19-4271

To Be Argued By:
CHRISTOPHER CONNOLLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-4271

LINDA A. LACEWELL, in her official capacity as Superintendent of the New York State Department of Financial Services,

Plaintiff-Appellee,

—v.—

OFFICE OF THE COMPTROLLER OF THE CURRENCY, BRIAN P. BROOKS, in his official capacity as Acting U.S. Comptroller of the Currency,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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FOR THE SECOND CIRCUIT

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LINDA A. LACEWELL, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Plaintiff-Appellee,

—v.—

OFFICE OF THE COMPTROLLER OF THE CURRENCY, BRIAN P. BROOKS, IN HIS OFFICIAL CAPACITY AS ACTING U.S. COMPTROLLER OF THE CURRENCY,

Defendants-Appellants.[1]

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Plaintiff-appellee the New York Department of Financial Services ("DFS") cannot overcome the funda-

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting U.S. Comptroller of the Currency Brian P. Brooks is automatically substituted as a defendant in this matter.

mental barrier to the justiciability of this case: defendant-appellant the Office of the Comptroller of the Currency has neither received nor taken any action to approve an application for a special purpose national bank ("SPNB") charter, let alone one from a non-depository fintech with a nexus to New York. Accordingly, DFS lacks standing, and the case is not ripe. Were the Court to reach the merits, DFS cannot show the statutory term "business of banking" is unambiguous, or that it requires a bank to accept deposits to receive an OCC charter. OCC's regulation interpreting this ambiguous language—which, consistent with Supreme Court precedent, looks to the three "core banking functions" identifiable elsewhere in the National Bank Act—is reasonable.

Finally, DFS's argument that the Administrative Procedure Act ("APA") mandates a nationwide set-aside of OCC's ability to charter non-depository fintechs is inconsistent with a decision of this Court issued after DFS's brief, as well as principles of equity and the APA's text and history.

For all of these reasons, the district court's judgment should be reversed.

ARGUMENT

POINT I

DFS's Claims Are Not Justiciable

DFS's claims are not justiciable. The alleged injuries it relies on to establish standing are premised on a fintech receiving a charter and commencing business

in New York. But OCC has not received a single charter application, let alone chartered a fintech with a nexus to New York. Accordingly, DFS cannot demonstrate an "injury in fact," and its claims are not prudentially ripe. (Gov't Br. 20-30).

A. DFS Lacks Standing

DFS's alleged injuries are speculative, as they rely on a series of events that has not occurred: OCC receiving and approving an SPNB charter application from a non-depository fintech that intends to conduct business in New York, and then does so in a manner that causes the harms DFS identifies. (Gov't Br. 21). The district court's judgment should be reversed for this threshold reason.

DFS cannot establish that its alleged injuries are "certainly impending." (DFS Br. 27; CSBS Amicus Br. 4-11). DFS argues that OCC's decision to accept SPNB applications from non-depository fintechs had the "expressly stated" aim "to preempt the States' authority to license and supervise nondepository fintech companies." (DFS Br. 27 (citing JA 51)). But the material DFS relies on belies this characterization: OCC's white paper explains in detail the ways both federal and state laws would govern fintechs that receive an SPNB charter, and specifies "that state laws aimed at unfair or deceptive treatment of customers"—the laws DFS appears most concerned about (DFS Br. 27)—"apply to national banks" (JA 51).

In any event, DFS's preemption arguments are mistaken as a matter of law. The cases it cites (DFS Br. 31) involved "explicit[ ] and direct[ ]" preemption of

laws the states sought to enforce (Gov't Br. 23-24). Here, by contrast, no "state law has been preempted by the OCC's preliminary activities respecting Fintech charters," *CSBS v. OCC* ("*CSBS I*"), 313 F. Supp. 3d 285, 298 (D.D.C. 2018), and "[a]ny allegation of preemption at this point relies on speculation about the OCC's future actions," *Vullo v. OCC* ("*Vullo I*"), No. 17 Civ. 3574, 2017 WL 6512245, at *8 (S.D.N.Y. Dec. 12, 2017). Indeed, OCC offering a federal alternative to a state license is consistent with the "competitive tensions inherent in a dual banking structure." *See First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122, 142 (1969); (Gov't Br. 24).

DFS also cannot establish standing based on alleged injury to its "sovereign interests" caused by preemption. (DFS Br. 26-27; NACCA Amicus Br. 7-18). The "special solicitude" afforded states in the standing analysis does not relieve them of their obligation to demonstrate injury that is actual and imminent—a requirement DFS cannot satisfy here, where OCC has neither received nor acted upon a charter application whose approval would cause DFS's alleged harms. (Gov't Br. 22-23 (citing *Massachusetts v. EPA*, 549 U.S. 497, 520-23 (2007); *Delaware Dep't of Natural Resources & Environmental Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009))).

Nor can DFS show standing based on "regulatory costs" it claims it will incur "*before* any issuance of a charter." (DFS Br. 28). DFS's complaint is devoid of such allegations (JA 10-32), and the Court should not entertain these newly discovered "regulatory costs" now, *see Bogle-Assegai v. Connecticut*, 470 F.3d 498,

504 (2d Cir. 2006) ("an appellate court will not consider an issue raised for the first time on appeal" (quotation marks omitted)). Moreover, in the cases DFS cites, the states possessed standing based on specific and quantifiable financial costs they incurred as a result of federal government action. *See Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059 (D.C. Cir. 2018) (standing based on "the expenditures states have previously made and may incur again when responding to accidental releases during the delay period"); *Texas v. United States*, 787 F.3d 733, 748 (5th Cir. 2015) (state faced with imminent choice to either comply with federal directive or incur financial costs). It is at best unclear how the new "regulatory costs" DFS asserts—which essentially amount to continuing to carry out its regulatory oversight of state-licensed fintechs subject to its jurisdiction—equate to the "pocketbook injur[ies]" that conferred standing in the cited cases. (DFS Br. 28).

Relatedly, DFS's potential loss of assessments levied on fintechs does not amount to an injury in fact. (DFS Br. 28-29). In the cases on which the district court and DFS rely, the pecuniary injuries were either imminent or had already occurred. *See Texas*, 787 F.3d at 748 (implementation of federal program would lead to financial costs); *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (Oklahoma statute had already led to a decline in purchases of Wyoming-mined coal, which had already deprived Wyoming of severance tax). Here, any possible financial harm remains hypothetical until OCC receives and acts on a charter application that may affect New York. (Gov't Br. 25).

DFS also wrongly suggests that it satisfies a "substantial risk" test. (DFS Br. 29-30). The Supreme Court has questioned whether that test is "distinct from the 'clearly impending' requirement," but in any event it is not satisfied by an "attenuated chain of inferences necessary to find harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013); (Gov't Br. 25-26). That is all DFS offers here. It characterizes statements of former Comptrollers as "announc[ing] [OCC's] ambition to create a nationwide network of chartered fintechs free from state oversight" (DFS Br. 29), but notwithstanding OCC's announcements, until a fintech with a nexus to New York applies for, is granted, and begins operating pursuant to an SPNB charter, DFS's alleged harms remain "contingent on future events that may never occur," *Vullo I*, 2017 WL 6512245, at *9.

Finally, DFS's predictions concerning the business models of future fintech applicants do not alter the standing analysis. DFS claims it is "exceedingly unlikely that OCC will never charter a fintech company with a New York nexus," and that many fintechs "market their financial services without regard to geography." (DFS Br. 30). But if DFS is correct about the nature of possible fintech applicants, it need only wait until its predictions come to fruition. At present, however, DFS cannot make out an actual, imminent injury sufficient to confer standing.

B. The Doctrine of Prudential Ripeness Is Applicable and Counsels Against Adjudication of DFS's Claims

Even if DFS has standing, its claims are not prudentially ripe: judicial resolution of the issues presented in this case would benefit from further factual developments—specifically, OCC's consideration of an actual application from a fintech with a nexus to New York—and the parties will not be harmed by a delay in adjudication. (Gov't Br. 26-30).

DFS argues that the "doctrine has no application here" because OCC's decision to accept SPNB charter applications constitutes a final agency action under the APA. (DFS Br. 33). But as DFS admits, the prudential ripeness analysis "'involve[s] the exercise of judgment, rather than the application of a black-letter rule.'" (DFS Br. 33 (quoting *Connecticut v. Duncan*, 612 F.3d 107, 112-13 (2d Cir. 2010)). Thus, the fact that an action might be administratively final does not mean that a court must determine it is ripe for adjudication. That is particularly true where, as here, a party's claims remain "contingent on future events or may never occur," notwithstanding the consummation of the agency decisionmaking process. *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008) (quotation marks omitted). Indeed, "a regulation" such as § 5.20(e)(1) "is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation

in a fashion that harms or threatens to harm him." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). The concrete action that would purportedly harm DFS has not occurred.

DFS is also incorrect that this dispute is ripe because it "presents a pure question of law." (DFS Br. 33). That is not determinative of the ripeness inquiry (Gov't Br. 27): even legal questions may not be prudentially ripe where "further factual development would significantly advance [the court's] ability to deal with the legal issues presented." *National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (quotation marks omitted). Here, the identity of a particular fintech applicant is relevant, not only because of its nexus (or lack of nexus) to New York, but because of the types of activities it proposes to engage in, which will affect the alleged impact on DFS. (Gov't Br. 28; CRL Amicus Brief 20-34).

DFS brushes aside these unresolved factual issues by claiming that "OCC recognized that no further factual development was necessary" when it agreed to the district court's entry of final judgment after OCC's motion to dismiss was denied (DFS Br. 33-34 (citation omitted)). But that is untrue—it was the district court that erroneously determined no further factual development was necessary to resolve the case in favor of DFS. (JA 251-52). Faced with that ruling, it was impossible for OCC to delay adjudication until the factual components of this controversy were fleshed out through consideration of an actual charter application.

Like the district court, DFS largely ignores the second prong of the prudential ripeness test: whether the

parties would be harmed by a delay in adjudication. It asserts, without further explication and without any support, that "immediate adjudication [will] conserve time and money for all stakeholders." (DFS Br. 34). That may be true in any number of unripe cases, but it is insufficient to demonstrate that the parties face an "immediate dilemma," *Marchi v. Board of Cooperative Education Services*, 173 F.3d 469, 478 (2d Cir. 1999), or will have their "constitutional rights undermined by the delay," *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003), if this controversy is not adjudicated now. Further, DFS fails to explain why whatever temporal or financial harm stakeholders might experience prior to OCC's actual receipt of an SPNB charter application outweighs the clarity that factual development would bring to the issues presented in this case.

In its opening brief, OCC explained that the nature of the SPNB chartering process would allow ample opportunity for DFS to bring its claims based on an actual charter application. (Gov't Br. 29-30). Put simply, contrary to the district court's assertion, DFS does not "face[] the current risk that entities may, at any moment, leave its supervision to seek greener pastures." (JA 250). In its brief, DFS never disputes the timeframe OCC sets out, and never disputes that this timeframe would allow it to challenge OCC's chartering activities before a charter is issued and its alleged harms materialize. (DFS Br. 31-32). Instead, it merely points to a different type of agency action—OCC's conversion of foreign bank branches to federal oversight from oversight by multiple states—on an expedited timeframe in 2018. (DFS Br. 32). But OCC's conduct in a different licensing context has no bearing here,

and certainly does not establish that DFS is suffering a "present detriment"—the touchstone for evaluating the second prong of the prudential ripeness test. *Simmonds*, 326 F.3d at 360.

Because this dispute would benefit from further factual development, and because DFS would not experience any detriment from not adjudicating this dispute now, DFS's claims are not justiciable even if it possesses standing.

POINT II

OCC's Decision to Accept SPNB Charter Applications from Non-Depository Fintechs Is Reasonable and Entitled to *Chevron* Deference

If the Court reaches the merits, it should afford *Chevron* deference to OCC's reasonable interpretation of ambiguous language in the National Bank Act. The term "business of banking" is never defined in the Act; cannot be gleaned by recourse to dictionaries or legislative history; and is not made clear by the interaction of the Act with other federal banking laws. Indeed, the need for innovation in the banking industry—and the consequent flexibility concerning the contours of the business of banking—have routinely been recognized by the courts.

A. The National Bank Act Is Ambiguous on Whether Deposit-Taking Is a Necessary Component of the "Business of Banking"

1. The Text and Structure of the National Bank Act Do Not Create an Unambiguous Deposit-Taking Requirement

DFS first insists that nineteenth-century dictionary definitions of "bank" and "banking" unambiguously establish the existence of a deposit-taking requirement. (DFS Br. 36-37). But at most, they show that deposit-taking was understood as a typical, not a necessary, banking function. (Gov't Br. 34-35). Even the district court acknowledged "ambiguity on this point" because the definitions it cited "do not define deposit-receiving as an indispensable part of banking." (JA 265). Consequently, and contrary to DFS's claim (DFS Br. 36), dictionary definitions do not play the same role here as in *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009), where, although it ultimately found the relevant statutory language to be ambiguous at *Chevron* step one, this Court was able to rely on dictionary definitions of the term "visitation" contemporaneous with the passage of the National Bank Act because it determined that those definitions were unambiguous. 557 U.S. at 525-27. No such clarity exists here.

Nor do surrounding phrases in the National Bank Act render deposit-taking an unambiguous requirement of the "business of banking." DFS argues the Act is "replete with phrases that evince the understanding that a 'bank' is an institution that receives deposits."

(DFS Br. 37; ICBA Amicus Br. 16-24). But the phrases they cite do no such thing. For example, § 24(Seventh) includes "receiving deposits" among a broader list of permissible national bank activities, but nowhere requires it, any more than it requires banks to "issu[e] . . . notes" or "discount[ ] . . . evidences of debt." 12 U.S.C. § 24(Seventh); (Gov't Br. 35-36). Indeed, "[t]here 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." *Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System* ("*ICBA*"), 820 F.2d 428, 440 (D.C. Cir. 1987).

Likewise, the organizational certificate and location provisions in §§ 22 and 81 merely require a bank to specify the locations where it will carry out certain activities of its business, and to carry out those activities at those locations, without mandating what those activities must be. 12 U.S.C. §§ 22, 81; (Gov't Br. 37-38). Like the dictionary definitions, the statutory language DFS relies on stands for the unremarkable proposition that deposit-taking is a typical banking function, but an institution is not required to take deposits to be engaged in the "business of banking."

DFS also adopts the district court's erroneous views of the significance of amendments to the Act concerning trust banks and bankers' banks. (DFS Br. 39-42). With respect to the trust bank amendment, DFS misinterprets *National State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223 (3d Cir. 1979). The salient point of that decision was that, through the amendment to

12 U.S.C. § 27(a), Congress "validate[d] retroactively as well as prospectively" the issuance of charters to banks that engage only in trust activities. *Id.* at 231. DFS contends the Third Circuit "rejected the argument that the amendment merely confirmed existing powers" (DFS Br. 40), but that is inaccurate; the court declined to address whether the district court's decision prohibiting OCC from chartering trust banks was correct when it was issued, and instead merely gave effect to the intent of Congress in the then-recent amendment. *See* 591 F.2d at 231-32; (Gov't Br. 39). *National State Bank of Elizabeth*, then, does not stand for the proposition that OCC can charter non-depository institutions only when Congress expressly allows it; at most, it is agnostic on that issue.

DFS's arguments concerning the bankers' bank amendment at 12 U.S.C. § 27(b) fare no better. At the threshold, as DFS effectively concedes, bankers' banks take deposits. (DFS Br. 41; Gov't Br. 40 & n.3). The district court therefore erred in identifying § 27(b) as an example of a congressional amendment designed to authorize OCC to charter "non-deposit" banks. (JA 268). Further, DFS's inaccurate assertion that deposits must be taken from the "general public" for FDIC purposes[2] misses the point. (DFS Br. 41). DFS claims "there would have been no need for Congress to enact this statute if . . . no deposits of *any* kind were required for a financial institution to receive a federal

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[2] FDIC does not require banks to accept retail deposits from the general public to qualify for deposit insurance. *See* 12 C.F.R. § 303.14(a).

bank charter from OCC." (DFS Br. 41-42). But § 27(b) was not enacted in order to allow OCC to charter institutions that took deposits from other banks rather than from the general public; its purpose was "to exempt bankers' banks from certain existing statutory restrictions appropriate for full-service commercial banks [that] may prove incompatible with the operation of a bankers' bank." (Gov't Br. 41 (quotation marks omitted)).

There is no evidence that OCC may charter non-depository institutions only when Congress explicitly allows it, and, more broadly, nothing in the text or structure of the National Bank Act that renders deposit-taking an indispensable component of the "business of banking."

2. Historical Practice and Legislative History Do Not Resolve the Act's Ambiguity

DFS's lengthy disquisition on the supposed "history and purpose" of the National Bank Act also does not establish the unambiguous necessity of deposit-taking. (DFS Br. 42-51). First, DFS argues that selected writings of the Founders nearly a century prior to the passage of the Act resolve any ambiguity in the Act's text. (DFS Br. 43-47). It is unclear how, if at all, those writings are meant to factor into the Court's statutory interpretation. *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 508 (2d Cir. 2017) (in evaluating a statute at *Chevron* step one, court should "employ traditional tools of statutory construction"—examining the statutory text, structure, purpose, and, in appropriate circumstances, legislative

history—to ascertain whether "Congress had an intention on the precise question at issue that must be given effect" (quotation marks omitted)).

And DFS's characterization of those writings is, at best, incomplete. DFS claims that Alexander Hamilton viewed deposit-taking as the central activity of a national bank. (DFS Br. 44-45). The reality is less clear. Rather than focusing exclusively on deposits, as DFS suggests, Hamilton was describing how a bank could extend credit based on either deposits or investment in a bank's stock. *See* Alexander Hamilton, *Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit* (Dec. 13, 1790), https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0003 (noting that money a person "keeps in his chest" is unproductive, but if "he either deposits it in a Bank, or invests it in the Stock of a Bank, it yields a profit"). Moreover, in his argument for the constitutionality of the First Bank of the United States, Hamilton explained that "[t]he proposed bank is to consist of an association of persons for the purpose of creating a joint capital to be employed, chiefly and essentially, in loans." Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003. Thus, Hamilton omitted deposit-taking from his articulation of the First Bank's core purpose. *See id.*

DFS relies on Hamilton's statement that "a deposit of coin or other property, as a fund for *circulating* a *credit* upon it" was the "simplest and most precise idea of a bank" (DFS Br. 45 (quotation marks omitted)), but

Hamilton was not describing the activities of the First Bank he was designing. Rather, Hamilton was envisioning that the government could "set apart out of any monies in its Treasury, a given sum and appropriate it . . . as a fund for answering the bills as presented for payment"—in other words, the assets used to back the government's credit would be an appropriation from the Treasury rather than deposits. *See* Hamilton, *Opinion on the Constitutionality*. In short, Hamilton's writings concerning the First Bank do not reflect an understanding that deposit-taking is the *sine qua non* of banking—much less do they demonstrate that the language of the National Bank Act, passed nearly a century later to govern the activities of numerous non-governmental banks, unambiguously says as much.

The history and content of New York's nineteenth-century banking law also demonstrates the ambiguity of the National Bank Act's "business of banking" clause. (DFS Br. 46-49). As OCC explained, although New York's 1848 amendment to its Free Banking Act specified that all banks "hereafter . . . organized . . . shall be banks of discount and deposit as well as of circulation," 1848 N.Y. Laws 462, ch. 340, § 1, Congress never incorporated a similar requirement into the National Bank Act (Gov't Br. 41-43). That fact alone defeats DFS's claim that, because other elements of the New York statute were subsequently incorporated into federal law, the National Bank Act must also be read to include a deposit-taking requirement. *Jama v. ICE*, 543 U.S. 335, 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

DFS's brief does not, and cannot, fix that fundamental flaw in its argument. It cites New York judicial decisions post-dating the 1848 amendment, which DFS asserts demonstrate the necessity of deposit-taking to New York banking, but they do not govern the meaning of the "business of banking" in the later-in-time National Bank Act. (DFS Br. 46-47). And DFS's characterization of those cases is inaccurate. For example, *People v. Metropolitan Bank*, 7 How. Pr. 144 (Sup. Ct. N.Y. County 1852), did not hold that "banks of circulation only" were "illegally created." (DFS Br. 46-47). It merely observed that the 1848 amendment was aimed at eliminating such banks, without any comment on their legality prior to the amendment's passage. 7 How. Pr. At 152-53. Similarly, *Curtis v. Leavitt*, 15 N.Y. 9 (1857), did not, as DFS claims, hold that the "'most important operations' of 'the business of banking' are 'issuing and receiving deposits.'" (DFS Br. 47 (quoting *Curtis*, 15 N.Y. at 53)). In fact, the *Curtis* court stated that "two of [a bank's] most important operations [are] issuing and receiving deposits." 15 N.Y. at 53. That is beyond dispute, but *Curtis*—which concerned whether borrowing money was an incidental banking power—did not hold that deposit-taking was mandatory for banks, or even discuss the issue. *Id.*

Nor can DFS sustain its claim that the National Bank Act as originally enacted was "substantively indistinguishable from the New York law." (DFS Br. 48). It was distinguishable in the substantive respect relevant to this case: unlike New York's law, the National Bank Act never contained language unambiguously requiring that banks must take deposits. (Gov't

Br. 42). Irrespective of whether a deposit-taking requirement was "settled law in New York" (DFS Br. 49), Congress did not include it in the National Bank Act.

3. Other Federal Banking Laws Do Not Establish That Institutions Must Accept Deposits to Engage in the "Business of Banking"

Recognizing the ambiguity in the National Bank Act does not lead to conflict with other banking laws. (Gov't Br. 48-51; Banking Scholars Amicus Br. 14-22). First, the Federal Reserve Act ("FRA"), 12 U.S.C. § 222, does not preclude non-depository institutions from being recognized as national banks. (Gov't Br. 48). DFS is incorrect that OCC argued the FRA is limited "to banks located in newly admitted States" (DFS Br. 53); the FRA applies to all national banks, but it does not require that those banks be FDIC-insured, and thus does not mandate deposit-taking (Gov't Br. 48-49). Moreover, DFS's cramped interpretation of the FRA fails to mention subsequent statutory changes and would effectively nullify numerous provisions in the Federal Deposit Insurance Act. (Gov't Br. 49-50). DFS attempts to skirt this issue by claiming in a footnote, without support, that the language of those provisions is meant only to apply to trust banks and bankers' banks. (DFS Br. 53 n.7). That interpretation is contradicted by the language of the relevant statutes, which nowhere limits their scope to certain types of banks, but instead contemplates the chartering of uninsured banks. *See* 12 U.S.C. §§ 191(a), 1815(a)(1), 1818(b)(5).

The Bank Holding Company Act ("BHCA") also does not conflict with the National Bank Act's ambiguous language. (DFS Br. 54-56). In arguing otherwise, DFS downplays the fact that courts have expressly rejected the notion that the National Bank Act must be interpreted in light of the later-enacted BHCA. (Gov't Br. 50-51 (citing cases)); *see Whitney Nat'l Bank in Jefferson Parish v. Nat'l Bank of New Orleans & Trust Co.*, 379 U.S. 411, 423 (1965). Nor does DFS acknowledge that the BHCA applies only to "compan[ies]" that propose to own a "bank" as defined by that act; that is, the BHCA is concerned with defining a "bank" only for the purpose of establishing the scope of the BHCA's applicability. 12 U.S.C. § 1841(c)(1)-(2).

4. Courts Routinely Recognize the Inherent Flexibility of the "Business of Banking"

Finally, courts have consistently recognized that the "business of banking" is, and must remain, a flexible concept capable of changing with the times. (Gov't Br. 43-45).

DFS cites cases in which courts have identified deposit-taking as a critical banking function (DFS Br. 57-58), but none of them purport to define the scope of OCC's chartering authority under the National Bank Act. By contrast, DFS discounts the significance of *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995), in which the Supreme Court did address the term "business of banking" and found it to be ambiguous. (DFS Br. 58-59). To be sure, that case addressed the "outer limit" of permissible banking functions, not

the necessary core functions at issue here. 513 U.S. at 256-57. But the broader principle—that the "business of banking" is ambiguous and that OCC's interpretation of ambiguous terms within the National Bank Act is entitled to *Chevron* deference—applies here. *See NationsBank*, 513 U.S. at 256–257; *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 739 (1996).

DFS's attempts to distinguish the D.C. Circuit's decision in *ICBA* also miss the mark. (DFS Br. 60-62). It asserts that the bank at issue only qualified as a "bank" because it engaged in nominal deposit-taking. (DFS Br. 60). But that is inconsistent with what the D.C. Circuit actually said: "[t]here 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." 820 F.2d at 440. Accordingly, banks may perform "less than the full scope" of banking powers enumerated in the Act, and whether doing so is consistent with the Act's purpose is "a judgment within the particular expertise of the Comptroller and reserved to his chartering authority." *Id.* This undermines DFS's assertion that references to deposit-taking in the Act itself render deposit-taking mandatory.

Lastly, DFS gives insufficient weight to the repeated instances in which courts have recognized the need for flexibility and innovation in the banking industry. (DFS Br. 60). "[C]ommentators uniformly have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms." *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977). Since the

passage of the Act, courts have understood that banking inexorably evolves to meet the needs of customers and communities and, most importantly, national banking powers necessarily evolve with them. *See Merchants' Nat'l Bank v. State Nat'l Bank*, 77 U.S. 604, 648 (1870) ("The practice of certifying checks has grown out of the business needs of the country . . . . We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity.").

The conclusion that the Court should draw from this constant state of evolution within the banking industry is not that the definition of what it means to be in the "business of banking" has remained static for 160 years and should continue to remain so in perpetuity, but that what constitutes the "business of banking" is dynamic and does not have a single definition that remains permanently rooted in a particular moment in history. Cases such as *NationsBank* that uphold the interpretive authority of the Comptroller in this area capture the essential correctness of this point: evolution in banking is constant, and products or services that were once considered revolutionary or controversial are now commonplace. *NationsBank*, 513 U.S. at 256-57 (allowing national banks to broker annuities).

Conversely, the ability of banks to shed formerly important activities that are no longer commonly engaged in further demonstrates that there is nothing talismanic about deposit-taking or any of the other powers enumerated in the National Bank Act. Just as national banks need not, for example, issue currency

to properly engage in the "business of banking," there is nothing in the text of the Act requiring that an applicant for a national bank charter accept deposits if it can present the OCC with a viable business model that does not require it.

B. OCC's Interpretation of the "Business of Banking" Is Reasonable and Entitled to Deference

Because the term "business of banking" is ambiguous, the Court should give effect to OCC's reasonable interpretation of the statutory language so long as it is supported by "valid considerations," and is "sufficiently reasoned to clear *Chevron*'s rather minimal requirement that the agency give a reasoned explanation for its interpretation." *Catskill*, 846 F.3d at 501, 524. Such deference is particularly appropriate here, where the Supreme Court has recognized the considerable weight afforded to OCC's interpretation of the banking laws. *NationsBank*, 513 U.S. at 256-57. And as explained in OCC's opening brief, its interpretation of the "business of banking" is reasonable: relying on the Supreme Court's reasoning in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), it determined that non-depository institutions may still engage in the business of banking so long as they either pay checks or lend money. (Gov't Br. 46-48).

Contrary to DFS's position (DFS Br. 62-66; CSBS Amicus Br. 26-36), the fact that *Clarke* dealt with branching rather than chartering does not render OCC's interpretation unreasonable. *Clarke* upheld as reasonable OCC's interpretation of the statutory

phrase "[t]he general business of each national banking association" in 12 U.S.C. § 81, a provision that restricts the locations where a bank can do business, by reference to the core activities in 12 U.S.C. § 36. (Gov't Br. 46-47). OCC has logically reasoned that because the "general business of each national [bank]" bears similar meaning to "the business of banking" in the chartering provisions, the core activities specified at § 36 provide a reasonable basis for interpreting both sets of terms. (Gov't Br. 48).

Moreover, DFS misinterprets the meaning of the exclusion of the branching provisions from OCC's general rulemaking authority. (DFS Br. 64). Title 12 U.S.C. § 93a says OCC's rulemaking authority "does not apply" to § 36, which generally governs, and places restrictions on, branch banks. But that carve-out exists to "make[ ] clear that the rule-making provision carries no authority to permit" activities that violate those branching restrictions. H.R. Conf. Rep. No. 96-842 (March 21, 1980). Nothing about § 93a diminishes OCC's ability to interpret § 36, much less to consider it as part of its interpretation of its chartering authority.

Finally, references to deposit-taking in OCC's brief in *Clarke* do not contradict OCC's position here. (DFS Br. 65-66). In a discussion of the International Banking Act of 1978, OCC quoted a Senate Report stating "that foreign banks, which are not subject to the McFadden Act's restrictions [on branches], had a competitive advantage over domestic banks primarily in that they were permitted 'to receive deposits, make

loans, and pay checks at banking offices located in several States'—a factor that was particularly important because 'the essence of banking is the ability to receive deposits.'" Br. for the Fed. Pet'r, *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987) (Nos. 85-971, 85-972), 1986 WL 728047, at *38 (June 23, 1988). But again, OCC has never disputed that receiving deposits is a "core banking function," as reflected in the regulation at issue here. 12 C.F.R. § 5.20(e)(1). Neither OCC's brief, nor the legislative history cited in it, dealt with the question of whether receiving deposits is a requirement of the "business of banking."

Because the term "business of banking" is ambiguous concerning whether deposit-taking is mandatory, and because OCC's interpretation of that ambiguous language is reasonable, the Court should reverse the district court's judgment on the merits if it finds DFS's claims justiciable.

POINT III

The District Court Erred in Granting DFS Nationwide Relief

Finally, even if the Court were to determine that DFS's claims are justiciable, and disagree with OCC's interpretation of the National Bank Act, it should reject the nationwide relief imposed by the district court, and instead set aside § 5.20(e)(1) only with respect to non-depository fintech applicants with a nexus to New York. (Gov't Br. 52-57).

DFS argues nationwide relief is appropriate because—despite the fact that it alleges injuries only to

New York and to New York residents—the APA requires agency action to be set aside universally. Indeed, it states that there is not "even one instance of a federal court imposing a geographic limit on relief under § 706." (DFS Br. 67). But shortly after DFS's brief was filed, this Court did exactly that. *New York v. DHS*, __ F.3d __, 2020 WL 4457951, at *31-32 (2d Cir. Aug. 4, 2020) (in § 706 case, limiting injunction against enforcement of rule to states of the Second Circuit). In doing so, the Court discussed the same cases DFS relies on, which state that the "ordinary result" in a challenge to a rule under the APA is vacatur. *Id.* (citing *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quotation marks omitted)). Nonetheless, in light of the harms to the adjudicative process caused by nationwide relief, the Court imposed a geographic limit, despite the important policy interest in avoiding "inconsistent interpretations of immigration law across the circuits." *Id.* And this Court was not alone in recognizing that the APA does not mandate nationwide relief: in the course of reversing nationwide relief in an APA case, the Fourth Circuit recently described as "baseless" the argument that "§ 706 even authorizes, much less compels, nationwide injunctions." *CASA de Maryland v. Trump*, No. 19-2222, 2020 WL 4664820, at *29 n.8 (4th Cir. Aug. 5, 2020); *see also Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263 F.3d 379, 394 (4th Cir. 2001) ("Nothing in the language of the APA" requires that a regulation be "set[ ] aside . . . for the entire country.").

The district court's order here implicitly confirms that point: far from understanding the APA as requiring that a court "set aside" a challenged rule or other agency action universally, the district court "set aside" § 5.20(e)(1) only "with respect to all fintech applicants seeking a national bank charter that do not accept deposits." (JA 299). DFS identifies no reason why the district court could limit the scope of its order in that way, but could not limit the scope of its order by "set[ting] aside" § 5.20(e)(1) only with respect to non-depository fintechs with a nexus to New York.[3]

While DFS attempts to distinguish APA relief from injunctive relief, that contradicts the terms of the APA

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[3] Even the cases DFS cites acknowledge that the APA does not require universal vacatur of agency action. *National Mining Association*, for example, recognized a distinction between cases that "involve a facial challenge to the validity of a regulation," where universal set-aside might be appropriate, and cases that raise an as-applied challenge, where it would not. 145 F.3d at 1409. That distinction is relevant here, where the district court properly construed DFS's complaint "as a challenge only to so much of [§ 5.20(e)(1)] as purports to authorize OCC to issue SPNB charters to non-depository institutions" (JA 230), and where all of DFS's alleged harms are premised on the issuance of charters with a nexus to New York, *see National Wildlife Federation*, 497 U.S. at 891 (set-aside of agency action should be limited to "concrete action[s] applying the regulation to the claimant's situation that harm[ ] or threaten[ ] to harm him").

itself, which contemplates suits for declaratory and injunctive relief, 5 U.S.C. § 703, and permits courts to "deny relief on any . . . appropriate legal or equitable ground," 5 U.S.C. § 702(1); *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 155 (1967) (confirming that "equitable defenses may be interposed" in an APA case). Indeed, "[t]he APA was passed in 1946, seventeen years before the first nationwide injunction was issued by a federal court. That Congress would have implicitly codified such a radical departure from settled equity practice is quite illogical." *CASA de Maryland*, 2020 WL 4664820, at *29 n.8 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) ("[A] major departure from the long tradition of equity practice should not be lightly implied.")). DFS's bald assertion that the district court "merely granted the relief that the APA specifies" (DFS Br. 67) is therefore contradicted by the statute itself. More broadly, DFS is wrong that case law concerning injunctions is "inapposite." (DFS Br. 67). To the contrary, those cases underscore the fundamental principle that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quotation marks omitted). And while DFS insists that the district court here did not provide injunctive relief (DFS Br. 68), the final judgment's structure —precluding OCC from applying § 5.20(e)(1) to "all fintech applicants seeking a national bank charter that do not accept deposits" (JA 299)—was essentially injunctive, and goes well beyond what would be necessary to address DFS's injury.

DFS's speculation that limiting relief to New York would "present[] significant challenges of administration" is unpersuasive. (DFS Br. 69). DFS cannot identify any case law supporting the proposition that a court may abandon Article III's standing requirements and traditional principles of equity whenever it believes that doing otherwise might "engender[] more litigation involving third parties." (DFS Br. 70). Furthermore, the "challenges of administration" DFS imagines are unfounded. DFS claims that "even if an applicant did no business in New York at the time of its charter application, approval of the charter would allow it to offer services to New York customers at any time without DFS oversight." (DFS Br. 69). That is not true. "OCC expects a company seeking any type of national bank charter to articulate why it is seeking a national bank charter and to provide significant detail about the proposed bank's activities." (JA 179). That "business plan should clearly define the market that the proposed bank plans to serve and the products and services it will offer." (JA 180); *see also* 12 C.F.R. § 5.20(h) ("The plan must . . . demonstrate realistic assessments of risk in light of economic and competitive conditions in the market to be served."). And in granting a charter, OCC has the authority to impose conditions, which "include ensuring that the bank does not significantly deviate from the business model proposed in its application without obtaining the OCC's prior non-objection." (JA 185). "These charter conditions are enforceable and generally will remain in place until removed or modified by the OCC. Compliance with these conditions will be reviewed by the OCC during the ex-

amination process." (JA 186). The chartering procedures therefore contain ample safeguards to ensure that any fintech that receives a charter must comply with limitations set on its ability to do business in New York.

Finally, DFS ignores OCC's explanation that the district court's entry of nationwide relief improperly precludes other courts from considering the weighty issues raised in this litigation—the ground this Court relied on in *New York v. DHS*. (Gov't Br. 56-57). The district court's judgment "substantially thwart[s] the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160 (1984), and violates the principle that "nonmutual offensive collateral estoppel simply does not apply against the government," *id.* at 162; *accord New York v. DHS*, 2020 WL 4457951, at *32 (expressing doubt that "the court that imposes the most sweeping injunction should control the nationwide legal landscape"). Those concerns are present here, as the district court's order effectively overruled the judgment of another district court. (Gov't Br. 57).

Accordingly, even if the Court holds the district court had jurisdiction and agrees with the district court on the merits, it should narrow the overly broad grant of relief.

CONCLUSION

The judgment of the district court should be reversed.

Dated: New York, New York
August 13, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 6,986 words in this brief.

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