintech—or decides to do so imminently." *Id.* at 300.

IV. AT PRESENT, THE OCC HAS NOT GRANTED AN SPNB CHARTER

While the OCC has announced that it will begin accepting applications for SPNB Charters, it has not yet approved an application for an SPNB Charter to a fintech bank that does not take deposits. *See* Lybarger Decl., Ex. B, at ¶ 7. In terms of satisfying the Court's four prerequisites for when CSBS might have standing to sue, the parties are still at stage one: "the

OCC must decide to finalize a procedure for handling those applications." *CSBS I*, 313 F. Supp. 3d at 296. To date, none of the other prerequisites have come to pass: no fintech company has submitted an application for a charter and the OCC had not decided to grant a charter. Lybarger Decl., Ex. B, at ¶¶ 6, 7.[6]

ARGUMENT

I. CSBS LACKS STANDING TO SUE

A. Issue Preclusion Bars CSBS from Re-Litigating Whether It Has Article III Standing to Sue or Whether Its Claims Are Ripe for Judicial Review

Issue preclusion prevents "successive litigation of . . . issue[s] of fact or law actually litigated and resolved" that were "essential to the prior judgment," *Taylor v. Sturgell*, 553 U.S. 880, 892 & n.5 (2008), including threshold jurisdictional issues such as standing and ripeness, *see, e.g.*, *Underwriters Nat'l Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982). As discussed above, CSBS has already litigated the issue of whether, absent a grant of an SPNB Charter, CSBS has Article III standing to sue or whether their claims are prudentially ripe. The Court should conclude that CSBS cannot re-litigate the Court's holding in *CSBS I* to avoid the inevitable conclusion that CSBS's claims are *still* premature.

[6] In deciding to dismiss a claim under Rule 12(b)(1) for lack of jurisdiction, a court may consider documents outside the pleadings, including sworn declarations. *See CSBS I*, 313 F. Supp. 3d at 294; *Garnett v. Zeilinger*, 323 F. Supp. 3d 58, 64-65 (D.D.C. 2018). In deciding to dismiss a claim under Rule 12(b)(6), a court may consider (1) facts alleged in the complaint, (2) documents attached as exhibits or incorporated by reference in the complaint, and (3) matters subject to judicial notice. *See*, *e.g.*, *Ahuja v. Detica Inc.*, 742 F. Supp. 2d 96, 102 (D.D.C. 2010). Defendants' Exhibits A, C, and D, are documents attached to, referred to, or relied upon in the Complaint. Defendants' Exhibit B is a sworn declaration from the OCC's Deputy Comptroller for Licensing of facts relevant to standing. Defendants' Exhibit E, is a docket sheet from the U.S. District Court for the Middle District of Florida, of which the court may take judicial notice. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). Similarly, the court may take judicial notice of the official OCC materials referenced in footnotes 2, 3, 4, 5, and 7 and available on government public websites. *See*, *e.g.*, *Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014).

Although the issue preclusion doctrine contains a "curable defect" exception permitting the re-litigation of certain jurisdictional dismissals, the exception does not apply here because CSBS has not demonstrated "a material change following dismissal cur[ing] the original jurisdictional deficiency" identified in the earlier suit. *See Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 786 F.3d 34, 41 (D.C. Cir. 2015). CSBS attempts to avoid the force of the *CSBS I* decision—and the operation of issue preclusion—by suggesting that changed circumstances justify a different outcome, Compl. ¶¶ 7, 16, but the only change CSBS can identify is the OCC's decision to entertain applications for SPNB Charters. The Court's analysis in *CSBS I* makes clear that the decision to accept applications—the first of the four chartering-process milestones identified by the Court—does not, on its own, create an injury in fact, rendering that change immaterial to the Court's conclusion regarding standing. Therefore, issue preclusion applies to the issues reached and resolved in *CSBS I.*

B. CSBS Still Lacks Article III Standing to Sue

The Court should dismiss CSBS's Complaint because CSBS has still not satisfied Article III's case-or-controversy requirement, which necessitates that a plaintiff have standing to sue. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The "irreducible constitutional minimum" for standing contains three elements: "injury in fact," "causation," and "redressability." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). CSBS, as the party invoking this Court's jurisdiction, bears the burden of establishing each element. *Id.* at 103-04. CSBS has not met this burden because it has not shown how the OCC's decision to accept applications for SPNB Charters has injured any particular CSBS member. Consequently, CSBS has not met its burden of showing a "concrete," "actual or imminent" injury-in-fact, and hence cannot show causation or redressability. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409

(2013); *see also CSBS I*, 313 F. Supp. 3d at 295. Therefore, CSBS's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

As before, none of the harms CSBS references can materialize, or even be identified with the requisite certainty, until the OCC issues a SPNB Charter and the charter recipient commences the business of banking. And although "certainly impending" threats of future injury constitute injury-in-fact for standing purposes, *Clapper*, 568 U.S. at 409, the OCC remains several steps removed from issuing any such charter, *see CSBS I*, 313 F. Supp. 3d at 296; *see also* Lybarger Decl., Ex. B, at ¶¶ 6-20. Because no charter has been issued, and because no issuance is currently imminent, CSBS's chief alleged harm—the preemption of state law—has not occurred. *Cf. West Virginia ex rel. Morrisey v. U.S. Dep't of Health & Human Servs.*, 827 F.3d 81, 84 (D.C. Cir. 2016) (explaining that even if a federal government action "created a theoretical breach of State sovereignty," states must still establish "a *concrete* injury-in-fact"). To be sure, CSBS might be able to identify an injury-in-fact once the OCC issues a final SPNB Charter, depending in part on the identity of the national bank charter recipient and where the recipient conducts business. The resulting national bank would be entitled to the protections of federal law, including the preemption of conflicting state laws, which plausibly could cause harm to one or more CSBS members. But the prospect that a hypothetical statute in a hypothetical state might be preempted because of a future OCC decision imposes no "certainly impending" or imminent harm. *See CSBS I*, 313 F. Supp. 3d at 297.

CSBS's attempts to conjure additional supposed harms to its members, Compl. ¶¶ 137-147, also lack force. Each of the alleged harms CSBS identifies are (1) speculative, and (2) predicated on a fintech's operation as a national bank, which will not occur until such time as the OCC grants final approval for an SPNB Charter. *CSBS I*, 313 F. Supp. 3d at 298 ("The OCC's

national bank chartering program does not conflict with state law until a charter has been issued."). Equally problematic, CSBS has not identified *which* of its members have been harmed. *Id.* at 298-99.

CSBS's allegations also remain insufficient to establish injury-in-fact under the "substantial risk" test. *See Clapper*, 568 U.S. at 414 n.5. This test considers costs incurred by a plaintiff to "mitigate or avoid" future harm, *id.*, but nevertheless focuses on "the ultimate alleged harm . . . as the concrete and particularized injury." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017). CSBS has not identified any efforts to mitigate or to avoid the alleged harm. *See CSBS I*, 313 F. Supp. 3d at 297. Moreover, CSBS's claims depend on the OCC's potential regulation of future third-party applicants, meaning that CSBS must allege or show that these third-party applicants will indeed submit successful applications in a way that creates the substantial risk. *See Lujan*, 504 U.S. at 562. CSBS cannot make this showing. *See Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 7 (D.D.C. 2018).

C. This Matter Remains Unripe for Judicial Review

Article III demands that a case be ripe for judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Ripeness has both constitutional and prudential aspects. *See Atl. States Legal Found. v. Envtl. Prot. Agency*, 325 F.3d 281, 284 (D.C. Cir. 2003). CSBS's claims remain both constitutionally and prudentially unripe because, as the Court emphasized in *CSBS I*, the OCC has not issued an SPNB Charter. *CSBS I*, 313 F. Supp. 3d at 300-01. First, this matter remains constitutionally unripe because CSBS does not face a sufficiently "imminent" injury in fact. *See Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (noting that ripeness "shares the constitutional requirement of standing that an injury in fact be certainly impending"). CSBS has not established any such injury because the OCC remains

several stages away from actually granting an SPNB Charter. *See supra* pp. 9-11.

Second, this matter remains prudentially unripe because the OCC has not finalized its decision to issue an SPNB Charter to a particular applicant. *See Gardner*, 387 U.S. at 148-49. The prudential ripeness doctrine "protect[s] . . . agencies from judicial interference until an administrative decision has been formalized *and* its effects felt in a concrete way by the challenging parties." *Id.* (emphasis added). To that end, when evaluating prudential ripeness, courts look to two factors: the "fitness of the issues for judicial decision" and the extent to which the court's withholding of a decision will cause "hardship to the parties." *Id.* at 149.

Here, neither factor has been met because the OCC has not issued an SPNB Charter. Specifically, the issues in this dispute remain unfit for judicial review because the OCC has not "charter[ed] a particular Fintech—or decide[d] to do so imminently." *CSBS I*, 313 F. Supp. 3d at 300. The fitness prong turns on, among other things, "whether the agency's action is sufficiently final." *Atl. States Legal Found.*, 325 F.3d at 284 (quoting *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998)). In this case, courts would benefit from "a more concrete setting to resolve the[se] legal disputes" by waiting until "the OCC elects to adopt and *apply* a regulatory scheme to a *particular*" applicant. *CSBS I*, 313 F. Supp. 3d at 301 (emphasis added). Otherwise, the OCC could potentially face a "new legal challenge every time [it] takes a step towards a result disfavored by" organizations like CSBS, *id.* at 301, the precise situation the ripeness doctrine is meant to prevent, *see Gardner*, 387 U.S. at 148-49.

Nor will the Court's withholding of a decision impose an "immediate and significant" hardship on the parties. *See Sec. Indus. and Fin. Mkts. Ass'n v. Commodities & Futures Trading Comm'n*, 67 F. Supp. 3d 373, 413 (D.D.C. 2014) (quoting *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 427 (D.C. Cir. 2007)). Because CSBS has not suffered any actual, concrete injury,

any hardship caused by the deferral of the case would be insufficiently direct and immediate, especially when compared to the hardship the OCC would experience should "each minor step towards a potential agency policy [be] litigated one-by-one." *CSBS I*, 313 F. Supp. 3d at 301. Accordingly, this matter remains unripe for judicial review.

II. BECAUSE THE JULY 31, 2018 ANNOUNCEMENT WAS NOT A FINAL AGENCY ACTION, COUNT IV FAILS TO STATE A CLAIM OF ARBITRARY AND CAPRICIOUS ACTION UNDER THE APA

CSBS asserts in Count IV of its Complaint that the OCC failed to consider the effect of its actions on state regulatory authority, and that this purported failure rendered the OCC's action arbitrary, capricious, and an abuse of discretion under the APA. This count lacks merit. First, the Court should conclude that the true target for CSBS's challenge is not the July 31 Announcement but, rather, its interpretive core: the OCC's special purpose bank regulation, 12 C.F.R. § 5.20(e)(1). As discussed more fully below, an APA challenge to the OCC interpretive regulation, to the extent it constitutes a final agency action, would be unavailing because it was promulgated *fifteen years ago* pursuant to notice and comment rulemaking. *See* 68 Fed. Reg. 70122 (Dec. 17, 2003). Any challenge to the regulation is now time barred. *See infra* pp. 15-16.

Second, Count IV fails because only final agency actions are subject to judicial review under the APA's arbitrary and capricious standard, 5 U.S.C. §§ 704, 706, and the OCC's July 31 Announcement does not represent a final agency action within the meaning of that Act. *See Gardner*, 387 U.S. at 140. Agency action becomes "final," and hence reviewable, when it satisfies both prongs of the two-part test stated in *Bennett v. Spear*, 520 U.S. 154 (1997): the agency action must (1) "mark the consummation of the agency's decision-making process," and (2) be one "by which rights or obligations have been determined, or from which legal

consequences will flow." *Id.* at 177-78; *see also Southwest Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). Neither *Bennett* requirement has been satisfied. The July 31 Announcement is not an OCC action from which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The July 31 Announcement is a statement of general policy of the OCC's readiness to accept charter applications from fintech companies. The announcement does not control the outcome of any chartering process—the OCC's statutes, regulations, and formal policies regarding the formation of a national bank govern the final disposition of an application. As recognized in *CSBS I*, no actual legal consequences apply to CSBS's members as a result of the OCC's threshold decision to accept SPNB Charter applications. *See also Peoples Nat'l Bank v. OCC*, 362 F.3d 333 (5th Cir. 2004) (finding no reviewable final agency action when a bank challenged OCC banking bulletin limiting the scope of OCC Ombudsman review of examination ratings because the bank did not use bulletin review process). At this time, however, no such charter has been issued. Accordingly, the OCC's chartering activity "should not be reviewed by a court until it has" actually occurred "and resulted in a final agency action." *Id.* at 337.

Third, the Court should dismiss Count IV because the issuance of "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," like the July 31 Announcement, do not require notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A); *see also Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (the "most important factor" in differentiating between legislative rules and nonbinding actions such as a general statement of policy is "the actual legal effect (or lack thereof) of the agency action in question"); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) ("An agency action that merely explains how the agency will enforce a statute or

regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.”). On July 31, 2018, the OCC announced that it will use its existing statutory authority, under its existing 2003 regulation, to accept and consider SPNB Charter applications. This announcement is not a legislative rule with legal effect binding the OCC or any other party. Therefore, the announcement is exempt from the APA notice-and-comment requirement. *See, e.g., Clarian Health West, LLC v. Hargan*, 878 F.3d 346, 356-59 (D.C. Cir. 2017) (Department of Health and Human Services' 2010 instruction manual regarding the means of calculating reimbursements for Medicare providers was a general statement of policy, concerning the implementation of a 2003 regulation on authority to reconcile payments, leaving the agency free to exercise its discretion). Finally, the APA does not require the OCC to conduct cost-benefit analysis, and CSBS fails to identify any other statute that imposes such an obligation in this instance. *See Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011); *see also Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 & n.30 (1981) (“When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute,” and has used “specific language” to express that intent). Accordingly, Count IV should be dismissed for failure to state a claim.

III. BECAUSE CSBS'S FACIAL CHALLENGE TO THE OCC'S REGULATION IS TIME-BARRED, IT SHOULD BE DISMISSED

To the extent CSBS's claims present a facial challenge to the regulation at 12 C.F.R. § 5.20(e)(1), the cause of action is time-barred by the statute of limitations applicable to civil actions against the United States and federal agencies. “Except as provided [in the Contract Disputes Act of 1978], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C.

§ 2401(a). A cause of action under the APA accrues on the date of the final agency action. *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). "Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (citations omitted). Here, any cause of action challenging the OCC's adoption of the amendments to Section 5.20(e)(1) accrued on January 16, 2004, when the Final Rule became effective. 68 Fed. Reg. 70122 (Dec. 17, 2003). Accordingly, the time for filing a facial challenge to the regulation expired in January 2010, and the Court lacks jurisdiction over the cause of action.

IV. THE OCC HAS NOT MADE A PREEMPTION DETERMINATION WITH RESPECT TO THE SPNB CHARTER, NOR IS A DETERMINATION REQUIRED

CSBS erroneously claims under Count III that the OCC has made a preemption determination with respect to SPNBs by relying on statements made in the OCC's 2016 white paper without following the procedures required by 12 U.S.C. §§ 25b and 43. Further, CSBS argues that the OCC must make a formal determination to preempt state law, and to provide notice and opportunity to comment, within the meaning of §§ 25b and 43, before granting an SPNB Charter. *See* Compl. ¶¶ 127-130. But Count III fails to state a claim, as it is premised on a misapprehension of the operation, scope, and applicability of the cited statutes. There is no support for the proposition that § 25b imposes a mandatory duty on the Comptroller to conduct a preemption determination when chartering a national bank (or in any other circumstance).

First, nothing in the statute remotely supports CSBS's position that, as a condition of granting an SPNB Charter, the Comptroller must make a preemption determination covering all of the state consumer financial laws that could be preempted every time a new national bank is

launched and begins operations. Apart from the absurdity of such a position, the statute itself makes plain that the decision of whether (and when) the OCC will issue a formal preemption decision rests with the Comptroller. Section 25b's operative language uses the word "may"—not compulsory language such as "shall' or "must"—when it provides that a preemption determination "*may* be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law." 12 U.S.C. § 25b(b)(1)(B) (emphasis added).

Second, no preemption determination has been made by the OCC that would trigger the requirements of either §§ 25b or 43b. Neither the July 31 Announcement, Ex. C, nor the Licensing Manual Supplement, Ex. D, address preemption nor do they propose the preemption of any *particular* state laws. *See id.* § 25b(b)(1)(B) (preemption determination made on a "case-by-case basis"); § 25b(b)(3)(A) ("case-by-case basis" defined as "a determination pursuant to this section made by the Comptroller concerning the impact of a *particular* State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms" (emphasis added)). Similarly, the OCC's 2016 white paper discusses preemption in general terms, but does not (as is required to trigger the application of § 25b) address or even suggest the preemption of a particular state consumer financial law. Rather these statements simply restate existing law regarding the application of state laws to *all* national banks (*i.e.*, no new determination has been made).[7]

Third, § 25b's scope is limited to the preemption of State consumer financial laws. 12 U.S.C. § 25b(b)(1); *see also Office of Thrift Supervision Integration; Dodd-Frank Act*

[7] EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES, *supra* n.3, at 5 ("State law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank.").

Implementation, 76 Fed. Reg. 43549, 43551 (July 21, 2011). Therefore, the statute does not apply to the OCC's chartering decision because the question of whether granting a proposed national bank will result in the preemption of any particular state consumer financial law is not relevant to the chartering process; the OCC focuses instead on the proposed institution's prospects and whether it will operate in a safe and sound manner. *See* 12 C.F.R. § 5.20(f)(1); Licensing Manual Supplement*,* Ex. D, p. 5. When an SPNB Charter application is filed, the only question before the OCC will be whether or not to grant the application, not whether State consumer finance laws are preempted.

CSBS's reliance on 12 U.S.C. § 43 is equally unavailing. Section 43 simply provides that whenever a "Federal banking agency" seeks to issue an "opinion letter or interpretive rule" concluding that "Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches," the agency must publish a notice in the Federal Register and seek written comments. 12 U.S.C. § 43(a); *see also New Mexico v. Capital One Bank (USA), N.A.*, 980 F. Supp. 2d 1314, 1322 (D.N.M. 2013) ("Congress has expressly recognized the OCC's power to preempt *particular* state laws by issuing opinion letters and interpretive rulings, subject to certain notice-and-comment procedures." (emphasis added)).

Again, neither the OCC's July 31 Announcement nor the Licensing Manual Supplement addresses preemption, nor do they propose the preemption of any particular state laws. Likewise, the OCC's 2016 white paper discusses preemption in general terms, but does not (as is required to trigger the application of Section 43) address or suggest the preemption of a particular state law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches. The question before the OCC after receiving an SPNB

Charter application will be whether to grant or deny the application, not whether a particular state consumer protection law should be preempted. Accordingly, § 43 is inapposite.

V. ALTERNATIVELY, BECAUSE THE OCC REASONABLY INTERPRETED THE AMBIGUOUS NATIONAL BANK ACT TERM "BUSINESS OF BANKING," COUNTS I, II, AND IV SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Should the Court ultimately deem it proper to reach CSBS's claims related to the OCC's statutory authority, the Complaint should be dismissed for failure to state a claim because, under the framework articulated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), Section 5.20(e)(1) represents a reasonable OCC interpretation of the undefined and ambiguous statutory term "business of banking."

The Supreme Court has repeatedly applied the deferential *Chevron* framework to the OCC's interpretation of the National Bank Act. *Cuomo v. Clearing House, Ass'n, LLC*, 557 U.S. 519, 525 (2009); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) ("*NationsBank*"); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). The *Chevron* framework proceeds in two analytical steps. "Where a statute is clear, the agency must follow the statute." *Cuozzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). "But where a statute leaves a 'gap' or is 'ambigu[ous],' [courts] typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Id.* (citing *U.S. v. Mead Corp*., 533 U.S. 218, 229 (2001)); *Chevron,* 467 U.S. at 843.

At the outset, CSBS's assertion that the OCC's interpretation of the National Bank Act is not entitled to *Chevron* deference because it "define[s] the scope of [the OCC's] own regulatory authority" lacks merit. *See* Compl. ¶ 126. *Chevron* recognizes that when Congress leaves a gap or an ambiguity in a statutory scheme that has been entrusted to an agency's administration,

Congress has implicitly delegated to that agency the power to reasonably fill the gap or resolve the ambiguity. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). There is no *Chevron* exception for interpretive decisions involving the scope of an agency's statutory authority. *City of Arlington, Texas v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 298 (2013). "The reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has." *Id.* at 299; *see also Montford & Co., Inc. v. Sec. & Exch. Comm'n*, 793 F.3d 76, 82 (D.C. Cir. 2015); *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 635 (D.C. Cir. 2014).

Contrary to CSBS's assertion that the statute is unambiguous, the term "business of banking" has neither an express definition nor a plain meaning in the National Bank Act. Under *Chevron*, the OCC therefore possesses discretion in addressing that ambiguity or "gap" in the statute by enacting rules that are "reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Tech.*, 136 S. Ct. at 2142. Moreover, the OCC's interpretation is reasonable and entitled to deference: the OCC's interpretation is not precluded by statutory text, is supported by judicial authority—including Supreme Court and D.C. Circuit precedent—and is consistent with the text, nature, and purpose of the statute. Accordingly, Counts I, II, IV, and V should be dismissed for failure to state a claim.

A. Because the Statutory Text Has No Plain Meaning under *Chevron* Step One, the OCC Has Discretion in Reasonably Interpreting "Business of Banking"

An examination of the relevant text of the National Bank Act makes clear that, under the *Chevron* framework, the term "business of banking" is ambiguous, having no fixed meaning that precludes the OCC's interpretation set forth in Section 5.20(e)(1). Section 27, the general chartering provision, states as follows:

> If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller . . . it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate . . . that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business.

12 U.S.C. § 27(a). The National Bank Act does not set forth any mandatory activity[8] that must be performed in order for a bank to be engaged in the "business of banking." Indeed, the text is permissive and therefore consistent with an expansive grant of discretion to the Comptroller in assigning content to the term.

The term "business of banking" appears in several other provisions of the National Bank Act, but these references offer no definition or textual elaboration that would provide a more specific meaning of the term. *See* 12 U.S.C. § 21 ("Associations for carrying on the business of banking . . . may be formed by any number of natural persons, not less in any case than five."); § 24(Seventh) (dealing with bank powers); § 26 (stating that the requirements of "title 62 of the Revised Statutes" must "be complied with before an association shall be authorized to commence the business of banking"); § 27(b)(1) (specifying that the Comptroller of the Currency may issue a "certificate of authority to commence the business of banking" to a banker's bank). In addition, a similar term, "the general business of each national banking association" is contained in a geographic restriction in 12 U.S.C. § 81 ("The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any . . . ."). Accordingly, given the undisputed absence of an express statutory definition, nothing in the National Bank Act's text expressly or

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[8] Section 27 also recognizes two forms of special purpose national banks: trust banks, 12 U.S.C. § 27(a), and bankers' banks, 12 U.S.C. § 27(b)(1).

implicitly precludes the OCC's interpretation of the term "business of banking" as laid out in 12 C.F.R. § 5.20(e)(1)(i).

1. In *NationsBank*, the Supreme Court Recognized the OCC's Authority to Interpret the Ambiguous Term "Business of Banking"

These statutory references to the "business of banking" have rarely been the subject of litigation that could add interpretive meaning, with the notable exception of that in § 24(Seventh), which reference has been litigated throughout the history of the National Bank Act. *See, e.g.*, *Merchants' Nat'l Bank v. State Bank*, 77 U.S. 604 (1870) (power to certify checks); *First Nat'l Bank of Charlotte v. Nat'l Exch. Bank*, 92 U.S. 122 (1875) (power to purchase securities in the course of settling a claim); *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913) (power to pay state taxes on depositors' accounts); *Colo. Nat'l Bank of Denver v. Bedford*, 310 U.S. 41 (1940) (power to operate a safe deposit business); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (power to advertise). Section 24(Seventh) provides that national banks are authorized:

> To exercise . . . *all such incidental powers as shall be necessary to carry on the business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes [and provisions limiting securities and stock sales].

12 U.S.C. § 24(Seventh) (emphasis added). The Supreme Court explicated this text definitively in *NationsBank* and recognized the Comptroller's broad discretion in defining which powers are necessary to carry on the "business of banking."

In *NationsBank*, the OCC had interpreted § 24(Seventh)'s text as permitting the Comptroller to authorize national banks to sell annuities to bank customers. *NationsBank*, 513 U.S. at 254. An insurance agents' association challenged that interpretation, arguing that the text

should instead be read to limit the scope of permissible banking powers under § 24(Seventh) to activities connected with the five statutorily enumerated powers: discounting, deposit-taking, trading in exchange and money, lending, and dealing in notes. Under the association's implicit *expressio unius est exclusio alterius* statutory-structure argument, the general authorization to "exercise . . . all such incidental powers as shall be necessary to . . . the business of banking" would have been circumscribed by the succeeding text listing specific powers. *Id.* at 256. The Supreme Court, however, expressly and emphatically rejected that argument.

First, the Court reviewed the OCC's interpretation through the framework of *Chevron* deference. *Id.* at 256-57. "As the administrator charged with supervision of the National Bank Act, see [12 U.S.C.] §§ 1, 26-27, 481, the Comptroller bears primary responsibility for surveillance of the 'business of banking' authorized by § 24 Seventh." *Id.* at 256.

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Id. at 256-57 (quoting *Clarke*, 479 U.S. at 403-04).

Applying this standard, the Court affirmed the OCC's construction of the § 24(Seventh) phrase—"incidental powers . . . necessary to carry on the business of banking"—as an independent grant of authority not limited by the specified enumerated grants of authority, *id.* at 257, thus rejecting the insurance agents' arguments to the contrary:

> We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments—for example, operating a general travel agency—may exceed those bounds.

Id. at 258 n.2. This analysis resolved the question of whether there is a distinction between "business of banking" and "all such incidental powers as shall be necessary to carry on the business of banking." By equating § 24(Seventh)'s text with the "business of banking," *NationsBank* established that the analysis is a unitary inquiry.

NationsBank marked a watershed in construing the term "business of banking," resolving an analytical dispute that had sharply divided courts of appeals for two decades. On one side of the divide, the D.C. Circuit had prefigured *NationsBank* by rejecting a narrow interpretation of § 24(Seventh) and, instead, deferring to the "expert financial judgment" of the Comptroller. *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (municipal bond insurance part of the business of banking). On the other side of the divide, two courts of appeals had adopted a more restrictive test limiting the scope of permissible powers to those related to the enumerated powers in § 24(Seventh). *See M&M Leasing Corp.*, 563 F.2d at 1382 (stating the power "must be 'convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act'") (equipment leasing); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) (holding the test is whether the activities were "directly related to one or another of a national bank's express powers") (travel agency not authorized). *NationsBank* rejected that test, implicitly superseding *Arnold Tours*, *M&M Leasing*, and other decisions that had relied upon them.[9] Accordingly, the reasoning of any "business of banking" decisions that preceded *NationsBank* is subject to reconsideration in light of the Supreme Court's holding.

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[9] While the *NationsBank* holding displaced the test applied by *M&M Leasing, NationsBank* fully vindicated the policy observation articulated in *M&M Leasing:* "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.*, 563 F.2d at 1382.

2. The D.C. Circuit Has Confirmed That There Are No Mandatory National Bank Powers

Just as the OCC received deference in *NationsBank* when broadly interpreting the general powers of national banks under the "business of banking," the OCC has received similar deference when it approved a charter providing for a national bank to exercise a narrow range of banking powers. *Indep. Cmty. Bankers Ass'n of S.D., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 820 F.2d 428 (D.C. Cir. 1987) ("*ICBA v. FRB*"). Nominally a suit against the Federal Reserve Board, the *ICBA v. FRB* case focused in part on an OCC decision to issue a national bank charter that authorized the exercise of limited banking powers. The charter limited the bank's deposit-taking powers in order to comply with state-law restrictions on interstate banking made applicable by the then-current version of the Bank Holding Company Act ("BHCA"). At the time, the BHCA accorded states some control over the ability of bank holding companies to acquire a national bank outside the institution's home state. *Id.* at 430-31. South Dakota law limited the operations of such national banks, in particular the deposit-taking function, in order to protect state-chartered institutions from competition. *Id.* at 431.

Specifically, *ICBA v. FRB* focused on the OCC's issuance of a charter to a credit card national bank with curtailed powers in order to conform to the South Dakota restrictions.[10] The D.C. Circuit noted that the Comptroller's decision to charter the limited purpose bank was consistent with an earlier OCC chartering decision reflected in a Federal Reserve order, *Citicorp*, 67 Fed. Res. Bull. 181 (1981). There, the Comptroller had noted that the grant of authority to

[10] The national bank charter application at issue in *ICBA v. FRB*, while proposing the primary activity of the new bank to be credit card services, also proposed to provide limited deposit-taking, lending, and checking services to the local community to the extent permitted under state law. 820 F.2d at 439. Nothing in the opinion's reasoning indicates that the D.C. Circuit placed any weight on the existence of those nominal activities.

national banks under § 24(Seventh) is "permissive, rather than mandatory," and that a national bank "rarely contemplates engaging in the full range of permissible activities." *ICBA*, 820 F.2d. at 439. The Comptroller found that the decision to operate as a limited service bank so as to avoid conflict with a state statute was "a business decision." *Id.*

Like CSBS, ICBA argued that there is "no such institution as a 'special purpose' national bank," and that a limited national bank charter was otherwise inconsistent with federal law. *Id.* at 438-40. The D.C. Circuit rejected those arguments and held that there are no "mandatory" national bank powers and that the Comptroller has the discretion to grant a national bank charter with limited powers:

> We have no doubt but that the Comptroller's construction and application of the National Bank Act in this context is reasonable. There is nothing in the language or legislative history of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory. Restriction of a national bank's activities to less than the full scope of statutory authority conflicts with the purposes of the Act only if it undermines the safety and soundness of the bank or interferes with the bank's ability to fulfill its statutory obligations. That judgment requires consideration of the particular legal and business circumstances of the individual banks—a judgment within the particular expertise of the Comptroller and reserved to his chartering authority.

Id. at 440. Accordingly, the *ICBA* court's reasoning supports the OCC's authority to promulgate Section 5.20(e)(1) and illustrates that the legal concept of a special purpose national bank charter is not novel or unprecedented, but rather follows a decades-old OCC practice.

Shortly after *ICBA* was decided, Congress amended the BHCA to create an exception from the definition of "bank" applicable to credit card banks. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (August 10, 1987), *codified at* 12 U.S.C. § 1841(c)(2)(F). Congress, however, did not amend the OCC's chartering authority—there remains no express statutory chartering authority for credit card banks in the National Bank Act.

Instead, the OCC has chartered credit card banks relying on the general statutory authority endorsed in *ICBA v. FRB*.

B. Under *Chevron* Step II, the OCC Reasonably Interpreted the Statutory Term "Business of Banking" by Reference to Three Core Banking Functions Identified in the National Bank Act

In its Complaint, CSBS frames its objection to Section 5.20(e)(1) by arguing that the OCC has attempted to use the rule to expand its chartering authority beyond that delegated by statute. Compl. ¶ 155. To the contrary, case law supports the reasonable choices made by the OCC in interpreting the "business of banking" in the manner reflected by the regulation in its current form. In considering the 2003 amendment of Section 5.20(e)(1), *see supra* pp. 4, 15-16, the OCC weighed the ways in which to give content to the statutory term "business of banking" in determining eligibility for a national bank charter. The OCC's Final Rule provides that "[a] special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: [r]eceiving deposits; paying checks; or lending money." 12 C.F.R. § 5.20(e)(1).

In the preamble to the Final Rule that promulgated amendments to 12 C.F.R. § 5.20(e)(1) in 2003, the OCC explained that it added the "core banking functions" requirement by reference to 12 U.S.C. § 36, which defines a national bank "branch" as a branch place of business "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). While § 36 does not include the term "business of banking," the OCC took guidance from a Supreme Court decision construing the statutory phrase the "general business of each national banking association" in 12 U.S.C. § 81 by reference to the core activities of § 36. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 389 (1987) ("*Clarke v. SIA*"). Section 81 restricts the locations at which a national bank may conduct business: "The *general business of each national banking association*

shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of [12 U.S.C. § 36]." 12 U.S.C. § 81 (emphasis added). In *Clarke v. SIA*, the Supreme Court deferred to the OCC's reasonable interpretation of what constitutes the "general business" of each bank. Because of the close textural resemblance of the "business of banking" to the concept of the "general business" of a bank, the OCC drew on its prior analysis regarding "core activities" under § 36 to inform its interpretation of the OCC's chartering authority in § 27.

In *Clarke v. SIA*, the OCC had approved a national bank's application to offer discount brokerage services at, *inter alia*, non-branch locations both inside and outside the bank's home state. A securities trade association challenged the OCC's approval, arguing that § 81's reference to the "general business" of each banking association should be read more broadly than the § 36 activities and should include all activities statutorily authorized for national banks, including the sale of securities, which would therefore limit where such sales could be conducted. *Clarke*, 479 U.S. at 406. The Supreme Court rejected that argument. The Court found that the phrase "the general business of each national banking association" is ambiguous and held that the Comptroller's interpretation was entitled to deference. *Id.* at 403-04. The Court also observed that national banks engage in many activities, and there was no evidence that Congress intended all of those activities to be subject to the geographical limitations of §§ 81 and 36. *Id.* at 406-09. Instead, the Court found the OCC's conclusion was reasonable that the general business of the bank under § 81 included only "core banking functions," and not all incidental services that national banks are authorized to provide. *Id.* at 409. The Court also held that the OCC reasonably equated "core banking functions" with the activities identified in § 36,

which defined "branch" as any place "at which deposits are received, or checks paid, or money lent." *Id.*

The Court's endorsement of the OCC's analysis—that national banks engage in many activities, but that only these three activities represent "core banking functions" and so define the "general business" of the bank—supports treating any one of these same three activities as the required core activity for purposes of the chartering provisions. Just as the "general business" of each national bank is undefined in the location restriction of § 81, the "business of banking" is undefined in the chartering provisions of §§ 21 and 27(a). The natural reading of the two phrases is similar in meaning, which supports the reasonableness of using § 36(j) as a common source for the interpretation of each one.

Equally important, because § 36's terms are linked by "or" and not "and," performing only *one* of the activities is sufficient to meet the statutory definition and to cause the location restrictions to apply. *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 135 (1969) (stating that because the activities element of the definition "is phrased in the disjunctive, the offering of any one of the three services . . . will provide the basis for finding that 'branch' banking is taking place"). This interpretation provides symmetry and consistency between the chartering and the location provisions of the National Bank Act.

VI. BECAUSE CSBS'S ARGUMENTS THAT THE OCC LACKS STATUTORY AND CONSTITUTIONAL AUTHORITY TO ISSUE AN SPNB CHARTER ARE MERITLESS, COUNTS I, II, IV, AND V FAIL TO STATE A CLAIM

The CSBS Complaint outlines a variety of arguments against the OCC's proposed use of Section 5.20(e)(1) to charter as a national bank an entity that does not take deposits. These arguments are predicated on CSBS's misinterpretation of the National Bank Act and rely on defunct and inapposite case law and the irrelevant requirements of statutes other than the

National Bank Act. Given the authority under the National Bank Act to grant SPNB Charters, Tenth Amendment constitutional infirmities alleged by CSBS are nonexistent, and Counts I, II, IV, and V are properly dismissed for failure to state a claim.

A. CSBS's Arguments Construing the National Bank Act Lack Merit

1. No Provision in the National Bank Act Identifies Deposit Taking as an Indispensable Function for an Association to Engage in the Business of Banking

CSBS wrongly claims that provisions of the National Bank Act pertaining to the more ministerial aspects of the chartering process—the filing of an "organization certificate" pursuant to 12 U.S.C. § 21 through § 23—give a "clear indication" that deposit taking is an indispensable function to carry on the business of banking. Compl. ¶ 68. The one thing that is clear from the statutory language cited by CSBS is that these provisions are silent as to the indispensable nature of deposit taking.

CSBS attempts to bootstrap an argument that deposit-taking is a mandatory national bank power from the unremarkable fact that the National Bank Act requires a bank's "organization certificate" to identify the place where its operations of "discount and deposit" are to be conducted. CSBS's arguments overstate the case. Part of the process of forming a new national bank includes the execution of an "organization certificate" by the bank's organizers. The certificate recites basic information, such as the name of the bank, its location, the amount of stock, and the names of initial shareholders. *See* 12 U.S.C. §§ 21-23. Section 22 states as follows:

> The persons uniting to form such an association [a National Bank] shall, under their hands, make an organization certificate, which shall specifically state: . . . [t]he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county, city, town, or village.

CSBS characterizes this requirement—that a bank's organization certificate supply notification designating where a bank will discount notes or take deposits—as an affirmative requirement that a bank must take deposits.

CSBS's interpretation is insupportable. Historically, the reference to operations of "discount" and "deposit" would have fixed the city where these two activities, traditionally requiring repeated retail contact with bank customers, would take place. Nothing in the language of the statue makes the discounting of notes or deposit operations mandatory. Rather, the statute simply requires the organizers to identify the place where these activities would be conducted if a particular bank engages in them. Under CSBS's logic, national banks would also be required to discount notes, an activity that banks have not undertaken in the modern era.

2. Judicial Authority and Statutory Context Defeat CSBS's *Expressio Unius* Argument

CSBS's next foray into interpreting the National Bank Act is to posit that the Comptroller's chartering authority under 12 U.S.C. § 27 is tightly circumscribed by Congress with respect to his ability to determine what it means to be engaged in the "business of banking." Without identifying the legal canon explicitly, CSBS asks the Court to apply the *expressio unius est exclusio alterius* canon of statutory construction that was rejected in *NationsBank* to conclude that because Congress specifically authorized the chartering of particular types of special purpose banks—trust banks, banker's banks, and credit card banks—it creates the inference that Congress intended to withhold the authority of the Comptroller to charter other types of special purpose banks. Compl. ¶¶ 79-85. This argument lacks merit.

Section 27's text does not reflect the structural pattern that triggers the canon's application. "As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are

members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also U.S. v. Vonn*, 535 U.S. 55, 65 (2002). No such inference is available for § 27. The three examples CSBS cites do not present an "associated group or series." Instead, they are each manifestly different in kind: a general chartering authority, a specific chartering authority (banker's banks), and a ratification of a type of charter issued under the Comptroller's general chartering authority (trust banks).

Moreover, the timeline for the passage of each of the provisions in question establishes that the statute's present structure is not the product of a single Congress to which any intent can be attributed. Rather, the distinct provisions reflect discrete legislation by different Congresses, widely separated in time and responding to disparate reasons for legislation. The general chartering authority dates from 1864, the recognition of trust banks was added by legislation in 1978,[11] and the authority for banker's banks was added in 1982. "The possibilities either of [congressional] neglect or of implied delegation to the agency grow more likely as the contrasted contexts grow more remote from each other." *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990). "[T]he canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (quoting *Vonn*, 535 U.S. at 65).

[11] The trust bank text in part retroactively ratified previously issued charters. This text therefore should be read as a *post-hoc* congressional endorsement of the OCC's authority to issue special purpose charters under its general chartering authority.

Additionally, because the canon of *expressio unius* is inherently statute-specific, no meaningful inference can be drawn from the provisions of non-National Bank Act statutes such as the credit card bank exception in the BHCA heavily relied upon by CSBS. *See* 12 U.S.C. § 1841(c)(2)(F).[12] Finally, in *NationsBank*, as discussed *supra* pp. 22-24, the Supreme Court rejected an implicit *expressio unius* argument with respect to the enumerated express powers in § 24(Seventh) that, "as an associated group or series," would more plausibly satisfy the legislative pattern associated with application of the canon than does the structure of § 27.

More generally, the Supreme Court and the D.C. Circuit have repeatedly expressed caution in applying the canon, especially in an administrative context. "The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (2014) (quoting *Cheney R.R. Co. v. Interstate Commerce Comm'n*, 902 F.2d 66, 68-69 (D.C. Cir. 1990)); *see also Mobile Commc'ns Corp. of Am. v. Fed. Commc'ns Comm'n*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (holding that a maxim, unsupported by arguments based on the statute's structure and legislative history, was "too thin a reed" to support the conclusion that Congress had clearly resolved the issue); *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (same). For all these reasons specific to the statutory text and structure, the doctrine of *expressio unius* is unavailing to CSBS's position.

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[12] Indeed, the BHCA exception for credit card banks in 12 U.S.C. § 1841(c)(2)(F) is at odds with CSBS's theory of the case because there is no corresponding chartering authority for credit card banks in the National Bank Act. Notwithstanding the absence of any such specific National Bank Act authorization for credit card banks, the OCC has chartered such credit card banks and has been sustained in so doing. *See* discussion of *ICBA v. FRB*, *supra* pp. 25-27.

3. The Principal Cases Cited by CSBS Are Not Entitled to Weight

The Court may quickly dispose of two district court cases CSBS cites for the proposition that the OCC lacks authority to charter a limited-purpose national bank that does not take deposits. Compl. ¶¶ 80, 82. The first, *National State Bank of Elizabeth, N.J. v. Smith*, No. 76-1479, 1977 U.S. Dist. LEXIS 18184 (D.N.J. Sept. 16, 1977), was reversed by the Third Circuit. *Nat'l State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 227 (3d Cir. 1979). In *Smith*, the OCC issued a charter to a national bank limited to the business of a commercial bank trust department and related activities. The district court concluded that the charter was "contrary to law and invalid," though the reasoning supporting that conclusion is unreported. *Id.* at 228. After the district court decision, and during the appeal, Congress amended 12 U.S.C. § 27(a) to recognize trust banks, retroactively and going forward. *Id.* at 231. On appeal, the Third Circuit reversed the district court, applying the terms of the newly amended § 27(a). Significantly, the Court declined to address the correctness of the district court decision when entered, and opined that the legislation had "validated the Comptroller's action." *Id.* at 231-32. Accordingly, this district court decision ceased to have any force and effect in 1979, the correctness of its reasoning was not endorsed by the Third Circuit, and therefore merits no weight in this Court.

In the second case, *Independent Bankers Ass'n of America v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. Lexis 22529 (M.D. Fla. Feb. 15, 1985) ("*Conover*"), banks and trade associations challenged the OCC's authority under § 27(a) to charter a "nonbank bank"—an institution that would either not accept demand deposits or make commercial loans, or both, so as to avoid the definition of "bank" in the BHCA and attendant restrictions on interstate operations. *Id.* at *2. In awarding the plaintiffs a preliminary injunction against final approval of a nonbank bank charter, the court characterized disapprovingly nonbank banks as taking

advantage of a statutory definition to structure themselves so as to "escape regulation" under the BHCA. *Id.* at *3. And in determining that the plaintiffs had a likelihood of success on the merits, the court looked to the "historical understanding in law and custom" of the term "business of banking." *Id*. at *23.

Like *Smith, Conover* is not good law. First, the ruling in *Conover* was an interim preliminary injunction order that was subsequently vacated when the case was dismissed before final judgment. *See* Docket Entry No. 137 (Sept. 11, 1987) (attached hereto as Exhibit E). Second, the analysis in *Conover* stands in substantial conflict with the later decision of the D.C. Circuit in *ICBA v. FRB* as to the OCC's authority to issue a limited purpose charter, *supra* pp. 25-27, and with the expansive test for "business of banking" established in *NationsBank, supra* pp. 22-24 . Third, a Supreme Court decision the year following *Conover* discounted the "intentional avoidance of regulation" justification partly relied upon in *Conover* to issue an injunction. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (rejecting Federal Reserve Board's argument that its expansive regulation was justified to prevent exploitation of statutory loopholes). Because the district court ruling never reached final judgment, because it stands in conflict with a later decision by the D.C. Circuit, and because parts of its rationale were superseded by legislation and by the Supreme Court decisions in *NationsBank* and *Dimension*, the *Conover* opinion also merits no weight in this Court.

4. No Other Authority Identified by CSBS Supports the Position that Deposit-Taking Is an Essential Function for an Association to be Chartered as a National Bank

The OCC does not dispute that deposit-taking is among the core banking functions that comprise the business of banking. *See* 12 C.F.R. § 5.20(e)(1). CSBS, however, identifies no

authority either within the National Bank Act or within other applicable law to support the proposition that a national bank *must* take deposits to be engaged in the business of banking.

CSBS's Complaint cites an OCC administrative decision approving a 1984 application from Deposit Guaranty National Bank to establish a branch in Gulfport, Mississippi. Compl. ¶ 69 (citing 1985 OCC QJ LEXIS 812). In analyzing the application, the OCC concluded unsurprisingly that a branch of a national bank that, like savings associations chartered under Mississippi law, accepted demand deposits, made commercial and other non-mortgage loans, and accepted time and savings deposits would be offering products and services that "appear to be essential to the banking business." 1985 OCC QJ LEXIS at *27. But the OCC's analysis and characterization of the scope of powers for Mississippi savings associations under state law has no bearing on assessing the minimum activities required for a financial institution to be considered carrying on the business of banking under the National Bank Act.

The remaining caselaw cited in the Complaint, ¶¶ 69, 70, 76, similarly conveys general references to the scope of the business of banking while addressing issues other than the acceptance of deposits as a necessary feature of an individual national bank. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 326 (1963) (delineating relevant product market in banking antitrust cases); *Gutierrez v. Wells Fargo Bank*, *N.A.*, 704 F.3d 712, 730 (9th Cir. 2012) (dealing with preemption of state law applied to the posting of transactions for purposes of calculating overdraft fees); *Bank of Am. v. City and Cty. of S.F.*, 309 F.3d 551, 563 (9th Cir. 2002) (ruling on preemption of ordinances prohibiting banks from charging ATM fees to non-depositors); *Dep't of Banking & Consumer Fin. v. Clarke*, 809 F.2d 266, 270 (5th Cir. 1987) (overturning district court injunction against the OCC's administrative decision related to Mississippi branch application in 1985 OCC QJ LEXIS 812, and stating that "[t]he Comptroller did not incorrectly

interpret the controlling statutory provisions. His interpretation was more than a mere 'permissible construction,' all that is required in order to secure this court's deference."); *Davis v. W.J. West & Co.*, 127 Ga. 407 (1907) (individual who engaged in the money-lending business discounting notes and advertised himself as a bank, but did not take deposits and was not chartered as a bank, was not a bank).[13] These sources do not impugn the reasonableness of the OCC's interpretation of what activities are required to be deemed engaged in the business of banking under the National Bank Act or banking generally. *See supra* pp. 27-29. Indeed, the Supreme Court has recognized, near in time to the passage of the National Bank Act, that engaging in lending or payment functions is sufficient for an entity to be considered a bank. *See Oulton v. German Sav. & Loan Soc.*, 84 U.S. 109, 119 (1872) (stating that an institution is a bank "in the strictest commercial sense" if it engages in only one of the three functions of deposit taking, discounting, or circulation).

B. CSBS Improperly Invokes Statutory Provisions Outside the National Bank Act

CSBS floods its Complaint with allegations that the OCC's interpretation of the "business of banking," as used in the National Bank Act, conflicts with a host of other federal banking laws. *See* Compl. ¶¶ 67, 71-78, 125. To be clear, the OCC based its decision to accept applications for SPNB Charters solely on its interpretation of the National Bank Act, an Act over which it possesses administrative authority. *See Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). The OCC did *not* base its decision, as CSBS suggests it should, on

[13] CSBS also cites 12 U.S.C. § 378, Compl. ¶ 76, which makes it unlawful for an entity not chartered as a bank to take deposits. The statute does not establish the converse, *i.e.*, that a bank must take deposits.

statutes over which it does not possess administrative authority, both because the National Bank Act sets forth the OCC's chartering authority and because the extraneous statutory provisions cited by CSBS do not speak to the scope of that chartering authority.[14] Thus, CSBS's position—that every passage, amendment, or interpretation of a later-enacted federal banking statute requires the parallel reconsideration of existing National Bank Act interpretations—lacks both legal support and practical workability.

1. The OCC's Interpretation of the National Bank Act Does Not, and Should Not, Depend on the Bank Holding Company Act

At a loss to construct an argument based upon the National Bank Act, CSBS argues that national banks must take deposits because the BHCA classifies a "bank" as either "[a]n insured bank" as defined in Section 3(h) of the Federal Deposit Insurance Act or "[a]n institution . . . which . . . accepts demand deposits" and "is engaged in the business of making commercial loans." 12 U.S.C. § 1841(c)(1)(A)-(B). Both aspects of the definition, CSBS argues, either presume or require that an entity will take deposits in order to be considered a "bank" for BHCA purposes. Compl. ¶¶ 74-75. Governing case law, however, holds that interpretations of the National Bank Act do not depend on the terms of the BHCA.

The D.C. Circuit's decision in *Independent Insurance Agents v. Ludwig* illustrates the point. 997 F.2d 958 (D.C. Cir. 1993), *rev'd on other grounds by Indep. Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 732 (D.C. Cir. 1992). There, the D.C. Circuit rejected arguments that the OCC's interpretation of Section 92 of the National Bank Act must be harmonized with a later-enacted amendment to the BHCA. *Id.* at 962. Acknowledging materials suggesting that

[14] *Cf. Am.'s Cmty. Bankers v. Fed. Deposit Ins. Corp.*, 200 F.3d 822, 833 (D.C. Cir. 2000) (stating that when an agency's interpretation "derive[s] principally from" an organic statute, "the two-step *Chevron* inquiry [remains] appropriate"); *see also Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 250 F.3d 778, 782 (D.C. Cir. 2001).

Congress intended the BHCA amendment to "parallel" Section 92, the D.C. Circuit nonetheless deferred to an OCC interpretation of Section 92 that directly contradicted the Federal Reserve Board staff's interpretation of the "parallel" BHCA provision. *Id.* The D.C. Circuit also reiterated the district court's conclusion that "[t]he [National Bank Act and BHCA] were enacted over sixty-five years apart and deal with two different types of banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies." *Id.* (quoting *Nat'l Ass'n of Life Underwriters v. Clarke,* 736 F. Supp. 1162, 1171 (D.D.C. 1990)). The D.C. Circuit further cited to an earlier case where it rejected a similar argument suggesting that the OCC was obligated to follow the BHCA: "the Comptroller derived his authority solely under the [National Bank Act], and it was his responsibility to determine issues under that Act, not under the BHCA." *Id.* at 962 (citing *Am. Ins. Ass'n*, 865 F.2d at 287).

CSBS's reliance on *Whitney v. National Bank of New Orleans & Trust Co.* fails for related reasons. 379 U.S. 411 (1965). In that case, Whitney National Bank of New Orleans ("Whitney") planned to establish a new national bank in another parish of Louisiana. *Id.* at 413. To do so, Whitney sought approval from the Federal Reserve Board of its plan to organize itself as a bank holding company. *Id.* After the Federal Reserve Board approved the plan, Whitney's competitors filed a declaratory judgment action seeking a determination that the Comptroller of the Currency had no power to issue a certificate of authority for the new bank because of state bank branching laws made applicable by the BHCA. *Id.* The Supreme Court, however, held that the Federal Reserve Board and the OCC have distinct roles with respect to newly established national banks proposed to be owned by bank holding companies. In the Court's words, the authorization for the new national bank was "the sole function of the Comptroller, requiring his appraisal of the bank's assets, directorate, etc., and his action is therefore necessary in addition to

that of the Board approving the organization by the holding company." *Id*. at 417. Separately, the Court noted that "[t]he Bank Holding Company Act makes the Board's approval of a holding company arrangement binding upon the Comptroller." For that reason, the Comptroller could be stayed from issuing a certificate pending Federal Reserve Board action, but only in "exceptional circumstances." *Id.* at 426 n.7; *see also Am. Ins. Ass'n*, 865 F.2d at 287-88 (*per curiam* on petitions for rehearing) (declining to find such "exceptional circumstances").

In that same vein, CSBS ignores *Whitney*'s key observation that "it is the ownership of [the new bank] by the holding company that is at the heart of the project, not the permission to open for business which is acted upon routinely by the Comptroller once the authority to organize is given by the Board." *Whitney*, 379 U.S. at 423. Thus, the BHCA governs affiliations between "banks," as defined for BHCA purposes, and other companies—in particular nonfinancial commercial companies. *Id.* The BHCA does not, however, speak to the nature or type of national banks the OCC can charter—an authority governed exclusively by the National Bank Act.[15]

2. Neither the Federal Reserve Act nor the Federal Deposit Insurance Act Require National Banks to Accept Deposits and Acquire Deposit Insurance

CSBS improperly relies on provisions of the Federal Reserve Act ("FRA") and the Federal Deposit Insurance Act ("FDIA") when it argues that all nationally chartered banks must accept deposits because they are required to have federal deposit insurance. Compl. ¶¶ 71-73. When read in the proper context, nothing in these Acts require national banks to acquire deposit insurance and, by extension, to accept deposits. To be sure, the FRA states that "[e]very national

[15] Similarly, CSBS does not identify any authority where a court relied on provisions of the Federal Deposit Insurance Act to interpret terms in the National Bank Act. *Cf. In re Cmty. Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) (reading provisions of the FDIA with the aid of the National Bank Act, not the reverse); *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir. 1992) (doing the same).

bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located," become a member of the Federal Reserve System and "shall thereupon be an insured bank" under the FDIA. 12 U.S.C. § 222. But the text, structure, and history of that and other related provisions demonstrate the discretionary, rather than mandatory, nature of the deposit-taking function for a given institution. Neither the FDIA nor the FRA imposes conditions on or limit the Comptroller's discretion when determining what it means to be engaged in the business of banking for purposes of the National Bank Act. Nor do the cited FDIA and FRA provisions require every national bank to take deposits or to be insured.

To demonstrate, the plain text of the current FDIA provision governing the deposit insurance application process does not impose any corresponding deposit insurance requirement for all national banks. *See* 12 U.S.C. § 1815(a)(1). Section 1815(a)(1) specifies that, absent two exceptions not relevant here, "any depository institution which is engaged in the business of receiving deposits other than trust funds . . . , upon application to and examination by the Corporation and approval by the Board of Directors, may become an insured depository institution." *Id.* The statute's language leaves open the possibility of the existence of banking institutions that would not be insured because they are not "engaged in the business of receiving deposits other than trust funds." *Id.*

A careful parsing of the statutory language bears this reasoning out. Nothing in § 1815 suggests that a non-depository institution *must* become an insured depository institution. Instead, § 1815(a)(1) applies with respect to "depository institution[s] . . . engaged in the business of receiving deposits other than trust funds" who "*may* become . . . insured depository institution[s]." *Id.* (emphasis added). Section 1815(a)(1)'s separation of "depository institution[s]" from "insured depository institution[s]" is no accident: the FDIA defines both

terms, and notes that the former "means any bank or savings association" while the latter "means any bank or savings association the deposits of which are insured." *Id.* § 1813(c)(1)-(2). Other FDIA provisions echo this distinction, and expressly envision the existence, operation, and supervision of uninsured banks. *See id.* § 1813(h) (defining "noninsured bank" for purposes of the Act); § 1818(b)(5) (noting that the OCC's authority to issue cease-and-desist orders extends "to any national banking association chartered by the Comptroller of the Currency, *including an uninsured association*" (emphasis added)).

Similarly, FDIA provisions dealing with the cessation of a national bank's insured status contemplate situations where a banking institution may operate without deposit insurance and without taking deposits. While the FDIA states that insured national member banks cannot voluntarily surrender their deposit insurance, 12 U.S.C. § 1818(a)(1), the prohibition yields when these entities stop accepting deposits other than trust funds. For example, a national bank's insured status *shall* terminate if it no longer receives deposits other than trust funds, 12 U.S.C. § 1818(p), or if another institution assumes its deposits, 12 U.S.C. § 1818(q). But these provisions do not *require* the OCC to terminate a national bank's charter if or when that bank loses its insured status because it no longer accepts deposits. Instead, these provisions show that the link between being a national bank and having deposit insurance applies only to those national banks that actually hold deposits other than trust funds.

Nor does 12 U.S.C. § 222 support CSBS's argument. Section 222 states that a national bank "shall . . . become a member of the Federal Reserve System" and, after becoming a member, "shall thereupon be an insured bank" under the FDIA. 12 U.S.C. § 222. CSBS relies on this latter phrase to argue that every national bank must be insured and, by implication, must take deposits. But when read in its proper context, the provision expresses a descriptive, rather

than prescriptive, function and purpose. Under § 222, national banks need not take any specific action to become an "insured bank." The lack of any specific mandate stands in stark contrast to the detailed requirements that § 222 instructs national banks to meet in order to become members of the Federal Reserve System. *Id.* (instructing national banks to become Federal Reserve System members by "subscribing and paying for stock in the Federal Reserve bank of its district"); *see also* 12 U.S.C. § 282 (outlining the Federal Reserve bank stock subscription process). Thus, § 222 should be read as simply conferring the status of "insured bank" on those national banks that need to obtain deposit insurance under 12 U.S.C. § 1815(a)(1), *i.e.*, on those national banks that take deposits other than trust funds.

This reading also aligns with § 222's historical role in the deposit insurance sphere. Congress added the provision at issue in contemplation of Alaska entering the Union. Pub. L. No. 85-508, § 19, 72 Stat. 339, 350 (1958). National banks located in states are required to be member banks. 12 U.S.C. § 282. National banks located in U.S. territories are not. 12 U.S.C. §§ 143, 466. Congress amended § 222 to facilitate the transition of national non-member banks in Alaska and Hawaii to the status of member banks and insured banks by virtue of, among other things, automatic eligibility for deposit insurance. *See* H.R. Rep. No. 85-624, at 2933 (1957) (noting that the enactments would "enable Alaska to achieve full equality with existing states, not only in a technical juridicial sense, but in practical economic terms as well"). Stated differently, § 222 allowed national nonmember banks in Alaska and Hawaii to become member banks—and, without further action, "insured banks"—at a time when all newly chartered national member banks engaged in the business of receiving deposits other than trust funds would have been required to be insured and been granted insurance automatically upon receiving a charter. *See* 12 U.S.C. § 1814(b) (prior to amendments by Pub. L. No. 101-73, § 205, 103 Stat.

183, 195 (1989) and Pub. L. No. 102-42, § 115(b), 105 Stat. 2236, 2249 (1991)). This automatic process, however, was modified in part by the amendments imposed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), and altered by § 1815(a)(1)'s deposit insurance application system. Accordingly, § 222 should not be read as currently imposing any deposit-insurance requirement or, more importantly, a deposit-taking requirement.

C. Neither Section 5.20(e)(1) nor Any SPNB Charter Issued in the Future Would Violate the Supremacy Clause or the Tenth Amendment

In the 153-year history of the national bank system, it has been repeatedly established that the Supremacy Clause operates in concert with the National Bank Act to displace state laws or state causes of action that conflict with federal law or that prevent or significantly interfere with national bank powers. *See, e.g., Barnett Bank of Marion Cty. v. Nelson,* 517 U.S. 25 (1996); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). As a federal regulation, Section 5.20(e)(1) preempts contrary state law. *See, e.g., Smiley*, 517 U.S. at 735 (1996); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). Under these lines of authority, a fintech chartered as a national bank under Section 5.20(e)(1) would be entitled to the protections of the National Bank Act against state interference.

> It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking Act. So long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, therefore, the Comptroller has the power to preempt inconsistent state law.

CSBS v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983).

The Tenth Amendment is not implicated when the Constitution assigns authority to the federal government. "If a power is delegated to Congress in the Constitution, the Tenth

Amendment expressly disclaims any reservation of that power to the States." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." *Id.* Accordingly, the Tenth Amendment has no application to either Section 5.20(e)(1), or to any SPNB Charter issued in the future.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed on all counts for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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