19-4271

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,
Defendants - Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

AMICUS CURIAE BRIEF OF THE CENTER FOR RESPONSIBLE LENDING, NATIONAL CONSUMER LAW CENTER AND NATIONAL COMMUNITY REINVESTMENT COALITION IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Center for Responsible Lending (CRL) is a non-profit organization under 501(c)(3) of the Internal Revenue Code. CRL is a supporting organization of the Center for Community Self-Help, which is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

National Consumer Law Center is a Massachusetts non-profit corporation that operates as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The National Community Reinvestment Coalition (NCRC) is a nonprofit organization operating under Section 501(c)(3) of the Internal Revenue Code. NCRC's mission is to help increase the flow of capital into underserved communities. Its membership comprises more than 600 community reinvestment organizations; community development corporations; local and state government agencies; faith-based institutions; community organizing and civil rights groups; minority-

and women-owned businesses associations and local and social service providers across the nation. NCRC has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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STATEMENT OF IDENTIY AND INTEREST IN CASE[1]

The National Consumer Law Center, the Center for Responsible Lending, and the National Community Reinvestment Coalition are non-profit organizations dedicated to ensuring consumers have access to fair financial products. All the organizations have extensive experience in consumer protection legal issues, including supporting strong state and federal consumer protections. All *amici* advocate for limiting the extent to which the Office of the Comptroller of the Currency's preemption authority under the National Bank Act erodes consumer protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the authority of the Office of the Comptroller of the Currency (OCC) to extend the privileges of national banks to entities that do not accept deposits and are not banks in any traditional or legal sense. The foremost reason why nonbanks will seek out a "special purpose national bank" is to take advantage of preemption of

[1] The parties have consented to the timely filing of this brief. No party's counsel authored this *Amici Curiae* brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

state consumer protection laws, particularly interest rate caps. High-cost predatory lenders are eager to evade state laws that limit them from charging usurious rates.

Allowing the OCC to grant national bank charters to nonbank lenders will eviscerate the fundamental power that states have had since the time of the American Revolution—to cap interest rates to protect their residents from predatory lending. Extending bank preemption here would disregard Congress's decision to curtail preemption rights for nonbanks, to rein in the OCC's power to preempt state consumer protection laws, and to vest federal authority over nonbanks with the Consumer Financial Protection Bureau (CFPB).

Predatory lenders will be eager to obtain a national bank charter so that they can charge rates well over 100% APR that are illegal under most state laws. High-cost lenders, often under the "fintech" label, are already trying to exploit banks' preemptive powers to evade state rate caps by using rent-a-bank schemes. The OCC is not reining in – and in fact has been defending – predatory lenders that launder their loans through banks. A nonbank charter will make usurious lending even more widespread.

The OCC's safety and soundness supervision and enforcement of federal law will not compensate for the elimination of state interest rate caps. Federal law does not generally limit interest rates, and interest rate caps are the simplest and most effective protection against predatory lending. Safety and soundness regulation does not adequately protect consumers. Congress created the CFPB in 2010 precisely because the OCC and other bank regulators had failed to adequately protect consumers.

A nonbank charter will result in fewer constraints on predatory lending than true national banks. Nonbanks will not be subject to the Community Reinvestment Act, which only applies to depository institutions, amounting in a higher risk they will offer products that harm the communities where they do business rather than serving these communities with responsible products.

I. OCC'S AGGRESSIVE EXPANSION OF ITS AUTHORITY THREATENS BOTH THE ROLE OF STATES AND ESSENTIAL CONSUMER PROTECTIONS

A. Rate Caps Have Been Fundamental State Policies Since the Time of the American Revolution

Since our nation's founding, policymakers have recognized the inherent unequal bargaining power and asymmetrical incentives between borrowers and lenders. State interest rate laws are the primary way in which states have protected borrowers from predatory lending.

Courts have long recognized that a state's usury prohibition constitutes a fundamental public policy. *See, e.g.*, *Madden v. Midland Funding*, 237 F.Supp.3d 130, 150 (S.D.N.Y. 2017) (collecting New York cases); *Kaneff v. Delaware Title Loans*, 587 F.3d 616 (3d Cir. 2009) (Pennsylvania); *MacDonald v. CashCall, Inc.*, 2017 WL 1536427, at *8–9 (D.N.J. Apr. 28, 2017), *aff'd on other grounds*, 883 F.3d 220 (3d Cir. 2018). "The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation." *Schneider v. Phelps*, 41 N.Y. 2d 238, 391 N.Y.S. 2d 568, 359 N.E.2d 1361, 1365 (1977). American usury law "represents a venerable body of legal, ethical, religious, and (sometimes) economic

thought, reaching back through the Middle Ages to the foundations of western civilization." James Ackerman, *Interest Rates and The Law: A History of Usury,* 27 Ariz. St. L.J. 61, 62-63 (1981), https://bit.ly/3jxpnY4.

The thirteen original American colonies aggressively regulated consumer loans with annual interest rate caps. Christopher L. Peterson, "*Warning: Predatory Lender" -- A Proposal for Candid Predatory Small Loan Ordinances*, 69 Wash. & Lee L. Rev. 893, 899 (2012). By 1886, every state had some usury limit. Ackerman, *supra* at 85. Further reflecting the critical importance of interest rate limits, many states have criminal usury caps. *See* National Consumer Law Center (NCLC), Consumer Federation of America & Consumers Union, *Small Dollar Loan Products Scorecard—Updated* at 7 (2010), https://bit.ly/2ZR6Xtp.

State interest rate caps continue to be essential today because federal law does not generally limit rates.[2] States have always had

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[2] Other than for federal credit unions, federal law only limits interest rates for servicemembers and their dependents. The Military Lending Act prohibits creditors from "imposing annual percentage rate of interest greater than 36 percent," 10 U.S.C. § 987, and the

primary authority in the area of consumer financial protection, including establishing and enforcing usury caps to protect their residents from predatory lending. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 35–36 (2007) ("Consumer protection is quintessentially a 'field which the States have traditionally occupied,'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area."); *Travis v. Navient Corp.*, No. 17CV4885RRMST, 2020 WL 2523066, at *5 (E.D.N.Y. May 18, 2020); *New York by James v. Pennsylvania Higher Educ. Assistance Agency*, No. 19 CIV. 9155 (ER), 2020 WL 2097640, at *13 (S.D.N.Y. May 1, 2020). Though some states have eliminated their rate caps or carved out limited exceptions for short-term payday loans, the vast majority still retain interest rate limits for longer-term loans by nonbank companies.

Servicemembers Civil Relief Act requires lenders to lower the rates on pre-service loans to 6 percent, 50 U.S.C. § 3937.

Today, at least 45 states and the District of Columbia (DC) impose interest rate caps on some consumer loans. *See* NCLC, *State Rate Caps for $500 and $2,000 Loans* (Feb. 2020), http://bit.ly/state-loan-caps; *see generally* NCLC, CCR (2d ed. 2015), *updated at* www.nclc.org/library. Among those states that cap rates, the median annual rate including all fees is 38.5% for a $500, six-month loan; 31% for a $2000, two-year loan; and 25% for a $10,000, five-year loan. Carolyn Carter et al., NCLC, *Predatory Installment Lending in the States: 2020* (Feb. 2020), https://bit.ly/2WK217y; Carolyn Carter et al., NCLC, *A Larger and Longer Debt Trap? Analysis of States' APR Caps for A $10,000 5-year Installment Loan* (Oct. 2018), http://bit.ly/instloan18. In addition, sixteen states plus DC have interest rate caps that prevent triple-digit-rate short-term payday loans. *See* CRL, *U.S. Payday Interest Rates Map* (Feb. 2019), https://bit.ly/3jKEcGK.

The American public strongly supports state interest rate caps. At every opportunity in recent years, voters in a diverse range of states have overwhelmingly (typically by a two-to-one or higher margin) approved rate caps of 36% or less, including in Arizona (2008), Ohio (2008), Montana (2010), South Dakota (2016), and Colorado (2018). *See*

NCLC, *Testimony of Lauren Saunders before the U.S. House Financial Services Committee on Rent-a-Bank Schemes and New Debt Traps* at 4 & n.5 (Feb. 5, 2020), http://bit.ly/debt-trap-schemes ("Saunders Testimony").

B. The National Bank Act Provides a Narrow, Recent Exception to State Regulation of Interest Rates

The OCC's interpretation of the National Bank Act (NBA) would override the states' fundamental, historic interest in limiting interest rates and protecting consumers. But the NBA provides only a narrow exception to states' authority in this area, and for most of its history the NBA did not even relieve national banks of the obligation to comply with state interest rate limits.

The National Bank Acts of 1863 and 1864 established the OCC and a federal banking system. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99. Notwithstanding, the state banking system remained, and states capped the rates for state banks. States also had some power over the rates charged by national banks, as the NBA gives banks the option of charging the higher of the rate allowed by the state where they are located or a low alternative federal rate. 12 U.S.C. § 85. Thus, national banks were subject to

interest rate caps in place wherever they did business from their inception through much of the twentieth century.

Then, in its 1978 decision in *Marquette*, the Supreme Court ushered in an era of deregulation of bank interest rates. The Court interpreted the NBA to allow national banks to "export" to other states any rate permitted by their home state. *Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 311 (1978); 12 U.S.C. § 1831a(j)(1).

However, the deregulation of bank interest rates did not change state authority over nonbank lenders. Nonbank lenders have consistently been subject to state interest rate laws, with one notable exception for first mortgage loans. *See* 12 U.S.C. §§ 1735f-7, 1735f-7a.

C. Granting "bank" charters to nonbanks will result in a race to the bottom eviscerating state usury laws, as it did for real banks

Allowing nonbanks to "export" their home state interest rate caps to other states will bring intense pressure upon states to raise or eliminate their rate caps. Non-chartered lenders will also push for parity – with the threat of leaving the state – to prevent unfair competition from chartered lenders who can ignore state laws.

The *Marquette* decision set off a race to the bottom. States competed to eliminate interest rate caps to attract or retain bank headquarters, and a few smaller states were able to deregulate bank lending for all other states. *See* Peterson, *supra* at 901-902. The OCC openly advertised preemption of state laws as a benefit of a national bank charter. OCC, News Release 2002-10, *Comptroller Calls Preemption a Major Advantage of National Bank Charter* ("OCC 2002 Preemption Release") (Feb. 12, 2002), https://bit.ly/3hBXz2L. A combination of federal and state laws eventually allowed most state-chartered banks to piggyback on the rights of national banks and ignore state rate caps. *See generally* NCLC, CCR Ch. 3.

Such was the aftermath of the *Marquette* decision. First, national banks moved to states that eliminated their rate-caps so they could ignore state interest limits nationally. Other states were forced to repeal their limits on bank interest rates to keep the national banks headquartered there. Congress eventually allowed state-chartered banks to charge any rate a national bank branch can charge. 12 U.S.C. §§ 1831a(j), 1831d(a). And states enacted similar parity laws to allow their in-state banks to do the same. *See* NCLC, CCR § 3.6. The result,

with very few exceptions, is that banks today are not subject to interest rate caps.

If nonbanks can obtain a federal charter, similar pressure is inevitable, and the few local lenders that remain subject to state rate caps will be drowned out by the flood of unregulated predatory lending. High-cost lenders are notoriously insensitive to rate competition, focusing instead on convenience. *See* CFPB, 82 Fed. Reg. 54472, 54480, 54603 (Nov. 17, 2017); 85 Fed. Reg. 44382, 44413 (July 22, 2020). The race to the bottom this time would be even worse than the deregulation of banks. Rate caps would be eliminated completely, and not only for chartered-nonbanks.

II. THE NONBANK CHARTER IS INCONSISTENT WITH CONGRESS'S 2010 LIMITS ON THE OCC'S AUTHORITY AND DISAPPROVAL OF ITS PREEMPTION ACTIVITIES

A. Congress in 2010 Limited Preemption for Nonbanks and Reined in the OCC's Preemption Authority

The OCC's plan to grant national bank charters to nonbank entities audaciously ignores the recent mandate of Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("DFA"). The DFA explicitly rejected national bank rights for nonbank

entities and curtailed the OCC's preemptive power in reaction to the role that preemption played in triggering the Great Recession of 2008.

In the early 2000s, the federal bank regulators sought to aggressively preempt state laws. The Office of Thrift Supervision (OTS) and the OCC issued regulations declaring large categories of state laws covering real estate lending, other lending, deposit-taking and electronic activities preempted by their authority over federal savings associations and national banks. *See generally* NCLC, Mortgage Lending § 5, *updated at* www.nclc.org/digitallibrary. The OCC also promulgated regulations and opinions expanding its theory of preemption under the NBA to cover even nonbank subsidiaries and agents. *See id.* § 5.10; *see e.g.,* 66 Fed. Reg. 34784, 34788–34789 (July 2, 2001).

Preemption by federal bank regulators was a significant contributing cause of the Great Recession. *See* 111th Congress, Senate Report, 111-176, 16-17 ("[T]he OCC and the OTS actively created an environment where abusive mortgage lending could flourish without State controls."). Loose regulatory oversight, fueled by federal banking regulators' desire to recoup greater assessments from "charter-

shopping" banks, was not an effective substitute for state consumer protection laws. *See* CRL, Testimony of Eric Stein before the U.S. Senate Committee on Banking, Housing and Urban Affairs, *Turmoil in the U.S. Credit Markets: The Genesis of the Current Economic Crisis* at 21-23 (Oct. 6, 2008), https://bit.ly/306Zarr; Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 Harv. L. Rev. 1991, 2055 (2014); Lauren Saunders, NCLC, *Preemption and Regulatory Reform: Restore the States' Traditional Role as "First Responder"* at 1 (Sept. 2009), https://bit.ly/3fVjHEX (noting that in 2016, the peak year of disastrous mortgage lending, 32% to 51% of risky loans were made by banks or subsidiaries exempt from state consumer protection laws).

Congress responded to the banking agencies' aggressive use of preemption by limiting federal preemption and enhancing the role of states. The DFA abolished the OTS, abrogated the OCC's extension of preemption to nonbank subsidiaries, agents, and affiliates, limited the OCC's preemption authority, further empowered state regulation, and deputized state regulators to help protect consumers and prevent future

financial calamity. The DFA substantially enhanced consumer financial protection authority for the states.

Significantly, the DFA limited the NBA's preemption of state law to the *bank* itself, 12 U.S.C. § 25b, overturning a U.S. Supreme Court decision that had upheld OCC's interpretation that NBA preemption extends to nondepository subsidiaries of national banks. *See Watters,* 550 U.S. at 11. In three distinct provisions specifically addressing preemption for subsidiaries and affiliates, and, in one place, agents, Congress declared that *nonbank entities are not entitled to federal preemption*. 12 U.S.C. §§ 25b(b)(2), 25b(e), 25b(h). Congress's understanding that it was addressing inappropriate preemption for *nondepository* entities is clear from the title of one of these provisions: "Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks." *Id.* § 25b(h).

The DFA further limited the OCC's preemption authority by mandating that when making a determination that state consumer financial laws are preempted, the OCC must do so only on a "case-by-case basis," after consultation with the CFPB, and based upon "substantial evidence" to justify the "prevent or significantly interfere"

standard set out in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996); 12 U.S.C. § 25b(b). Congress also reined in the OCC's preemption determinations when challenged, by giving them only *Skidmore* deference. 12 U.S.C. § 25b(b)(5)(A); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

These limitations on preemption do not apply to the authority conferred by the NBA for the charging of interest "by a national bank" at the rate of the bank's home state. 12 U.S.C. § 25b(f). However, other DFA amendments make clear that interest rate preemption, like the rest of the NBA, only applies to national banks, not nonbank, nondepository entities. 12 U.S.C. §§ 25b(b)(2), (e), (h).

Finally, Congress expressed its disapproval of the federal banking agencies' failure to protect consumers through Title X of the DFA, the "Consumer Financial Protection Act" (CFPA), which created the CFPB. The CFPA transferred primary authority over supervising and enforcing federal consumer financial laws from prudential regulators, such as the OCC, to the CFPB.

Congress also endorsed and enhanced the role of state regulators and Attorneys General. The CFPA strictly limits the CFPB's

preemption authority and explicitly preserves state laws that afford consumers greater protection. 12 U.S.C. § 5551(a). State Attorneys General and state regulators are expressly permitted to enforce the CFPA and its implementing regulations against nonbanks. 12 U.S.C. §§ 5552(a)(1), (a)(2). Even with respect to national banks, the CFPA authorizes Attorneys General to bring actions to enforce rules proscribed by the CFPB under the CFPA. 12 U.S.C. § 5552(a)(2). If nonbanks are allowed to obtain national bank charters and thereby become "banks" for purposes of the CFPA, states could still enforce CFPB regulations, but would lose enforcement authority with respect to the CFPA's statutory provisions, including the ability to enforce the DFA's prohibition against unfair, deceptive, or abusive acts or practices. *See* 12 U.S.C. § 5536.

Allowing the OCC to charter nonbanks would be an end-run around Congress's unequivocal statement in the DFA that bank preemption does not extend to nonbank entities, that the OCC's authority to preempt state law is limited, and that states play a vital role in protecting consumers.

B. Congress Made Clear That the CFPB, Not Bank Regulators, is the Federal Regulator of Nonbanks

Congress's creation of the CFPB and the powers entrusted to CFPB further illustrate that Congress, understanding the OCC's authority to be limited to depository institutions, gave authority over nondepository institutions to the CFPB. In expanding its chartering authority to nondepository institutions, the OCC works damage upon the structure of federal regulation of consumer financial products.

Most notably, for "Federal consumer financial protection laws," the CFPB has jurisdiction over several categories of "nondepository covered persons," including "*exclusive* enforcement authority" and "*exclusive* authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions" among federal regulators. 12 U.S.C. §§ 5514(a), (c), (d) (emphasis added). Except for some concurrent authority with the Federal Trade Commission, the CFPB has exclusive consumer protection supervision authority over nondepository institutions offering consumer financial products or services if the entity (A) is involved in mortgage lending, (B) is a larger participant in a market for other consumer financial products or services, as defined by the CFPB, (C) is subject to supervision because

the CFPB has determined by order that a company's conduct poses risks to consumers, (D) offers or provides private education loans, or (E) offers or provides payday loans. 12 U.S.C. § 5514(a)(1).

This exclusive CFPB authority over nondepository institutions is very different from the structure Congress created for depository institutions. The CFPB has only "primary," not exclusive, consumer protection enforcement authority over depository institutions with more than $10 billion in assets, and coordinates with the OCC or other federal prudential regulators, who serve as a backup. 12 U.S.C. § 5515(c). The CFPB does have exclusive consumer protection supervision authority over large banks but must coordinate with their prudential regulator. *Id.* § 5515(b).

For smaller banks, the OCC or other prudential regulator, not the CFPB, has the primary authority to conduct consumer protection examinations, but the CFPB may include examiners on a sampling basis. *Id.* § 5516(c). The prudential regulator has exclusive federal consumer protection enforcement authority. *Id.* § 5516(d).

Notably, however, this coordinated and delineated bank supervision regime – and the limits on the CFPB's authority over

smaller banks (including national banks) – apply *only* to "insured depository institution[s]," 12 U.S.C. §§ 5515(a)(1), 5516(a)(1); *see id.* § 5301(18)(A) (defining term as in 12 U.S.C. § 1813(c)(2)). Congress clearly understood the authority of the bank regulators to be limited to depository institutions.

Thus, granting "national bank" charters for nondepository institutions (or uninsured depository institutions) would result in anomalous entities outside the regulatory regime that Congress created. Congress granted CFPB "exclusive" federal consumer financial supervision and enforcement authority if these entities fall into any of the broad nondepository categories delineated by the DFA, including mortgage, student or payday lenders, or the larger participants offering any of the three services that the OCC claims makes an entity eligible for a national bank charter: deposit-taking, handling payments, or making loans. *See* 12 U.S.C. §§ 5481(7), (8), (15)(a)(i), (iv), (vi), (vii), (xi).

An OCC nondepository "bank" ignores the policy preference demonstrated by the DFA that the OCC not become the regulator of nonbanks. If Congress had intended OCC's authority regarding consumer financial products to expand to nonbanks, it could easily have

given the OCC that authority. Instead, it did the opposite, removing the OCC's authority to extend national bank preemption to nonbanks and giving the CFPB exclusive federal consumer financial law authority over nondepository institutions.

III. HIGH-COST LENDERS WILL EXPLOIT A "BANK" CHARTER TO ENGAGE IN PREDATORY LENDING

A. The Nonbank Charter Would be Available to Predatory Lenders, Which Are Already Laundering Their Loans Through Banks

The nonbank charter has been colloquially called the "fintech" charter, and the OCC has stated that it will accept applications from "financial technology companies, or 'fintechs' — a term that encompasses a broad array of entities that offer financial services through the internet, mobile applications, cloud computing, or other technological platforms." (OCC Br. at 2.) But all companies use technology; online and mobile lending is now commonplace, and there are in fact no special "fintech" requirements for the charter in the OCC's Licensing Manual (Joint Appendix [JA], 171-91.), or policy statement (JA, 166-70.). The OCC merely requires the applicant to engage in one of three activities: "Receiving deposits; paying checks [which the OCC equates to engaging in payments]; or lending money."

(OCC Br. at 6.) (quoting 12 C.F.R. § 5.20(e)(1)(i)). As one article put it, "even some payday lending shops" could be eligible, as "the wording of the charter is broader [than technologically oriented businesses], potentially allowing other nonbank players a way to enjoy the benefits of federal pre-emption and avoid state-by-state regulation." Lalita Clozel, American Banker, *Will OCC's New Charter Go Beyond Fintech Firms?* (Jan. 3, 2017), https://bit.ly/39vW6IL.

The "fintech" label is often merely the latest gloss put on the evasive schemes pursued by high-cost lenders. These lenders seek to preempt state usury laws in order to charge consumers exorbitantly high interest rates. But now, they are attempting to do so under the guise of "innovation" and through the legitimacy of an OCC Charter. Though they promise new and innovative products, many lenders that call themselves "fintechs" are merely predatory lenders in disguise.

In the last few years, using "rent-a-bank" schemes with the apparent permission of the OCC and the Federal Deposit Insurance Corporation (FDIC), high-cost lenders have already been using bank charters to evade state interest rates. In a rent-a-bank scheme, a high-cost lender designs a lending program, handles most of the operations,

then launders the loans through a bank in order to claim that the loans are bank loans exempt from state interest rate caps. But the high-cost lender purchases the vast majority of the loans or receivables from the bank and earns the vast majority of the profits. *See* Saunders Testimony at 8, n.25.

High-cost lenders that are currently using rent-a-bank schemes but are now cloaked in "fintech" garb have made clear they are eager for a national charter. For example, in supporting the nonbank charter, the Online Lenders Alliance (OLA) emphasized the technology its members employ. OLA, Comment to OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* at 4 (Jan. 13, 2017), https://bit.ly/2CXdnOM ("OLA Comment"). But clearly the key benefit of the charter is that OLA members would be free from "very restrictive interest rate regimes that effectively prohibit" their loans. *Id.* at 3. The charter would allow online lenders to operate "by exporting interest rates and by eliminating state lending law restrictions." OLA Comment at 7.

OLA members are primarily high-cost online lenders. OLA's board of directors includes representatives of CURO Financial Technologies

Corp (CURO), Enova, and Elevate, which all offer loans well over 100% APR. *See* OLA, *Board of Directors*, https://bit.ly/30HetGo (last visited 7/28/20). All three offer loans directly in states that allow high-cost lending and use or are planning rent-a-bank "partnerships" to launder loans through banks in states that do not allow high rates. *See* Saunders Testimony at 9-10 & n.25, n.26, n.27.

For example, CURO lends directly in states that allow its high-cost loans, as with its Speedy Cash short-term payday loans up to 456% APR and installment loans up to 345% APR. *See* Speedy Cash website, Rates & Terms, https://www.speedycash.com/rates-and-terms/ (last visited 7/26/20). But CURO is using a national bank regulated by the OCC, Stride Bank, in two rent-a-bank schemes. One is a pilot under the Avío Credit brand with loans up to 130% APR. *See* Avío Credit website, *Installment Loan Fee Schedule*, https://bit.ly/3gao1jF (last visited 7/28/20). Avío is currently in two states but is "a product that will help us expand geographically, online and in some states where we -- where we don't operate right now." CURO Group Holdings Corp., Q4 2019 Earnings Call Transcript (Feb 6, 2020), (Don Gayhardt, Chief Executive Officer), https://bit.ly/39CrzJi. The other scheme is with Verge Credit,

which makes loans up to 179% APR and touts itself as "100% transparent" because its relationship with a national bank "means you are under the protection of federal regulators (who make sure consumer laws are followed). 100% legit." *See* Verge Credit website, https://www.vergecredit.com (last visited 7/28/20).

OLA member, Elevate, offers Rise installment loans at 99% to 149% APR through a bank in several states that do not allow rates that high. *See* https://bit.ly/32VEJjd (select each state); Saunders Testimony at 8 & n.24, n.27. Elevate uses another bank to offer a line of credit called Elastic that carries an effective APR of up to 109%. *Id.*

OLA member, Enova's NetCredit brand, uses a bank to fund $1,000 to $10,000 installment loans with APRs up to 99.9% in 22 states that do not allow that rate. *See* NetCredit website, https://www.netcredit.com (bottom of page) (last visited 7/28/20); *see* Saunders Testimony at 8, n.25.

These predatory lenders offer loans directly in states where high-cost loans are legal but through banks where they are not. They will be eager to switch to their own bank charters to avoid paying a bank middleman. As CURO told investors when explaining the plan to

change to a rent-a-bank model through MetaBank, a national bank regulated by the OCC, in order to evade California's newly tightened usury law, CURO needs to "sacrifice a little bit of the economics" to a bank "that's going to need a good rev[enue] share." The Motley Fool website, *CURO Group Holdings Corp. Q2 Earnings Call Transcript* (Aug. 2, 2019), *bit.ly/2Eg619v*.

Predatory lenders are also eager for a nonbank charter to avoid court challenges to their attempts to use banks to evade the law. Going back to at least the early 1800s, courts have questioned schemes to evade usury laws:

> The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded….[I]f giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction.

Scott v. Lloyd, 34 U.S. (9 Pet.) 418, 446-47 (1835).

Applying this longstanding anti-evasion principle, courts have rejected rent-a-bank schemes and have found that federal bank preemption does not apply where, going beyond the "mere form" and "shifts and devices" of a transaction, the nonbank that has the

predominant economic interest is the true lender subject to state interest rate limits. *CashCall, Inc. v. Morrisey*, 2014 WL 2404300 (W. Va. May 30, 2014) (quoting *Crim v. Post*, 41 W.Va. 397, 23 S.E. 613 (1895)); *see Community State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011) (federal bank law does not provide immunity for abetting usury-related offenses if the bank is not the true lender); *Community State Bank v. Knox*, 523 Fed. Appx. 925 (4th Cir. 2013) (finding claims against nonbank were not completely preempted and noting dispute about whether bank was the "real lender"); NCLC, CCR § 3.4.3a (collecting cases).

This long precedent of regulators and courts denying federal preemption rights to nonbank, predatory lenders has served banks and consumers well. States have typically been successful in enforcing their interest rates against the products to which interest rate caps apply. *See* Diane Standaert and Brandon Coleman, CRL, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement* (Nov. 2015), https://bit.ly/32R0hgZ; *see also In re Advance America*, No. 05:008:CF *43-44 (N.C. Comm'r of Banks, Dec. 22, 2005).

Even the OCC, in the early 2000s, while promoting preemption for banks themselves, cracked down on a "handful of national banks [that] essentially rented out their charters to third party payday lenders." *See* OCC, *Payday Lending*, https://bit.ly/3fT7oJo (listing the enforcement actions) (last visited 7/28/20). OCC Comptroller, John D. Hawke, in 2002-2003, stated that rent-a-bank arrangements are "an abuse of the national charter", that "[t]he preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders," and that "[w]e are particularly concerned where an underlying purpose of the relationship is to afford the vendor an escape from state and local laws." OCC 2002 Preemption Release.

But the OCC has changed its tune and is now actively supporting use of the bank charter by high-cost lenders to evade state usury laws, as discussed in the next section. The risk of a nonbank charter to state usury laws and the fight against predatory lending is thus very real.

B. The OCC's oversight and enforcement of federal law will not compensate for the elimination of state rate caps

The Comptroller would replace state usury caps with the "standards of safety and soundness and fairness that all federally

chartered banks must meet." OCC, *Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters* (JA, 166-70.). But the OCC's track record and support for high-cost, predatory lenders show that we cannot count on OCC oversight to replace the protection of interest rate limits. And even if the OCC were willing to take on these lenders, it would lack the simplest and most powerful tool to prevent the harms of high-cost lending: usury laws.

1. The OCC's track record with high-cost lenders makes clear that the risks from a nonbank charter are real

The OCC has defended predatory rent-a-bank schemes used to evade usury caps, has failed to take action against OCC-supervised banks enabling abusive practices, and has promised to promulgate rules to protect rent-a-bank schemes from court challenges.

Last year, the OCC filed an *amicus* brief supporting the right of a predatory nonbank lender, World Business Lenders (WBL), to charge 120% APR on a $550,000 loan despite Colorado's 45% usury law. *See Amicus Brief of the [FDIC] and the [OCC] in Support of Affirmance and Appellee, In Re: Rent-Rite Super Kegs West Ltd.* (Sept. 10, 2019), https://bit.ly/3fQDwx6. While the Colorado case involved an FDIC-supervised bank, which was not a party to the case, WBL has since

switched to laundering its loans through Axos Bank (f/k/a BOFI Bank), an OCC-supervised federal savings bank. *See* WBL website, https://www.wbl.com (last visited 7/28/20).

The OCC's supervision of Axos Bank, the purported lender of WBL loans, has not stopped a predatory business model where WBL approaches struggling businesses, does little responsible underwriting or due diligence, launders exorbitantly priced loans through the bank to evade state rate caps, and threatens to foreclose on the business owner's home when they cannot afford to repay. One court recently rejected a motion to dismiss filed by WBL and Axos Bank, finding that a couple threatened with foreclosure after borrowing $175,000 at 92% APR had alleged sufficient facts that underwriting failures may have made the loan "doomed to fail" and thus an unfair and deceptive business practice. *Kaur et al. v. World Business Lenders, LLC et al.*, 440 F.Supp.3d 111 (D. Mass. 2020). Other examples of reckless Axos Bank/WBL loans in litigation include a 138% APR, $90,000 mortgage, a 73% APR, $28,000 mortgage, personal mortgages disguised as business loans at 121% APR or higher, and charges of usury, fraud and misrepresentation. *See* Saunders Testimony, at 11-12.

The OCC's supervision of Axos Bank is clearly not ensuring sound underwriting or stopping the bank from letting itself be used by a predatory lender, even when the bank is facing extensive litigation. In fact, these practices have been going on for some time. A 2014 article describes how WBL employs some of the worst actors and practices from the foreclosure crisis for its predatory lending practices towards small businesses. Zeke Faux, *Wall Street Finds New Subprime With 125% Business Loans*, Bloomberg (May 22, 2014), https://bloom.bg/2WLWRYG.

As discussed in the previous section, the payday lender CURO has an active rent-a-bank program with a national bank offering loans up to 130% APR, which partners with another national bank, Stride Bank. The OCC is apparently allowing that misuse of the bank charter.

Finally, the OCC has proposed a rule that would overturn the "true lender" doctrine and make state usury laws "a dead letter." *See Scott*, 34 U.S. (9 Pet.) at 446. Under the proposal, bank rate exportation laws could preempt state usury laws as long as the bank is "named as the lender in the loan agreement" or the bank technically "funds the loan" that it launders for and immediately sells back to the true

nonbank lender that is running and profiting from the loan program. *See* 85 Fed. Reg. 44223, 44228 (July 22, 2020). This follows on the heels of its issuance of a rule attempting to reject the Second Circuit's decision in *Madden v. Midland*, 786 F.3d 246 (2d. Cir. 2015), that nonbank debt buyers are subject to state usury laws. 85 Fed. Reg. 33530 (June 2, 2020) (adopting 12 C.F.R. §§ 7.4001(e), 160.110(d), effective July 2, 2020).

Just as the OCC defends its nonbank charter in the name of "fintech," the Acting OCC Comptroller noted in June that a true lender rule "would help stem litigation that has plagued the fintech lending industry." Lydia Beyoud, Bloomberg Law, *OCC Plans Rule to Define Valid Bank-Fintech Partnerships* (June 11, 2020), https://bit.ly/2WMvMVm. But the "fintechs" the rule would protect undoubtedly include Elevate, which was sued just five days earlier in a "true lender" lawsuit by the District of Columbia Attorney General over Elevate's 99% to 251% APR loans, laundered through a bank, despite DC's 6% to 24% usury cap. DC Attorney General, Press Release, *AG Racine Sues Predatory Online Lender For Illegal High-Interest Loans To District Consumers* (June 5, 2020), https://bit.ly/2CYlNFD.

The OCC's direct support for predatory lenders and schemes to use bank charters to evade state usury laws shows exactly what will happen if it is allowed to issue nonbank charters to companies that want to charge high rates prohibited by state laws.

2. State interest rate caps are the simplest and most effective protection against predatory lending

Even if the OCC were willing to rein in high-cost predatory lending, without federal interest rate caps, the OCC will not be able to sufficiently protect against predatory lending. Interest rate limits are easy to understand, easy for lenders to comply with, and easy for regulators to enforce. General principles regarding responsible lending, on the other hand, are vague, in the eye of the beholder, and difficult to enforce.

The OCC, for example, recently joined the other bank regulators in issuing small dollar lending principles guidelines that lack specifics, do not provide any rights or protections that consumers can rely on, and may even permit banks to resume making "single-payment" loans, *i.e.*, bank payday loans. *See* OCC et al., *Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 2020), https://bit.ly/3jFY0Lp. In the early 2000's, the lack of federal interest

rate caps allowed national banks to make 150% to 650% payday loans (so-called “deposit advance products”) even in states that prohibit payday lending. CRL, *Big Bank Payday Loans* (July 2011), https://bit.ly/2PfyGy1. In 2013, the OCC issued guidance that stopped these predatory products, but new leadership at the OCC rescinded that guidance in 2017, and the agency’s reference to “single-payment” loans in its 2020 “principles” could herald a return to bank payday loans with well-documented abuses. *See* CFPB, *Payday Loans and Deposit Advance Products*, 43-44 (April 24, 2013), https://bit.ly/39iW46V.

The CFPB, which lacks the authority to establish a usury limit, 12 U.S.C. § 5517(o), can enforce the full range of federal consumer protection laws that would apply to chartered-nonbanks. But when finalizing an ability-to-repay rule for payday lenders (since repealed), the CFPB stated that it regards state “fee and interest rate caps … as providing greater consumer protections ….” 82 Fed. Reg. 54472, 54523 (Nov. 17, 2017).

Without rate caps, borrowers are left vulnerable to the harms created by the asymmetrical incentives between borrower and lender. While many lenders offer responsible loans at affordable rates,

predatory lenders can make profits from high interest rates that put many borrowers in ruin. *See* NCLC, *Misaligned Incentives: Why High-rate Installment Lenders Want Borrowers Who Will Default* (July 2016), https://bit.ly/3hzFHpi. The easiest and most effective way to align the interests of lenders and borrowers and to minimize defaults is to cap interest rates. *See id.* Simply put, usury caps reduce these inequities to provide the best protection against predatory lending. The OCC would lack this powerful tool.

Safety and soundness oversight by the OCC cannot replace state usury laws. Ensuring the protection of consumers and ensuring the safety and soundness of institutions are not the same, and many commentators have found the two missions to be in conflict. *See, e.g.*, Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 Yale J. on Reg. 143, 155 (2009) ("Safety and soundness ultimately means profitability because only profitable financial institutions can be safe and sound. Unfortunately, unfair and abusive practices can often be quite profitable."). Regulation focused on making sure that an entity does not fail is very different from protecting consumers and enforcing interest rate caps.

An emphasis on sound underwriting is important, but it has not alone prevented exceedingly harmful lending abuses, as abuses in the mortgage, bank payday loan, and rent-a-bank contexts show. Under this rubric, chartered-nonbanks could make loans at significantly higher rates than under established state laws, while exposing consumers to significant risks. All too often, banking regulators view these risks to consumers as secondary to the "soundness," or rather the profitability, of the bank's product. Safety and soundness supervision simply cannot replace the protection of interest rate limits.

IV. CHARTERED-NONBANKS WOULD HAVE THE PREEMPTION RIGHTS OF BANKS WITHOUT THE OBLIGATION TO MEET COMMUNITY NEEDS UNDER THE COMMUNITY REINVESTMENT ACT

The nonbank charter allows companies to reap the preemption rights of a national charter without complying with the Community Reinvestment Act ("CRA") and meeting the "convenience and needs" of their communities. 12 U.S.C. § 2901(a). This inconsistency with bank CRA obligations heightens the risk that nonbanks would offer products and services that do not serve, and will often harm, the communities where they do business.

The CRA applies to a "regulated financial institution," defined as an "insured depository institution." 12 U.S.C. § 2902(2). CRA obligations exist in the legislatively-defined context of assessment areas, which are communities where a bank has a branch from which it takes deposits. *Id.* § 2902(3)(C). Partnerships between banks and nonbank lenders are also subject to the CRA.

Under the nonbank charter, lenders would merely have to meet the OCC's weaker Financial Inclusion Plan ("FIP"), described in a scant three pages. (JA, 156-58.) Nonbanks would have no depository footprint, and the FIP does not establish assessment areas where they must meet community "conveniences and needs." *See id.* Similarly, the FIP does not require nonbanks to accept input from individuals and groups in their communities, as banks must do under the CRA. *See id.* Nor does the FIP set any standard for what products and services would meet community "convenience and needs." *See id.* The OCC's licensing manual states "the nature of the commitment will depend on the proposed bank's business model," suggesting that these nonbanks could receive credit for originating high-cost loans to underserved consumers. *Id.* at 126.

Congress passed the CRA with the understanding that the business of banking includes the act of deposit taking. This is consistent with the district court's order that it is "unambiguous" that deposit taking is central to the banking statutory framework. *Id.* at 262. CRA exams assess the full spectrum of the banking business. In contrast, the nonbank charter lacks a legislative mandate and relies on a unilateral plan offered by the "fintechs" with few evaluation measures. Allowing nonbank national banks would create a two-tiered system for community reinvestment, inconsistent with and undermining Congress's CRA and national banking framework. Extending the definition of banking to include nondepositories requires new legislation, not a unilateral act by an agency.

CONCLUSION

The Online Lenders Alliance applauded the OCC's "outside-the-box thinking" in deciding to grant nonbank charters. OLA Fintech Comment, *supra* at 1. The OCC's thinking is not just outside the box – it is outside the law and outside the agency's authority to preempt state consumer protection laws. This court should reject the OCC's effort to eviscerate the power states have had since this nation's founding to

protect residents from high-rate lending and should affirm the district court's ruling that the OCC does not have the power to give national bank charters to entities that do not take deposits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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