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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, **v.** **THE FEDERAL DEPOSIT INSURANCE CORPORATION,** Defendant.	Case No. 4:20-CV-05860-JSW **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Date: August 6, 2021 Time: 9:00 a.m. Courtroom: Oakland Courthouse, Courtroom 5 – 2nd Floor Judge: The Honorable Jeffrey S. White Action Filed: August 20, 2020

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SUMMARY OF ARGUMENT

The provision at issue ("Provision") impermissibly expands preemption of state interest-rate caps, which 12 U.S.C. § 1831d grants exclusively to FDIC Banks, to buyers of FDIC Bank loans. 12 C.F.R. § 331.4(e); 12 U.S.C. § 1831d. Contrary to the FDIC's claims, the Provision exceeds statutory authority, and the FDIC acted arbitrarily and capriciously in its rulemaking. The Provision must therefore be set aside as unlawful. 5 U.S.C. § 706(2).

The statute is unambiguous and does not permit the FDIC's interpretation, which is not entitled to any deference. Because Congress made clear through the statutory text, purpose, and context that § 1831d preemption applies only to FDIC Banks, the inquiry ends there; the FDIC's interpretation is not entitled to deference, either on its position that the statute is ambiguous or its purported clarification. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (no agency deference if Congress was clear); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005) (§ 1831d "appl[ies] only to . . . state chartered banks, not to non-bank [loan] purchasers"); *compare* 12 U.S.C. § 1831d *with* 12 U.S.C. § 1735f-7a (§ 1831d preemption applies to FDIC Banks, whereas § 1735f-7a preemption applies to loans). The FDIC attempts to manufacture ambiguity where there is none by injecting and interpreting terms not in § 1831d, adopting a strained reading of the statute that ignores the rules of grammar and common sense, conflating the state-law-created power to make and transfer loans with the purported power to transfer preemption privileges, and relying on inapplicable contract-law assignability principles. These efforts fail. *See, e.g.*, *Nat'l Enterprises, Inc. v. Smith*, 114 F.3d 561, 564 (6th Cir. 1997) (statutory right granted specifically to entity cannot be transferred to assignee). The FDIC also lacks authority to issue the Provision because it unlawfully regulates the conduct of non-banks.

Even if the Court finds § 1831d to be ambiguous, the Provision impermissibly expands the scope of preemption and is not a reasonable interpretation of the statute.

The FDIC also acted arbitrarily and capriciously in its decision-making because it failed to consider important aspects of the problem, provide the minimal level of analysis required, or acknowledge its departure from its previous policy against rent-a-bank schemes. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

INTRODUCTION

The Non-bank Interest Provision ("Provision") substantively and procedurally violates the Administrative Procedure Act ("APA") and thus must be set aside. The plain language of 12 U.S.C. § 1831d unambiguously preempts state interest-rate caps as to federally insured, state-chartered banks and insured branches of foreign banks ("FDIC Banks"). The Provision impermissibly expands the scope of § 1831d[1] to preempt state rate caps as to non-bank loan buyers of FDIC Bank loans. The FDIC also attempts to impermissibly expand its regulatory power because the Provision dictates the interest rates that can be charged by non-banks, which the FDIC does not have the authority to regulate.

The FDIC, however, claims that § 1831d is ambiguous and that its purported clarification through the Provision is entitled to this Court's deference. The Court, and not the agency, is the arbiter of whether the statute is ambiguous. The statute is not. To adopt the FDIC's view would require the Court to read powers into the statute that Congress did not grant to FDIC Banks, to ignore the rules of grammar and common sense, and to turn a blind eye to § 1831d's place in the statutory scheme that Congress enacted.

The FDIC claims, among other things, to interpret § 1831d as implicitly including the power to transfer loans, and that this implicit power to transfer loans further includes the implicit right to assign § 1831d's interest-rate protections to loan buyers. Congress, however, did not grant FDIC Banks the power to make or transfer loans in §1831d or anywhere else, because these powers come from state, not federal, law. The FDIC further attempts to bolster its argument that § 1831d's interest-rate preemption rights are assignable by relying on the inapplicable "historical and legal context" of contract law. But even if § 1831d were ambiguous, which it is not, the presumption against preemption applies and the Provision is not a reasonable interpretation of the statute.

Separately, the Provision is arbitrary and capricious because the FDIC, among other things, ignored important aspects of the problem that the Provision purportedly addresses.

Plaintiffs respectfully ask the Court to reject the FDIC's attempted regulatory overreach, to

[1] Statutory citations refer to sections of Title 12 of the current U.S. Code unless otherwise noted.

safeguard the states' historic police power to prohibit usurious interest rates charged by non-banks, and to maintain the separation of powers by giving effect to the intent of Congress rather than the policy preferences of an administrative agency.

ARGUMENT

I. SECTION 1831D UNAMBIGUOUSLY ALLOWS FDIC BANKS—AND ONLY FDIC BANKS—TO CHARGE INTEREST WITHOUT REGARD TO STATE USURY LAW

Section 1831d is plain: it permits FDIC Banks to "take, receive, reserve, and charge" interest on their loans at specified rates, usually the rate allowed by their home state, and preempts other states' rate caps. It does not allow FDIC Banks that sell their loans to also transfer § 1831d's preemption right as part of the sale. This reading of the statute is further supported by § 1831d's express purpose and the statutory context.

A. The Plain Text of § 1831d Makes Clear that § 1831d Preempts State Law as to FDIC Banks Only

To determine a statute's meaning, courts look first to the text itself. If the statutory language is plain, that is the end of the matter. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (quotation marks and citations omitted).

Congress used straightforward language to grant FDIC Banks—and only FDIC Banks, not their loan buyers—the privilege of preemption: "[A] State bank or such insured branch of a foreign bank [*i.e.*, an FDIC Bank] may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made . . . interest at a rate . . . ." 12 U.S.C. § 1831d(a). An FDIC Bank, then, is permitted to "take, receive, reserve, and charge" the permissible interest on "any loan" it holds. An FDIC Bank that sells a loan no longer takes, receives, reserves, or charges interest on the loan; it is the loan's new owner that does those things.

In their opening brief, Plaintiffs cite several cases for the proposition that § 1831d applies only to FDIC Banks, not to non-bank loan buyers. Plaintiffs' Motion for Summary Judgment

[Dkt. No. 47] ("Pls.' Br.") at 9-10. The FDIC claims that these cases are inapt because the banks did not "validly originate" the loan. *See* Defendant's Motion for Summary Judgment [Dkt. No. 56] ("FDIC Br.") at 16. This is beside the point: § 1831d's continuing application does not depend on whether the FDIC Bank "validly originated" a loan, but whether the FDIC Bank continues to hold an interest in the loan. *E.g.*, *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005) (§ 1831d "appl[ies] only to . . . state chartered banks, not to non-bank [loan] purchasers"); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1200 (N.D. Cal. 2012) (denying non-bank buyer's motion to dismiss on preemption grounds because "it is not clear whether or to what extent [the bank] retained any significant stake in or control over [the] loan"); *Madden v. Midland Funding, LLC*, 786 F.3d 246, 252 (2d Cir. 2015) (extending preemption to non-bank buyer "would create an end-run around usury laws for [non-bank] entities that are not acting on behalf of a . . . bank"). Even if the FDIC Bank "validly originates" the loan, these cases confirm that once a non-bank buys that loan and receives or charges interest on its own behalf, § 1831d no longer applies.

B. The Express Purpose of § 1831d Supports the Conclusion that § 1831d Applies Only to FDIC Banks

Section 1831d's purpose, as codified in the statute, is to "prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates" to achieve parity with national banks. 12 U.S.C. § 1831d(a); *Gavey Props./762 v. First Fed. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) ("Without federal legislation, [state-chartered] institutions were being battered by competition from national banks that were allowed to charge higher rates of interest by federal law."). That purpose is effectuated by allowing FDIC Banks to charge and receive interest at specified rates on the loans they hold, just as national banks are allowed to do. It is not served by extending § 1831d's interest-rate privilege to non-bank buyers of FDIC Bank loans.[2]

[2] National banks' statutory preemption privileges do not extend to non-bank loan buyers. Three of the plaintiff States in this action have also challenged the Office of the Comptroller of the Currency's ("OCC") parallel rule purporting to extend preemption to non-bank buyers of national-bank loans (12 C.F.R. §§ 7.4001(e), 160.110(d)), which violates the APA for the same

(continued…)

Ignoring § 1831d's codified purpose, the FDIC asserts that the statute's "plain purpose" is to provide FDIC Banks "a meaningful right" to originate loans in excess of state usury limits, and that banks' § 1831d preemption right is only "meaningful" if they can transfer it to loan buyers because, otherwise, "loans sales to the 'secondary market' would be 'uneconomic.'" FDIC Br. at 11. The FDIC wrongly asks this Court to disregard Congress's stated purpose (to prevent interest-rate discrimination) and instead to adopt the FDIC's interpretation of Congress's purpose (to increase loans' resale value and liquidity). "The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986) (rejecting the Federal Reserve's effort to use statute's purported "plain purpose" to justify a banking regulation defining the statutory term "banks"); *see also Bob Jones Univ. v. U.S.*, 461 U.S. 574, 586-87 (1983) (cited in FDIC Br. at 11) (statute's purpose to grant tax exemption just to charitable organizations "underl[ies] all relevant parts of the Code" and "appears explicitly" in statute with "virtually identical" list that Congress intended to have same meaning as in statute at issue). In evaluating the purpose of a statute, courts should be "reluctant to inject into the statute a purpose not codified within it." *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1034 (9th Cir. 2010). Additionally, an agency cannot invoke the purported "plain purpose" of legislation "at the expense of the terms of the statute itself": doing so "takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Dimension Fin.*, 474 U.S. at 374. The FDIC fails to provide support for its authority to promulgate a regulation in service of its own views on § 1831d's purpose.

Congress did indicate that facilitating loan sales to the secondary market was one purpose of the Depository Institutions Deregulation and Monetary Control Act ("DIDA"), the legislation that enacted § 1831d. Congress's concern, however, was specific to "the functioning of a national secondary market *in mortgage lending*." S. Rep. No. 96-368, at 19 (1979), *reprinted in* 1980

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reasons, among others, as does the FDIC's Provision. *California v. Office of the Comptroller of the Currency*, No. 4:20-cv-05200 (N.D. Cal.) (filed July 29, 2020). Moreover, unlike national banks, state-chartered FDIC Banks derive their power to make and transfer loans from state law, not federal law. *See infra* Section II.C.2(a).

U.S.C.C.A.N. 236, 255 (emphasis added). Congress achieved this purpose through another DIDA provision, § 1735f-7a, in which, unlike in § 1831d, Congress preempted state rate caps for certain mortgage loans, regardless of who holds those loans or if they are transferred. *See Brown v. Investors Mortg. Co.*, 121 F.3d 472, 475 (9th Cir. 1997) (noting that Congress intended to "promote home ownership by increasing the flow of available mortgage money" and that § 1735f-7a was to be "interpreted narrowly in light of federalism concerns"); *see* Pls.' Br. at 14.

C. The Statutory Context of § 1831d Supports the Conclusion that § 1831d Applies Only to FDIC Banks

In construing a statute, courts may look to statutory context. *E.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2114-15 (2018) (looking to neighboring statutory provisions in determining that statute is unambiguous); *Barnhart*, 534 U.S. at 452-54 (comparing provision to simultaneously enacted provisions in determining that statute is unambiguous). Here, § 1831d's statutory context confirms that Congress intended to limit preemption to FDIC Banks.

1. Section 1831d(b)

The fact that Congress provided remedies for § 1831d violations only as to FDIC Banks, when taken together with § 1831d's plain language, makes clear that § 1831d applies only to FDIC Banks. *See* Pls.' Br. at 21. Section 1831d(b) provides that persons who paid interest greater than that allowed by § 1831d "may recover . . . an amount equal to twice the amount of the interest paid from such State bank or such insured branch of a foreign bank taking, receiving, reserving, or charging such interest." 12 U.S.C. § 1831d(b). FDIC Banks can only receive interest on a loan while they hold the loan. If an FDIC Bank originates a loan with an interest rate that violates § 1831d and sells that loan to a non-bank that continues to charge that rate, it is unclear what, if any, remedies apply. The FDIC does not address § 1831d(b) in its brief, and its comment that state-law remedies apply to rent-a-bank schemes, FDIC Br. at 23, is not responsive. By allowing non-bank loan buyers to enjoy § 1831d preemption without facing liability for violating the statute, the Provision creates a potential loophole that Congress could not have intended.

2. Section 1735f-7a

The contrasting language Congress used in § 1735f-7a, which was simultaneously enacted as part of the same legislation as § 1831d, also supports the conclusion that Congress limited § 1831d preemption to FDIC Banks. In § 1831d, Congress provided that preemption applies to certain *entities*, which it expressly gave the right to "take, receive, reserve, and charge" specified interest rates. In contrast, Congress provided in § 1735f-7a that preemption applies to certain mortgage *loans*, using the passive phrase "[state rate caps] which may be charged, taken, received, or reserved shall not apply to any loan," because the focus is on the loan, not the entity charging or taking interest. Pls.' Br. at 13-14.

When Congress uses different language in simultaneously enacted provisions, as it did with §§ 1831d and 1735f-7a, courts construe those provisions differently. "[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" when it uses particular language in one provision, but not another provision, of the same legislation. *Barnhart*, 534 U.S. at 452 (quotation marks and citations omitted); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (the "contrast between the language used" in two simultaneously enacted provisions of the same Act "certainly indicate[s] that Congress intended the two standards to differ").

In *Barnhart*, the Court construed a provision of the Coal Act that allowed beneficiaries to be assigned to signatory operators or other specified entities but that did not specify a signatory operator's successor in interest as one of those entities. 534 U.S. at 450-52. The Court held that the provision "is unambiguous": "The statutory text instructs that the Coal Act *does not permit* the Commissioner to assign beneficiaries to the successor in interest of a signatory operator." *Id.* at 450. It also compared the provision with others in the Coal Act, noting that "[w]here Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act," which were "in direct contrast" to the provision at issue. *Id.* at 452-453. Because the statute "does not contain conflicting provisions or ambiguous language," the Court held that its "inquiry [was] complete" and that it "need not contemplate deferring to the agency's determination." *Id.* at 461-62 (quotation marks and citations omitted).

Applying the Supreme Court's reasoning here, it is presumed that Congress intentionally and purposefully used different language in §§ 1831d and 1735f-7a. The Court "need not contemplate deferring" to the FDIC's determination that they should operate the same. If Congress intended to preempt state usury laws for FDIC Bank loans, "it could have done so clearly and explicitly," *Barnhart*, 534 U.S. at 454, as it did in § 1735f-7a. It did not.

Despite Congress's intentional use of different language in these two statutes, the FDIC argues that they should be interpreted the same. First, the FDIC claims that because § 1735f-7a is commonly understood to apply to transferred loans even though it does not expressly refer to loan transfers, Congress "understood that usury exemptions implicitly continue to apply after the loan's transfer." FDIC Br. at 13. To the contrary, Congress indicated otherwise in § 1735f-7a by expressly exempting the loans themselves from state law. 12 U.S.C. § 1735f-7a. Second, contrary to the FDIC's claim that both statutes apply to "loans made by specified entities," FDIC Br. at 13, the structure of § 1735f-7a's text makes clear that its preemption applies to certain *loans* (which, Plaintiffs agree, are made by specified entities), whereas the structure of § 1831d's text makes clear that its preemption applies to *FDIC Banks* (with respect to loans they make). Third, the FDIC cites cases standing for the unremarkable proposition that silence does not necessarily signal a prohibition on agency action. FDIC Br. at 13-14. Section 1831d, though, is not silent; it specifically preempts state law for FDIC Banks, in contrast with § 1735f-7a's preemption for loans. Finally, the FDIC claims that Congress implied that preemption applies after transfer because it was "commonly understood" that the right to make loans includes the right to transfer them. FDIC Br. at 14. The FDIC misreads the case upon which it relies, *Planters' Bank of Miss. v. Sharp*, 47 U.S. 301 (1848), and confuses the right to transfer loans with the right to transfer the statutory privilege of preemption. *See infra* Section II.A at 9, Section II.C.2(b).

II. BECAUSE § 1831D IS UNAMBIGUOUS, THE FDIC'S INTERPRETATION IS NOT ENTITLED TO THIS COURT'S DEFERENCE

The meaning of § 1831d is clear—it preempts state interest-rate caps only while the FDIC Banks "take, receive, reserve, and charge" interest on the loans—so that is the end of the inquiry, and the FDIC is not entitled to deference.[3] "If the intent of Congress is clear, that is the end of the

[3] Courts have held that "*Chevron* deference does not apply to preemption decisions by federal agencies" unless Congress has expressly authorized the agency to preempt state law directly. *E.g.*, (continued…)

matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). "[T]he Court need not resort to *Chevron* deference . . . for Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira*, 138 S. Ct. at 2113; *see also SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless . . . we find ourselves unable to discern Congress's meaning."); *Medina Tovar v. Zuchowski*, 982 F.3d 631, 634 (9th Cir. 2020) ("To maintain the proper separation of powers between Congress and the executive branch, we must 'exhaust all the traditional tools of construction' before we 'wave the ambiguity flag.'") (citation omitted).

The text of § 1831d itself answers the interpretive question at hand: only FDIC Banks—not their loan buyers or other entities—may charge interest at the rates permitted by § 1831d. The express statutory purpose and statutory context support this conclusion. The FDIC is not due any deference on its view that the statute is ambiguous. *Massachusetts*, 93 F.3d at 892 ("the judiciary, not the agency, 'is the final authority on issues of statutory construction'") (quoting *Chevron*, 467 U.S. at 843 n.9).[4]

Despite the plain statutory text and § 1831d's codified purpose and context, the FDIC attempts to create ambiguity in § 1831d where there is none by purporting to interpret terms that

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Grosso v. Surface Transportation Bd., 804 F.3d 110, 116-17 (1st Cir. 2015) (declining to apply *Chevron* deference to agency's determination that statutory term "transportation" included activities at issue, where statute preempts state law governing such "transportation"); *see Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (no deference is given to agency's conclusion that state law is preempted; agencies have "no special authority to pronounce on pre-emption absent delegation by Congress"). The Provision is a preemption decision because it preempts state usury laws as to non-bank buyers of FDIC Bank loans, and the FDIC does not, and cannot, identify an express statutory delegation of preemption authority. In any event, as in *Massachusetts v. U.S. Department of Transportation*, this Court "need not determine whether an agency's interpretation of a statute on the preemption question is subject to *Chevron* analysis in order to decide this case, as the agency's determination here cannot be upheld with or without deference." 93 F.3d 890, 892 (D.C. Cir. 1996).

[4] The FDIC's cited cases, in which the Court deferred to the OCC's interpretation of § 85, § 1831d's National Bank Act ("NBA") counterpart for national banks, are inapt. FDIC Br. at 4-5. In those cases, the Court first determined the terms at issue were ambiguous. Furthermore, those cases were decided before Congress stripped the OCC of *Chevron* deference regarding NBA rulemaking that preempts state consumer financial laws and so have no ongoing application.

Congress did not include in the statute, contorting the grammatical structure of Congress's language to its breaking point, and purporting to fill gaps that do not exist.

A. The FDIC Purports to Construe Terms Not in § 1831d

The FDIC claims that "the banks' power to make loans under § 1831d" implies the power to transfer loans, and that the implied power to transfer loans further implies the power to assign § 1831d's interest-rate protections along with those loans. For example, the FDIC claims that it is interpreting "the banks' power to make loans under § 1831d" and that "the statutory terms granting banks the power to make loans charging certain interest rates are best understood as necessarily including the power to transfer enforceable rights in those loans." FDIC Br. at 3, 19; *see also id.* at 17 (claiming to construe "a bank's statutory authority to make loans"). Congress, however, did not grant FDIC Banks the power to make loans in § 1831d or anywhere else; as the FDIC acknowledges, state law gives FDIC Banks that power. *See infra* Section II.C.2(a). The FDIC reads into § 1831d a power to make loans that does not exist in the statute, claiming that the term "to make loans" is ambiguous and then purporting to clarify that term, insisting on this Court's deference to the meaning it comes up with. This far exceeds the FDIC's, or any agency's, authority.

Because the FDIC purports to interpret a term that Congress did not include in § 1831d—because that term concerns a power granted by state law—its reliance on *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108 (1919), and *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), are inapposite. Those cases concerned the interpretation of specific statutory banking terms that Congress used without defining. In *Evans*, the Court read the term "discounting" in a federal statute to include the power to reserve interest in advance; in *Smiley*, it read the term "interest" in a federal statute to include late fees. *Evans*, 251 U.S. at 108-09; *Smiley*, 517 U.S. at 737, 744-45. Here, by contrast, the FDIC is not seeking to clarify the definition of any statutory term; instead, it is asking the Court to read a new concept (the power to make loans) into § 1831d, to determine that the concept is ambiguous and could include the power to transfer loans, and to defer to the FDIC's interpretation that this could include the power to transfer the statutory right of preemption. In short, the FDIC is rewriting and extending the scope of § 1831d.

The FDIC's reliance on *Planters* is also misplaced. The FDIC claims that the Supreme Court's decision in *Planters* marked a turning point after which Congress understood that the power to make loans implied the power to transfer loans. FDIC Br. at 11. Here, § 1831d does not grant FDIC Banks the power to make loans. Additionally, in *Planters*—which did not interpret federal law but rather banks' state-law powers to make and transfer notes—the Court found an implicit right to transfer notes based not on the bank's right to make notes but rather on other provisions of the bank's state charter, such as the provision allowing it to "grant, demise, alien, or dispose of" notes. *Planters*, 47 U.S. at 302, 320-22.

Importantly, neither *Planters* nor *Evans* addresses the transferability of loans in general or the transferability of the right to enforce a particular interest rate on a loan. Like *Nichols v. Fearson*, 32 U.S. 103 (1833), and *Gaither v. Farmers & Mechs. Bank*, 26 U.S. 37 (1828), the antebellum cases that proponents of the so-called "valid-when-made" theory improperly rely upon, these cases concern a specific type of debt instrument—discounted and negotiable notes—that are no longer common today. *See First Nat. Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) (declining to extend *Evans*, which involved discounting short-term commercial paper, to the modern practice of lending on installment paper because doing so would "extend [*Evans*] to a materially different factual situation and into a new economic setting"); Administrative Record ("AR")[5] [Dkt. No. 44] at 396-97 (noting that the sale of discounted notes, a practice widespread in the nineteenth century, "does not give rise to the evasion of state usury laws like the 'valid-when-made doctrine [does]"); Pls.' Br. at 12 n.5.

Even if § 1831d could be read as implicitly incorporating the power to make loans, and even if the FDIC could reasonably interpret the power to make loans as including an implicit power to transfer loans, that power to transfer loans is distinct from, and does not imply, a power to transfer the privilege of preemption. The contract-law principle of assignability does not apply to statutory privileges granted to specific entities; therefore, the existence of the contract-law principle of assignability does not render § 1831d ambiguous on whether its statutory privilege is

[5] Relevant pages of the Administrative Record are identified throughout by the significant digits at the end of each Bates stamp. For example, "AR 397" refers to FDIC-AR-00397.

assignable. *See infra* Section II.C.2(b). Furthermore, the power to transfer loans is a creature of state law that the FDIC has no authority to interpret. *See infra* Section II.C.2(a).

B. The FDIC Contorts § 1831d's Plain Text

The FDIC argues that § 1831d is ambiguous because other interpretations of it are "possible." FDIC Br. at 8. Because § 1831d is unambiguous and not in need of the FDIC's interpretation, and because the FDIC's alternatives require contortion of the statute, the Court need not credit these implausible alternatives. When construing a statute, courts assume "that the ordinary meaning of [the statute's] language accurately expresses the legislative purpose." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (quotation marks and citation omitted). Where, as here, the statute is plain, an implausible alternative cannot create ambiguity. *See Barnhart*, 534 U.S. at 450 (statute allowing agency to assign beneficiaries to signatory operators and other specified entities unambiguously "does not permit" agency to assign beneficiaries to signatory operator's successor in interest). *Regions Hospital v. Shalala*, on which the FDIC relies, is consistent: a statute is ambiguous only if it can "plausibly be read to mean" different things. 522 U.S. 448, 457 (1998); *accord id.* at 457-58 (statutory term "recognized as reasonable" was ambiguous because parties' interpretations were both plausible: term could refer either to agency's past or future determination of reasonableness).

The FDIC's interpretation of § 1831d as applying to "any loan" made by an FDIC Bank, regardless of who holds that loan, requires the Court to ignore the rules of grammar and common sense. The FDIC's claim that § 1831d "plainly applies to certain loans (namely, to loans made by FDIC banks)," FDIC Br. at 8, is based on a misreading of the statutory text's subject (the bank) and object (the loan). Section 1831d allows FDIC Banks (the subject) to charge the permissible interest rates "on any loan" (the object). Loans do not "take, receive, reserve and charge interest"; banks do.[6] This is not a drafting error on FDIC's part; there is no linguistically sound, common-sense reading of the statute's text that supports the FDIC's position. *See United States v. Ron Pair*

[6] The FDIC's defense of its construction is itself grammatically incorrect: it makes no sense to say that "a bank's statutory authority to make *loans that 'take, receive, reserve, and charge' interest* at the home-state [rate] implies the authority to transfer those loans," FDIC Br. at 17 (emphasis added), because loans do not "take, receive, reserve, and charge" interest. Also, as discussed in Section II.A, there is no "statutory authority to make loans" in § 1831d.

Enterprises, Inc., 489 U.S. 235, 241 (1989) (looking to "natural reading" of statutory phrase and "grammatical structure of the statute"). Moreover, had Congress intended to apply § 1831d to loans made by FDIC Banks, rather than to FDIC Banks themselves, it could have simply stated as much—as it did in § 1735f-7a. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000) (where statute "authorizes specific action and designates a particular party empowered to take it," only those parties may act; Congress "could easily have used [a different] formulation" if it had intended otherwise).

The FDIC also argues that § 1831d is ambiguous as to whether preemption may be transferred because it does not expressly use the term "privilege," "exemption," or a "non-transferable" right. FDIC Br. at 8. But Congress was not required to use the FDIC's preferred words for the Court to be able to discern Congress's meaning. A statute does not need to contain particular words to create a privilege. *See, e.g.*, *Exch. Nat'l Bank of Chi. v. Abramson*, 45 F.R.D. 97, 105 (D. Minn. 1968) (explaining that it is "well established" that the federal law in that case, which used the permissive phrase "may be" but not the term "privilege," "creates a personal privilege for national banks" to choose venue). The statute makes clear that FDIC Banks may charge interest at specified rates "notwithstanding" any state law, which "is hereby preempted." 12 U.S.C. § 1831d(a). The FDIC's rulemaking acknowledges as much. AR 210-11.

The FDIC further argues that even if Congress had used the term "non-transferable privilege," the statute would still be ambiguous. FDIC Br. at 9-10. The FDIC's argument appears to rest on the erroneous premise that to be clear, a statute must foreclose every possible interpretation, however unnatural. That is not the standard. The Court must be able to discern the intent of Congress, and it can do so from the plain language of § 1831d.

C. Section 1831d Does Not Contain Gaps for the FDIC To Fill

The FDIC also attempts to create the appearance of ambiguity by conflating two issues: (1) what happens to the validity of a loan's interest rate after subsequent changes in state usury law, and (2) what happens to the validity of a loan's interest rate after an FDIC Bank transfers the loan. FDIC Br. at 7-10. The FDIC's framing of these issues as a question about the "point in time the validity of the interest rates should be determined" is an attempt to create gaps that do not actually exist: changes in state law generally are not retroactive, and as discussed above, § 1831d itself states that it applies to FDIC Banks and thus does not apply after FDIC Banks transfer their loans. Put simply, § 1831d provides that an FDIC Bank may charge interest as allowed by the law of its home state (or at other specified rates) and disregard the usury law of its host state; it does nothing more. Contrary to the FDIC's argument, the Provision does not fill any "gaps"; rather, it impermissibly expands the scope of § 1831d, intruding into areas regulated by state law.

As discussed in Plaintiffs' opening brief, all statutes necessarily speak to certain issues but remain silent on others. Each statute, too, is necessarily limited in scope; an agency is not authorized to promulgate rules extending the statute's reach under the guise of filling gaps. A "statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute." *Lin-Zheng v. Att'y. Gen.*, 557 F.3d 147, 156 (3d Cir. 2009) (quotation marks and citation omitted). In *Lin-Zheng*, for example, the court held that a statute granting refugee status to a "person who has been forced to . . . undergo" forced sterilization was not ambiguous, even though it was silent on whether spouses were eligible. *Id.* at 155-57 (also stating that Congress could have drafted different language if it had intended otherwise). The court held that the agency "'put aside' the very statutory text that should have controlled its inquiry into congressional intent" and erred in concluding that the statute's omission of spouses was not determinative. *Id.* at 157. Just because a statute does not "explicitly preclude[]" an interpretation does not mean there is a statutory gap: "That approach would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations. Nothing in the Supreme Court's *Chevron* opinion suggests this result, which is inconsistent with traditional modes of statutory interpretation." *Prestol Espinal v. Att'y Gen.*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting attempt to "manufacture[] an ambiguity from Congress' failure to specifically foreclose each exception that could possibly be conjured or imagined"); *see also Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009) ("the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of [the statute]").

In the context of preemption, where a federal statute grants an agency the authority to displace state law on certain issues but is silent on others, courts regularly interpret this silence to mean that Congress did not intend for the agency to regulate those issues and, instead, intended to leave regulation to the states. *See, e.g.*, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted"); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201, 1220 (9th Cir. 2020) (Congress's 'certain awareness of the prevalence of state' law, coupled with its 'silence on the issue,' 'is powerful evidence that Congress did not intend' to preempt [state] laws.") (quoting *Wyeth v. Levine*, 555 U.S. 555, 575 (2009)). That is, when a statute expressly preempts state law in some areas but is silent on others, Congress has unambiguously left the areas not addressed to state law, and so outside the boundaries of the agency's regulatory authority. As the FDIC's cited authority states, "*Chevron* and later cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency . . . ." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012).[7]

1. There Is No Timing Gap

The first purported "gap," concerning when the validity of an interest rate is determined, supposedly clarifies an ambiguity about situations in which the home state's usury law changes after a loan is made. FDIC Br. at 7. Although Plaintiffs do not challenge the FDIC's rule as it pertains to changes in state law so long as the FDIC Bank continues to hold the loan, there is no ambiguity to clarify: changes in state law generally do not retroactively alter contractual obligations. *See, e.g.*, *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"); *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997), *opinion amended on denial of reh'g*, 125 F.3d 1281 (9th Cir. 1997) ("Cases

[7] The FDIC selectively quotes *Home Concrete* for the proposition that statutory silence means that Congress has "likely delegate[ed] gap-filling power to the agency." FDIC Br. at 7. But *Home Concrete* makes clear that there must be more than mere silence to conclude that an agency has "gap-filling power." *Home Concrete*, 566 U.S. at 488-90 (following judicial precedent that construed statute's scope based on statutory language, legislative history, and statutory context and concluding that there was no gap for agency to fill).

involving settled contract and property rights, for example, require predictability and stability and are generally inappropriate candidates for statutory retroactivity. Similarly, the courts presumptively should not apply statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." (quotation marks and citations omitted)); *Smith v. Mercer*, 172 S.E.2d 489, 494 (N.C. 1970) ("Ordinarily, an intention to give a statute a retroactive operation will not be inferred." (citation and quotation marks omitted)).

The FDIC fails to show there is any ambiguity as to whether permissibility of interest rates under § 1831d would be affected retroactively by subsequent changes in state usury law. Accordingly, this nonexistent gap is not a valid justification for the Provision allowing FDIC Banks to transfer their preemption rights to non-banks.

2. There Is No Transfer Gap

The FDIC asserts that "§ 1831d is silent with respect to what happens, upon loan transfer, to the validity of the interest-rate terms of loans made under its authority" and that the Provision clarifies that interest rates permissible under § 1831d are not affected by loan transfer. FDIC Br. at 3, 8; 12 C.F.R. § 331.4(e) ("Whether interest on a loan is permissible under [§ 1831d] is determined as of the date the loan was made. Interest on a loan that is permissible under [§ 1831d] shall not be affected by . . . the sale, assignment, or other transfer of the loan . . . ."). The FDIC arrived at this conclusion by purporting to interpret FDIC Banks' "power to make loans under Section 1831d," which is not a power that Congress granted in § 1831d, but which instead comes from state law. But even if the power to transfer loans were implicit in § 1831d (and it is not), it does not imply the power to transfer the statutory privilege of preemption.

a. The FDIC Is Not Authorized To Interpret the State-Law-Created Power To Make or Transfer Loans

The FDIC acknowledges, as it must, that FDIC Banks obtain their powers to make and transfer loans from state law. AR 213 ("State banking laws . . . typically grant State banks the power to sell or transfer loans, and more generally, to engage in banking activities . . . and activities that are 'incidental to banking.'").[8] The FDIC does not contest that its rulemaking authority does not extend to the interpretation of state law. Nor does it contest that it lacks expertise to construe the states' laws and that it is entitled to no deference when it does so. *See* Pls.' Br. at 17-18. The FDIC does not, because it cannot, explain the source of its authority to interpret these state-created powers to make and transfer loans as including the power to transfer the interest rate permitted by § 1831d.

Nevertheless, the FDIC insists that it is interpreting § 1831d, not state law. It argues that, as in *Evans* and *Smiley*, state law supplies the "'maximum permitted interest rate' that banks may charge, not the meaning of terms in the federal statute." FDIC Br. at 16-17. The Court in *Evans* and *Smiley*, however, interpreted banking terms ("discount" and "interest," respectively) that Congress actually used in the relevant federal statutes. *See supra* Section II.A. The FDIC does no such thing here, but rather refers to activities in which FDIC Banks engage, like their state-authorized power to make loans, then vaguely claims that it is interpreting "statutory language." The FDIC's imprecision cannot mask the reality that it is not, in fact, interpreting any part of § 1831d. Moreover, *Evans* and *Smiley* (as well as *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), another case the FDIC cites) involved national banks, which derive their power to engage in banking activities from federal law. 12 U.S.C. § 24(Seventh) (granting national banks "all such incidental powers as shall be necessary to carry on the business of banking"). State banks, however, receive such powers from state, not federal, law. *See, e.g.*, Cal. Fin. Code § 109; 205 Ill. Comp. Stat. Ann. 5/3; N.Y. Banking Law § 96(1); *see also* AR 213.

b. The Power To Transfer Loans Does Not Include the Power To Transfer the Statutory Privilege of Preemption

To bolster its claims that FDIC Banks have the implicit power to transfer loans at interest rates permitted by § 1831d, the FDIC repeatedly invokes the contract-law doctrine of assignment. Relying on the "historical practice and fundamental principles of contract law regarding assignments," along with the absence of the words "non-transferable privilege" or "exemption" in

[8] State law also regulates non-bank lenders, which are required to obtain state licenses and follow state-law restrictions. *See, e.g.*, Cal. Fin. Code §§ 22009, 22100; 815 Ill. Comp. Stat. 122/3-3; N.J. Stat. Ann. § 17:11C-1 *et seq.*

§ 1831d, the FDIC argues that ordinary contract principles apply and that FDIC Banks' right to charge interest at the rate permitted by § 1831d may be transferred with the loan. FDIC Br. at 8-9. While a contractual interest-rate term might be transferred under the principles of contract law, a statutory right—like § 1831d's right to charge that contract rate even if state law does not permit it—cannot be transferred without statutory authorization. Thus, there is no significance to be gleaned from Congress's omission of words like "non-transferrable privilege" and no inferences to be made based on the state of contract law when Congress passed § 1831d.[9]

The Sixth Circuit's opinion in *National Enterprises, Inc. v. Smith* makes clear that statutory rights granted to certain entities may not be sold, transferred, or assigned as part of a contractual assignment, even if the statute at issue does not expressly use the terms "privilege" or "non-transferable." 114 F.3d 561 (6th Cir. 1997). In *Smith*, the defendant-borrower leased a yacht from a bank. *Id.* at 562. The bank subsequently failed, and its assets, including the yacht lease, were taken over by a federal agency, the Resolution Trust Corporation ("RTC"). *Id.* Later, RTC "sold and assigned all of its rights, title and interest in the Lease" to the plaintiff, a private company, and after the defendant failed to make his required monthly payments, the plaintiff filed suit against him in federal court. *Id.* at 562-63. A federal statute gave RTC the right to bring suits in federal court, and the plaintiff claimed that RTC, by assigning the lease and its rights to the plaintiff, had assigned RTC's statutory right to sue in federal court. *Id.* at 563. The court rejected that argument, holding that the statutory right "applies solely to RTC" and that assignment of the lease "could not effectively transfer" that right to the plaintiff. *Id.* at 563, 565. The court, noting that "RTC cannot contractually assign federal jurisdiction to another party absent statutory authorization," stated that "[i]f Congress had wished to extend the right to sue in federal court to the RTC's assignees, it could have explicitly done so in the statutory language." *Id.* at 564. Other courts have similarly held that statutory rights cannot be assigned by contract. *E.g.*, *DaimlerChrysler Servs. N. Am., LLC v. Comm'r of Revenue Servs.*, 875 A.2d 28, 38, 39 (Conn.

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[9] The FDIC invokes *Planters*, *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005), and *Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735 (1979), in support of its assignability arguments. FDIC Br. at 9, 10. These cases are inapposite. *See supra* Section II.A at 9; *see infra* Section II.C.2(b) at 18-19.

2005) (the right to a sales tax credit, which "arises by virtue of a statute," "is not one incident to the contract and assignable on that basis" but rather may be assigned only if that right "is conferred pursuant to statute"; "absent an express indication from the legislature that such a right could be assigned, the plaintiff cannot invoke the tax credit by virtue of its status as an assignee"). Thus, an FDIC Bank may sell or transfer its loans, but it cannot sell or transfer its statutory right to preempt otherwise applicable state law.

Although the FDIC does not expressly rely on the purported "valid-when-made" "doctrine," its explanation for the Provision is essentially identical to it: if a loan's interest rate is "valid" under § 1831d when an FDIC Bank originates the loan, it should remain so—and state usury law should be preempted—even after the bank sells it to a non-bank. AR 844; FDIC Br. at vii, 3, 7, 8. But this "doctrine" is, in fact, a modern invention whose purported antecedents, *Nichols* and *Gaither*, have nothing to do with the transferability of preemption privileges. These cases involved the now-obsolete law of transferable notes and merely held that, if a lender originates a non-usurious loan and then sells the loan at a discount, whether the interest rate is usurious is calculated based on the principal amount borrowed, not based on the price at which the assignee purchased the loan. *See* Pls.'s Br. at 12 n.5; AR 355-56, 390-91, 396-99; Br. of Prof. Adam J. Levitin as *Amicus Curiae* [Dkt. No. 50] at 13-15.

Even the handful of modern cases cited by the FDIC and *amici* that supposedly apply the "valid-when-made" "doctrine" are inapplicable. *Robinson v. Nat'l Collegiate Student Loan Tr. 2006-2*, No. 20-cv-10203, 2021 WL 1293707 (D. Mass. Apr. 7, 2021), and *FDIC v. Lattimore Land Corp*, 656 F.2d 139 (5th Cir. 1981), both concerned national banks, not FDIC Banks, that receive their powers to charge interest from federal, not state, law. Moreover, in *Robinson*, the plaintiffs did not dispute the validity of the OCC's "valid-when-made" rule; thus, the court applied that rule without questioning the legitimacy of the "valid-when-made" concept underlying the rule. 2021 WL 1293707 at *5. In *Lattimore*, the national bank was the assignee, not the assignor, so the transferability of that bank's statutory preemption privileges was not at issue. 656 F.2d at 141. Three other cases that the FDIC and its amici cite—*Galatti v. Alliance Funding Co., Inc.*, 644 N.Y.S.2d 330 (App. Div. 1996); *Olvera*, 431 F.3d at 285; and *Strike*, 92 Cal. App. 3d at

735—do not mention § 1831d or § 85 at all and instead merely address whether state laws exempt certain assignees from those same states' interest-rate caps. Even if these cases suggest that some state laws incorporate aspects of "valid-when-made," they do not provide support for the FDIC's argument that Congress intended to do so in § 1831d.

D. The Provision Unlawfully Regulates the Conduct of Non-banks

The FDIC does not dispute that it lacks authority to regulate non-banks, but argues instead that the Provision only regulates the conduct and rights of FDIC Banks. FDIC Br. at 15-16. But as the FDIC admits, the Provision applies not to FDIC Banks but to "*loans made by [FDIC Banks]* regardless of whether such loans are held by the bank to maturity, or are 'subsequently assigned to another bank or to a non-bank.'" *Id.* at 15 (emphasis added). The Provision has no direct effect on the permissible actions of FDIC Banks, since § 1831d already preempts state rate caps as applied to FDIC Banks and, as the FDIC concedes, banks' power to sell or transfer loans is granted by state law, not federal law. AR 213. That is, when a loan originated by an FDIC Bank is "held by the bank to maturity," or is "subsequently assigned to another bank," FDIC Br. at 15, § 1831d already applies to preempt state rate caps. As such, the only application of the Provision is where a loan originated by an FDIC Bank is "subsequently assigned . . . to a non-bank." *Id.* In other words, *only* the conduct of non-banks is directly governed.

The FDIC claims the Provision has only "indirect effects" on non-banks, which "do not place the rule outside the agency's authority." FDIC Br. at 16 (citing *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260 (2016)). In *FERC*, the Court made clear that the agency, which had statutory authority to regulate wholesale but not retail electricity sales, could not "take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates" because regulation of retail sales "is a job for the States alone." *FERC*, 577 U.S. at 279-80. The agency's rule, which required wholesale market operators to make certain payments at certain rates, directly regulated the wholesale market; even if it had indirect effects on the retail market, the rule "addresse[d]—and addresse[d] only—transactions occurring on the wholesale market." *Id.* at 265, 282. Here, in contrast, the Provision applies only upon an FDIC Bank's "sale, assignment, or other transfer of the loan." 12 C.F.R. § 331.4(e). By extending § 1831d preemption to non-bank loan buyers, the FDIC governs the rate those non-banks can charge, which "is a job for the States alone."

E. The Court Need Not Consider *Chevron*'s Second Step, But If It Does, the FDIC Has Not Construed the Statute in a Permissible Way

As discussed above, § 1831d unambiguously limits state rate cap preemption to FDIC Banks; thus, the Provision impermissibly contradicts the statute. However, even if § 1831d were ambiguous and *Chevron* step two is warranted, the Provision is unlawful because it is an unreasonable interpretation of § 1831d.

In *Chevron* step two, courts determine whether an agency reasonably interpreted an ambiguous statute. Courts proceed to *Chevron*'s second step "[i]f, but only if, the statute is ambiguous after using ordinary tools of construction." *Medina Tovar*, 982 F.3d at 635. Further, "[b]ecause the range of permissible interpretations of a statute is limited by the extent of its ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency's action be held unreasonable." *Massachusetts*, 93 F.3d at 893. Courts should also apply traditional presumptions—including the presumption against preemption of state laws in areas of traditional state regulations—and other canons of construction in determining whether an agency's interpretation is reasonable, since those canons constrain the number of reasonable ways a statutory ambiguity may be interpreted. *Id.* at 893-94.[10]

Even if the Court finds § 1831d to be ambiguous, the FDIC's expansion of preemption to non-banks is not a permissible interpretation of it. As the *Massachusetts* court held, "[i]n light of the powerful and well-established presumption against extending a preemption statute to matters not clearly addressed in the statute in areas of traditional state control, [the court] cannot credit an interpretation of an explicit preemption provision" that "may sweepingly preclude state rules" in

[10] The FDIC argues that Plaintiffs' arbitrary and capricious claim, *see* Pls.' Br. at 18-24, should be analyzed under the same standard as *Chevron* step two. FDIC Br. at 21 ("Because the FDIC's interpretation is reasonable under *Chevron* Step Two, it is not arbitrary and capricious."). Plaintiffs maintain the two claims are separate and should be analyzed separately. *See infra* Section III.A. If the Court considers the two together, however, Plaintiffs' arguments that the Provision is arbitrary and capricious support the conclusion that the Provision is not a reasonable interpretation of § 1831d. *See* Pls.' Br. at 18-24.

those areas of traditional state control. *Massachusetts*, 93 F.3d at 896. Usury law, which protects consumers from predatory loans, is an area of traditional state control and so the presumption against extending preemption applies. *See* Pls.' Br. at 16. The FDIC's interpretation of § 1831d would eviscerate state rate caps and usher in increased predatory lending "rent-a-bank" schemes.

Although the FDIC claims, citing *Smiley*, that the presumption against preemption should not apply because the provision purportedly interprets the substantive meaning of § 1831d, FDIC Br. at 18, these are not mutually exclusive categories: an agency's construction of a statute's "scope and meaning" may preempt state law. The Supreme Court has squarely rejected the claim that rules "merely interpret[ing]" a statute's meaning are not preemptive. *Cuomo*, 557 U.S. at 535 (quotation marks and citation omitted). In *Cuomo*, the Court rejected the argument that the OCC's regulation did not declare the preemptive scope of a statute but merely interpreted the statutory term "visitorial powers." *Id.* It held that the regulation was preemptive because, since the purpose and function of the statute was to allocate authority between state and federal government, any interpretation of it "necessarily declares the pre-emptive scope of the NBA." *Id.* (quotation marks and citation omitted). Likewise, the Provision "necessarily declares" § 1831d's preemptive scope by expanding to loan buyers the statute's exemption from state usury law.

The FDIC's other arguments that its interpretation is reasonable under *Chevron* step two also fail. Although the FDIC claims the Provision carries out the purpose of § 1831d, FDIC Br. at 19-20, Congress's stated purpose in passing the statute does not support the Provision. *See supra* Section I.B. The FDIC's claims regarding the historical and legal context of § 1831d's terms and the "well-established principles of contract law," FDIC Br. at 19-20, rely on inapt case law and conflate contract-law principles with statutory privileges. *See supra* Section II.A at 9, Section II.C.2(b). And far from "buttress[ing]" the FDIC's interpretation, FDIC Br. at 19, § 1735f-7a supports § 1831d's plain text that Congress intended to limit preemption to FDIC Banks. *See supra* Section I.C.2. Finally, *Strike* and *Olvera*, which the FDIC claims support the Provision, FDIC Br. at 20-21, are irrelevant to the issues in this case because they address issues of state law.

The FDIC insists that the Court must uphold its interpretation of § 1831d because the statute's text does not "unambiguously preclude" it. FDIC Br. at 7. This is not the standard. As the court in *Massachusetts* stated in rejecting a similar argument, an agency's interpretation, "while perhaps not conclusively forbidden by the statute itself, could not be deemed reasonable in light of the [statutes'] text and structure *as well as* the traditional presumption against the federal preemption of state rules in areas of traditional state regulation." *Massachusetts*, 93 F.3d at 894 (also stating that "even if we defer, we cannot conclude that a reading of [the statute] that could easily preclude most, if not all, such local regulation . . . reasonably resolves any ambiguity that might lurk in the statute"); *see also Prestol*, 653 F.3d at 220-21 (rejecting agency's argument that court should accept its interpretation where "nothing in the text of the statute explicitly precludes" it, noting that would "necessitat[e] deference to nearly all agency determinations" and "is inconsistent with traditional modes of statutory interpretation.") Here, in light of these factors, the FDIC's construction is not reasonable.

III. THE PROVISION IS ARBITRARY AND CAPRICIOUS

The Court should also set aside the Provision for the independent reason that it is arbitrary and capricious.

A. The Factors Established in *Motor Vehicle Mfrs. Ass'n v. State Farm* Apply

The FDIC argues that the Supreme Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), has no bearing on this case, claiming that the "arbitrary and capriciousness" inquiry is answered under *Chevron* step two and "[a]ccordingly, the Court can stop its inquiry here." FDIC Br. at 21. To the contrary, the Ninth Circuit has made clear that *State Farm* and *Chevron* provide "related but distinct standards": courts apply *State Farm* to "evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process," and *Chevron* to "evaluate whether the conclusion reached at the end of that process—an agency's interpretation of a statutory provision it administers—is reasonable." *Altera Corp. v. IRS*, 926 F.3d 1061, 1075 (9th Cir. 2019); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation"). A litigant, then, may challenge both the reasonableness of a rule under *Chevron* and the "procedural adequacy of the APA process" under *State Farm*, although there are "circumstances when the two analyses may overlap." *Id*. at 1075, 1075 n.5. Here, Plaintiffs challenge the Provision on the grounds that the FDIC's decision-making process was defective and that the conclusion it reached at the end of that process was unreasonable; therefore, the *State Farm* factors apply.[11]

The FDIC also claims that *State Farm* "does not apply to an agency regulation addressing an issue of statutory interpretation for the first time, as here." FDIC Br. at 21. But while "*the reasonableness* of '[a]n agency's initial interpretation of a statutory provision should be evaluated only under the *Chevron* framework,' which looks to whether the interpretation is substantively reasonable, [b]y contrast, '*State Farm* is used to evaluate whether a rule is procedurally defective . . . .'" *Nat. Res. Def. Council, Inc. v. EPA*, 961 F.3d 160, 170 (2d Cir. 2020) (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 521, 523 (2d Cir. 2017), and citing *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 502 n.20 (2002)) (emphasis added). Where both the agency's substantive interpretation and its procedure is challenged, both standards apply, even where an agency interprets a statute for the first time. *Id.* at 170-71 (evaluating procedural challenge to agency's "initial interpretation" of statute under *State Farm* and evaluating substantive reasonableness of interpretation under *Chevron*); *see also In re Vestavia Hills, Ltd. U.S. Small Bus. Admin.*, No. 20-cv-01308, 2021 WL 1165038 at *1-2, 8-9, 13-14 (S.D. Cal. Mar. 26, 2021) (applying *Chevron* analysis to evaluate whether agency, in its first interpretation of the Paycheck Protection Program statute, had statutory authority to issue interim final rules interpreting Paycheck Protection Program statute as excluding businesses in bankruptcy from loan eligibility, and applying *State Farm* analysis to evaluate whether agency's procedure in issuing interim final rules was arbitrary and capricious).

[11] None of the FDIC's cited cases are to the contrary. *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013) (noting only that the analysis is "often" the same and applying the *State Farm* standard to the "arbitrary and capricious" review); *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (conducting "'arbitrary [or] capricious review' under the APA" and declining to apply *Chevron* step two because agency action "is not an interpretation of any statutory language—nor could it be, given that [statute] does not mention deportation cases [subject of agency's action]"); *Harkonen v. DOJ*, 800 F.3d 1143, 1150 (9th Cir. 2015) (applying *Chevron* step two to regulation's definition of "dissemination" to exclude information distributed through press releases).

B. The Provision is Arbitrary and Capricious

As Plaintiffs demonstrated in their opening brief, the Provision is arbitrary and capricious because the FDIC failed to consider important aspects of the problem that the Provision purportedly seeks to address, provide the minimal level of analysis required by the APA, or acknowledge and explain its departure from its previous policy against rent-a-bank schemes. Pls.' Br. at 18-24. The FDIC's responses lack merit.

The FDIC continues to gloss over the Provision's facilitation of rent-a-bank schemes and its impact on the true lender doctrine, as well as how it conflicts with the agency's stated position against rent-a-bank schemes. The FDIC does not contest that the Provision allows non-bank buyers of FDIC Bank loans to charge interest at the same rates that the FDIC Bank charged even if those rates exceed state rate caps. Because rent-a-bank schemes rely on precisely this type of arrangement, the FDIC is wrong to deny that consideration of the Provision's effect on rent-a-bank schemes is an important aspect of the problem. As explained in Plaintiffs' opening brief, the interplay between the true lender doctrine and the Provision also required the FDIC to meaningfully consider the true lender doctrine in its rulemaking; the FDIC did not. Pls.' Br. at 20-21.

The FDIC claims that it is not reversing position and that the Provision does not implicate rent-a-bank schemes or the true lender doctrine because the Provision only applies "if a bank actually made the loan." FDIC Br. at 22. But many rent-a-bank schemes involve loans purportedly originated by banks, *see, e.g.*, AR 903-05, a fact the FDIC ignores. The APA requires agencies to acknowledge concerns raised by "relevant and significant public comments" and to "respond to them in a meaningful way, not blithely dismiss them as 'outside the limited scope of this rulemaking.'" *Catholic Legal Immigr. Network v. Exec. Off. for Immigr. Rev.*, No. 20-cv-03812, 2021 WL 184359, at *12 (D.D.C. Jan. 18, 2021) (citation omitted); *accord PPG Indus., Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980) (granting petition for review of agency action where agency gave only "perfunctory treatment" of comments and "conclusory" statements that it had considered all relevant factors). The FDIC's mere statement that it does not condone rent-a-bank schemes is an insufficient response to comments that the Provision furthers those schemes, and choosing to not address true-lender issues is an insufficient response to comments that the Provision creates significant uncertainty about those issues. The Provision is arbitrary and capricious not because the FDIC arrived at a "policy balance" that Plaintiffs disagree with, *see* FDIC Br. at 23, but because it paid only "lip service acknowledgement of the problems," "fail[ing] to contend meaningfully with the valid concerns and criticisms raised by commenters." *District of Columbia v. U.S. Dep't of Agric.*, 496 F. Supp. 3d 213, 244 (D.D.C. 2020) (invalidating agency rule). While agencies may take incremental steps to address a regulatory problem, the Provision exacerbates rent-a-bank problems and increases uncertainty about true lender issues and the number and complexity of true lender disputes. The Provision constitutes, in substance if not form, a reversal of the FDIC's previous stance, and the FDIC was obligated to acknowledge and explain this inconsistency.

The FDIC argues that it was not required to provide empirical studies, FDIC Br. at 23-24, rebutting an argument that Plaintiffs never made. Plaintiffs argued that the FDIC may not rely on speculation about *Madden*'s negative effects or ignore evidence that contradicts the agency's premise that the inability to transfer preemption of state rate caps constrains bank liquidity. Pls' Br. at 22-23. As this Court has held, a rule may be arbitrary and capricious if the agency "ignore[s] information presented during the notice and comment period that contradict [the agency's] beliefs." *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 540 (N.D. Cal. 2020). The FDIC acknowledged that it "is not aware of any widespread or significant negative effects on credit availability or securitization markets" resulting from the *Madden* decision, and the Record includes evidence that banks' inability to transfer preemption to loan buyers does not hamper bank liquidity." AR 220; Pls.' Br. at 22-23. While the FDIC argues that Plaintiffs did not go into detail about the evidence in the record, Plaintiffs cited examples in the Administrative Record that the FDIC failed to address. Pls' Br. at 22 (citing AR 353-54); *id.* at 22 n.7 (citing AR 856).

CONCLUSION

For the foregoing reasons, the Provision violates the APA and must be held unlawful and set aside. 5 U.S.C. § 706(2)(A), (C).

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