No. 19-4271

NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiff-Appellee,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY, JOSEPH M. OTTING, in his official capacity as U.S. Comptroller of the Currency,

Defendant-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR INDEPENDENT COMMUNITY BANKERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF THE *AMICUS CURIAE*[1]

Community banks are the financial backbone of communities throughout America. Unlike larger banks that often take deposits in one state and lend in others, community banks reinvest local dollars back into the community and help create local jobs. Their relationship-banking philosophy is ingrained in the way they conduct business, one loan—one customer—at a time. Local reinvestment helps small businesses grow and helps families finance major purchases and build financial security. These banks provide more than 60% of all small-business loans, and more than 80% of agricultural loans. And collectively they employ more than 750,000 people, making them a major source of employment in the financial sector.

Amicus curiae the Independent Community Bankers of America ("ICBA") is the nation's voice for community banks. It is a membership organization, formed by community banks and dedicated to promoting and protecting the interests of this part of the banking industry, in part through the monitoring of, and advocacy in, federal issues that affect thousands of

[1] No counsel for any party authored this brief in whole or in part; and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

community banks and their customers. The ICBA represents nearly 5,000 community banks of all sizes and charter types and is dedicated exclusively to representing the interests of the community banking industry and its members.

Community banks have a keen interest in the continued vitality of the dual regulatory system—federal and state—that prevails in banking. About three-quarters of community banks are state-chartered institutions, subject to federal supervision thanks to their participation in federal deposit insurance and to supervision from their state prudential regulators. Others are national banks chartered by the Office of the Comptroller of the Currency ("OCC"). Collectively, community banks compete for business (for deposits and for loans) and cooperate (such as through overnight lending) in an environment where regulatory oversight of banking is based on an established foundation of safety and soundness and prudent banking practices. They rely on the existing framework to enable their provision of community-focused banking services that are tailored for the communities where they work. The new policy of the OCC to charter nonbank national banks, i.e. companies that do not engage in the traditional banking functions, threatens to upend the existing system. Community banks will

face a new threat, in the form of online financial services that enjoy federal protection from many state laws but do not have the same responsibilities as real banks.

In light of these concerns, the ICBA provided substantial feedback as the OCC developed its nonbank chartering policy. JA101.[2] The ICBA submits this *amicus* brief to give the Court additional information about the context and purpose of the OCC's authority to charter national banks.

SUMMARY OF THE ARGUMENT

National banks serve a specific purpose in our country's financial system, a role established for them 160 years ago with the enactment of the National Bank Act. Taking deposits and enabling payments are central to that mission. Congress authorized the chartering of national banks, and established the OCC to supervise them, to enable the creation of a nationwide currency and payments system. This purpose is clear from the origin of the statute, the motivating purpose of which was to replace the fragmented system of a thousand currencies issued by local banks that was

[2] *See also* Letter from Christopher Cole, ICBA, to Comptroller Thomas J. Curry (Apr. 12 2017) (providing feedback on OCC's draft supplement to its licensing manual to cover nonbank charters), *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/2017/cl041217.pdf.

hobbling the nation's prosecution of the Civil War. Deposits were a necessary feature of national banks as Congress conceived them; without receiving deposits, the new banks would have been incapable of fulfilling their purpose. The national banks that Congress authorized were banks as ordinarily understood: institutions that accept and hold value in the form of deposits, and then lend in the form of bank accounts backed by the reserve of deposits, thus enabling payments to flow in the economy in volumes beyond the actual amount of deposits and loans.

It is certainly possible for a company to make loans without engaging in this full model. But that company would not be a bank. Not as conventionally understood, and not as Congress used the term in the National Bank Act. The OCC believes that because the statute does not define the phrase "the business of banking," it can interpret the phrase loosely to permit chartering of companies that operate different, and fundamentally nonbank, business models. The OCC disregards clear signs in the text, structure, and purpose of the National Bank Act that show what Congress intended national banks to be; and it misreads the statutory provisions that it does acknowledge.

The OCC is engaged on a speculative adventure. It says the financial industry is changing, and it wants to update its regulatory authority to match. The OCC is openly motivated by interests and concerns that go far beyond what Congress set forth as its mandate, namely the supervision of a system of national banks to achieve an efficient nationwide payments system by means of cycling deposits into loans. The OCC has decided that federal chartering of nonbank fintech firms, with the associated preemption of state regulation, will support economic growth more broadly. Laudable as that ultimate goal is, that decision is for Congress, not for the Comptroller of the Currency.

ARGUMENT

I. CONGRESS CREATED NATIONAL BANKS TO PROVIDE A NATIONAL CURRENCY AS A MEANS OF EXCHANGE.

Any assessment of whether the OCC has authority to charter nonbanks must consider the purposes for which Congress gave the OCC chartering authority in the first place. *See Maryland v. EPA*, 958 F.3d 1185, 1198 (D.C. Cir. 2020) (agency's interpretation "must be reasonable in light of the

Act's text, legislative history, and purpose") (citation omitted).[3] The OCC's plans fly in the face of those purposes.

A. The National Bank Act was enacted to transform a fragmented system of local currencies into a uniform nationwide currency.

The OCC was created in the depths of the Civil War precisely to charter and supervise national banks. That historical context is critical for understanding the purposes of the National Bank Act.

Before the war, the United States did not have a national paper currency.[4] Gold and silver (known as "specie") were the widely accepted stores of value and the only legal tender at the federal level.[5] There was no uniform paper money that could be exchanged for goods and services in lieu of gold. Instead, individual banks, located across the country, accepted gold

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[3] The National Bank Act is not ambiguous: It does not allow the OCC to charter nonbanks. At a minimum, it does not unambiguously permit the OCC's new policy, and the OCC does not claim it does; rather, the OCC asserts that it is entitled to deference for interpreting an ambiguity in the statute. *See* Defs.-Appellants Br. 30. The ICBA trains its arguments on that point. In light of the purposes of the National Bank Act, the OCC's policy is beyond its authority regardless.

[4] *See Cong. Globe*, 37th Cong., 3d Sess. 845 (1863) (statement of Sen. Sherman: "[W]e cannot maintain our nationality unless we establish a sound and stable financial system; and as the basis of it we must have a uniform national currency.").

[5] Roger D. Bridges, *Salmon P. Chase and the Legal Basis for the U.S. Monetary System*, 39 N. Ky. L. Rev. 737, 737 (2012).

in deposit, and provided notes in return.[6] Each banknote provided the holder a claim on the bank, a right (in principle) to submit the note and demand payment in the equivalent amount of gold. These banknotes served, practically speaking, as currency in the relevant locales. Banks could introduce notes into the economy by providing them in return for gold deposits, and also by making loans, providing the loaned funds in the form of notes. Banks earned revenue from interest on their loans and through discounting their banknotes on early presentation. From the perspective of the broader economy, they provided a critical service by establishing a mechanism for exchanging value—the banknotes—that made it feasible to trade goods and services in a rapidly growing economy.

Still, the fragmentation of currency was problematic. Not only did the supply of money vary locally and regionally, the value of paper money depended on the finances of the individual banks issuing the notes.[7] A person holding a piece of paper denominated a dollar had to trust that the

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[6] *Id.* (noting that as of 1860 there were about 1,600 banks issuing notes and about 13,000 different notes in circulation).

[7] Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 723 (Princeton University Press, 1957) ("Each note, though conventionally the equivalent of a certain number of dollars, might be in fact the equivalent of anything more or anything less, depending on the reputation of the bank that issued it.").

reserves of the issuing bank were adequate to support the volume of its notes in circulation; and repeated bank crises demonstrated that trust could be misplaced.[8] A bank panic just before the Civil War was a fresh reminder; gold reserves represented, by the time of the panic in 1857, just 7 percent of the notional value of the notes in circulation.[9]

The Civil War cast these problems into sharp relief. The government was forced to increase the scale of its spending dramatically, to support a war mobilization unprecedented in the nation's history. It needed increased taxation and significantly increased borrowing, but doing so in the medium of unreliable local banknotes soon proved impracticable.[10] To be blunt, the value of a "dollar" was different depending on which bank's notes a person held. The government could not safely accept the variety of fluctuating local banknotes in a transaction (such as a tax payment). This difficulty became

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[8] *See* Clement Juglar, *A Brief History of Panics and Their Periodical Occurrence in the United States* 90 (G.P. Putnam's Sons, 3d ed. 1916) ("When there is too much paper, when the public has created an endless chain of bank notes, representing no real value, it is enough that the first ring break for the whole gear, thus no longer held together, to fall to pieces.").

[9] *Id.* at 91.

[10] John Wilson Million, *The Debate on the National Bank Act of 1863*, Journal of Political Economy 2, no. 2, 251, 253 (Mar. 1894) ("No bank was upon a sound basis.").

even more acute at the end of 1861, when state banks suspended redemptions of notes for specie, with the result that banknotes became an even more unreliable store of value.[11]

Early in the war, the government printed its own notes. These were distinctive for being printed on both sides, with green on the back.[12] These were backed by the government's own store of gold, although redemption was also suspended. But this mechanism did not permit the scale of borrowing that the government needed to finance the war. The stock of gold was not increasing, so each issuance of new greenbacks just caused the greenbacks to be discounted in value even more. By 1863 it was clear that simply issuing government notes would not be enough. The country needed a genuine national currency.

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[11] *Id.* at 251.

[12] *See* Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. Cin. L. Rev. 393, 424 (1999) (citing Act of Feb. 25, 1862, ch. 33, § 1, 12 Stat. 345).

The National Bank Act was the solution.[13] The Act created the OCC to charter and supervise a new cadre of national banks.[14] These banks would be authorized to issue national banknotes, of a uniform type.[15] The statute required each bank to maintain a minimum level of reserves, and supervision by the OCC would verify those reserves.[16] Thus, in principle, the value of these notes would not fluctuate from bank to bank, because a holder could have the same confidence about the redemption of a note regardless of which bank issued it. In addition, these notes were to be backed by U.S. Treasury bonds that the banks would place with the Comptroller for safekeeping, rather than directly by gold—a mechanism that supported the government's borrowing.[17] Once a national bank had satisfied the various criteria in the statute, the notes that it issued would be valid legal tender.[18]

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[13] As the OCC has noted, Congress's first attempt was in 1863, and Congress then replaced that statute in 1864 with the National Bank Act that is generally in place today.

[14] Act of June 3, 1864, ch. 106, § 1 (providing "a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof") (hereinafter "*1864 Act*").

[15] *Id.* § 23.

[16] *Id.* §§ 31, 34.

[17] *Id.* § 16.

[18] *Id.* § 23.

That the central purpose of the statute was to facilitate the establishment of a single national currency is obvious from the title, which originally was not the National Bank Act but "An Act to provide a National Currency." It is obvious from the title of the agency—the Office of the Comptroller of the *Currency*. And it is obvious from what the statute does: The central privilege that a national bank gained, as the statute was originally conceived, in exchange for submitting to the requirements of the Act, was the a bility to issue notes that would be legal tender. Thus, the core function of a national bank is to provide a mechanism for payments—to distribute and maintain a corpus of currency.

B. Taking deposits was a function necessary for fulfilling the purpose of national banks.

It is equally apparent that accepting deposits was one of the primary mechanisms by which Congress understood a national bank would develop its currency base. In traditional banking as it had developed up to the time of the Civil War, deposits and lending went hand in hand as the means by which banks facilitated payments. Trading specie, actual gold in the form of coins or otherwise, was often inconvenient or impracticable. A person who possessed gold could deposit it at a bank and receive banknotes in return. The bank could also generate currency by issuing further banknotes, backed

by the gold it held. The banknotes then formed the mechanism of payment, and the gold sitting in the bank's vaults enabled transactions many times greater in aggregate value.

Holding some gold was necessary, of course; the banknotes had value, notionally, because of the bank's promise to redeem them for specie. Deposits were a key input of that money. To put it simply, the bank takes in deposits and uses the money to make loans; and the bank paper (in modern times, simply the bank's accounts) enables payments. Alexander Hamilton explained the principle concisely in his report on the first federal banking system:

> Gold and Silver, when they are employed merely as the instruments of exchange and alienation, have been not improperly denominated dead Stock; but when deposited in Banks, to become the basis of a paper circulation, which takes their character and place, as the signs or representatives of value, they then acquire life, or, in other words, an active and productive quality. . . .
>
> These deposits are of immense consequence in the operations of a Bank. Though liable to be redrawn at any moment, experience proves, that the money so much oftener changes proprietors than place, and that what is drawn out is generally so speedily replaced, as to authorise the counting upon the sums deposited, as an *effective fund*; which, concurring with the Stock of the Bank, enables it to extend its loans, and to answer all the demands for

> coin, whether in consequence of those loans, or arising from the occasional return of its notes.[19]

Indeed, had the new national banks not taken deposits, they could hardly have achieved the purposes for which Congress established the system. The banks needed reserves to support their issuance of circulating notes. In fact the statute specified a reserve ratio, *1864 Act* § 31, and required banks to report to the OCC on their deposits, loans, and circulation, precisely so that the OCC could verify they had adequate reserves, *id.* § 34. Congress cannot have expected shareholder equity investments to be the sole or even the major source of reserves, because the statute imposed a serious disincentive on investment: Instead of the ordinary corporate limited liability, bank investors faced liability up to roughly twice their investments. *Id.* § 12.[20] Nor could Congress have intended corporate debt to be the main source of reserves, because the statute limited a bank's borrowing to the

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[19] Alexander Hamilton, "Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank) 13 December 1790," *in The Papers of Alexander Hamilton*, vol. 7, *September 1790–January 1791* 305 (Harold C. Syrett eds., New York: Columbia University Press 1963).

[20] To be more precise, a shareholder could be liable up to the par value of the shares plus the amount invested. *1864 Act* § 12. In addition, the statute exempted from this double liability any small bank (less than $5 million in capital paid in) that converted from a state charter and had adequate reserves. *Id.*

amount of its shareholder capital. *Id.* § 36. Clearly, Congress understood that banks would increase the amount of circulating currency by taking deposits to form the basis of banknotes issued to depositors and borrowers—the same model that Hamilton had laid out.

The statute makes clear how integral deposits were to the operation of national banks. The first item of substance required in a national bank's organization certificate, after the name of the bank, is "[t]he place where its operations of discount and deposit are to be carried on."[21] Every national bank has, by statute, and may exercise "all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits*; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes."[22] The Act specifically authorized deposits as one of only four types of liability a national bank could have in excess of its capital

[21] *1864 Act* § 6 para. 2 (codified as amended at 12 U.S.C. § 22 para. 2).
[22] *Id.* § 8 (emphasis added) (codified as amended at 12 U.S.C. § 24 para. 7).

reserves.[23] And the Act authorized national banks to serve as depository institutions for federal government funds.[24]

C. Subsequent developments have not changed the basic purposes of the National Bank Act.

The system of national banks established in the Civil War proved inadequate. Repeated bank panics, about one per decade, caused costly economic damage during the 50 years after the enactment of the National Bank Act, and eventually Congress established a central banking system, the Federal Reserve.[25] National banks are no longer the sources of currency; today currency is issued by the Federal Reserve Banks.[26]

But though national banks do not issue currency, they retain their function of providing a unified national system of payments. Congress has not altered that basic purpose even while it established the Federal Reserve System to control the volume of the money supply, the Federal Deposit

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[23] *Id.* § 36.

[24] *Id.* § 45 (codified as amended at 12 U.S.C. § 90). A later amendment to this provision authorized national banks to serve as depositories for state and tribal governments as well. *See* 12 U.S.C. § 90.

[25] *See generally* George A. Selgin & Lawrence H. White, *Monetary Reform and the Redemption of National Bank Notes, 1863-1913*, 68 Bus. History Rev., no. 2, Summer 1994, at 205.

[26] *See* Craig K. Elwell, Cong. Research Serv., R41887, Brief History of the Gold Standard in the United States 8-9 (2011).

Insurance Corporation to backstop deposits, and other mechanisms to ensure the stability and flexibility of the monetary system. The OCC itself has stated the continuing purpose of the National Bank Act: "to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the post-Civil War national economy." 68 Fed. Reg. 6363, 6367 (proposed Feb. 7, 2003) (OCC proposed rule). "[T]he national banks organized under the [National Bank Act]," the OCC has reiterated, "are instruments designed to be used to aid the government in the administration of an important branch of the public service." *Id.* at 6368 (second alteration in original) (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875)). "The United States has set up a system of national banks as Federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories." *Id.* (quoting *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954)).

II. THE OCC'S POLICY OF CHARTERING NONBANKS IS INCONSISTENT WITH THE TEXT AND PURPOSE OF THE NATIONAL BANK ACT.

Thus, as the OCC itself has long understood, the purpose of national banks is to maintain the national currency system—a role in which

receiving deposits and processing payments are central functions. The OCC has not explained how it is possible for a company to serve as a genuine national bank without performing these functions.

The statute itself indicates that it is not possible. As noted above, a national bank's organizing document must identify, first and foremost, "[t]he place where its operations of discount and deposit are to be carried on." 12 U.S.C. § 22 para. 2. That sentence alone should foreclose the OCC's notion that it can charter a national bank that does not plan to carry out deposit operations at all. *See* JA168 ("[T]he OCC has authority to grant a national bank charter to a fintech company that engages in one or more of those core banking activities," thus need not necessarily engage in "receiving deposits" or "paying checks."). The OCC's response to this provision is startlingly dismissive; it says the provision "simply requires a bank to describe the location where it carries out certain aspects of its business; it does not suggest, let alone unambiguously establish, that receiving deposits—not to mention discounting notes—is mandatory." Defs.-Appellants Br. 37-38. But the statute does not just require a bank to state a location, and the OCC's gloss fails to respect the requirement that Congress actually imposed. A national bank charter must state where the bank carries

out a very specific aspect of its business, namely taking deposits. The charter cannot fulfill that statutory requirement if the bank is not planning to take deposits at all.

The OCC relies on the notion that "business of banking" is, standing alone, an ambiguous phrase. *Id.* at 32. But "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). In context, it could hardly be clearer that the "business of banking" that Congress had in mind—and has had in mind all along—is focused on currency and payments, including the acceptance of deposits to support payments. Section 24, as noted above, lists the powers that a national bank "shall have," and they include "all such incidental powers as shall be necessary to carry on the business of banking; . . . [including] by receiving deposits." 12 U.S.C. § 24 para. 7. "[T]he word 'shall' usually connotes a requirement." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). Thus, in plain English, one of the powers "necessary" to the business of banking is the power of "receiving deposits." It is hard to see how there is any genuine ambiguity about whether the "business of banking"—in the sense the National Bank Act uses the term—is a concept so flexible as to encompass a company that only makes loans.

Here, too, the OCC's response is singularly disrespectful to the statute Congress wrote. The OCC asserts, off-handedly, that section 24's "reference to receiving deposits does not . . . establish deposit-taking as a necessary activity for every national bank." Defs.-Appellants Br. 36. How does it not? The statute says exactly that, even using the word "necessary": every national bank "shall" have the powers "necessary" to the business of banking, and then enumerates the "necessary" powers explicitly to include receiving deposits. *Cf.* 68 Fed. Reg. 46,119, 46,129 (proposed Aug. 5, 2003) (OCC proposed rule) ("Deposit-taking and lending are powers specifically enumerated in statute.").

The OCC contends that a case the ICBA litigated three decades ago shows the OCC can, in the chartering process, restrict a national bank from exercising some of the section 24 powers. Defs.-Appellants Br. 36-38 (discussing *ICBA v. Bd. of Governors of the Fed. Reserve Sys.*, 820 F.2d 428 (D.C. Cir. 1987)). The OCC overreads that case. The bank whose situation the ICBA was contesting was in fact planning "to provide retail and commercial deposit-taking, lending, and checking services to the local community to the extent permitted by the [state] statute and to offer additional services not already provided, including the provision of overline banking services to

other banks in South Dakota." 820 F.2d at 439. The question at issue was whether the bank could legitimately (and the OCC could properly allow it to) limit its deposit-taking and other activities to part of the possibly available market—not whether a company could be chartered as a national bank while committing to do no deposit or payment services at all. *ICBA* cannot stand as precedent showing that the OCC can slice the section 24 powers off from a charter entirely. *Cf. Villanueva v. United States*, 893 F.3d 123, 131 (2d Cir. 2018) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (citing and quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Indeed, if the D.C. Circuit had decided that question, the case would be unpersuasive. The *ICBA* opinion says "nothing in the language or legislative history of the National Bank Act . . . indicates . . . that the authorized activities for nationally chartered banks [are] mandatory." 820 F.2d at 440. But the language does say that: "[A] national banking association . . . shall have power . . . ." 12 U.S.C. § 24. The D.C. Circuit's statement makes sense, but only in the context of the case, as an observation that a national bank

need not assert unfettered freedom to exercise the section 24 powers to the hilt.

Moreover, the OCC neglects to mention that it has, itself, previously affirmed that deposit-taking is a central function of national banks. The OCC's regulation 7.4007 states that "[a] national bank may receive deposits and engage in any activity incidental to receiving deposits, . . . subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law," and "without regard to state law limitations." 12 C.F.R. § 7.4007(a), (b). Explaining its reasons for this regulation, the OCC said it "is charged with the fundamental responsibility of ensuring that national banks . . . are able to [operate], if they choose, to the full extent of their powers under Federal law." 69 Fed. Reg. 1904, 1907 (Jan. 13, 2004) (OCC final rule). "This responsibility includes enabling the national banking system to operate as authorized by Congress, consistent with the essential character of a national banking system and without undue confinement of their powers." *Id.* The "essential character of a national banking system," presumably, meant national banks that are free to engage in their "powers specifically enumerated in statute," 68 Fed. Reg. at 46,129

(OCC proposed rule), even though the OCC now finds it convenient to characterize those powers as merely suggestions.

The OCC dismisses the text of sections 22 and 24 for the further reason that those provisions also make reference to "issuing[] and circulating notes" (section 24) and "operations of discount" (section 22), activities that the OCC says banks no longer do. Defs.-Appellants Br. 35-37. With respect to the first, the fact that banks no longer issue notes is a choice by Congress that the statute actually builds in. Section 24 says a bank has the power to issue notes "in accordance with chapter 52 of the Revised Statutes," and since the creation of the Federal Reserve that chapter no longer authorizes national banks to issue notes. With respect to "operations of discount," the OCC is incorrect. Banks do engage in discounting, which today is a business of negotiating short-term paper sold at a discount to its face value.[27] Of course, this operation is not identical to what it was in 1864, just as deposits today do

[27] *See* U.S. Securities & Exchange Commission, *Introduction to Investing: Glossary*, Investor.gov (last visited July 27, 2020), https://www.investor.gov/introduction-investing/investing-basics/glossary/discount-note (SEC's investor guide describing "Discount Note[s]" as "[s]hort-term obligations issued at a discount from face value"; "[d]iscount notes have no periodic interest payments; the investor receives the note's face value at maturity").

not take the form of gold specie. These changes hardly warrant reading the relevant portions of sections 22 and 24 out of the statute.

Notably, none of these arguments appeared in the OCC's policy statement or in the regulation in which it first asserted the authority to charter nonbanks. JA168 (citing 12 C.F.R. § 5.20(e)). The OCC simply ignored all these features of the statute. Instead, it focused on a different provision of the National Bank Act that does not mention the "business of banking" at all: section 36, which defines the concept of a "branch." 12 U.S.C. § 36(j). The OCC's use of this provision is backwards. Section 36 defines a "branch" to be an office of a bank "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). The statute then says that state laws shall apply to a branch "to the same extent as such laws would apply if the branch were a national bank" headquartered in the state. *Id.* § 36(f)(2). The OCC infers that a national bank can also be any company that receives deposits, pays checks, or lends money—without doing all three. But if that were true, the section 36(j) definition would be redundant. If lending money, on its own, could make a facility a national bank, then the branch could be a national bank headquartered in the state where it is located; it would not be necessary to have a provision saying the branch should be treated "as . . . if [it] were" one.

Id. The fact that Congress defined a branch to be a bank office that does any one of three activities implies that the bank itself must be doing something more.

The OCC treats a Supreme Court case that discussed the "general business of [a] national banking association" in a similarly backwards fashion. Defs.-Appellants Br. 46-47 (discussing *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388 (1987)). In *Clarke*, a dispute arose whether a national bank could conduct brokerage services—not one of the OCC's "core functions"—outside of its home state, at a time when the National Bank Act said a national bank could conduct its "general business" only at statutory "branches" in its home state. 479 U.S. at 391. The Supreme Court accepted the OCC's interpretation that non-core functions like securities brokerage are not part of a bank's "general business." *Id.* at 409. The OCC infers, from that decision, that the OCC's list of the core functions is correct; and, what is truly without support, that a company can qualify as a national bank by doing only one of them. The Supreme Court held that the sky is blue, and the OCC concludes that the ground must be blue too.

III. THE OCC'S INTERPRETATION IS NOT ELIGIBLE FOR *CHEVRON* DEFERENCE.

For these reasons, the OCC's conclusion that it can issue a national bank charter to a company that does not take deposits is incorrect and unreasonable in any event. But the Court should not apply the *Chevron* framework to the OCC's interpretation in the first place, for multiple reasons.

First, the OCC's policy represents a radical departure from 160 years of understanding, rooted in the structure and purpose of the National Bank Act, about what a bank is and what it does.

The purpose of national banks, as the OCC has previously stated, is to "provid[e] circulating medium and government credit, as well as financ[e] commerce and act[] as private depositories." 68 Fed. Reg. at 6368. The OCC's policy of chartering nonbanks makes no reference to that purpose. Instead the OCC announced that "[a]s the banking industry changes, companies that engage in the business of banking in new and innovative ways should have the same opportunity to obtain a national bank charter as companies that provide banking services through more traditional means." JA167.

The OCC's desire to read the statute creatively so that the federal banking system can "remain relevant and vibrant," JA168, is just the sort of

adventurism that courts have repeatedly disapproved. "Although agencies must be 'able to change to meet new conditions arising within their sphere of authority,' any expansion of agency jurisdiction must come from Congress and not the agency itself." *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 365 (1986) (quoting *Dimension Fin. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 744 F.2d 1402, 1409 (10th Cir. 1984)) (invalidating Federal Reserve rule that extended Bank Holding Company Act treatment to nonbanks). Notwithstanding the *Chevron* doctrine, the Supreme Court has generally been skeptical that Congress delegated to agencies the authority to reshape their missions to such a broad extent. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."). The OCC expressed its desire to "support the nation's economy." JA168. But the OCC's mandate is not to foster economic growth by whatever means it finds convenient; its task is to charter and supervise national *banks*, as Congress conceived them.

Second, the OCC has never engaged in the policy-based exercise of judgment that would be necessary to justify *Chevron* deference, and in

particular, as noted above, the OCC has never explained how its interpretation serves the purposes of the National Bank Act. Ordinarily, "we ask whether the [agency] has reasonably explained how the . . . interpretation it chose is 'rationally related to the goals of' the statute." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (citation omitted). The OCC's failure to even attempt the explanation during its policy processes makes its interpretation ineligible for *Chevron* deference. "[W]e . . . will not defer to an agency interpretation if it is not supported by a reasoned explanation." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 520-21 (2d Cir. 2017) (citing *Vill. of Barrington*, 636 F.3d at 660).

In its recent policy announcement, the OCC only relied on its existing regulation stating that it can issue a charter to a company that engages in any one of three activities that the regulation labels the "core" activities. JA168 (citing 12 C.F.R. § 5.20(e)). The OCC did not purport to evaluate whether that view is sensible; it asserted that its regulation states the scope of its authority. *Id.* In the rulemaking that adopted that regulation, the OCC also did not engage in a policy-based interpretation of a perceived ambiguity in the statute. The OCC simply stated, without analysis or explanation, that

the statute does permit a charter to a company doing any of the three activities, and it noted that the three-activity list is "based on 12 U.S.C. 36." 68 Fed. Reg. 70,122, 70,126 (Dec. 17, 2003) (OCC final rule). So far as the rule reveals, the OCC seems to have believed the statute unambiguously yields the interpretation it came to.

For any agency to deserve *Chevron* deference for an interpretation, "it is incumbent upon the agency not to rest simply on its parsing of the statutory language." *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 797 (D.C. Cir. 2004). "It must bring its experience and expertise to bear in light of competing interests at stake." *Id.* at 798. There surely are competing interests, as this litigation reveals. Having failed to consider them when it adopted regulation 5.20(e), and again when it issued its new policy, the OCC cannot claim *Chevron* deference for an interpretation it has assumed flows inexorably from the statute.

Third, to the extent the OCC did consider policy reasons in adopting its new policy, its primary justification was a desire to achieve preemption—a goal that further disqualifies its interpretation for *Chevron* deference.

That preemption was the motivation for the OCC's policy can hardly be in doubt. The OCC said the benefit of the national bank charter is that it

"provides a framework of uniform standards" that would "help promote consistency in the application of laws and regulations across the country." JA168. That is an unmistakable reference to the fact that national banks are empowered to carry out many of their activities without state-by-state regulation. *See Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996).

Courts "have not deferred to an agency's *conclusion* that state law is pre-empted." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009); *see also Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31, 40 (2d Cir. 2013) ("We do not defer to an agency's legal conclusion regarding preemption.").[28] Yet that is, in essence, the sort of conclusion that the OCC has declared. The OCC did not decide on its policy in order to serve the purposes of the National Bank Act, to which it made no reference. It announced that it can and will charter nonbanks so that they can enjoy preemption of state regulation of their activities. The premise that state law will be preempted is not entitled to *Chevron* deference,

[28] On occasion, Congress has explicitly delegated to an agency the authority to decide questions about preemption. *See Wyeth*, 555 U.S. at 576 (citing as an example 21 U.S.C. § 360k, which "authoriz[es] the FDA to determine the scope of the Medical Devices Amendments' pre-emption clause"). The OCC has in the past assumed it has that authority. *See, e.g.*, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004) ("The OCC has ample authority to provide, by regulation, that types of state laws are not applicable to national banks."). Regarding the authorities (chiefly 12 U.S.C. § 93a) on which the OCC has rested that assumption, *Wyeth* forecloses it.

and surely neither is an interpretation based almost entirely on that premise.

CONCLUSION

For these reasons, *amicus curiae* the Independent Community Bankers of America urges the Court to affirm the decision of the district court that the OCC's policy of granting national bank charters to nonbanks is contrary to law.

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