UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and BLAKE PAULSON, in his official capacity as Acting Comptroller of the Currency, Defendants.	Civil Action No. 20-CV-03797 (DLF)

MEMORANDUM OF POINTS AND AUHORITIES IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

This is the Conference of State Bank Supervisors' ("CSBS" or "Plaintiff") third time challenging the Office of the Comptroller's ("OCC" or "Agency") authority to issue a special purpose national bank "(SPNB") charter pursuant to 12 C.F.R. § 5.20 (e)(1). As with the other two cases, this case must likewise be dismissed for lack of jurisdiction because CSBS still lacks standing and its claims remain unripe. The OCC has yet to grant an application for an SPNB and there are no SPNB applications pending. CSBS alleges that an application submitted by organizers of Figure Bank is for an SPNB charter without providing any factual or legal support for its assertion. However, the application itself does not indicate that the requested charter is for an SPNB and in fact states that the proposed bank would conduct a full range of services including lending, payments, and custody activities to its customers. And as Plaintiff's Complaint acknowledges Figure would also be a deposit-taking institution. Regardless, even if the application was for an SPNB charter (which it is not), the application is pending and has not yet been conditionally approved. Even if the application is conditionally approved, there are several steps that must occur prior to the OCC issuing a charter and the bank commencing operations. Additionally, CSBS has failed to allege any injury in fact because its assertions that either it or any of its members will be injured if the OCC issues an SPNB charter are purely speculative. For these same reasons, CSBS' claims are also unripe.

Even if Plaintiff is somehow able to overcome these jurisdictional obstacles, its claims still fail as a matter of law. CSBS' lawsuit boils down to its unsupported allegation that Figure's application for a national bank charter must be considered an SPNB because Figure will not apply for and obtain federal deposit insurance. However, as explained below, there is no (and there never has been a) provision in the National Bank Act that requires *all* national banks to

obtain deposit insurance. Nor is there any provision in either the Federal Deposit Insurance Act, the statute delineating the federal deposit insurance system, or the Federal Reserve Act, the statute that speaks to membership in the Federal Reserve System, that requires a depository national bank to obtain insurance.

Last, CSBS' challenges to certain OCC preemption regulations must also be dismissed for lack of standing and because they are time-barred. Moreover, the challenged preemption regulations are consistent with the OCC's statutory authority, and the procedural requirements that CSBS alleges were not followed do not retroactively apply to the preemption regulations.

For these reasons, as explained in detail below, this Court lacks jurisdiction over Plaintiff's claims and this lawsuit should be dismissed. Alternatively, Plaintiff's claims merit dismissal because they fail as a matter of law.

BACKGROUND

I. OCC CHARTERING AUTHORITY

The OCC is an independent bureau of the U.S. Department of the Treasury, with primary supervisory responsibility for 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 ensuring that national banks (and other institutions subject to its jurisdiction) operate in a safe and sound manner, comply with applicable laws and regulations, offer fair access to financial services, and provide fair treatment of customers. *Id.* § 1(a). As one of its responsibilities, the OCC has authority to charter national banks, a key part of which includes receiving applications and, when appropriate, granting charters to associations formed to carry out the "business of banking." *See id.* §§ 21, 26, 27. The National Bank Act does not define the term "business of banking." Nor does it set forth any mandatory or minimum number of activities that must be performed for a national bank to be engaged in the "business of banking." *See id.* § 24 (Seventh). 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." *Id*. § 27(a). As administrator of the National Bank Act, the OCC interprets its chartering authority and the term "the business of banking" consistent with its statutory authority. *See NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) ("As the administrator charged with supervision of the National Bank Act . . . the Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh.").

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 perform all of the powers available to national banks under the National Bank Act, *see* 12 U.S.C. §24 (Seventh), or they may seek authority for more focused 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. *See* Comptroller's Licensing Manual, Charters (October 2019) ("Charters Booklet") at 1, *available at* https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/licensing-booklet-charters.html (last viewed April 21, 2021). Prior to issuing a national bank charter, the OCC considers numerous factors, including the safety and soundness of the association's proposed operations and compliance with applicable laws and regulations. 12 U.S.C. § 26; 12 C.F.R. § 5.20(f).

II. OCC CHARTERING PROCEDURES

The OCC's chartering regulations provide a thorough and public process for receiving and considering applications for national bank charters. 12 C.F.R. Part 5 ("Part 5"). The OCC's procedures for implementing its chartering regulations are collected in the Agency's Charters Booklet. Applications for all national bank charters are submitted to the OCC's Licensing

Division and are processed in accordance with the OCC's Part 5 regulations. *See also* Charters Booklet at 31-50. The application process is initiated by publishing a newspaper notice of the application, followed by receipt of public comments. *Id.* at 34. The OCC reviews each application on a case-by-case basis to determine whether statutory and regulatory requirements have been met, including safety and soundness considerations. *Id*. at 1, 4, 23, 39. If the application satisfies these requirements and considerations, the OCC undertakes a two-step approval process: it grants a preliminary conditional approval and then a final approval. *Id*. at 3, 39. Prior to final approval, the OCC generally requires the organizers to raise capital within 12 months and open within 18 months of a grant of preliminary conditional approval. *Id.* Until final approval is granted and a charter issued, the OCC may alter, suspend, or revoke preliminary conditional approval should the OCC deem that any interim development warrants such action. *Id*. at 48. If the organizers receive final approval, the OCC will issue a charter and the new bank can commence the business of banking. *Id.* at 3, 39, 48; 12 C.F.R. § 5.20(d)(3).

III. THE FIGURE CHARTER APPLICATION

On November 6, 2020, the organizers of Figure Bank, National Association ("Figure") submitted a charter application for a proposed fully digital, branchless, *de novo* national bank to be headquartered in Reno, Nevada and operated nationwide. *See* Declaration of Stephen A. Lybarger, Deputy Comptroller For Licensing ("Lybarger Decl.") [1] ¶ 8 and Ex. 1 (attaching Application to the Office of the Comptroller of the Currency to organize Figure Bank, National Association, November 6, 2020 ("Figure Application").[2] The Figure Application is for a full-

[1] In deciding a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction, a court may consider documents outside the pleadings, including sworn declarations. *See Conference of State Bank Supervisors v. OCC*, 313 F. Supp. 3d, 285, 394 (D.D.C. 2018) (citing cases).

[2] The Figure Application includes a main application, public exhibits and confidential exhibits. The confidential information contains commercial and financial information. *See* Lybarger Decl.

service bank that will take institutional deposits and provide lending, payments and custody activities to its customers through the use of blockchain technology. *Id*. The application also provides that Figure will be engaged in taking deposits but will not apply for FDIC insurance. *Id.*; Complaint for Declaratory and Injunctive Relief, ECF No. 1 ("Compl.") ¶¶ 14-15. The OCC is currently reviewing the Figure Application to determine if it meets all the statutory and regulatory requirements, including safety and soundness considerations, and to date, no decision regarding the Figure Application has been made. Lybarger Decl. ¶ 10.

IV. OCC PREEMPTION REGULATIONS

The three challenged OCC regulations, 12 C.F.R. §§ 7.4007, 7.4008, and 34.4 (collectively, "Preemption Regulations"), were originally promulgated in 2004 and identify types of state laws that do and do not apply to national banks' operations. *See* 69 Fed. Reg. 1904, 1904 (Jan. 13, 2004). These Preemption Regulations are based on and expressly incorporate the legal standard for conflict preemption set forth in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996) (*Barnett*). 69 Fed. Reg. at 1910-11; 12 C.F.R. § 7.4007(c); 12 C.F.R. § 7.4008(e); 12 C.F.R. § 34.4(b). They were amended in 2011 following enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376, § 1044 (2010), *codified in relevant part at* 12 U.S.C. § 25b, ("Dodd-Frank"). 76 Fed. Reg. 43,549, 43,557 (July 21, 2011). Effective on July 21, 2011, Dodd-Frank codified the *Barnett* standard for conflict preemption of state consumer financial laws and established a series of procedural requirements for future OCC

Ex. 1 at 2-3. (Letter dated November 6, 2020 Requesting Confidential Treatment filed with Application.)

preemption determinations, among other things. *See, e.g.* 12 U.S.C. §§ 25b(b)(1)(B), (b)(3) and (d), 5412; 76 Fed. Reg. at 43,549.

The OCC's 2011 amendments to its Preemption Regulations are consistent with the OCC's statutory authority. *See* 12 U.S.C. § 1 (OCC charged with assuring "compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction"); *id.* § 93a (OCC authorized to "prescribe rules and regulations to carry out the responsibilities of the office"); *id.* § 371(a) (national banks authorized to, arrange, purchase or sell real estate loans subject to "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order"); *see also* 12 U.S.C. § 25b(b)(1)(B) (OCC authorized to issue regulations that preempt state consumer financial laws in accordance with the legal standard for preemption in *Barnett* and applicable law).

V. PRIOR LITGATION BROUGHT BY PLAINTIFF

CSBS previously brought two similar lawsuits challenging the special purpose national bank ("SPNB") charter regulations, and both were dismissed for lack of standing and being unripe. *See CSBS v. OCC*, 313 F. Supp. 3d 285, 299-300 (D.D.C. 2018) ("*CSBS I*"); *CSBS v. OCC,* Case No. 18-cv-2249, 2019 WL 4194541 (D.D.C. September 3, 2019) ("*CSBS II*").

In *CSBS I*, this Court noted that a threatened injury must be "certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *CSBS I*, 313 F. Supp. 3d at 295 (citation omitted). Against this standard, this Court reviewed CSBS' 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. This Court 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*. Specifically, this Court 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. This 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. Separately, this Court 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.

In *CSBS II*, this Court again dismissed CSBS' case concluding that CSBS continued to lack constitutional standing and its claims were still unripe. *See CSBS II,* 2019 WL 4194541 at *1. Again, this Court found that the Complaint still failed to "allege that any [] Fintech has applied for a charter, let alone that the OCC has chartered a Fintech." *Id.* at *1-2. This Court reiterated its prior finding in *CSBS I* that several contingent and speculative events must occur before the OCC charters a Fintech, *CSBS I* at 296, and noted that "[t]he second step—a Fintech's electing to apply— ha[s] not occurred, let alone the third or fourth." *Id*. at *2. This Court also found it significant that CSBS continued to fail to allege a particular harm or that such risk would "prompt its members to reasonably incur costs to mitigate that harm." *Id*. Likewise, the Court found the Complaint's silence about which state bank supervisors—CSBS' members—

face imminent injury alone warranted dismissal. *Id*. Finally, finding CSBS' claims were again both constitutionally and prudentially unripe, this Court noted that "the prudential ripeness doctrine counsels in favor of allowing time to sharpen this dispute before deciding it. Indeed, there may ultimately be no case to decide at all if the OCC does not charter a Fintech." Thus, "even if CSBS had successfully alleged an injury in fact, this case is prudentially unripe." *Id.* at **3* (internal citations omitted).

LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(1) permits a defendant to move to dismiss a claim for "lack of subject-matter jurisdiction." As the Supreme Court has said "many times," "[t]he district courts of the United States . . . are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute."' *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)). Accordingly, this Court has a duty to ensure that it is acting within the scope of its jurisdictional authority, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), and "[a] plaintiff carries the burden of establishing [the court's] subject matter jurisdiction." *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 403 (D. Md. 2012); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). For this reason, a plaintiff's factual allegations in the complaint will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see also Adamski v. McHugh*, 304 F. Supp. 3d 227, 233 (D.D.C. 2015).

Defendants also move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must contain sufficient factual allegations, accepted as true, to state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The facts

alleged "must be enough to raise a right to relief above the speculative level." *Id.* at 555. While a court must treat the complaint's factual allegations as true, it need not accept as true legal conclusions set forth in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF LACKS STANDING AND ITS CLAIMS ARE UNRIPE

The "irreducible constitutional minimum" for standing contains three requirements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). "First and foremost," a plaintiff must allege an "injury in fact – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id*. at 103 (internal quotations omitted). "Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Id.* "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Id.* at 103-04 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 103-04 (D.D.C. 2016). "A deficiency on any one of the three prongs suffices to defeat standing." *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000).

An organization seeking to establish its standing can proceed under a theory of "organizational standing" by asserting standing "on its own behalf." *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Or it can proceed under a theory of "associational standing" by asserting standing "on behalf of its members," *id.*, and demonstrating that one of its members "would have standing to sue in [its] own right." *Sierra Club v. EPA*, 292

F.3d 895, 898 (D.C. Cir. 2002). Plaintiff's Complaint does not plausibly allege standing under either theory.

A. CSBS Lacks Standing to Challenge the SPNB Regulation and the Pending Figure Application

1. CSBS Lacks Standing to Challenge the SPNB Regulation Because There is No Application Pending for an SPNB

Plaintiff's Complaint states that it is "challenging the OCC's creation of a new special-purpose national bank charter for nonbank companies" and the OCC's consideration and "impending approval" of the Figure Application for such a charter. Compl. ¶ 1. The Court should dismiss this claim because the OCC has not granted an application for an SPNB nor is any such application pending. Lybarger Decl. ¶¶ 6-7, 9.

As with the two cases previously dismissed by this Court, the OCC has not yet received an application for an SPNB charter. Despite Plaintiff's claim to the contrary, Figure is not seeking an SPNB charter pursuant to 12 C.F.R. § 5.20(e)(1). Lybarger Decl. ¶ 9. Under § 5.20(e)(1), a special purpose bank is one that engages in limited banking or fiduciary activities and "must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money." The Figure Application is for a full-service bank that will take institutional deposits and provide lending, payments, and custody activities to its customers through the use of blockchain technology. Lybarger Decl. ¶ 9. As such, the charter that Figure would receive if granted will not be an SPNB charter.

CSBS further alleges that Figure's application for a national bank charter must be considered an SPNB as a matter of law because Figure will not apply for and obtain federal deposit insurance but proffers no support for this assertion. *See* Compl. ¶¶ 12-19. Given the fact that Figure has *not* applied for an SPNB charter, *see* Lybarger Decl.¶ 9, there is no reason for the Court to even entertain this fiction. Moreover, the OCC's fundamental authority to charter

national banks that take deposits is unassailable and, as will be discussed later, *see infra* section II, the OCC's authority to charter a deposit taking institution is not inextricably linked to an institution obtaining FDIC deposit insurance.

2. CSBS Lacks Standing to Challenge the Figure Application Because the OCC has not Made a Decision

Plaintiff likewise does not have standing to challenge the Figure Application for a national bank charter because the application is currently being considered and has not yet been approved. Lybarger Decl. ¶ 10. There are a number of steps that must occur before organizers of a proposed bank obtain final approval and a charter is issued. *Id.* ¶ 12. Even if the OCC ultimately "approves" Figure's Application, the OCC will first grant preliminary conditional approval, which permits the organizers to proceed with the organization of the bank. *Id.* ¶¶ 12(e), 13. The organizers then have 12 months to raise capital and must open within 18 months from the preliminary conditional approval date, unless extended by the OCC. *Id.* ¶ 13. A preliminary conditional approval decision is not an assurance that the OCC will grant final approval for a new bank charter. *Id.* ¶ 14. Importantly, until final approval is granted, and a charter issued, the OCC may alter, suspend, or revoke preliminary conditional approval. *Id.* ¶ 15. Only upon final approval are the organizers issued a national bank charter and authorized to commence the business of banking. *Id.* ¶ 16; s*ee* 12 C.F.R. §§ 5.20(d)(3), (i)(5)(ii)(B). As this Court previously recognized, until the OCC issues a charter, *none* of the harms CSBS alleges can materialize or be identified with the requisite certainty. *See CSBS I,* 313 F. Supp.3d at 294-295; *CSBS II, 2019 WL 4194541* at *2. For the same reasons, CSBS again does not have standing to challenge the Figure Application.

3. CSBS Lacks Standing Because it has not Alleged any Injury in Fact

Even if this Court were to move beyond the threshold standing arguments detailed above, once again CSBS has failed to allege any injury in fact because its assertions that either it or any of its members will be injured are pure conjecture. CSBS' allegations that Figure *could* engage in activities that *could* violate various laws in various states do not rise to the level of specific facts demonstrating injury or imminent injury. *See Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) (stating that a plaintiff that speculates as to how it will be injured by the challenged conduct not only "cannot establish injury" but also "cannot establish causation or redressability") (citations omitted). For example, CSBS generally identifies various laws in New Mexico, Missouri, California, as well as an additional (but unnamed) 15 jurisdictions that cover mortgage lending, consumer lending such as payday lending, and, money transmission and then speculates that Figure's "impending charter" *might* violate these laws. *See* Compl. ¶¶ 187-190.

This list of speculative harms is no different from those Plaintiff identified in *CSBS II*, which this Court previously determined were insufficient to establish standing. *CSBS II,* 2019 WL 4154541 at *2 (holding that generally identifying laws from each state that cover mortgage lending, consumer lending, and money transmission, without connecting those general laws to any particular actual or imminent harm, and a failure to specify which CSBS member face imminent injury warranted dismissal). Once again, this Court should conclude that CSBS' conjecture that if the OCC charters Figure, it "will circumvent each of these described state laws and more," Compl. ¶ 191, is not enough to demonstrate the requisite concrete injury. *Id.*; *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be *de facto*; that is, it must actually exist.");

In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig., 45 F. Supp. 3d 14, 24 (D.D.C. 2014) (allegations of "possible future injury simply do not satisfy the requirements of Article III . . . [a] threatened injury must be *certainly impending* to constitute injury in fact.") (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Moreover, all of the alleged harms are premised on Figure being chartered as an SPNB under §5.20(e)(1), which is factually incorrect, and the Complaint alleges no concrete or imminent harms to itself or its members if Figure's current application to be chartered as a national bank is approved in the future. *See generally* Compl. ¶¶ 181-206. For all these reasons, dismissal of the Complaint for lack of standing to challenge the SPNB charter regulation and the pending Figure Application for a national bank charter is required. [3]

B. CSBS' Claims are Unripe Because the OCC has not Received, nor is it Considering, an Application for an SPNB Charter, and the Figure Application is Pending.

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). As with its prior lawsuits, CSBS' claims remain both constitutionally and prudentially unripe. *CSBS I*, 313 F. Supp. 3d. at 300-01; *CSBS II*, 2019 WL 4194541 at *3. This matter is constitutionally unripe because as explained above, CSBS does not face a sufficiently "imminent" injury in fact. *See*

[3] CSBS should be precluded from relitigating the issue of whether, absent an application for an SPNB Charter, they can challenge the validity of the SPNB regulations. This Court has already twice dismissed CSBS' prior lawsuits for lack of standing and ripeness because the OCC has not yet received a single application for an SPNB charter. *See CSBS I* and *CSBS II*. 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).

CSBS I, 313 F. Supp. 3d. at 299 (finding that constitutional ripeness was subsumed by standing's injury-in-fact requirement); *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").

This matter is also prudentially unripe. 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." *Gardner*, 387 U.S. at 148-49. (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. The fitness factor 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)). As noted earlier, Figure has not requested an SPNB charter and the OCC is neither considering nor has it issued an SPNB Charter. Lybarger Decl. ¶¶ 6-7, 9. As of this date, no decision has been made on Figure's charter application. *Id.* ¶ 10. Therefore, for the same reasons this Court found the two prior cases not fit for judicial review, this dispute is also unfit. *CSBS I*, 313 F. Supp. 3d at 300-301 (holding the case "will be sharpened if the OCC charters a particular Fintech or decides to do so imminently."); *CSBS II*, 2019 WL 4194541 *3 (same).

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. *CSBS I*, 313 F. Supp. 3d at 301. In fact, as this Court previously found "the prudential ripeness doctrine counsels in favor of allowing time to sharpen this dispute before deciding it. Indeed, there may ultimately be no case to decide at all…." *CSBS II*, 2019 WL 4194541 *3. Given the lack of any SPNB application, or approval of the Figure Application, this lawsuit is unripe for judicial review.

C. CSBS' Challenge to the OCC's Preemption Regulations Based on the Figure Application Lacks Standing and is Unripe

This Court should likewise reject Plaintiff's thinly veiled attempt to bootstrap a challenge to the OCC's Preemption Regulations to the pending Figure Application. Compl. ¶¶ 208-224, 253-267. At the outset, an OCC decision to charter a national bank is not a preemption determination and therefore, the substantive and procedural requirements for certain preemption determinations as set forth in 12 U.S.C. § 25b are not at issue in this case. Moreover, any challenge to the Preemption Regulations based on the Figure Application lacks standing and is unripe because the Figure Application has not yet been approved. Because "Figure National Bank" does not currently exist as an entity, the Preemption Regulations, which apply to the operation of all national banks, are not yet applicable. *Cf. CSBS I*, 313 F. Supp. 3d at 298 (state laws cannot be preempted until after national bank is chartered). The OCC has not approved its national bank charter application; nor has Figure's operations as a national bank commenced. *See* Lybarger Decl. ¶ 10. These facts alone are sufficient to dismiss CSBS' challenge to the Preemption Regulations.

Moreover, CSBS cannot establish any concrete harm these Preemption Regulations have caused or will cause to itself or any of its members based on the Figure

Application. As discussed, *supra*, section I.A.3, CSBS is not entitled to standing based on "remote and speculative claims of possible future harm its members." *Pub. Citizen, Inc.*, 489 F.3d at 1294. Without this showing of imminent and concrete harm, Plaintiff has not made the required showing and, therefore, lacks standing to challenge the Preemption Regulations.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

This lawsuit primarily boils down to unsupported allegations that the Figure Application for a national bank charter must be construed as an SPNB charter pursuant to 12 C.F.R. § 5.20(e)(1) because, if approved, Figure would not be an insured bank and the OCC lacks authority to charter an uninsured national bank. These assertions have no merit. *First,* the National Bank Act authorizes the OCC to charter uninsured national banks. *Second,* none of the other relevant banking statutes condition the OCC's authority to charter a national bank on an institution obtaining deposit insurance. *Third*, the SPNB charter regulation is inapplicable because the Figure Application is not for an SPNB charter. *Fourth*, the OCC's preemption regulations are valid, and Plaintiff's facial challenge to those regulations should be dismissed as time barred. Furthermore, the preemption regulations are consistent with the OCC's statutory authority and the Dodd-Frank procedural requirements do not apply retroactively to these regulations. For all these reasons, Plaintiff's Complaint must be dismissed for failure to state a claim.

A. The National Bank Act Authorizes the OCC to Charter Uninsured National Banks

The Complaint should be dismissed for failure to state a claim because the National Bank Act authorizes the OCC to grant charters for uninsured deposit-taking national banks. *See* 12 U.S.C. § 21 (providing OCC broad authority to grant charters for "carrying on the business of

banking"); § 27(a) (OCC may grant a national bank charter "[i]f . . . it appears that such association is lawfully entitled to commence the business of banking."). The National Bank Act does not define the term "business of banking." Nor does it set forth any mandatory or minimum number of activities that must be performed for a bank to be engaged in "the business of banking." *See id*. at § 24(Seventh). The OCC administers the National Bank Act and is, therefore, tasked with interpreting its chartering authority and the term "the business of banking." *See NationsBank of N. Carolina*, 513 U.S. at 256; *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (agency's interpretation merits deference given "'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . .").

Moreover, there is no (and there never has been) a provision in the National Bank Act that requires *all* national banks to obtain deposit insurance. Yet, Plaintiff inexplicably alleges that national banks are required to obtain deposit insurance to lawfully engage in the business of banking. *See, e.g.,* Compl. ¶¶ 14-18; 97-108, 152-154, 168, 227-228.[4] This is simply not true. In several instances Congress has spoken to the OCC's authority to charter uninsured national

[4] Plaintiff also wrongly asserts that the OCC must defer its decision on the Figure Application to the Federal Reserve Board because it may implicate the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq*, ("BHCA"). *See* Compl. ¶ 167. Because Figure would neither be insured nor does Plaintiff allege it would accept demand deposits, Plaintiff fails to articulate how Figure would be defined as a "bank" under the BHCA or how the BHCA is even implicated here. *See* 12 U.S.C. § 1841(c); Board of Governors of the Federal Reserve System Interpretive Letter No. 4-358, 1976 WL 29763, at * 1 (March 4, 1976) (stating that because a national bank is engaging in activities not covered by definition of bank under BHCA, the parent company would not become a bank holding company). In addition, Plaintiff's unsupported assertion that only the FDIC has authority to determine whether an institution applying for a national bank charter will accept "deposits" within the meaning of 12 U.S.C. § 1813(*l*) should be summarily rejected. *See* Compl. ¶ 101.

banks following previous challenges to its authority. *See e.g.*, Pub. L. 95-630, 92 Stat. 3641, § 1504 (1978), *codified at* 12 U.S.C. § 27(a) (Congress amended the National Bank Act to explicitly state that the OCC could charter uninsured national trust banks following legal challenge); [5] *see also* S. Rep. 97-536, at 61 (1982) (discussing amendment to National Bank Act, 12 U.S.C. § 27(b)(1), and stating that the OCC could charter uninsured bankers' banks); *cf.* 12 U.S.C. § 191(a) ("The Comptroller of the Currency may . . . appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation *if the national bank is an insured bank* . . .) (emphasis added)). [6] Furthermore, there is no question that the OCC has authority to use its broad discretion to reasonably interpret the National Bank Act to determine that a national bank does not need to obtain deposit insurance to be "lawfully entitled to commence the business of banking." [7] *Cf. NationsBank*, 513 U.S. at 264 (Comptroller's

[5] *See also Nat'l State Bank of Elizabeth, N. J. v. Smith*, 591 F.2d 223, 231 (3d Cir. 1979) ("This new statutory provision validates retroactively as well as prospectively the action of the Comptroller in limiting to the business of a trust company the operation of a national banking association . . . ."). As of 2021, the OCC supervises approximately 41 uninsured national trust banks. *See, e.g.,* note 17, *infra* (listing examples of uninsured national trust banks).

[6] The provision for appointment of a receiver for a national bank, codified at 12 U.S.C. § 191, was amended to address appointing receivers for both insured and uninsured national banks in response to the 1991 amendments to the Federal Deposit Insurance Act ("FDIA"), which made federal deposit insurance optional for all national banks. *See* Pub. L. 102-550, 106 Stat. 3672, § 1603(d)(7)(B) (1992); *see also* discussion of 1991 amendments to federal deposit insurance system in section II.B.1, *infra*.

[7] Despite Plaintiff's assertions to the contrary, the OCC has not previously conceded that a bank that engages in deposit taking must be insured. *See* Compl. ¶¶ 15, 21, 248. In *CSBS II*, – which did not directly involve the issue of whether a deposit taking bank must be insured – the OCC specifically concluded "[a]ccordingly, § 222 should not be read as currently imposing any deposit-insurance requirement or, more importantly, a deposit-taking requirement." *See CSBS II*, OCC Mem. at 44 (ECF No. 12-1). And in its Reply brief, the OCC again stated that "CSBS ignores many other FDIA provisions that also expressly envision the existence, operation, and supervision of uninsured banks." *CSBS II*, OCC Reply at 27 (ECF No. 20). Further, Plaintiff's discussion of an OCC White Paper focused on special purpose national banks that would not

interpretation of what constitutes an incidental power necessary to the business of banking reasonable and given deference).

Importantly, Congress has not required national banks to be insured under the National Bank Act, although it has done so for other federal depository institutions. For example, the National Bank Act's silence on any deposit insurance requirement stands in stark contrast to the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §§ 1461 *et seq*, ("HOLA"), which governs savings associations and is administered by the OCC with respect to Federal savings associations. *See* 12 U.S.C. § 5412(b)(2)(B). HOLA defines a savings association as an entity "as defined in section 3 of the Federal Deposit Insurance Act [12 U.S.C. § 1813], *the deposits of which are insured by the Corporation*." 12 U.S.C. § 1462(2) (emphasis added). A separate section of HOLA similarly defines a *federal* savings association as "any savings association or former savings association *that retains deposits insured by the Corporation*, notwithstanding termination of its status as an institution insured by the Corporation." 12 U.S.C. § 1464(d)(5) (emphasis added). [8] By contrast, the National Bank Act does not define what constitutes a national bank by referencing insured deposits. This demonstrates that Congress could have chosen to include a deposit insurance requirement in the National Bank Act, as it did in HOLA for savings associations, but it did not. *Cf. P.J.E.S. v. Wolf*, No. CV 20-2245 (EGS), 2020 WL 6770508, at *29 (D.D.C. Nov. 18, 2020) ("[T]he fact that Congress 'precisely legislated' in an area in one statute indicates that such power was not granted by a different statute because

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accept deposits is not relevant to this action because Figure is not applying for a special purpose national bank charter and will accept deposits. *See* Compl. ¶¶ 14, 118-120; Lybarger Decl. ¶ 9.

[8] There are several other instances not applicable to national banks where Congress explicitly requires depository institutions to obtain deposit insurance. *See, e.g.*, note 18 *infra* (citing statutes expressly requiring deposit insurance for bank holding companies and federal credit unions).

'Congress knows how to speak on that subject when it wants to.'" (quoting *Merck & Co. v. Dep't of Health and Human Servs.*, 385 F. Supp. 3d 81, 96 (D.D.C. 2019), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020), *appeal filed*, Case No. 20-5357 (D.C. Cir. Nov. 30, 2020)). Thus, Plaintiff is simply wrong that the National Bank Act and the phrase "business of banking" requires national banks to obtain federal deposit insurance.

For these reasons, Plaintiff's claim that the OCC will act outside its statutory authority under the National Bank Act if it issues a national bank charter for an uninsured depository bank must be dismissed for failure to state a claim.

B. The OCC's Authority to Charter Uninsured National Banks is not Limited by the Federal Deposit Insurance Act or the Federal Reserve Act

Just as with the National Bank Act, no provision in either the Federal Deposit Insurance Act ("FDIA"),[9] the statute delineating the federal deposit insurance system, or the Federal Reserve Act ("FRA"),[10] the statute that speaks to membership in the Federal Reserve System, requires a depository national bank to obtain insurance from the FDIC.

FDIA governs the federal deposit insurance system. Plaintiff's allegations that FDIA requires national banks to be insured completely ignores the1991 amendments to FDIA set forth in the Federal Deposit Insurance Corporation Improvement Act ("FDICIA"). Compl. ¶¶ 90, 97-108. As discussed below, FDICIA changed the framework that had previously provided automatic deposit insurance for national banks upon receipt of an OCC charter and instituted a

[9] Current FDIA provisions are codified at 12 U.S.C. § 1811 *et seq.* The original provisions of FDIA can be found at Public Law No. 81–797, 64 Stat. 873 (1950). Citations to current FDIA provisions will be directly to the United States Code and citations to the original provisions of FDIA will be to Statutes at Large, referenced as "FDIA."

[10] Current FRA provisions are codified at 12 U.S.C. § 221 *et seq.* The original provisions of FRA can be found at Pub L. 63-43, ch. 6, 38 Stat. 251 (1913). Citations to current FRA provisions will be directly to the United States Code and citations to the original provisions of the FRA will be to Statutes at Large, referenced as "FRA."

new voluntary framework under which a national bank once chartered "*may*" apply to the FDIC for deposit insurance. *See* 12 U.S.C. § 1815(a)(1) (emphasis added). Under this amended framework, if a national bank applies for insurance, the FDIC has discretion whether to grant that insurance. Nothing in FDICIA, however, changed the OCC's authority or discretion under the National Bank Act, to charter an uninsured national bank.

The FRA addresses the requirement that national banks must be members of the Federal Reserve System and also contains language stating that upon obtaining such membership, a national bank "shall thereupon be an insured bank under the Federal Deposit Insurance Act." 12 U.S.C. § 222. Plaintiff wrongly interprets this quoted language as a requirement that national banks must be insured. *See* Compl. ¶¶ 52, 89, 98, 106, 108, 162, 231, 241. However, as discussed in detail below, this language must be construed in the context of related provisions in effect when this phrase was first added in 1958 as part of the Alaska Statehood Act. A look at the history and congressional intent behind the amendment, as well as the wording of the amendment compared to other similar statutes, demonstrates that this phrase does not impose an insurance requirement but rather reflects the statutory scheme in effect at that time where a national bank automatically became an insured bank as part of the OCC chartering process. FDIA, § 4(b). Thus, the language in the FRA now directly conflicts with the current deposit insurance statutory framework in FDICIA. As discussed below, a review of both statutes shows that the more specific and recent deposit insurance system enacted by FDICIA takes precedence over the outdated scheme reflected in the FRA.

1. The FDICIA Amendments to FDIA Expressly Makes Obtaining Deposit Insurance Optional for National Banks

Congressional approval of uninsured national banks is underscored in an express provision of FDICIA, which amended FDIA and changed the deposit insurance framework from

automatic to optional for national banks. *See* 12 U.S.C. § 1815(a)(1). FDICIA was the result of an extensive examination and overhaul of the then-existing deposit insurance framework in response to the near depletion of the deposit insurance fund that stemmed from the savings and loan crisis in the 1980s and 1990s.[11] FDICIA introduced a new voluntary application process for all depository institutions, including national banks, seeking deposit insurance from the FDIC. *See* 12 U.S.C. § 1815(a)(1). Prior to FDICIA, deposit insurance was automatically granted to most national banks when they were chartered by the OCC and became members of the Federal Reserve System (referred to as "national member banks"). *See* FDIA, § 4(b) ("Every national member bank which is authorized to commence or resume the business of banking, shall be an insured bank from the time it is authorized to commence . . . ."). FDICIA eliminated the automatic insurance framework for national member banks.[12] Specifically, FDICIA provides that "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

[11] *See* FDICIA, Pub. Law. No. 102–242, 105 Stat 2236 ("An Act to require the least-cost resolution of insured depository institutions, to improve supervision and examinations, to provide additional resources to the Bank Insurance Fund, and for other purposes."); S. Rep. No. 102-167, at 1 (1991) (stating that the purpose of the bill was "to reform Federal deposit insurance, protect the deposit insurance funds, and improve supervision and regulation of and disclosure relating to federally insured depository institutions."); *id.* (unprecedented bank failures drained the deposit insurance fund "nearly dry").

[12] National member bank was defined to mean "any national bank located in any of the States of the United States, the District of Columbia, any Territory of the United States, Puerto Rico, or the Virgin Islands which is a member of the Federal Reserve System." FDIA, § 3(d).

[13] Courts have consistently interpreted the word "may" as connoting a permissive or discretionary, rather than mandatory or obligatory, action. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("'[t]he word "may," when used in a statute, usually implies some degree of discretion'" (citing *United States v. Rogers*, 461 U.S. 677, 706)); *see also Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) ("When Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'") (quoting *Stone v. Immigration & Naturalization Serv.,* 514 U.S. 386, 397 (1995)).

Board of Directors, *may* become an insured depository institution." [13] 12 U.S.C. § 1815(a)(1) (emphasis added); *see generally id. at* §§ 1815, 1816 (setting forth application process and factors the FDIC must consider in approving an application for deposit insurance). Accordingly, under FDICIA, depository institutions, including national banks, *may* apply to obtain deposit insurance, but they are not *required* to do so.

As further evidence that Congress intended national banks to have discretion to apply for deposit insurance (and the Comptroller the discretion to charter such an institution), FDICIA's optional, application-based deposit insurance provision had previously applied to national nonmember banks under previous iterations of the statute.[14] *See* FDIA, § 5. And the current FDICIA language making deposit insurance voluntary for all national banks is nearly identical to the pre-FDICIA language that made deposit insurance optional for nonmember banks. *Compare* 12 U.S.C. § 1815(a)(1) ("[A]ny 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") (emphasis added), *with* FDIA, § 5 ("[A]ny national nonmember bank which is engaged in the business of receiving deposits, other than trust funds as herein defined, *upon*

[13] Courts have consistently interpreted the word "may" as connoting a permissive or discretionary, rather than mandatory or obligatory, action. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("'[t]he word "may," when used in a statute, usually implies some degree of discretion'" (citing *United States v. Rogers*, 461 U.S. 677, 706)); *see also Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) ("When Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'") (quoting *Stone v. Immigration & Naturalization Serv.,* 514 U.S. 386, 397 (1995)).

[14] National nonmember bank was defined to mean "any national bank located in any Territory of the United States, Puerto Rico, or the Virgin Islands which is not a member of the Federal Reserve System." FDIA, § 3(e). State nonmember banks were also subject to the optional application process for deposit insurance. *See* FDIA, § 5.

application by the bank and certification by the Comptroller of the Currency . . . and any State nonmember bank, *upon application to and examination by the Corporation* and approval by the Board of Directors, *may* become an insured bank") (emphasis added). Congress' extension of the optional application-based deposit insurance scheme that had previously only applied to nonmember banks to all depository institutions marked a clear legislative choice to give all depository institutions (including national banks) discretion to apply for deposit insurance.[15]

Thus, in FDICIA, a statute that redefined the contours of the deposit insurance system to protect the deposit insurance fund after near exhaustion, Congress provided the FDIC with discretion over applications for deposit insurance and explicitly made obtaining deposit insurance optional for all depository institutions, including national banks. This reading of FDICIA is consistent with the OCC's authority under the National Bank Act to charter uninsured national banks. *See* Section II.A, *supra*.

2. The FRA does not Require National Banks to be Insured

a. The FRA does not Govern National Bank Charters or the Federal Deposit Insurance System

Plaintiff's allegations that the FRA should be read as requiring deposit insurance also lack merit. Compl. ¶¶ 52-53, 98-99. The FRA does not alter the OCC's authority to charter uninsured national banks because it governs neither the chartering authority for national banks under the National Bank Act nor the federal deposit insurance system. In 1913, the FRA was enacted to establish the Federal Reserve System and to create and apportion the Federal Reserve

[15] Plaintiff attempts to buttress its assertion that national banks are required to obtain deposit insurance by arguing that national banks cannot voluntarily terminate their insured status after they are insured. Compl. ¶¶ 106-07 (relying on 12 U.S.C. § 1818(a)(1)(A)). First, that provision simply does not apply to an uninsured national bank, and moreover, a provision not allowing insurance once obtained to be terminated, is not the same as requiring insurance in the first place.

districts within the continental United States. *See* FRA, § 2. All national banks within the continental United States were required to become members of the Federal Reserve System except for those located in the United States' territories. *Id*. § 2, ¶¶ 3, 6, 19. The FRA was amended in the Banking Act of 1933 and Banking Act of 1935, which created the FDIC and the federal deposit insurance system. Pub. L. 73–66, 48 Stat. 162, § 8 (1933); Pub. L. 74-305, 49 Stat. 684, § 101 (1935). As part of these amendments, section 12B was added to the FRA which automatically insured the deposits of all national member banks and permitted, but did not require, national nonmember banks to be insured.[16]

In 1950, the deposit insurance provisions of section 12B were "withdrawn" from the FRA and made part of the newly enacted FDIA. *See* FDIA, Introduction Statement ("That section 12B of the Federal Reserve Act, as amended, is hereby withdrawn as part of that Act and is made a separate Act to be known as the 'Federal Deposit Insurance Act'."). By removing the deposit insurance provisions from the FRA, Congress clearly intended FDIA, not the FRA, to govern the federal deposit insurance system and any insurance requirements for depository institutions, including national banks. As discussed above, this insurance system was further reformed under the 1991 FDICIA amendments to FDIA, which changed the automatic insurance scheme for national banks to an optional, application-based deposit insurance system for all depository institutions. *See* Section II.B.1, *supra*.

b. The Language of the FRA Reflects the Automatic Insurance System Displaced by the FDICIA Amendments

[16] *See, e.g.*, 49 Stat. 684, § 101 (amending section 12B(e)(2) to read: "[E]very national member bank . . . shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System."); *see id.* (under section 12B(f), national nonmember bank may submit application to Comptroller if it chose to become an insured bank).

Plaintiff's assertion that the language in Section 2 of the FRA, 12 U.S.C. § 222, requires national banks to obtain deposit insurance ignores the changes that FDICIA made to the deposit insurance framework, and the legislative history behind the FRA amendments. *See* Compl. ¶¶ 52, 84, 89, 98-99. Section 2 of the FRA was originally enacted in 1913 to create the Federal Reserve districts in the United States. Section 2 was amended in 1958 and 1959 under the Alaska Statehood Bill, Public Law No. 85-508, 72 Stat. 339, § 19 (1958), and Hawaii Statehood Admissions Act, Public Law No. 86-3, 73 Stat. 4, § 17 (1959), which respectively admitted Alaska and Hawaii to the Union and the Federal Reserve System. These amendments brought section 2 of the FRA to its current form which states:

> The continental United States, excluding Alaska, shall be divided into not less than eight nor more than twelve districts. . . .When the State of Alaska or Hawaii is hereafter admitted to the Union the Federal Reserve districts shall be readjusted . . . . Every national 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 bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this chapter and *shall thereupon be an insured bank* under the Federal Deposit Insurance Act, and failure to do so shall subject such bank to the penalty provided by section 501a of this title.

12 U.S.C. § 222 (emphasis added).

Plaintiff wrongly alleges that the phrase "shall thereupon be an insured bank" (hereinafter "Insurance Phrase") should be read to impose a blanket requirement that all national banks must have deposit insurance. *See* Compl. ¶¶ 52-53, 98-99. Rather than impose an insurance requirement, however, the Insurance Phrase merely reflected the automatic deposit insurance system that existed at that time, which was later repealed under FDICIA. The legislative history supports this interpretation. In a letter from the Federal Reserve Board to Congress, the Board acknowledged the limited reach of the amendments, which was to place Alaska and Hawaii on "equal footing" with other states upon admission into the Union and subject "national banks in Alaska and Hawaii . . . to the same requirements as other national banks," under then "present

law." 96 Cong. Rec. 9744 (Jul. 10, 1950) (Letter from S. R. Carpenter, Secretary of the Board of Governors). Moreover, Plaintiff's interpretation of the Insurance Phrase conflicts with how the deposit insurance framework for national banks has been applied for the 60 years since the provision was added because there are national banks that are Federal Reserve members as required under section 2, but are not FDIC insured.[17] *See also* note 5 and accompanying discussion, *supra*.

Additionally, Plaintiff's reading of the Insurance Phrase to impose a requirement for deposit insurance for all national banks ignores the basic canon of statutory construction that the use of different terms in the same statute suggests a difference in meaning. *See, e.g.*, *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001) (basic principle of statutory construction is that "different words within the same statute should, if possible, be given different meanings." (citing *Lindsey v. Tacoma-Pierce Cty. Health Dep't*, 195 F.3d 1065, 1074 (9th Cir. 1999) and *United States v. Maria*, 186 F.3d 65, 71 (2d Cir.1999)). Here, the part of the sentence in section 2 referring to the Federal Reserve membership requirement uses the wording "*shall . . . become . . . .*" 12 U.S.C. § 222 (emphasis added). However, the wording in the Insurance Phrase is "and *shall thereupon* be . . . ." *Id.* If Congress had intended for the Insurance Phrase to impose a requirement, like the phrase addressing Federal Reserve membership, it would have used the

[17] *See, e.g.*, Canandaigua National Trust Company of Florida, https://www.ffiec.gov/npw/Institution/Profile/3952904?dt=20120101 (last visited Apr. 21, 2021); Computershare Trust Company, National Association, https://www.ffiec.gov/npw/Institution/Profile/2600039?dt=20060101 (last visited Apr. 21, 2021); Trust Company of Toledo, National Association, https://www.ffiec.gov/npw/Institution/Profile/1820979?dt=20100920 (last visited Apr. 21, 2021); Securian Trust Company, National Association, https://www.ffiec.gov/npw/Institution/Profile/3089752?dt=20041008, (last visited Apr. 21, 2021).

same "shall become" wording. Indeed, in other similar statutes that impose a deposit insurance requirement, Congress has used the "shall" language paired with some affirmative action, not the "shall thereupon be" language denoting an event that automatically follows.[18] The use of different terms in the same section of the statute denotes different Congressional intentions. *See Firstar Bank,*, 253 F.3d at 991; *see also* Singer, *Statutes and Statutory Construction* (formerly Sutherland Statutory Construction), Volume 2A, § 46:6 at pages 261-64 (7th Ed. 2014) ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible.").

The term "thereupon" is not a word that ordinarily suggests a mandate. Rather, it describes an order of events, in which one event follows upon another. The Supreme Court has stated that "thereupon" is used frequently "to express the relation of cause or of condition precedent." *Yuma County Water Users' Ass'n v. Schlecht*, 262 U.S. 138, 145 (1923) (the word "thereupon" can be construed as "an adverb of time, meaning immediately thereafter" or "to express the relation of cause or of condition precedent"). Thus, it makes sense that the term "thereupon" in the Insurance Phrase refers to the then-existing system of automatic deposit insurance that accompanied a national bank charter and admission into the Federal Reserve System. Congress was merely identifying a consequence of a bank becoming a member of the

[18] For example, in requiring deposit insurance for every bank that is a holding company or a subsidiary of a holding company, Congress likewise used the phrase "shall become." 12 U.S.C. 1842(e) ("Every bank that is a holding company and every bank that is a subsidiary of such a company *shall become* and remain an insured depository institution as defined in section 1813 of this title.") (emphasis added)); *see also* 12 U.S.C. § 1781(a) which requires insurance for member accounts of Federal credit unions. ("The Board, as hereinafter provided, *shall insure* the member accounts of all Federal credit unions . . .") (emphasis added); *id.* ("Application for insurance of member accounts *shall be made immediately* by each Federal credit union (emphasis added)).

Federal Reserve at the time the statute was enacted, not imposing an additional requirement.[19] This interpretation is also consistent with the legislative intent of section 222, in which Congress repeatedly stated that the purpose of the provision was to bring national banks in Alaska and Hawaii into the Federal Reserve System and to treat them the same as other national banks.[20]

Finally, FDICIA controls on the question of whether there exists an insurance requirement, not the FRA. As detailed above, FDICIA was enacted more than 30 years after the FRA was amended to include the Insurance Phrase. When enacted in 1991, FDICIA eliminated the automatic insurance framework referenced in the FRA and made obtaining deposit insurance optional. *See* 12 U.S.C. § 1815(a)(1). To the extent any conflict exists between the current version of FDICIA and its discretionary deposit insurance framework and the automatic grant of insurance referenced in the FRA, FDICIA as the more recent and specific statute governs. *See Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384-85 (1992) (stating that "it is a

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[19] Because the Insurance Phrase refers to a now repealed automatic insurance scheme, which did not require national member banks to affirmatively and separately obtain deposit insurance, the failure to act penalties referenced in 12 U.S.C. § 222 and found at 12 U.S.C. § 501a do not extend to any deposit insurance obligation by national banks. A plain reading of § 501a reveals that the reference to penalties relates to failures related to Federal Reserve membership. 12 U.S.C. § 501a (discussing penalties for national bank failure to become member bank or to comply with provisions of chapter governing Federal Reserve System and discussing enforcement powers of OCC and Federal Reserve with respect to national banks and membership, but not FDIC regarding deposit insurance).

[20] *See* 104 Cong. Rec. 12,013 (June 24, 1958) (statement of Sen. Jackson) (stating "[a]ll of the remaining sections of the statehood bill provide the necessary amendments to existing laws, so that Alaska will, have equal treatment with the other States with reference to immigration, Federal Reserve bank requirements, and other laws."); 104 Cong. Rec. 9214 (May 21, 1958) (statement of Rep. Aspinall that the bill "will provide for a smooth transition from the status of Territory to that of State" through the "the new status of Alaska—for example, the statutes dealing with the judicial system, the Federal Reserve System, and immigration and nationality matters."); H.R. Rep. No. 85-624, at 23 (Jun. 15, 1957) (stating that: "Section 19 amends the Federal Reserve Act to bring Alaska within the Federal Reserve System."); S. Rep. No. 86-80, at 21 (1959) (stating that "Section 17 includes the State of Hawaii within the Federal Reserve System.").

commonplace of statutory construction that the specific governs the general," especially where, as here, a provision of one clause is shown to be a "relic" of a previous statutory regime). Moreover, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'" and "the meaning of one statute may be affected by other [a]cts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989)). Here, section 1815(a)(1) of FDICIA is not only more recent and more specific, but is central to the current voluntary federal deposit insurance framework, whereas the portion of the FRA relied upon by Plaintiff is a fragment of a now repealed automatic deposit insurance framework that has since been replaced.[21] *Cf. United States v. Batchelder*, 442 U.S. 114, 122 (1979) ("[t]he legislative intent to repeal must be manifest in the positive repugnancy between the provisions," i.e., competing statutory provisions cannot coexist (quoting *United States v. Borden Co*., 308 U.S. 188, 199 (1939))). Accordingly, Plaintiff's claim that section 2 of the FRA requires national banks to obtain deposit insurance lacks merit and must be dismissed for failure to state a claim.

C. The OCC's SPNB Charter Regulation is Inapplicable Here

Plaintiff's allegations that the OCC exceeded its statutory authority and was arbitrary and capricious in promulgating 12 C.F.R. § 5.20(e)(1) must be summarily dismissed. Compl. ¶¶ 158-160, 239, 242, 247-252. As established above, Figure has not applied for a SBNB charter as set forth in this regulation. *See* Lybarger Decl. ¶ 9.

[21] Because the FRA neither governs the deposit insurance system nor imposes a requirement that national banks obtain deposit insurance, Plaintiff's reference to the Federal Reserve Board's interpretation of the Insurance Phrase is unavailing here. *See* Compl. ¶ 108.

Apart from the Plaintiff's fundamental mischaracterization of Figure's proposed charter, the Court should consider two additional points. First, to the extent Plaintiff is making a facial challenge to § 5.20(e)(1), that challenge is time-barred. "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 Administrative Procedure Act accrues on the date of the final agency action. *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). Here, § 5.20(e)(1) became effective on January 16, 2004, and accordingly, the time for filing a facial challenge to this regulation expired in January 2010. *See* 68 Fed. Reg. 70122 (Dec. 17, 2003).

Second, Plaintiff's assertion that the OCC is bound by the district court's decision regarding the validity of § 5.20(e)(1) in *Vullo v. Office of the Comptroller of the Currency*, 378 F. Supp. 3d 271, (S.D.N.Y. 2019), *appeal docketed sub nom*., *Lacewell v. OCC*, No. 19-4271 (2d Cir. Dec. 19, 2019), is without merit. Compl. ¶¶ 10-12, 14-19, 96, 132-136, 230, 240, 246-252. Certainly, *Vullo,* decided in the United States District Court for the Southern District of New York, is not binding on this Court, but more importantly, the case is factually and legally distinguishable from the present case. *Vullo* involved a challenge to the OCC's authority under § 5.20(e)(1) to charter an SPNB that did not take deposits; this case does not. 378 F. Supp. 3d. at 279-80. The *Vullo* court held that only depository institutions are eligible to receive national bank charters under the National Bank Act and rejected the OCC's authority to charter non-depository institutions. *Id*. at 293, 298. Here, as even Plaintiff admits, *see* Compl. ¶ 14, Figure will be a depository institution, and its application for a charter is not for an SPNB charter as set

forth in § 5.20(e)(1).[22] *See* Lybarger Decl. ¶ 9. Accordingly, *Vullo's* holding is inapplicable to the present case.

D. The OCC's Preemption Regulations are Valid

Plaintiff raises two separate challenges to the OCC's Preemption Regulations, and both must be dismissed. First, CSBS wrongly claims that the challenged Preemption Regulations exceed the Agency's statutory authority. Compl. ¶¶ 208-219, 253-262. Second, CSBS incorrectly alleges that the OCC failed to observe procedure required by law when revising these Preemption Regulations. *Id.* at ¶¶ 220-224; 263-267. Both these challenges must be dismissed because they are time-barred. Moreover, Plaintiff has failed to state a claim because the Preemption Regulations are consistent with the OCC's statutory authority, and the procedural requirements do not retroactively apply to the Preemption Regulations.

1. Plaintiff's Facial Challenge to the Preemption Regulations is Time-Barred

CSBS' facial challenge to the Preemption Regulations is time-barred. The OCC has not yet granted Figure's charter and Plaintiff's inability to allege any concrete harm to itself, or its members, caused by the OCC's Preemption Regulations compels the conclusion that this constitutes a facial challenge. The Preemption Regulations were initially promulgated in 2004 and most recently amended on July 21, 2011. *See* 76 Fed. Reg. 43,549. The statute of limitations applicable to actions against the United States and federal agencies is six years. 28 U.S.C. §2401(a). Accordingly, the time for filing a facial challenge to the Preemption Regulations expired in July 2017.

[22] Plaintiff's assertion that that even if Figure is receiving deposits, the fact that it will not apply for deposit insurance means that it must be chartered under the SPNB regulation is without support. *See e.g.*, Compl. ¶16. For all the reasons explained above, neither the National Bank Act, FDIA nor the FRA require all national banks to obtain deposit insurance in order to legally commence the business of banking. *See supra,* sections II.A and B.

Moreover, because Plaintiff seeks wholesale invalidation of the Preemption Regulations, it "must show that the [regulations are] invalid not only as applied to Plaintiff, but also as applied in many or all other circumstances." *A.N.S.W.E.R. Coal. v. Salazar*, 915 F. Supp. 2d 93, 101 (D.D.C. 2013); *see United States v. Stevens*, 559 U.S. 460, 472 (2010) ("To succeed in a typical facial attack, [plaintiff] would have to establish 'that no set of circumstances exists under which [the regulation] would be valid.' ") (internal citations omitted); *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (noting cases requiring plaintiff to show that law would be invalid "in a large fraction of the cases in which [it] is relevant"). Not only does Plaintiff fail to allege any particularized harm to itself or identify any specific state consumer financial law that has been unlawfully preempted, it has also failed to point to any party that has been harmed. Therefore, Plaintiff has failed to meet its burden in bringing this facial challenge. *See P & V Enterprises v. U.S. Army Corps of Engineers*, 466 F. Supp. 2d 134, 142-144 (D.D.C. 2006), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008) (holding that a facial challenge to an Army Corps of Engineers regulation was time-barred because it did not include an "as-applied" challenge), *overruled on other grounds*, *Jackson v. Modly*, 949 F.3d 763, 776 (D.C. Cir. 2020).

2. CSBS has Failed to State a Claim Because the Preemption Regulations do not Exceed the Agency's Statutory Authority

a. 12 U.S.C. § 25b did not Invalidate the Preemption Regulations

Despite Plaintiff's contentions to the contrary, Dodd-Frank, specifically 12 U.S.C. § 25b, did not invalidate the OCC's Preemption Regulations. Compl. ¶¶ 209, 214-215. Plaintiff's arguments are founded upon the false premise that the "primary purpose of [12 U.S.C. § 25b] was to reverse the OCC's . . . assertions of federal preemption." Compl. ¶ 209. In clear contradiction to Plaintiff's claim, Congress did not specifically address, much less "reverse," the Preemption Regulations in passing Dodd-Frank. While Congress took clear and decisive action

to eliminate (1) preemption of state laws for subsidiaries, affiliates, and agents of national banks and Federal savings associations and (2) field preemption for Federal savings associations, *see* 12 U.S.C. §§ 25b and 1465, it took no such action to otherwise invalidate the Preemption Regulations. Had Congress intended to invalidate the Preemption Regulations or the substantive preemption standard upon which they were based, a fundamental component of the dual banking system, it could have easily done so in § 25b in the same manner it did for Federal thrifts and operating subsidiaries. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 458 (2001) (finding that Congress does not alter a regulatory scheme's fundamental details in vague terms or ancillary provisions); *see* 12 U.S.C. §§ 25b(b)(2), (e), (h) and 1465(b). Although Plaintiff relies on other cases that have challenged one or more of the Preemption Regulations as support for its assertions, *see* Compl. ¶¶ 215, 218, *none* of those cases have held that the particular preemption regulation at issue was invalid. *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018) (analyzing the level of deference owed an OCC regulation, not invalidating any OCC regulations); *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019) (concluding that an OCC regulation did not preempt a specific state law, not invalidating any OCC regulations); *Clark v. Bank of Am., N.A.*, No. CV SAG-18-3672, 2020 WL 902457 (D. Md. Feb. 24, 2020) (determining whether an OCC regulation deserved *Skidmore* deference, not invalidating any OCC regulations). Accordingly, there is no support for the contention that Dodd-Frank invalidated the Preemption Regulations.

b. 12 U.S.C. §25b Codified the Long-Standing *Barnett* Standard, and the OCC's Preemption Regulations Incorporate that Standard

The Preemption Regulations, originally promulgated in 2004 and amended in 2011, were based on and are consistent with the *Barnett* conflict preemption standard. *See* 69 Fed. Reg. 1904; *Barnett,* 517 U.S. 25. Congress codified this same conflict preemption standard in Dodd-

Frank. *See* 12 U.S.C. §25b(1)(B). In 2011, as part of the larger effort to integrate the Office of Thrift Supervision (OTS) into the OCC, the OCC amended numerous regulations, including the Preemption Regulations.[23] While the OCC did review its 2004 Preemption Regulations to confirm that they were consistent with the *Barnett* standard codified in § 25b, the amended Preemption Regulations did not preempt any new state laws. *See* 76 Fed. Reg. 43,549.

Section 25b(b)(1)(B) provides that a state consumer financial law[24] is preempted if "in accordance with the legal standard for preemption in . . . [*Barnett*], the [s]tate consumer financial law prevents or significantly interferes with" a national bank's exercise of its powers.[25] While Plaintiff alleges that the OCC's preemption regulations articulate the wrong preemption standard and that § 25b requires a strict application of the phrase "prevents or significantly interferes" in order to correctly apply the *Barnett* standard, this view is inconsistent with the *Barnett* decision itself and § 25b's legislative history. *See* Compl. ¶¶ 213, 257.

The allegation that the OCC is using the incorrect preemption standard is erroneous. Compl. ¶¶ 214; 258. Although the OCC's use of the "obstruct, impair, or condition" language in the 2004 regulations was intended to reflect *Barnett* and the precedents it cited, the OCC removed all references to that language in 2011 to eliminate confusion. In reviewing the

[23] OTS merged into the OCC pursuant to Dodd-Frank, 124 Stat. at 1521-22, § 312.

[24] The term "state consumer financial law "means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2).

[25] Section 25b(b) also codified two additional standards for the preemption of state consumer financial laws, which are not at issue here. *See* 12 U.S.C. § 25b(b)(1)(A) and (C).

regulations, the OCC confirmed that no OCC-issued preemption precedent rested solely on the "obstruct, impair, or condition" formulation. 76 Fed. Reg. 43,556.

In *Barnett*, the Court applied "ordinary preemption principles" in a variety of formulations to assess the degree of federal-state conflict presented and concluded that national bank powers are "not normally limited by, but rather ordinarily preempt[], contrary state law." *Barnett*, 517 U.S. at 27, 32. Accordingly, the "prevent or significantly interfere" phrase used in § 25b does not exclude the other preemption formulations that are referenced in *Barnett*. In quoting a variety of conflict preemption formulations, *Barnett* implicitly endorsed the notion that there is no single exclusive "constitutional yardstick" for conflict preemption. *See id.* at 33-34 (state laws could be preempted if they "unlawfully encroach," "destroy or hamper," or "interfere with, or impair" the rights and privileges of national banks and citing cases); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("There is not . . . any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. . . . [N]one of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick.").

This view is consistent with and supported by § 25b's legislative history. Senator Chris Dodd—a main architect of Dodd-Frank, including § 25b—explained that "[t]he conference report specifically cites [*Barnett*]. There should be no doubt the legislation codifies the preemption standard stated by the [Court] in that case." 156 Cong. Rec. S5902 (daily ed. July 15, 2010). Notably, Senator Dodd did not mention "prevents or significantly interferes" as noteworthy or integral to the standard being codified. In fact, an earlier proposed version of § 25b provided that state consumer financial laws are preempted only if . . . "the State consumer financial law prevents, significantly interferes with, or materially impairs the ability [of the

national bank to engage in the business of banking]", without any reference to the *Barnett* standard. H.R. 4173, 111th Cong. § 4404 (as passed by the House of Representatives on Dec. 11, 2009). This proposed version was not adopted. The inclusion of "in accordance with the legal standard for preemption in [*Barnett*]" demonstrates Congress' codification of the entirety of the *Barnett* preemption standard, not just one phrase or a single manifestation of it. 12 U.S.C. § 25b(b)(1)(B).

Because the Preemption Regulations were consistent with the *Barnett* conflict preemption standard at their inception in 2004, and because § 25b did not change this standard, but in fact codified it, the Preemption Regulations remain consistent with the substantive standard in § 25b today. Therefore, the OCC has not exceeded its statutory authority.

c. The "Case-By-Case" and "Periodic Review" Procedural Requirements in 12 U.S.C. § 25b do not Apply to the Preemption Regulations

Plaintiff's allegation that the OCC has not complied with § 25b's case-by-case and periodic review procedural requirements should be summarily rejected. *See* 12 U.S.C. § 25b(b)(1)(B), (b)(3), and (d). Plaintiff is mistaken that § 25b's procedural requirements apply retroactively to the Preemption Regulations. *See* Compl. ¶¶ 217-19. Section 25b's procedural requirements only apply to OCC "preemption determinations" made after the effective date of § 25b on July 21, 2011 and, therefore, do not apply to the Preemption Regulations promulgated in 2004. *See* 76 Fed. Reg. 43,556-57 (explaining that Dodd-Frank's case-by-case requirement does not apply to regulations in effect prior to Dodd-Frank's effective date). Unlike the 2004 promulgation of the Preemption Regulations, the 2011 amendments to the regulations did not themselves preempt any additional state laws. *Id.* (retaining 2004 preemption rules without preempting any additional state laws). Accordingly, the 2011 amendments were not preemption determinations for the purpose of § 25b. *See* OCC Interpretive Letter 1173, at 3 (Dec. 18, 2020)

("the word determination contemplates an affirmative conclusion by the OCC that federal law preempts a state consumer financial law" and "a preemption determination . . . concludes that a state consumer financial law is preempted pursuant to the *Barnett* standard").

Requiring the OCC to apply these procedural requirements to regulations promulgated well before the effective date of § 25b would be contrary to Congress' intent and well-established jurisprudence. Congress, in passing Dodd-Frank, did not include any language, explicit or implicit, that indicated any intent to apply the procedural provisions in § 25b retroactively to the Preemption Regulations which had been codified in the Code of Federal Regulations for over six years. Consistent with Congress' decision to not apply § 25b retroactively, the OCC concluded in 2011 that the procedural provisions in § 25b only apply to "how the OCC may reach certain future preemption determinations." 76 Fed. Reg. 43,549; *see Landgraf v. USI Film Products*, 511 U.S. 244, 272-73 (1994) (recognizing presumption against retroactive legislation). Therefore, § 25b's procedural requirements do not apply to the Preemption Regulations.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint in its entirety for lack of subject matter jurisdiction, or in the alternative, for failure to state a claim for which relief can be granted.

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Respectfully submitted,

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