UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and KEITH A. NOREIKA, in his official capacity as Acting Comptroller of the Currency, Defendants.	Civil Action No. 17-CV-00763 (JEB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

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INTRODUCTION

The Complaint by the Conference of State Bank Supervisors ("CSBS") represents a fatally premature attempt to invoke the jurisdiction of this Court to remedy a speculative harm that CSBS alleges may arise from future action by the Office of the Comptroller of the Currency ("OCC") – action that the OCC may never take. The CSBS Complaint challenges: (1) provisions of an OCC regulation amended in 2003 to authorize special purpose charters that have, to date, never been used to charter a bank; and (2) a series of public OCC statements as part of an ongoing policy initiative that CSBS alleges to be a final decision by the OCC to make charters available to "nonbank" financial technology ("fintech") companies. CSBS's denomination of these public statements as a "Nonbank Charter Decision," Compl. ¶ 52, is wrong in two fundamental respects: it ignores that the proposal contemplates a form of national bank charter and that no final decision has been reached.

The Court should conclude that none of the allegations contained in the Complaint presents either a justiciable case or controversy under the Constitution or a reviewable final agency action under the Administrative Procedure Act. Stated succinctly, the OCC has not yet reached any decision with respect to whether it will offer the specific type of national bank charter — a charter for a Special Purpose National Bank ("SPNB") that does not take deposits and conducts activities other than fiduciary activities (referred to hereinafter as a "5.20(e)(1) Charter") — that is the subject of the present challenge. As noted recently by Acting Comptroller of the Currency Keith A. Noreika, the OCC is actively exploring different approaches to leveraging its authority to charter national banks that would allow the banking sector to take advantage of new ideas and new technology. *See Keith A. Noreika, Acting Comptroller, the Office of the Comptroller of the Currency, Exchequer Club Remarks* (July 19,

2017) ("Exchequer Speech") (attached hereto as Exhibit A). While the OCC is studying all aspects of the issue, it is clear that the OCC has made no final decision whether it will make a 5.20(e)(1) Charter available. Ex. A at 9. Acting Comptroller Noreika has clarified for the public record that the OCC is not accepting applications for this type of charter at this time and, if a decision were made to proceed, an application for a 5.20(e)(1) Charter would be subject to a thorough and public review process.

In short, nothing approaching what CSBS has labeled in their Complaint as the OCC's "Nonbank Charter Decision" has occurred. Given the scant record[1] to date, including the absence of allegations of cognizable harm in the Complaint and the as-yet interlocutory process embarked upon by the OCC to determine the position that it may eventually take, the Court should conclude that the facts as alleged do not present a justiciable controversy. Accordingly, the Court should dismiss CSBS's Complaint.

In the alternative, should the Court reach the merits of the OCC's authority to promulgate 12 C.F.R. § 5.20(e)(1), the Complaint should be dismissed because the OCC's authoritative interpretation of the ambiguous statutory term "the business of banking" is entitled to deference under the *Chevron* framework and is supported by Supreme Court and D.C. Circuit authority.

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[1] In deciding whether to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6), a court may consider (1) the facts alleged in the complaint, (2) documents attached as exhibits or incorporated by reference in the complaint, and (3) matters about which a court may take judicial notice. *See, e.g., Ahuja v. Detica Inc.*, 742 F. Supp. 2d 96, 102 (D.D.C. 2010); *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002). Defendants' Exhibits B-G are documents that are attached to, referred to, or relied upon in the Complaint or its exhibits. Defendants' Exhibit A is a public speech by the Acting Comptroller of the Currency available on the OCC's public website at https://www.occ.gov/news-issuances/speeches/2017/pub-speech-2017-82.pdf. (Defendants' Exhibits B-G are also available on the OCC's public website.) Defendants' Exhibit H, which is a docket sheet from the U.S. District Court for the Middle District of Florida. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (court may take judicial notice of facts contained in public records of other proceedings).

The OCC's exploration of mechanisms that could enable national banks to provide financial technology services to customers rests comfortably within the long legacy of the evolution of national bank powers endorsed by the Ninth Circuit in 1977: "[W]hatever the scope of [incidental bank] powers may be, we believe that the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977).

BACKGROUND

I. GENERAL BACKGROUND

The OCC is an independent bureau of the U.S. Department of the Treasury with primary supervisory responsibility over national banks under the National Bank Act of 1864, codified at 12 U.S.C. § 1 *et seq.*, as amended. The OCC is charged with assuring that national banks (and other institutions subject to its jurisdiction) operate in a safe and sound manner and in compliance with applicable laws and regulations and that they offer fair access to financial services and provide fair treatment of customers. 12 U.S.C. § 1(a). The OCC's activities in furtherance of its mission include receiving applications for and determining whether to grant new national bank charters to associations formed to carry out the "business of banking." *See, e.g.*, 12 U.S.C. §§ 21, 26, 27. Under Section 27(a), the OCC may grant a charter "[i]f . . . it appears that such association is lawfully entitled to commence the business of banking" and that "such association has complied with all provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business." "[T]he Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

II. OCC CHARTERING PROCEDURES

The OCC's chartering regulations, set forth at 12 C.F.R. Part 5 ("Part 5"), provide a thorough and public process for receiving and considering applications for national bank charters. The OCC's procedures for implementing its chartering regulations are collected in the Comptroller's Licensing Manual, Charters (Sept. 2016) ("Charters Booklet" or "CB") (attached hereto as "Exhibit B"). While the OCC charters various types of SPNBs with limited purpose operations, *see* Ex. B at 1, CSBS is challenging only one subset of national banks, defined for the purpose of this brief as 5.20(e)(1) Charters – SPNBs that do not take deposits.

Under its statutory authorities, the OCC may charter new national banks to undertake either "full service" or more limited "special purpose" operations. Ex. B at 1. A full-service bank generally exercises broad express and implied powers consistent with its charter. *Id.* at 50. In contrast, special purpose banks may offer only a small number of products, target a limited customer base, or have narrowly targeted business plans. *Id.* Banks with special purpose operations may include "trust banks, credit card banks,[2] bankers' banks, community development banks, cash management banks, and other banks that limit their activities." *Id.* at 1. As discussed more fully below, Part 5 was amended in 2003 to clarify the OCC's interpretation of its authority to charter an SPNB. *See* 12 C.F.R. § 5.20(e)(1) (a "bank may be a special purpose bank that limits its activities to fiduciary activities or any other activities within the business of banking").

[2] Credit card banks are "institutions whose primary business line is the issuance of credit cards, the generation of credit card receivables, and activities incidental to that line of business. Some credit card banks may have other lines of business but they are not generally material to the bank." Ex. B at 51.

Applications for all national bank charters are submitted to the OCC's Licensing Division and are processed in accordance with the OCC's Part 5 regulations. The application process is initiated by publishing a newspaper notice of the application, followed by receipt of public comments. The OCC reviews each application on a case-by-case basis to determine whether statutory and regulatory requirements have been met. Ex. B at 1, 4. If the application is successful, the OCC grants charters in two steps: a preliminary conditional approval and then a final approval. *Id* at 3. Prior to final approval, the OCC generally requires the organizers to raise capital within 12 months and open within 18 months of a grant of preliminary conditional approval. *Id.* If the organizers receive final approval, the OCC will issue a charter and the new bank can commence the business of banking. *Id.* at 3, 39, 48; 12 C.F.R. § 5.20(d)(3).

III. THE ALLEGED "NONBANK CHARTER DECISION"

In an attempt to manufacture a final agency action that would be subject to judicial review, *i.e.* a final decision by the OCC to grant a 5.20(e)(1) Charter, CSBS draws upon speeches by the Comptroller of the Currency, agency "white papers," a draft supplement to an OCC manual, and an amendment of a regulation in 2003 to construct what CSBS calls the "Nonbank Charter Decision." Compl. ¶ 52. While a decision by the OCC on a specific charter application would be a final agency action subject to judicial review, *see Camp v. Pitts*, 411 U.S. 138, 141-42 (1973), neither the 2003 regulation nor the various agency statements relied upon by CSBS provide the necessary foundation for their claims.

A. The 2003 Regulatory Amendment

In 2003, the OCC amended its chartering regulations to clarify its authority to charter an SPNB. 68 Fed. Reg. 70122 (Dec. 17, 2003). Among the amendments initially proposed by the OCC on February 7, 2003 was a revision to Section 5.20(e)(1) providing that a newly organized

bank "may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking." 68 Fed. Reg. 6363, 6373 (Feb. 7, 2003). In the Final Rule, published on December 17, 2003, the OCC clarified the scope of activities permissible for a special purpose bank to respond to commenters' concerns that the proposed amendment was too broad and that the special purpose charter had the potential to extend to activities "only loosely related to banking." 68 Fed. Reg. at 70126. The final rule clarified that "[a] special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits; paying checks; or lending money." *Id.* at 70129. The OCC explained that these core banking functions were based on 12 U.S.C. § 36, "which identifies activities that cause a facility to be considered a bank branch." *Id.* at 70126.

Since adopting this amendment, the OCC has not used its authority under 12 C.F.R. § 5.20(e)(1) to issue a national bank charter to an SPNB of the type that is identified in the Complaint: a charter for a bank that does not receive deposits. More fundamentally, the OCC has not yet received any applications for a 5.20(e)(1) Charter, nor has it yet reached a final decision regarding whether the agency will ultimately make a 5.20(e)(1) Charter available to a fintech. *See infra* pp. 8-9.

B. OCC Policy Initiatives Related to Responsible Innovation and the Agency's Chartering Authority: 2015-2017

The question whether the OCC should use its chartering authority to bring fintechs into the national banking system emerged out of a broader initiative, launched in 2015 by Comptroller of the Currency Thomas J. Curry. This broader initiative examined how the OCC could best support responsible innovation in the financial services industry. *See Thomas J. Curry, Former Comptroller, The Office of the Comptroller of the Currency, Remarks for Federal*

Home Loan Bank of Chicago (Aug. 7, 2015) (attached hereto as Exhibit C). While CSBS's Complaint cites a number of OCC actions in this area as proof that the agency has already made up its mind regarding 5.20(e)(1) Charters, it places particular importance on three events: a speech by the Comptroller in December of 2016, the issuance of a white paper on the subject of SPNBs, and a draft proposed supplement to the OCC's chartering manual.

1. Former Comptroller Curry's December 2016 Speech

In a speech at the Georgetown University Law Center on December 2, 2016, Comptroller Curry announced that "the OCC *will* move forward with chartering financial technology companies that offer bank products and services and meet our high standards and chartering requirements." *Thomas J. Curry, Former Comptroller, the Office of the Comptroller of the Currency, Remarks at Georgetown University Law Center: Special Purpose National Bank Charters for Fintech Companies* (Dec. 2, 2016) ("December Speech") (attached hereto as Exhibit D) at 3 (emphasis in original). Comptroller Curry told the audience that he had "asked [OCC] staff to develop and implement a formal agency policy for evaluating applications for fintech charters." *Id.* at 5.

2. SPNB White Paper and Request for Public Comment

In tandem with Comptroller Curry's December 2016 speech, the OCC published a white paper titled *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016) ("SPNB White Paper") (attached hereto as Exhibit E). The SPNB White Paper summarizes conditions under which the OCC might grant an SPNB charter to a fintech. *Id.* at 2. The SPNB White Paper (1) addressed how such charters "could advance important policy objectives, such as enhancing the ways in which financial services are provided in the 21st century, while ensuring that new fintech banks operate in a safe and sound manner, support their

communities, promote financial inclusion, and protect customers;" (2) reviewed the various federal and state law standards that would be applicable to fintech SPNBs; (3) explained how the OCC could impose other requirements on SPNBs as conditions of charter approval, such as the safety and soundness standards found at 12 U.S.C. § 1831p-1; and (4) outlined baseline supervisory expectations. *Id.* at 5-6, 8-13.

The OCC solicited public feedback on the SPNB White Paper. *Id.* at 15-16. In March 2017, the OCC published *OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies* (Mar. 2017) ("Explanatory Statement") (attached hereto as Exhibit F). The Explanatory Statement reviewed more than 100 public comments that the OCC received on the SPNB White Paper on topics such as consumer protection, regulatory and supervisory standards, and the separation of banking and commerce. *Id*. Simultaneously, the OCC issued a draft supplement to the Comptroller's Licensing Manual, titled *Evaluating Charter Applications from Financial Technology Companies* (Mar. 2017) ("Draft Supplement") (attached hereto as Exhibit G), for public comment. The comment period on the Draft Supplement closed on April 14, 2017. Ex. F at 1. The OCC has not issued a final supplement to the Comptroller's Licensing Manual dealing with applications for 5.20(e)(1) Charters from fintechs.

IV. ACTING COMPTROLLER NOREIKA'S SPEECH TO THE EXCHEQUER CLUB: JULY 19, 2017

In a speech to the Exchequer Club on July 19, 2017, Acting Comptroller Noreika summarized the OCC's efforts to date and the potential direction of the agency in the area of fintech and "responsible innovation." Acting Comptroller Noreika told his audience that the OCC was considering the "idea of granting national bank charters to fintech companies that are engaged in the business of banking and requiring them to meet the high standards for receiving a

charter." Ex. A at 4. He said: "Quite simply, I think it is a good idea that deserves the thorough analysis and the careful consideration we are giving it." *Id*. at 5. Crucially, however, he clearly indicated that the OCC had not received any applications from nondepository companies for 5.20(e)(1) Charters, and that the precise course that the OCC will pursue with this type of charter remains undecided:

> [A]t this point the OCC has not determined whether it will actually accept or act upon applications from nondepository fintech companies for special purpose national bank charters that rely upon [Section 5.20(e)(1)]. And, to be clear, we have not received, nor are we evaluating, any such applications from nondepository fintech companies.

Id. at 9. As possible alternatives to a *de novo* 5.20(e)(1) Charter, the Acting Comptroller suggested that the OCC might consider addressing fintech innovation using full-service national bank and federal savings association charters, or other special purpose national bank charters, such as trust banks, banker's banks, and credit card banks. *Id.*

ARGUMENT

I. BECAUSE CSBS FAILS TO SHOW COGNIZABLE HARM TO ITSELF OR TO ITS MEMBERS CAUSED BY ANY OCC ACTION, CSBS LACKS ARTICLE III STANDING AND THIS COURT LACKS JURISDICTION OVER THE COMPLAINT

The Court should dismiss this case because CSBS has not and cannot make the showing of standing necessary to meet the "case or controversy" requirement of Article III of the Constitution. Because neither the relevant provisions of Section 5.20(e)(1) nor the series of OCC public statements identified in the Complaint has had any cognizable real-world effect on anyone, including the members of CSBS, CSBS cannot show, as required, any injury-in-fact caused by the OCC's actions that would be redressed by the requested relief.

The "irreducible constitutional minimum" for standing contains three requirements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). "First and foremost," a plaintiff

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

Here, CSBS has not and cannot establish any of these requirements because the OCC has yet to take any relevant action that could have a concrete effect of any kind. No tangible effect on CSBS or CSBS's members could even arguably occur until a 5.20(e)(1) Charter has been issued to a specific applicant. This has not happened. No Section 5.20(e)(1) Charter has been issued (*i.e.*, to a non-deposit taking bank). *See* Ex. A at 9. No applications for such an institution have been received by the OCC. *Id.* No final procedures for processing such an application by the OCC are in place – the proposed supplement to the chartering manual remains in draft. *See supra* p. 8. Each of the OCC's public statements in 2016 and 2017 identified in the Complaint were part of ongoing policy development that is not final. *See supra* pp. 6-9.

When and if an application is received, the application would require agency consideration that would entail a public comment process before any preliminary or final approval would be possible. *See supra* p. 5. Again, there is no current or near-term prospect that

an application for a 5.20(e)(1) Charter will come under active agency consideration, let alone the more distant possibility that an applicant would actually commence the business of banking under such a charter. Accordingly, CSBS has not and cannot meet its burden of showing a "concrete" "actual or imminent" injury-in-fact, and *a fortiori* cannot show causation or redressability.

CSBS makes no attempt to show how the three-part test for standing is satisfied. This is because each of the alleged "harms" asserted in the Complaint is vague, future-oriented and, above all, speculative:

- The "Nonbank Charter Decision triggers significant risks to traditional areas of state concern," Compl. ¶ 92;
- The Nonbank Charter Decision "threatens to disrupt" the "integrity and stability of the U.S. dual banking system and bank regulation," *id.* at ¶ 93;
- The OCC's actions "impede the states' ability to continue their existing regulation of financial service companies within their borders and to enforce state laws designed to protect the consuming public and ensure the safety or soundness of nondepository companies," and creates difficulties in detecting unlicensed activity, *id.* at ¶ 94; and
- The "Decision creates conflicts with state law and threatens to preempt state sovereign interests," *id.* at ¶¶ 96-98.

The fundamental flaw in CSBS's argument is that the harms it alleges are inchoate. Until the OCC actually issues a 5.20(e)(1) Charter, *none* of the harms referenced by CSBS can materialize or be identified with the requisite certainty; the alleged harms are now merely hypothetical. *Cf. Mylan Pharm., Inc. v. F.D.A.*, 789 F. Supp. 2d 1, 6-10 (D.D.C. 2011) (no standing where drug approval process had not reached even tentative approval). "A 'concrete' injury must be *de facto*; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). CSBS has averred no such existing injury. "Allegations of possible future injury do not satisfy

the requirements of Article III. A threatened injury must be *certainly impending* to constitute injury in fact." *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 24 (D.D.C. 2014) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149 (1990)).

CSBS's only statement regarding standing is a conclusory allegation as to "associational standing" derivative of the alleged harm to its members. Compl. ¶ 15, citing *CSBS v. Lord*, 532 F. Supp. 694 (D.D.C. 1982), *aff'd CSBS v. Conover*, 710 F.2d 878 (D.C. Cir. 1983). But CSBS makes no attempt to show how its individual members satisfy the three-part test for standing, a necessary element to establish its associational standing. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1243-44 (D.C. Cir. 2003); *Int'l Acad. of Oral Med. & Toxicology v. F.D.A.*, 195 F. Supp. 3d 243, 263 (D.D.C. 2016). In *Lord*, a final OCC regulation addressing adjustable rate mortgages had a preemptive effect on state laws and thus an actual ongoing effect upon CSBS members. 532 F. Supp. at 695-96; *see also CSBS v. Conover*, 710 F.2d at 880-81. This Court found associational standing in a case where plaintiff's members were "directly regulated by the regulation being challenged" and "suffering from additional, allegedly unlawful reporting requirements, causing them injury." *Florida Bankers Ass'n v. U.S. Dept. of the Treasury*, 19 F. Supp. 3d 111, 120 (D.D.C. 2014), *judgment vacated on other grounds by* 799 F.3d 1065 (D.C. Cir. 2015). Here, in contrast, any adverse effect on CSBS members cannot conceivably be felt unless and until a 5.20(e)(1) Charter is issued. Accordingly, CSBS fails to make the necessary showing that the claimed harms satisfy the necessary requirements for standing.

At this stage, any attempt to draw a legal conclusion regarding the likelihood that CSBS or its members would be harmed is an exercise in speculation: no applications are pending, and

potential applicants may vary widely in the nature of their business models, including the location of the activity and the identity of competitors. The time for assessing whether and which CSBS members have been actually harmed would be after a charter application has been approved. In the absence of constitutional standing, the Complaint should be dismissed for lack of jurisdiction.

II. BECAUSE OCC PUBLIC STATEMENTS DO NOT CONSTITUTE FINAL AGENCY ACTION, CSBS'S COMPLAINT FAILS TO STATE A CLAIM

The majority of the OCC "actions" that the CSBS attempts to aggregate into what they call the "Nonbank Charter Decision" are, at bottom, nothing more than a collection of non-final policy papers and solicitations for input from the public that, whether considered separately or collectively, do not represent a "final agency action" subject to review under the Administrative Procedure Act ("APA"). Under the APA, judicial review is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Agency action is final when it satisfies the two-part test stated in *Bennett v. Spear*, 520 U.S. 154 (1997): when it (1) "mark[s] the consummation of the agency's decision-making process," and (2) is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-78 (internal citations and quotation marks omitted). To be final, an agency must state an "unequivocal position," *Ciba–Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986), rather than one contingent on future agency actions, *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). Because neither of the two *Bennett* requirements is here satisfied, the Complaint should be dismissed for failure to state a claim.

A. Because the OCC Has Not Completed Its Decision-Making Process, the First Part of the *Bennett* Test Is Not Satisfied

CSBS alleges that Comptroller Curry's December Speech and the OCC SPNB White Paper compel the Court to conclude that the OCC reached a "final decision" in December 2016 to grant 5.20(e)(1) Charters to fintech companies. Compl. ¶¶ 52-57. This is simply not the case. The OCC public statements relied upon by CSBS instead demonstrate that the OCC's decision-making process is still under way.

1. The December 2016 Speech Was Not a Final Agency Action

CSBS alleges that the OCC decisional process "culminated" in the December Speech, Ex. D, and the publication of the SPNB White Paper, Ex. E, Compl. ¶¶ 52-56. These arguments are refuted by the statements themselves. *See supra* pp. 6-8. In the December Speech, Comptroller Curry stated:

> We have published a paper today discussing several important issues associated with the approval of a national bank charter, and we are seeking stakeholder comment to help inform our path forward. Your comments will help us ensure that the agency's chartering decisions promote the safety and soundness of the federal banking system, increase financial inclusion, and protect consumers from abuse. I hope the professors and legal minds studying here will take the opportunity to read the paper and provide your thoughts.

Ex. D at 3. Far from indicating consummation of any final agency action, the former Comptroller made clear that the OCC was actively seeking comments to inform the OCC's path forward. At the same time, Comptroller Curry emphasized that: (1) staff was being directed to "develop" and "implement" a formal agency policy; (2) the OCC was in the process of requesting comments on the SPNB White Paper; and (3) those comments would inform the development of the OCC's policy. This context establishes that the former Comptroller's statement that the OCC "*will* move forward with chartering financial technology companies,"

Ex. D at 3, does not rise to the level of final agency action that is reviewable under the APA. These statements confirm that the OCC's decision-making process was still unfolding in December 2016. The Comptroller's speech committed the agency to moving forward in this area but nothing had been decided regarding *how* the agency would move forward, such as what types of charters might be offered.

2. The SPNB White Paper Was Not a Final Agency Action

A review of the SPNB White Paper, Ex. E, published on December 16, 2016, further refutes CSBS's arguments. *See, e.g.*, Compl. ¶¶ 57-58; *see supra* pp. 6-8. The SPNB White Paper demonstrates that the agency's decision-making process was still incomplete in December 2016. For example, in the preface, the SPNB White Paper states an intent to explore "what the OCC considers to be necessary conditions if the OCC is to exercise that authority." Ex. E at 1. The SPNB White Paper further requested "feedback on all aspects of this paper" and solicited responses to 13 questions to assist the OCC in policy formulation. *Id.* Again, the request by the OCC for feedback from stakeholders on a wide range of issues about whether to grant 5.20(e)(1) Charters makes clear that no final decision had yet been made.

3. The Explanatory Statement and Draft Supplement Were Not Final Agency Actions

CSBS further alleges, incorrectly, that two publications issued by the OCC in March 2017, the Explanatory Statement, Ex. F, and the Draft Supplement, Ex. G, show that the OCC completed its decision-making process concerning 5.20(e)(1) Charters for fintechs. Compl. ¶¶ 67-76. As with the December Speech and the SPNB White Paper, these publications demonstrate, by their draft form and conditional language, that the Agency had neither reached a final decision nor implemented a fintech chartering program. As CSBS concedes, the OCC invited public comment on the Draft Supplement, Compl. ¶ 74, which shows that it was still

under development. *See, e.g.*, *Oconus DOD Emp. Rotation Action Grp. v. Cohen*, 140 F. Supp. 2d 37, 43-44 (D.D.C. 2001) (draft subchapter of personnel manual not final agency action because it was still in process of being developed). The Explanatory Statement "addresses key issues raised by commenters" regarding the SPNB White Paper. Ex. F at 1. It also "explains the OCC's decision to issue for public comment" the Draft Supplement. *Id.*

4. The Exchequer Speech Confirms That There Has Been No Final Agency Action

Acting Comptroller Noreika's July 19, 2017 Exchequer Speech further confirmed the indeterminate status of the OCC's thinking on 5.20(e)(1) Charters. "[A]t this point the OCC has not determined whether it will actually accept or act upon applications from nondepository fintech companies for special purpose national bank charters that rely upon [Section 5.20(e)(1)]." Ex. A at 9. As possible alternatives to a *de novo* 5.20(e)(1) Charter, the Acting Comptroller suggested that the OCC might consider addressing fintechs using full-service national bank and federal savings association charters, or recognized special purpose national bank charters, such as trust banks, banker's banks, and credit card banks. *Id.* Accordingly, the OCC has demonstrably not "made up its mind," *AT&T*, 270 F.3d at 975, has not consummated its decision-making process, and has not yet engaged in reviewable final agency action.

B. Because the OCC's Actions Have Not Affected Rights or Obligations or Resulted in Legal Consequences, the Second Part of the *Bennett* Test Is Not Satisfied

In order to be final, the agency action must also have had an effect on rights or obligations or caused legal consequences. *Bennett*, 520 U.S. at 177-78. Here, even if the OCC had completed its decision-making process – and it has not – no legal consequences have flowed from the OCC's actions to date because no 5.20(e)(1) Charter has been issued. *See Peoples Nat'l Bank v. OCC*, 362 F.3d 333 (5th Cir. 2004) (no reviewable final agency action when bank

challenged OCC banking bulletin limiting the scope of OCC Ombudsman review of examination ratings because bank did not use bulletin review process). As in *Peoples Nat'l Bank*, CSBS "simply takes issue with the idea that" the OCC might issue a 5.20(e)(1) Charter at some future date. *Id.* at 337. CSBS alleges several legal consequences that *might* in the future flow from an OCC decision to issue such charters. *See supra* p. 11. As in *Peoples Nat'l Bank*, however, these consequences, even if they later come true, could potentially affect CSBS's rights adversely only "on the contingency of future administrative action," 362 F.3d at 337, an actual grant of a 5.20(e)(1) Charter. At this time, however, no such charters have even preliminarily been granted. Accordingly, as in *Peoples Nat'l Bank*, any alleged chartering decision "should not be reviewed by a court until it has" actually occurred "and resulted in a final agency action." *Id.*

III. BECAUSE THIS MATTER IS NOT RIPE FOR JUDICIAL REVIEW, CSBS'S COMPLAINT SHOULD BE DISMISSED

The Court should also conclude that this matter is not yet ripe for judicial review because no final agency action has taken place. Ripeness, at its core, "is about whether a federal court 'can or should decide a case.'" *Zuckerberg v. D.C. Bd. of Elections & Ethics*, 999 F. Supp. 2d 79, 83 (D.D.C. 2013) (quoting *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012)). Even where standing exists under Article III, there may still be "prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Courts assess the prudential ripeness of a case based on a two-prong inquiry: (1) the "fitness of the issues for judicial decision" and (2) the "extent to which withholding a decision will cause 'hardship to the parties.'" *Am. Petroleum Inst.*, 683 F.3d at 387 (quoting *Abbott Labs.*, 387 U.S. at 149). Because CSBS cannot satisfy either prong of this test, the case should be dismissed.

The first prong, fitness, turns on, among other things, "whether the agency's action is sufficiently final." *Am. Petroleum Inst.*, 683 F.3d at 387 (citation omitted). For the reasons

already addressed *supra* pp. 5-9, 13-16, the OCC's inquiry regarding whether to offer a 5.20(e)(1) Charter is still ongoing. More to the point, the OCC has not decided whether it will accept applications for 5.20(e)(1) Charters. By any measure, whatever agency "action" that may exist at this point is certainly not final and, therefore, not yet fit for review. *See N.Y. Stock Exch. v. Bloom*, 562 F.2d 736, 740-43 (D.C. Cir. 1977) (challenge to opinion letters of Comptroller of the Currency not ripe for review because opinions contained therein were tentative and not final); *Am. Land Title Ass'n v. Clarke*, 743 F. Supp. 491, 492-99 (W.D. Tex. 1989) (interpretive letters issued by the OCC did not announce a final agency position and were not ripe for judicial review).

Under the second prong, hardship, the "institutional interests in the deferral of review" are only outweighed where the hardship caused by that deferral is "immediate and significant." *Am. Petroleum Inst.*, 683 F.3d at 389. Further, considerations of any hardship that may flow from such a deferral "will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions." *Id.* (quoting *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984)). Here, CSBS will not suffer any immediate or significant hardship if this Court were to delay review of this matter. On the contrary, CSBS tacitly admits that it has not suffered any actual, concrete injury from any of the challenged OCC actions. *See supra* p. 11. In the absence of any conceivable concrete hardship, this matter is not yet ripe for judicial review. *See Zuckerberg*, 999 F. Supp. 2d at 85–86 (challenge to city council act that was not yet in effect not ripe for review because it imposed no concrete hardship and its impact was not sufficiently direct and immediate).

IV. BECAUSE THE OCC HAS NOT ISSUED ANY LEGISLATIVE RULE SPECIFIC TO THE CHARTERING OF FINTECH COMPANIES THAT WOULD REQUIRE NOTICE AND COMMENT, COUNTS III AND IV SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

CSBS also errs in its argument that the OCC has engaged in improper rulemaking by failing to comply with the APA's notice and comment procedures, by failing to conduct a cost-benefit analysis, and by acting in an arbitrary and capricious manner when the OCC issued its Draft Supplement, Ex. G, and SPNB White Paper, Ex. E. *See* Compl. ¶¶ 83-87, 107-110 (Count III); ¶¶ 88-91, 111-114 (Count IV). None of these arguments have merit.

A. The APA's Notice and Comment Procedures Do Not Apply

The Court should conclude that Count III fails at the outset because, as previously explained, *see supra*, pp. 13-16, neither document constitutes final agency action. Both documents are part of a still evolving decision-making process and are not indicative of any final action, including a legislative rule where notice and comment would be required. Even if the Draft Supplement and SPNB White Paper were final agency actions – which they are not – CSBS's argument would still fail because it is erroneously premised on the notion that the documents create a "legislative rule" rather than a general statement of policy to which notice-and-comment requirements do not apply.

"Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (citing 5 U.S.C. § 553); *see also Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (same). As the D.C. Circuit has explained:

> An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule. An agency action that sets forth legally binding requirements for a private party to obtain a permit or

> license is a legislative rule. * * * An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.

McCarthy, 758 F.3d at 251-52; s*ee also Huerta*, 785 F.3d at 717 (same); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (same). The "most important factor" in differentiating between legislative rules and nonbinding actions such as a general statement of policy is "the actual legal effect (or lack thereof) of the agency action in question." *Huerta*, 785 F.3d at 717 (quoting *McCarthy*, 758 F.3d at 252); *see also Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F. 2d 1106, 1112 (D.C. Cir. 1993) (same).

The wording of a document is significant in determining whether it is a legislative rule or a policy statement. "[A] document that reads like an edict is likely to be binding, while one riddled with caveats is not." *Huerta*, 785 F.3d at 717. As previously noted, the language used in the SPNB White Paper is neither mandatory nor obligatory; it is indefinite and conditional. *See supra* p. 15. Indeed, the document concludes with a "Request for Comment" seeking feedback from stakeholders to assist the OCC in the decision-making process. *See supra* p. 15. Thus, the language used in the SPNB White Paper is incompatible with any notion that the document creates definitive rights or imposes definitive obligations or limits in any way the OCC's discretion with respect to chartering decisions.

The Court should reach a similar conclusion regarding the Draft Supplement. First, to the extent the Draft Supplement proposes application procedures specific to fintechs, it is a *draft* document and is not evidence of an implemented policy. *See supra* pp. 15-16. Second, the document is explanatory in nature. "This Supplement *explains* how the OCC will apply the

licensing standards and requirements in its *existing* regulations and policies to fintech companies applying for an SPNB charter." Ex. G at 2 (emphasis added).

Therefore, taken together, the SPNB White Paper and Draft Supplement provide nothing more than a first take on what may eventually be adopted as generalized guidance. This is far from what the courts have previously construed to be a legislative rule. Accordingly, Count III should be dismissed, in the alternative, for failure to state a claim.

Moreover, the OCC followed notice-and-comment procedures when promulgating the 2003 amendment to 12 C.F.R. § 5.20(e)(1) and does not understand Count III to argue otherwise. CSBS's cost-benefit claim also fails because the APA's arbitrary and capricious standard does not in itself require an agency to engage in cost-benefit analysis. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011); *see also Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-12 & n.30 (1981) ("[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," and has used "specific language" to express that intent).

B. The Arbitrary and Capricious Standard Is Inapplicable

CSBS also asserts in Count IV that the series of OCC public statements identified in the Complaint are arbitrary, capricious, and an abuse of discretion. This claim fails for the same reason that Count III fails: only final agency actions are subject to judicial review under the APA's arbitrary and capricious standard. 5 U.S.C. §§ 704, 706. No final agency action has occurred. *See supra* pp. 13-16. Accordingly, Count IV should be dismissed for failure to state a claim.

V. BECAUSE CSBS'S FACIAL CHALLENGE TO THE OCC'S REGULATION IS TIME-BARRED, IT SHOULD BE DISMISSED

An additional basis for dismissing the Complaint's challenge to the relevant provisions of Section 5.20(e)(1) is that, to the extent CSBS's claims present a facial challenge to the regulation, the cause of action is time-barred by the statute of limitations applicable to civil actions against the United States and federal agencies. "Except as provided [in the Contract Disputes Act of 1978], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). A cause of action under the APA accrues on the date of the final agency action. *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). "Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987).

Here, if the adoption of the amendments to Section 5.20(e)(1) at issue constituted final agency action, the cause of action under the APA accrued on January 16, 2004 when the Final Rule became effective. 68 Fed. Reg. 70122 (Dec. 17, 2003). Accordingly, the time for filing a facial challenge to the regulation expired in January 2010, and this Court lacks jurisdiction over the cause of action.

VI. ALTERNATIVELY, BECAUSE THE OCC REASONABLY INTERPRETED THE AMBIGUOUS NATIONAL BANK ACT TERM "THE BUSINESS OF BANKING," CSBS'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

The absence of jurisdiction and nonexistence of final agency action prevent the Court from reaching the merits of the validity of 12 C.F.R. § 5.20(e)(1). Even if this Court were to reach the merits, however, the Complaint should be dismissed for failure to state a claim

because, under the framework articulated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), Section 5.20(e)(1) represents a reasonable OCC interpretation of the undefined and ambiguous statutory term "business of banking."

The Supreme Court has repeatedly applied the deferential *Chevron* framework to the OCC's interpretation of the terms of the National Bank Act. *Cuomo v. Clearing House, Ass'n, LLC*, 557 U.S. 519, 525 (2009); *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 739 (1996); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). The *Chevron* framework proceeds in two analytical steps. "Where a statute is clear, the agency must follow the statute." *Cuzzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). "But where a statute leaves a 'gap" or is 'ambigu[ous],' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Id.* (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001)); *Chevron*, 467 U.S. at 843.

CSBS concedes that the term "business of banking" is not "expressly defined." Compl. ¶ 31. Because the National Bank Act does not establish a plain meaning as to what it means to be engaged in the "business of banking," the OCC has the "leeway" to address that ambiguity or "gap" in the statute by enacting rules that are "reasonable in light of the text, nature, and purpose of the statute." *Cuzzo Speed Tech.*, 136 S. Ct. at 2142. Applying this test, the OCC's interpretation is reasonable and entitled to deference under the *Chevron* doctrine: the OCC's interpretation is not precluded by statutory text, the OCC's reading is supported by judicial authority — including Supreme Court and D.C. Circuit precedent — and the OCC's interpretation of the term is consistent with the text, nature, and purpose of the statute.

Accordingly, should the Court reach the merits, the Complaint should be dismissed for failure to state a claim.

A. Because the Statutory Text Has No Plain Meaning Under *Chevron* Step One, the OCC Has Discretion in Reasonably Interpreting That Text

An examination of the relevant text of the National Bank Act makes clear that, under the *Chevron* framework, the phrase "business of banking" is ambiguous, having no fixed meaning that precludes the OCC's interpretation set forth in Section 5.20(e)(1). The term "business of banking" appears in several National Bank Act provisions, without definition or textual elaboration that could add meaning. *See* 12 U.S.C. §§ 21 ("Associations for carrying on the business of banking may be formed by any number of natural persons, not less in any case than five"); 24(Seventh) (dealing with bank powers); 26 (compliance with requirements of "title 62 of the Revised Statutes" that are "required to be complied with before an association shall be authorized to commence the business of banking …."); and 27(b)(1) (the Comptroller of the Currency may issue a "certificate of authority to commence the business of banking") to [a bankers' bank]). In addition, a similar term, "the general business of each banking association" is contained in a geographic restriction in 12 U.S.C. § 81("The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any…"). Section 27, the general chartering provision, states:

> If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller . . . it appears that such association is lawfully entitled to commence the **business of banking**, the Comptroller shall give to such association a certificate . . . that such association has complied with all the provisions required to be complied with before commencing the **business of banking** and that such association is authorized to commence such business.

12 U.S.C. § 27(a) (emphasis added). In addition to this general chartering authority, Section 27

also recognizes two forms of special purpose national banks: trust banks and "bankers' banks." The National Bank Act does not set forth any mandatory activities that must be performed in order for a bank to be engaged in the "business of banking." Indeed, the text in general is permissive and therefore consistent with an expansive grant of discretion in the Comptroller to assign content to the phrase. Accordingly, there is nothing in the text of the National Bank Act that precludes the OCC's interpretation codified at 12 C.F.R. § 5.20(e)(1).

1. In *NationsBank*, the Supreme Court Recognized the OCC's Authority to Interpret the Ambiguous Term "Business of Banking"

These statutory references to the "business of banking" have rarely been the subject of litigation that has added interpretive meaning, with the exception of Section 24(Seventh), which has been litigated throughout the history of the National Bank Act. *See, e.g., Merchants' Bank v. State Bank*, 77 U.S. 604 (1870) (power to certify checks); *First Nat'l Bank of Charlotte v. Nat'l Exch. Bank*, 92 U.S. 122 (1876) (power to purchase securities in the course of settling a claim); *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913) (power to pay state taxes on depositors' accounts); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940) (power to operate a safe deposit business); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (power to advertise). Section 24(Seventh) provides that national banks are authorized:

> To exercise . . . **all such incidental powers as shall be necessary to carry on the business of banking**; by discounting and negotiating promissory notes drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes [and provisions limiting securities and stock sales].

12 U.S.C. § 24(Seventh) (emphasis added). The Supreme Court explicated this text definitively in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). In *NationsBank*, the OCC had interpreted the Section 24(Seventh) text to permit the Comptroller

to authorize national banks to sell annuities to bank customers. 513 U.S. at 254. That interpretation was challenged by an insurance agents' association that argued that the text should instead be read to limit the scope of permissible banking powers under Section 24(Seventh) to activities connected with the five statutorily enumerated powers: discounting, deposit-taking, trading in exchange and money, lending, and dealing in notes. Under this theory, an implicit *expressio unius est exclusio alterius* statutory structure argument, the general authorization to "exercise . . . all such incidental powers as shall be necessary to the business of banking" would be circumscribed by the succeeding text listing specific powers. 513 U.S. at 257-58. The Supreme Court expressly and emphatically rejected that argument.

First, the Court reviewed the OCC's interpretation through the framework of *Chevron* deference. 513 U.S. at 256-57. "As the administrator charged with supervision of the National Bank Act, see § 1, 26-27, 481, the Comptroller bears primary responsibility for surveillance of the 'business of banking' authorized by § 24 Seventh." 513 U.S. at 256.

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Id. at 256-57 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987)).

Applying this standard of review, the Court affirmed the OCC's construction of the Section 24(Seventh) phrase "incidental powers . . . necessary to carry on the business of banking" as an independent grant of authority, not limited by the specified enumerated grants of authority, *id.* at 257, rejecting the argument by the insurance agents to the contrary:

> We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those

> specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments – for example, operating a travel agency – may exceed those bounds.

Id. at 258 n.2. This analysis resolved the preexisting question whether there is a distinction between "business of banking" and "all such incidental powers as shall be necessary to carry on the business of banking." Before *NationsBank*, there were active questions whether a given power was "part of" the business of banking or "incidental to" the business of banking. By equating the Section 24(Seventh) text with the "business of banking," *NationsBank* established that it is a unitary inquiry.

NationsBank marked a watershed in construing the term "business of banking," resolving an analytical dispute that had sharply divided courts of appeals for two decades. On one side of the divide, the D.C. Circuit had prefigured *NationsBank* by rejecting a narrow interpretation of Section 24(Seventh), instead deferring to the "expert financial judgment" of the Comptroller. *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (municipal bond insurance part of the business of banking). On the other side of the divide, two courts of appeals had adopted a more restrictive test limiting the scope of permissible powers to those related to the enumerated powers in Section 24(Seventh). *See M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (power "must be 'convenient or useful' in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act") (equipment leasing); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) (test is whether the activities were "directly related to one or another of a national bank's express powers") (travel agency not authorized). *NationsBank* rejected that test, implicitly superseding *Arnold Tours*, *M&M Leasing*, and other decisions that had relied upon

them.[3] Accordingly, the reasoning of any "business of banking" decisions that preceded *NationsBank* is subject to reconsideration in light of its holding.

2. The D.C. Circuit Has Confirmed the OCC's Authority to Issue a Limited Purpose National Bank Charter

Just as the OCC was afforded deference in *NationsBank* in broadly interpreting the general powers of national banks under the "business of banking," the OCC has received deference in defining narrowly the scope of a particular national bank's powers in a case that strongly supports the Comptroller's authority to charter a special purpose national bank, and by extension, to codify that authority in 12 C.F.R. § 5.20(e)(1). *Indep. Cmty. Bankers Ass'n of South Dakota, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 820 F.2d 428 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) ("*ICBA v. FRB*"). In a chartering decision made long before the 2003 amendment of Section 5.20(e)(1), the OCC issued a limited purpose national bank charter, upheld by the D.C. Circuit, authorizing a national bank to exercise limited powers so as to comply with state law to enable it to engage in interstate banking under the Bank Holding Company Act ("BHCA"). At the time, the BHCA accorded states some control over the ability of bank holding companies to acquire a national bank in a state other than the institution's home state. 820 F. 2d at 430-31. Then-applicable South Dakota law limited the operations of such national banks, in particular the deposit-taking function, in order to protect state-chartered institutions from competition. *Id.* at 431.

ICBA v. FRB, a suit against the Federal Reserve Board, involved challenges to actions by the Federal Reserve Board and (embedded within the same petition) the OCC: (1) the Federal

[3] While the *NationsBank* holding displaced the test applied by *M&M Leasing, NationsBank* fully vindicated the policy observation articulated in *M&M Leasing:* "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.*, 563 F.2d at 1382.

Reserve Board's approval of the acquisition of a South Dakota-based national bank, newly created to carry out the credit card business of a Texas-based bank holding company; and (2) the OCC's issuance of a charter to that credit card national bank with powers limited to conform to the South Dakota restrictions.[4] The D.C. Circuit noted that the Comptroller's decision to charter the limited purpose bank built upon a prior OCC chartering decision reflected in a Federal Reserve order, *Citicorp*, 67 Fed. Res. Bull. 181 (1982). There, the Comptroller had noted that the grant of authority to national banks under Section 24(Seventh) is "permissive, rather than mandatory," and that a national bank "rarely contemplates engaging in the full range of permissible activities." 820 F.2d. at 439. The Comptroller assessed that the decision to operate as a limited service bank so as to avoid conflict with a state statute is "a business decision." *Id.*

Among the arguments made by the ICBA against the validity of the Federal Reserve's decision was that there is "no such institution as a 'special purpose' national bank," and that the limited national bank charter was otherwise inconsistent with federal law. 820 F. 2d at 438-40. The D.C. Circuit rejected those arguments and held the limited purpose bank charter to be within the Comptroller's "particular expertise."

> We have no doubt but that the Comptroller's construction and application of the National Bank Act in this context is reasonable. There is nothing in the language or legislative history of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory. Restriction of a national bank's activities to less than the full scope of statutory authority conflicts with the purposes of the Act only if it undermines the safety and soundness of the bank or interferes with the bank's ability to fulfill its statutory obligations. That judgment requires consideration of the particular legal and business circumstances of

[4] The national bank charter application at issue in *ICBA v. FRB*, while proposing the primary activity of the new bank to be credit card services, also proposed to provide limited deposit-taking, lending, and checking services to the local community to the extent permitted under state law. 820 F.2d at 439. There is nothing in the reasoning of the D.C. Circuit opinion that placed any weight on the existence of those nominal activities.

> the individual banks—a judgment within the particular expertise of the Comptroller and reserved to his chartering authority.

820 F.2d at 440. Accordingly, the reasoning of *ICBA v. FRB* supports the OCC's authority to promulgate Section 5.20(e)(1) and illustrates that the legal concept of a special purpose national bank charter is not novel or unprecedented, but rather follows a decades-old OCC practice.

Shortly after *ICBA v. FRB* was decided in June 1987, Congress amended the BHCA to create an exception from the definition of "bank" applicable to credit card banks. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (August 10, 1987) *codified at* 12 U.S.C. § 1841(c)(2)(F). There is no express statutory chartering authority for credit card banks in the National Bank Act; instead, the OCC has chartered credit card banks relying on the general statutory authority endorsed in *ICBA v. FRB.*

B. Under *Chevron* Step II, the OCC Reasonably Interpreted the Statutory Term "Business of Banking" by Reference to Three Core Banking Activities Identified in the National Bank Act

In considering the 2003 amendment of Section 5.20(e)(1), *see supra* pp. 5-6, the OCC weighed the ways in which to give content to the statutory term "business of banking" in determining eligibility for a national bank charter. The OCC's Final Rule provided, "A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits; paying checks; or lending money." 12 C.F.R. § 5.20(e)(1). In its Complaint, CSBS objects to Section 5.20(e)(1), arguing that it is unreasonable on policy and historical grounds for the OCC not to require deposit-taking as a necessary activity for a national bank. To the contrary, historical understanding and caselaw support the reasonable choices made by the OCC in interpreting the "business of banking" in a

manner reflected by the regulation in its current form.

In the preamble to the Final Rule that promulgated amendments to 12 C.F.R. § 5.20(e)(1) in 2003, the OCC explained that it added the "core banking activities" requirement by reference to 12 U.S.C. § 36, which defines a national bank "branch" as a branch place of business "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). While Section 36 does not include the term "business of banking," the OCC looked for guidance to a Supreme Court decision construing the statutory phrase the "general business of each national banking association" in 12 U.S.C. § 81 by reference to the core activities of Section 36. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987) ("*Clarke v. SIA*"). Section 81 restricts the locations at which a national bank may conduct business. "The **general business of each national banking association** shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of [12 U.S.C. § 36]." 12 U.S.C. § 81 (emphasis added). The close textural resemblance of "the business of banking" to the "general business" of each bank supports the OCC's reliance upon *Clarke v. SIA* to connect the "core activities" of Section 36 to the OCC's chartering authority.

In *Clarke v. SIA*, the OCC had approved a national bank's application to offer discount brokerage services at, *inter alia*, non-branch locations both inside and outside the bank's home state. A securities trade association challenged the approval, arguing that the phrase "general business" of each banking association in Section 81 should be read more broadly than the Section 36 activities to include all activities statutorily authorized for national banks, including the sale of securities, which would therefore limit where such sales could be conducted. 479 U.S. at 406. The Supreme Court rejected that argument. The Court noted that the phrase "the general business of each national banking association" is ambiguous and held the Comptroller's

interpretation entitled to deference. 479 U.S. at 403-04. The Court observed that national banks engage in many activities, and there was no evidence that Congress intended all of those activities to be subject to the geographical limitations of Sections 81 and 36. 479 U.S. at 406-09. Instead, the Court found reasonable the OCC's conclusion that the general business of the bank under Section 81 included only "core banking functions," and not all incidental services that national banks are authorized to provide. 479 U.S. at 409. The Court also held that the OCC reasonably equated "core banking functions" with the activities identified in Section 36, which defined "branch" as any place "at which deposits are received, or checks paid, or money lent." *Id.*

The Court's endorsement of the OCC's analysis — that national banks engage in many activities, but that only these three activities represent "core banking functions" and so define the "general business" of the bank — provides support for treating any one of these same three activities as the required core activity for purposes of the chartering provisions. Just as the "general business" of each national bank is undefined in the location restriction of Section 81, the "business of banking" is undefined in the chartering provisions of Sections 21 and 27(a). The natural reading of the two phrases is similar in meaning, which supports the reasonableness of using the common source of Section 36(j) for the interpretation of each. Because the terms of Section 36 are linked by "or," performing only *one* of the activities is sufficient to meet the statutory definition and to cause the location restrictions to apply. *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 135 (1969) (because the "activities" element of the definition "is written in the disjunctive, the offering of any one of the three services will provide the basis for finding that 'branch' banking is taking place."). This interpretation provides symmetry and consistency between the chartering and the location provisions of the National Bank Act.

VII. BECAUSE CSBS FAILS IN ITS ARGUMENTS THAT THE OCC LACKS STATUTORY AND CONSTITUTIONAL AUTHORITY TO ISSUE A 5.20(e)(1) CHARTER, IT FAILS TO STATE A CLAIM

The CSBS Complaint outlines a variety of arguments against the OCC's proposed use of Section 5.20(e)(1) to charter as a national bank an entity that does not take deposits, including arguments predicated on policy, statutes other than the National Bank Act, caselaw, the legislative history of the National Bank Act, historical practice, and the Constitution. None of these arguments can be sustained.

CSBS's central thesis, that the OCC's statutory authority under 12 U.S.C. § 27(a) to charter an entity to "commence the business of banking" does not extend to authority to charter a national bank that does not accept deposits, Compl. ¶¶ 6, 7, 65, 77-82, is contrary to the Supreme Court (*NationsBank*; *Clarke v. SIA*) and D.C. Circuit (*ICBA v. FRB*) authority discussed above. CSBS's *expressio unius* argument that principles of statutory construction applied to the chartering provisions at 12 U.S.C. § 27(a), (b), and the definition of "bank" for purposes of the Bank Holding Company Act at 12 U.S.C. § 1841(c)(2)(D) and (F) yield the result that special purpose charters require express statutory authorization, Compl. ¶¶ 38-41, cannot be sustained in light of the statutory structure and history of Section 27 and the rejection of an analogous argument by the Supreme Court in *NationsBank*. CSBS's statement that the legislative history of the National Bank Act identifies receiving deposits as an essential function, Compl. ¶ 31, fails to offer a citation to authority to support that proposition. The 19th and 20th century Supreme Court cases that CSBS cites for the proposition that receiving deposits is essential to the business of banking, Compl. ¶ 32, did not directly address that issue. The two district court opinions cited by CSBS for the proposition that a bank that does not receive deposits is not in the "business of banking," Compl. ¶¶ 32, 40, 42-43, quickly ceased to be viable law and have since been

superseded by legislation or subsequent Supreme Court authority. The provisions of non-National Bank Act statutes such as the BHCA relied upon by CSBS, Compl. ¶¶ 33-37, 43, have no bearing upon the OCC's interpretation of the National Bank Act. Historical sources do not yield the conclusion that deposit-taking is a function indispensable to the definition of the "business of banking," Compl. ¶ 32, but show instead that 19th Century authority recognized a variety of functions that could be, or need not be, performed by a "bank." Finally, long-established Supreme Court authority, reiterated in 2007, defeats CSBS's appeal to the Supremacy Clause and the Tenth Amendment. Compl. ¶¶ 115-121.

A. CSBS's Statutory Construction Arguments Lack Merit

1. Judicial Authority and Statutory Context Defeat CSBS's *Expressio Unius* Argument

CSBS cannot sustain its argument that the *expressio unius* canon of statutory construction yields the result that the specific legislation allegedly authorizing or recognizing the chartering of special purpose national banks – trust banks, banker's banks, and credit card banks – creates an inference that Congress intended to withhold inherent special purpose chartering authority from the OCC. Compl. ¶ 79. First, the text of Section 27 does not reflect the structural pattern that triggers the canon's application. "As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of 'an associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see U.S. v. Vonn*, 535 U.S. 55, 65 (2002). No such inference is available for Section 27, where the provisions do not present a like series, but are different in kind: a general chartering authority, a specific chartering authority (banker's banks), and a ratification of charters issued under unspecified authority (trust banks). Moreover, because

the general chartering authority dates from 1864, the recognition of trust banks was added by legislation in 1978,[5] and the authority for banker's banks was added in 1982, the structure of the statute is not the product of a single Congress to which any intent can be attributed. The distinct provisions instead reflect discrete legislation by different Congresses, widely separated in time, responding to disparate reasons for legislation. "The possibilities either of [congressional] neglect or of implied delegation to the agency grow more likely as the contrasted contexts grow more remote from each other." *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990). "The canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013).

Additionally, because the canon of *expressio unius* is inherently statute-specific, no meaningful inference can be drawn from the provisions of non-National Bank Act statutes such as the credit card bank exception in the BHCA. *See* 12 U.S.C. § 1841(c)(2)(F).[6] Finally, in *NationsBank*, as discussed *supra* pp. 25-27, the Supreme Court rejected an implicit *expressio unius* argument with respect to the enumerated express powers in Section 24(Seventh) that, "as

[5] The trust bank text in part retroactively ratified previously issued charters. This text therefore should be read as a *post-hoc* congressional endorsement of the OCC's authority to issue special purpose charters under its general chartering authority.

[6] Indeed, the BHCA exception for credit card banks in 12 U.S.C. § 1841(c)(2)(F) is at odds with CSBS's theory of the case because there is no corresponding chartering authority for credit card banks in the National Bank Act. Notwithstanding the absence of any such specific National Bank Act authorization for credit card banks, the OCC has chartered such credit card banks and has been sustained in so doing. *See* discussion of *ICBA v. FRB*, *supra* pp. 28-30. Credit card banks, therefore, stand as a counterexample to CSBS's argument that special purpose charters require specific statutory authority.

an associated group or series," would more plausibly satisfy the legislative pattern associated with application of the canon than does the structure of Section 27.

More generally, the Supreme Court and the D.C. Circuit have repeatedly expressed caution in the application of the canon, especially in an administrative context. "The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (2014), *quoting Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990); *see also Mobile Commc'n Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-05 (maxim, unsupported by arguments based on the statute's structure and legislative history, "too thin a reed" to support the conclusion that Congress had clearly resolved the issue); *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (same). For all these reasons specific to the statutory text and structure, CSBS cannot sustain its *expressio unius* argument.

2. CSBS Errs in Relying on Statutes Other Than the National Bank Act

CSBS errs in its attempts to extract meaning from the provisions of non-National Bank Act statutes addressing "bank" or "banking" for interpretation of the National Bank Act. As a matter of statutory interpretation, these arguments are meritless because it is well settled that the meaning of the same term, let alone similar terms, across different statutes may vary "to meet the purposes of the law." *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213, 218-20 (2001) (ambiguities in identical statutory terms should not be resolved identically regardless of their surroundings; instead, deference is due to agency's interpretations); *see also Yates v. U.S.*, 135 S. Ct. 1074, 1082 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the

same statute.") (collecting cases); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (also rejecting the presumption of uniform usage of statutory terms).

Contrary to CSBS's suggestion, there is no aspect of the BHCA that defines the term "business of banking" as it appears in the general chartering authority of the National Bank Act in Section 27(a). The provisions defining the term "bank" found in the BHCA at 12 U.S.C. § 1841(c)(1) have the purpose of identifying which entities will cause their controlling organization to become subject to regulation as "bank holding companies." Accordingly, that definition serves a legislative purpose very different from the chartering provisions of the National Bank Act and provides no meaning as to the functions necessary to qualify as the "business of banking" in Section 27.

B. The Judicial Authority Cited by CSBS Is Not Entitled to Weight

CSBS errs in relying on two subsequently superseded district court cases in 1979 and 1985 for the proposition that the OCC lacks authority to charter a limited-purpose national bank. In *Nat'l State Bank of Elizabeth, N.J. v. Smith*, No. 76-1479 (D.N.J. 1977), the OCC issued a charter to a national bank limited to the business of a commercial bank trust department and related activities. *Nat'l State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 227 (3d Cir. 1979). The district court concluded that the charter was "contrary to law and invalid," though the reasoning supporting that conclusion is unreported. *Id.* at 228. After the district court decision, and during the appeal, Congress amended 12 U.S.C. § 27(a) to recognize trust banks, retroactively and going forward. *Id.* at 231. On appeal, the Third Circuit reversed the district court, applying the terms of the newly amended Section 27(a), declining to address the correctness of the district court decision when entered, and opining that the legislation had "validated the Comptroller's action." 591 F.2d at 231-32. Accordingly, this district court

decision ceased to have any force and effect in 1979, did not receive an endorsement on the merits from the Third Circuit, and is unentitled to weight in this Court.

In *Indep. Bankers Ass'n of Am. v. Conover*, 1985 U.S. Dist. Lexis 22529 (M.D. Fla. 1985) ("*Conover*"), banks and trade associations challenged the OCC's authority under Section 27(a) to charter "nonbank banks," banks limited so that they would either not accept demand deposits or make commercial loans, or both, so as to avoid the definition of "bank" in the BHCA and attendant restrictions on interstate operations. *Id.* at *2. In awarding the plaintiffs a preliminary injunction against final approval of a nonbank bank charter, the court disapprovingly characterized nonbank banks as taking advantage of a statutory definition to structure themselves so as to "escape regulation" under the BHCA, *id.* at *3, and in determining that the plaintiffs had a likelihood of success on the merits, the court looked to the "historical understanding in law and custom" of the term "business of banking." *Id*. at *23.

Conover is not good law. First, the ruling in *Conover* was an interim preliminary injunction order that was subsequently vacated when the case was dismissed before final judgment. *See* Docket, Entry No. 137 (Sept. 11, 1987) (attached hereto as Exhibit H). Moreover, the analysis in *Conover* is in substantial conflict with the later decision of the D.C. Circuit in *ICBA v. FRB,* discussed above, as to the OCC's authority to issue a limited purpose charter, and in conflict with the expansive test for "business of banking" established in *NationsBank,* as discussed above. Additionally, a Supreme Court decision the year following *Conover* discounted the "intentional avoidance of regulation" justification partly relied upon in *Conover* to issue an injunction. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361 (1986) (rejecting Federal Reserve Board's argument that its expansive regulation was justified to prevent exploitation of statutory loopholes). Because the district court

opinion never reached final judgment, because it is in conflict with a later decision by the D.C. Circuit, and because parts of its rationale were superseded by legislation and by the Supreme Court decisions in *NationsBank* and *Dimension*, the *Conover* opinion is not entitled to weight in this Court.

C. Neither the Legislative History of the National Bank Act nor Historical Understanding Contradicts the OCC's Interpretation

CSBS invokes "industry custom" and historical practice in a futile attempt to establish that the OCC is not authorized to charter a bank that does not take deposits. History untethered from the National Bank Act, however, cannot establish a plain meaning for the term "business of banking" or render the OCC's interpretation unreasonable for *Chevron* purposes. In any event, the historical understanding of banking and, more saliently, legislation nearly contemporaneous with the National Bank Act do not support CSBS's position. Although the National Bank Act contains no definition of "bank" or "business of banking," Congress passed legislation in 1866 that did define the term "bank" for the purposes of amendments to an 1864 tax statute. *See* Internal Revenue Act of 1866, ch. 184, 14 Stat. 98 (1866). For the purposes of application of a tax on bank capital, Congress legislated that "bank" would mean:

> Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker. . . .

Id. at 115. This definition recognizing various forms of non-deposit taking entities as a "bank" refutes CSBS assertion that the Congress of the 1860s understood deposit-taking to be a

necessary function of either a bank generally or of a national bank chartered pursuant to Section 27.

Six years later, the Supreme Court had occasion to consider the scope of a statutory exception to another tax provision applicable to banks contained in the Internal Revenue Act of 1866 in *Oulton v. German Sav. & Loan Soc.*, 84 U.S. 109 (1872) (Clifford, J.). In support of its decision that a savings and loan was a "bank" within the meaning of the statute, the Court stated that an institution is a bank "in the strictest commercial sense" if it engages in only *one* of the three functions of deposit taking, discounting, or circulation. *Id.* at 118-19. ("Banks in the commercial sense are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution . . . . Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank . . . .").

The cases cited by CSBS for historical understanding, Compl. ¶ 32, do not consider, let alone answer, the question of whether a bank must accept deposits or perform any other particular core function to be chartered as a national bank or to be otherwise considered a bank in a more general sense. *See Mercantile Nat'l Bank v. Mayor of New York*, 121 U.S. 138, 156 (1887) (discussing various aspects of the business of banking and their relation to the term "moneyed capital" in tax statute); *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326 (1963) (delineating relevant product market in banking antitrust cases).

D. Neither Section 5.20(e)(1) nor Any Charter Issued Under Section 5.20(e)(1) in the Future Would Violate the Supremacy Clause or the Tenth Amendment

In the 153-year history of the national bank system, it has been repeatedly established that the Supremacy Clause operates in concert with the National Bank Act to displace state laws or state causes of action that conflict with federal law or that prevent or significantly interfere with national bank powers. *See, e.g., Barnett Bank of Marion Cty. v. Nelson,* 517 U.S. 25 (1996); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). As a federal regulation, Section 5.20(e)(1) preempts contrary state law. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996); *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). Under these lines of authority, a fintech chartered as a national bank under Section 5.20(e)(1) would be entitled to the protections of the National Bank Act against state interference.

> It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Bank Act. So long as he does not authorize activities that run afoul of federal laws governing the activities of national banks, therefore, the Comptroller has the power to preempt inconsistent state law.

CSBS v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983).

The Tenth Amendment is not implicated when the Constitution assigns authority to the federal government. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." *Id.* Accordingly, the Tenth Amendment has no application to either Section 5.20(e)(1), or to the proposed special purpose charter.

CONCLUSION

For the reasons stated above, the OCC asks the Court to dismiss the Complaint on all counts for lack of jurisdiction and, in the alternative, for failure to state a claim upon which relief may be granted.

Date: August 2, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with LCvR 5.3, I certify that on August 2, 2017, a true and correct copy of the foregoing *Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim* was served on all counsel of record through the Court's CM/ECF system.

Respectfully submitted,

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