19-4271

To Be Argued By:
CHRISTOPHER CONNOLLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-4271

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

Plaintiff-Appellee,

—v.—

OFFICE OF THE COMPTROLLER OF THE CURRENCY, 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

BRIEF FOR DEFENDANTS-APPELLANTS

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

Plaintiff-Appellee,

—v.—

OFFICE OF THE COMPTROLLER OF THE CURRENCY, JOSEPH M. OTTING, IN HIS OFFICIAL CAPACITY AS U.S. COMPTROLLER OF THE CURRENCY,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

The National Bank Act authorizes defendant-appellant the Office of the Comptroller of the Currency ("OCC") to charter associations to carry out the "business of banking"—a term that the Act does not define. In 2003, OCC issued a regulation affirming its authority to issue "special purpose national bank" ("SPNB") charters to associations that do not take deposits, so long as those associations either pay checks or lend

money. OCC was guided by relevant provisions in the National Bank Act when it identified deposit-taking, check-paying, and money-lending as "core banking functions." In 2018, OCC announced that it would accept applications for SPNB charters from non-depository 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.

Plaintiff-appellee the New York State Department of Financial Services ("DFS") brought this action to challenge OCC's interpretation of its chartering authority. DFS contended that OCC's chartering proposal would diminish the scope of its own regulatory influence by allowing fintechs that are currently regulated by the states to seek regulation by the federal government instead. DFS also feared losing its ability to collect revenue from New York-based fintechs that received SPNB charters. Despite the lack of a statutory definition of the "business of banking," and notwithstanding the substantial deference owed to OCC's interpretations of the National Bank Act, DFS claimed that receiving deposits is an essential component of the "business of banking."

The district court denied OCC's motion to dismiss the complaint and entered judgment in favor of DFS. In doing so, it erred in three respects. First, the district court incorrectly found DFS's claims justiciable. All of DFS's alleged injuries are premised on a fintech receiving a charter and commencing business in New York. But OCC has not yet received a single charter

application, let alone taken any steps to issue a charter to a New York fintech. DFS therefore lacks standing, and its claims are not ripe. Second, on the merits, the district court erred in holding that OCC's assessment of its own chartering authority was not entitled to *Chevron* deference. *Chevron* deference is warranted here because the term "business of banking" is ambiguous, and OCC's resolution of that ambiguity with reference to the "core banking functions" identifiable elsewhere in the Act is reasonable. Finally, the district court improperly entered judgment prohibiting OCC from entertaining charter applications from all fintechs—even those without any connection to New York. That nationwide relief is incompatible with Article III of the Constitution, traditional equitable principles, and the language of the Administrative Procedure Act ("APA").

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

Jurisdictional Statement

As explained below, the district court lacked subject matter jurisdiction over this action because DFS lacked standing and its claims were not ripe. *See infra* Argument, Point I. The district court entered final judgment on October 21, 2019. (Joint Appendix ("JA") 298-99). OCC timely filed a notice of appeal on December 19, 2019. (JA 302-03). Accordingly, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether DFS lacks standing to challenge OCC's decision to accept applications for SPNB charters from non-depository fintech companies, and whether its claims also are not constitutionally or prudentially ripe, because OCC has not yet received or taken any steps toward approving an application whose approval would cause any of the harms DFS alleges.

2. Whether OCC's determination that it possesses the authority to accept SPNB applications from non-depository fintech companies is entitled to *Chevron* deference, because the National Bank Act is ambiguous on the question of whether accepting deposits is a necessary component of the "business of banking," and OCC's interpretation of the Act as allowing for the chartering of non-depository institutions that engage in other core banking functions is reasonable.

3. Whether the district court's grant of nationwide relief under 5 U.S.C. § 706(2) was improper, because it contradicts Article III, equitable principles, and the structure of the APA.

Statement of the Case

A. Procedural History

DFS commenced this action in district court on September 14, 2018. (JA 10-32). On February 26, 2019, OCC moved to dismiss the complaint. (JA 216-17). On May 2, 2019, the district court (Victor Marrero, J.) issued a decision and order granting OCC's motion in part and denying it in part. (JA 225-81). The parties

agreed that the district court's decision and order rendered the entry of final judgment appropriate, but did not agree on the scope of relief, and submitted separate proposed judgments. (JA 282-94). In an order dated October 21, 2019, the district court adopted DFS's proposal (JA 295-97), and judgment was entered that same day (JA 298-99). An amended final judgment correcting the title of plaintiff Linda A. Lacewell was entered on October 23, 2019. (JA 300-01). OCC timely filed a notice of appeal on December 19, 2019. (JA 302-03).

B. OCC's Decision to Accept Applications for SPNB Charters from Non-Depository Fintech Companies

OCC is an independent bureau of the U.S. Department of the Treasury with primary supervisory responsibility over national banks, including the authority to issue national bank charters. *See* 12 U.S.C. §§ 1, 21, 26, 27. OCC may grant a national bank charter if "it appears that [the] association [applying for a charter] is lawfully entitled to commence the business of banking," and "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).

The National Bank Act does not define the term "business of banking," but it grants national banks "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." 12 U.S.C. § 24(Seventh).

OCC may charter associations to carry out the full complement of powers afforded under the National Bank Act, or to carry out limited "special purpose" operations, such as those of trust banks, credit card banks, bankers' banks, community development banks, or cash management banks. *See* Comptroller's Licensing Manual: Charters (Oct. 2019), at 1, https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf. In some instances, Congress has explicitly ratified OCC's authority to grant limited purpose national bank charters. *See, e.g.*, 12 U.S.C. § 27(a) (authorizing OCC to charter trust banks). In other instances, OCC relies on its broad discretion to interpret the National Bank Act in order to determine whether a particular set of banking activities is consistent with being engaged in the "business of banking."

In 2003, OCC adopted the current version of 12 C.F.R. § 5.20(e)(1), which clarifies OCC's authority to grant SPNB charters. *See* 68 Fed. Reg. 70,122, 70,126 (Dec. 17, 2003). The regulation explains that OCC may charter "a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking," provided that the bank "conduct[s] 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)(i). Since its adoption, OCC has not invoked § 5.20(e)(1) to charter

a national bank that engages in paying checks or lending money, but that does not accept deposits. (JA 220).

In 2015, OCC began exploring ways to encourage responsible innovation in the financial services industry. (JA 49). This included considering whether OCC should use § 5.20(e)(1) to permit some fintech companies[1] to become national banks and operate within the national banking system. (JA 49). In December 2016, OCC published a white paper on the topic (JA 45-62), and solicited public comments. In 2017, after reviewing the comments it received, OCC issued a draft supplement to its Licensing Manual, again inviting public comment. (JA 134-58).

On July 31, 2018, OCC announced that it would accept applications for SPNB charters from fintech companies that engage in one of the two core banking functions of paying checks or lending money, but that do not accept deposits. (JA 164-65). OCC's announcement

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[1] OCC describes fintechs as "thousands of technology-driven nonbank companies offering a new approach to products and services . . . . Fintech companies vary widely in their business models and product offerings. Some are marketplace lenders providing loans to consumers and small businesses, others offer payment-related services, others engage in digital currencies and distributed ledger technology, and still others provide financial planning and wealth management products and services." (JA 47-48).

was accompanied by a finalized supplement to its Licensing Manual (JA 171-91), as well as a policy statement (JA 166-70).

Since its July 2018 announcement, OCC has not received an application for an SPNB charter from a non-depository fintech company. (JA 220).

C. Other Challenges to OCC's Authority to Charter Fintech Companies

This case is one of several actions challenging OCC's authority to charter fintech companies. DFS first challenged OCC's authority to issue SPNB charters to non-depository fintechs in May 2017, more than one year before OCC determined that it would accept applications for such charters. In December 2017, the district court (Naomi Reice Buchwald, J.) granted OCC's motion to dismiss the complaint. *Vullo v. OCC* ("*Vullo I*"), No. 17 Civ. 3574, 2017 WL 6512245, at *1 (S.D.N.Y. Dec. 12, 2017). The district court held that DFS lacked standing to challenge OCC's purported "fintech charter decision" because OCC had not made a final determination that it would issue such charters. *See id.* at *7-8. The court explained that DFS's "alleged injuries will only become sufficiently imminent to confer standing once the OCC makes a final determination that it will issue SPNB charters to fintech companies . . . . [N]one of its alleged injuries will actually occur if the OCC never issues an SPNB charter to a fintech company." *Id.* at *7. The court also held that DFS failed to satisfy the standard for constitutional ripeness because it had not suffered a cogniza-

ble injury-in-fact, and that DFS's claims were not prudentially ripe because they were "contingent on future events that may never occur, namely the decision by the OCC to issue SPNB charters to fintech companies." *Id.* at *9 (quotation marks omitted).

In April 2018, a district court in the District of Columbia dismissed a similar complaint brought by the Conference of State Bank Supervisors ("CSBS"), a nationwide organization of state financial regulators to which DFS belongs. *See CSBS v. OCC* ("*CSBS I*"), 313 F. Supp. 3d 285 (D.D.C. 2018). The D.C. district court held that it only needed "to reach the first requirement [for establishing standing]—injury in fact—to resolve this case," because "each of [the] harms" identified by CSBS was "contingent on whether the OCC charters a Fintech." *Id.* at 295-96 (citing *Vullo I*, 2017 WL 6512245, at *7-8). The court further observed that "[s]everal contingent and speculative events" had to occur before OCC charters a fintech company: (1) "OCC must decide to finalize a procedure for handling those applications"; (2) "a Fintech company must choose to apply for a charter"; (3) "the particular Fintech must substantively satisfy regulatory requirements"; and (4) "OCC must decide to grant the charter to the particular Fintech." *Id.* at 296. Because OCC had not yet decided to "grant [a] charter to [a] particular Fintech," the court held that CSBS failed to satisfy either the "certainly impending" test or the alternative "substantial risk" test for establishing standing. *Id.* at 296-97. Moreover, like the district court in *Vullo I*, the court in *CSBS I* concluded that the case was constitutionally unripe, and that considerations of prudential ripeness weighed in favor of deferring adjudication. *Id.*

at 299-300. In particular, the court observed that "this dispute will be sharpened if the OCC charters a particular Fintech—or decides to do so imminently." *Id.* at 300.

Around the time DFS commenced this action in district court, CSBS also commenced a second action in the District of Columbia. In a memorandum opinion issued in September 2019—roughly four months after the district court's order in this case—the D.C. district court held that CSBS continued to lack standing and its claims were unripe because "CSBS does not allege that any financial technology company . . . has applied for a charter, let alone that the OCC has chartered a Fintech." *CSBS v. OCC* ("*CSBS II*"), No. 18-cv-2449, 2019 WL 4194541, at *1 (D.D.C. Sept. 3, 2019).

D. DFS's Complaint

DFS commenced this action in September 2018, following OCC's announcement of its intention to accept applications for SPNB charters. (JA 10-32). The complaint posited three harms stemming from OCC's potential future actions. First, DFS speculated that if OCC were to charter non-depository fintech companies, "New York-licensed money transmitters using technologically innovative operating platforms could . . . escape New York's regulatory requirements," thereby "strip[ping] customers . . . of critical financial protections otherwise guaranteed by New York law." (JA 25-26). Second, DFS predicted that OCC's issuance of SPNB charters might "effectively negate[] New York's strict interest-rate caps and anti-usury laws" by allowing fintech companies that lend money

to "gouge New York borrowers." (JA 26). DFS claimed that OCC's decision could lead "to the proliferation of prohibited payday lending by out-of-state OCC chartered entities seeking to import their usurious trade into the state to exploit financially vulnerable consumers." (JA 26). Finally, DFS asserted that OCC's issuance of charters presumably would injure DFS "in a directly quantifiable way," because DFS would lose assessments levied on state-licensed financial institutions if those institutions obtained an SPNB charter in place of a state license. (JA 27-28).

DFS brought three claims against OCC. First, it asserted that OCC's decision to accept SPNB applications from non-depository fintechs exceeded OCC's statutory authority under the National Bank Act, because the Act unambiguously establishes that accepting deposits is a requirement of the "business of banking." (JA 30). Second, and relatedly, DFS alleged that § 5.20(e)(1) was "null and void" insofar as that regulation defined the "business of banking" to include non-depository institutions. (JA 30-31). Third, DFS claimed that OCC's decision to accept applications violated the Tenth Amendment to the Constitution by pre-empting state regulation of fintech companies. (JA 31).

E. The District Court's May 2019 Order

OCC moved to dismiss the complaint in its entirety. (JA 216-17). In its May 2, 2019, order, the district court granted that motion in part and denied it in part. (JA 225-81). The district court granted OCC's motion

with respect to DFS's Tenth Amendment claim, holding that the power to issue SPNB charters did not categorically lie beyond the scope of federal authority. (JA 277-80). But it otherwise denied OCC's motion.

1. Standing and Ripeness

At the threshold, the district court held that DFS possessed standing to bring its claims. (JA 244-48). Relying on cases in which states established standing to challenge federal laws that would interfere with state laws, the district court held that DFS's alleged harms "implicate the type of sovereign and direct interests common in cases where states have standing to contest agency action." (JA 246-47).

The district court also held that DFS's claims were constitutionally ripe. (JA 248-51). Although it recognized that "certain steps . . . must occur before a fintech firm can flout New York's laws" (JA 249), the district court nonetheless concluded that "[t]he state standing cases discussed" in its standing analysis "repeatedly make clear that early action by state plaintiffs to combat concerns arising from unlawful federal agency action can be warranted" (JA 248). The district court determined that "DFS has demonstrated a substantial risk that the harm will occur" based on "the supposition that the government enforces and acts on its recent, non-moribund laws." (JA 249-50). Based on that supposition, according to the district court, "DFS faces the current risk that entities may, at any moment, leave its supervision to seek greener pastures." (JA 250). That threat would "force DFS to incur" unspecified "costs now to mitigate or avoid the harms

that currently unlawful lending practices might bring under OCC's supervision." (JA 250-51).

Finally, the district court concluded that DFS's claims were prudentially ripe, because they raised a "discrete legal question" that did not require additional factual development to resolve, and because OCC "ha[d] taken certain small but important steps towards the issuance of SPNB charters" since DFS's first lawsuit was dismissed in *Vullo I*. (JA 251-52).

2. OCC's Authority Under the National Bank Act

On the merits, the district court held that OCC's determination that it has the authority to issue SPNB charters to non-depository fintech companies is not entitled to *Chevron* deference because "the term 'the business of banking,' as used in the NBA, unambiguously requires receiving deposits as an aspect of the business." (JA 262).

The district court recognized that it was obliged to "begin with the text of the statute to determine whether the language at issue has a plain and unambiguous meaning." (JA 263 (quotation marks and alteration omitted)). It proceeded to quote the language of two predecessor sections contained in what it identified as "the original 1863 version of the NBA" (JA 263), and then to "interpret[ ] this 19th century language" using "dictionaries published just prior to the NBA's adoption" (JA 264). The district court acknowledged that the dictionary "definitions do not define deposit-receiving as an indispensable part of banking," but rather merely "implie[d] that receiving

deposits is not an optional alternative to the other listed activities." (JA 265). The district court therefore conceded that there was "some ambiguity on this point." (JA 265).

The district court then turned to "the remainder of the statutory scheme," finding that "the original NBA is replete with provisions predicated upon a national bank's deposit-receiving power." (JA 266-67). The district court also claimed that, in drafting the original version of the National Bank Act, Congress was influenced by New York's experience in drafting a similar state law, and that in 19th-century New York the business of banking was presumed to require the taking of deposits. (JA 267).

The district court then proceeded to state that OCC had not previously chartered a non-depository institution, except where Congress amended the National Bank Act expressly to allow it to do so. (JA 268 (citing Congressional amendments to allow chartering of trust banks and bankers' banks)). The district court "infer[red] from these two enactments that the amending Congress understood the NBA's original use of the 'business of banking' phrase to require deposit-receiving, such that a non-depository institution . . . is not considered eligible to be granted a federal charter to commence the 'business of banking' absent a statutory amendment to the contrary." (JA 269).

Next, the district court claimed to be "guided by the canon of construction under which the plausibility of an agency interpretation of statutory text that would confer new power upon that agency bears inverse rela-

tion to the size of that putative power and the belatedness of the putative discovery." (JA 269-70). The district court asserted that OCC only "claimed the power to charter non-depository institutions . . . some 140 years after the adoption of the statutory language that is that power's putative source" (JA 270), and that accepting OCC's arguments would condone "a fundamental revision of the NBA" (JA 271 (quotation marks omitted)).

The district court also opined that OCC's decision to accept SPNB charters was at odds with "the wider statutory scheme of national banking regulation." (JA 271). Specifically, the district court stated that although national banks are required to obtain membership in the Federal Reserve System under the Federal Reserve Act ("FRA"), such membership would be unavailable to non-depository fintech companies because the FRA requires members to receive deposits. (JA 272). Similarly, the Bank Holding Company Act ("BHCA") requires companies to obtain approval from the Federal Reserve before acquiring a "bank," which the BHCA defines as an institution that accepts deposits; thus, according to the district court, "there would be banks in the marketplace that could be acquired without Federal Reserve Board approval." (JA 272-73).

Lastly, the district court briefly considered and rejected what it characterized as OCC's "main counterarguments." (JA 273). First, it rejected the proposition that the D.C. Circuit's decision in *Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System*

("*ICBA*"), 820 F.2d 428 (D.C. Cir. 1987), demonstrates that institutions can receive national bank charters even when they carry out less than the "full complement of banking powers." (JA 273-74). Likewise, although the district court acknowledged that the Supreme Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), determined that the "outer limit of the phrase 'business of banking'" was ambiguous, it declined to read that precedent as supporting the conclusion that the core functions embodied by that term were also ambiguous. (JA 274-75).

For those reasons, the district court "conclude[d] that the NBA's 'business of banking' clause, read in the light of its plain language, history, and legislative context, unambiguously requires that, absent a statutory provision to the contrary, only depository institutions are eligible to receive national bank charters from OCC." (JA 277).

F. The District Court's October 2019 Order Adopting DFS's Proposed Judgment

Following the issuance of the May 2, 2019, order, the parties agreed that entry of final judgment was appropriate but were unable to reach agreement on the language of a proposed judgment. Consistent with the allegations in the complaint—all of which alleged harms to either DFS itself or to the citizens of New York—OCC proposed that the judgment be geographically limited: it asked the district court to set aside § 5.20(e)(1)(i) for "all fintech applicants seeking a national bank charter that do not accept deposits, and

that have a nexus to New York State, *i.e.*, applicants that are chartered in New York or that intend to do business in New York (including through the Internet) in a manner that would subject them to regulation by DFS." (JA 287-94). DFS, by contrast, took the position that the judgment should be nationwide in its scope, setting aside the regulation "with respect to all fintech applicants seeking a national bank charter that do not accept deposits." (JA 282-86).

On October 21, 2019, the district court entered an order adopting DFS's proposed language. (JA 295-97). The district court characterized OCC's position as "a lengthy argument about the propriety of nationwide injunctions," but asserted that those arguments were beside the point because the court was not granting injunctive relief. (JA 296). Further, relying on the D.C. Circuit's opinion in *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001), the district court concluded that "ordinary administrative procedure" in APA challenges under 5 U.S.C. § 706(2) is to provide "vacatur of the agency's order" without any geographical limitations. (JA 297 (quotation marks omitted)).

Final judgment was entered on October 21, 2019 (JA 298-99), and amended on October 23, 2019 (JA 300-01). This appeal followed. (JA 302-03).

Summary of Argument

At the outset, DFS's claims are not justiciable. DFS lacks standing to bring its claims, and those claims are not constitutionally ripe, because DFS cannot establish an injury in fact. Only actual, imminent injuries

are sufficient to confer standing. But because no fintech with a nexus to New York has applied for a charter, let alone received one, DFS's asserted harms remain speculative. Put another way, OCC's mere announcement that it will entertain applications from non-depository fintechs does not cause any concrete harm to DFS. For similar reasons, DFS's claims are not prudentially ripe. They are not fit for judicial review because they are dependent on future events that might never occur, and the contours of any future factual developments—most obviously, the identity and business model of an actual fintech applicant—are relevant to the adjudication of DFS's claims. Moreover, DFS is not prejudiced by judicial forbearance from resolving its claims until an actual controversy materializes, because it is not currently experiencing any harm, and because the prolonged nature of the chartering process allows ample opportunity for DFS to raise its claims if and when an application is made. *See infra* Point I.

DFS's claims also fail on the merits. OCC's interpretation of its chartering authority is reasonable and entitled to *Chevron* deference. The National Bank Act is ambiguous on the question of whether the "business of banking" requires taking deposits: although the Act undoubtedly identifies deposit-taking as a feature of banking, nothing in its plain language, statutory structure, or legislative history unambiguously establishes that deposit-taking is a minimum requirement for every national bank. OCC's interpretation of the Act, as codified in § 5.20(e)(1), is also reasonable. Its determination that a non-depository association may be chartered as an SPNB so long as it either pays

checks or lends money is consistent with Supreme Court case law upholding OCC's authority to resolve ambiguity in the National Bank Act with reference to the three core functions identifiable elsewhere in the Act. Furthermore, and contrary to the district court's conclusion, OCC's issuance of charters to non-depository fintechs would not run afoul of other federal banking laws. *See infra* Point II.

Finally, even if DFS's claims were justiciable, and even if OCC's interpretation of its chartering authority were not entitled to *Chevron* deference, any relief to which DFS is entitled must be geographically limited to New York. That is because DFS, as a state regulator, only asserts harms with a nexus to New York. The district court's nationwide set-aside of § 5.20(e)(1) is inconsistent with the requirements of Article III standing and traditional conceptions of equity, which establish that remedies should not extend beyond what is necessary to redress the plaintiff's alleged injuries. It is also incompatible with the APA, which never mandates that agency action must be set aside globally, and which specifically contemplates equitable forms of relief. *See infra* Point III.

Accordingly, the district court's judgment should be reversed.

ARGUMENT

Standard of Review

This Court reviews a district court's judgment on motions to dismiss for both lack of subject matter jurisdiction and failure to state a claim on which relief may be granted *de novo*. *Ajlani v. Chertoff*, 545 F.3d 229, 233 (2d Cir. 2008).

POINT I

DFS's Claims Are Not Justiciable

The district court lacked jurisdiction to consider DFS's claims. All of DFS's alleged injuries are premised on OCC receiving and approving a charter application from a non-depository fintech with a nexus to New York, and that fintech then conducting business in New York in a manner that causes the harms DFS identifies. But those events remain purely hypothetical because OCC has not received any applications from any fintechs. Consequently, DFS lacks standing to bring its claims, and its claims are not ripe.

A. DFS Lacks Standing and Its Claims Are Not Constitutionally Ripe Because It Has Not Suffered an Injury in Fact

DFS lacks standing because it cannot meet its burden to show that it has suffered an "injury in fact." *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998) (the "irreducible constitutional minimum" for standing includes establishing "injury in fact"); *id.* at 103-04 (party invoking the court's jurisdiction bears the burden of establishing standing). To

satisfy this requirement, a party's alleged injuries must be "likely" as opposed to merely "speculative." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (injuries in fact are "concrete, particularized, and actual or imminent"). Indeed, the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (quotation marks and alterations omitted). That same requirement governs a court's constitutional-ripeness inquiry: "to say a plaintiff's claim is constitutionally unripe is to say the plaintiff's claimed injury, if any, is not actual or imminent, but instead conjectural or hypothetical." *National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quotation marks omitted).

No actual, imminent injury exists here. All of DFS's alleged injuries are speculative, because they rely on a chain of events that has not occurred, and may never occur: OCC receiving and approving an application for an SPNB charter from a non-depository fintech that intends to conduct business in New York, and that fintech commencing business in New York pursuant to the charter in a manner that causes the harms DFS identifies.

The speculative nature of DFS's claimed injuries is clear from the face of the complaint. DFS identifies a host of "risks" that it claims flow from OCC's decision to accept SPNB charter applications from fintech companies. (JA 11). But those risks are not predicated on

OCC's mere statement of receptivity to receiving charter applications. Rather, they hinge on OCC issuing an SPNB charter to a particular type of applicant with a nexus to New York, and that applicant commencing activities in New York pursuant to the charter. For example, DFS speculates that OCC's decision to entertain applications "could realistically lead" to certain harms if fintech companies that engage in "payday lending" receive charters. (JA 26). But unless and until a payday lender with a nexus to New York receives and begins operating pursuant to an SPNB charter, those harms are merely speculative; they certainly are not impending at this stage, when no fintech of any sort has even submitted an application. *See Clapper*, 568 U.S. at 409.

"A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). But even DFS admits that none of its alleged harms actually exist: it concedes that "the full scope of [the] regulatory disruption" it alleges "is difficult to ascertain" at this stage, because OCC has merely announced that it will accept applications. (JA 25). In other words, DFS is speculating about harms that might occur if applications submitted by certain types of fintechs are approved. That is insufficient to establish standing.

The district court's standing analysis effectively ignored the "injury in fact" requirement. Instead, relying in particular on *Massachusetts v. EPA*, 549 U.S. 497 (2007), the court focused on the ability of states to "seek[] pre-enforcement review of federal agency action" that implicates the types of sovereign interests

DFS is asserting here. (JA 240, 248). But that is beside the point. Although the Supreme Court in *Massachusetts* recognized that states are accorded "special solicitude" for standing purposes, that did not absolve Massachusetts from demonstrating an actual, imminent injury in order to establish standing. 549 U.S. at 520-23; *see Delaware Dep't of Natural Resources & Environmental Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("This special solicitude does *not* eliminate the state petitioner's obligation to establish a concrete injury, as [the Supreme Court's] opinion [in *Massachusetts*] amply indicates."). The Supreme Court explained in detail that Massachusetts had standing because it had already experienced "significant harms," including "rising seas" that "ha[d] already begun to swallow Massachusetts' coastal land." 549 U.S. at 521-22. DFS, by contrast, has not yet experienced any harms.

The district court also erred in relying on cases that found standing based on the federal preemption of state law. (JA 242-43, 247 (citing *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008); *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004))). That is because, in the current posture, no "state law has been preempted by the OCC's preliminary activities respecting Fintech charters," *CSBS I*, 313 F. Supp. 3d at 298, and "[a]ny allegation of preemption at this point relies on speculation about the OCC's future actions," *Vullo I*, 2017 WL 6512245, at *8. As the district court in *Vullo I* explained, in preemption cases such as *Wyoming*, "a federal agency had informed the States ex-

plicitly and directly that federal law preempted specific provisions of state law that the States sought to enforce." 2017 WL 6512245, at *8. Similarly, the Attorney General's directive at issue in *Oregon* "essentially nullified" a recently enacted state law. 192 F. Supp. 2d at 1079. Here, by contrast, OCC's decision to accept SPNB applications merely raises the possibility that certain fintech companies currently regulated by New York might, at some future time, be regulated by the federal government. That possibility does not nullify any state law. Indeed, given the fundamental realities of the "dual banking system"—under which federal and state banking laws have long coexisted in a variety of congruent and overlapping spheres, *see generally* National Banks and the Dual Banking System (Sept. 2003), https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-national-banks-and-the-dual-banking-system.pdf—it is unclear at best whether OCC's issuance of SPNB charters to certain fintech companies would "conflict" with state law in the preemption sense under any circumstances. OCC's chartering proposal might reduce the number of entities subject to certain New York laws by creating a federal chartering alternative, but it would not invalidate those laws.

The district court was also wrong to conclude that "DFS's alleged anticipated financial losses" amounted to an injury in fact. (JA 247). The court claimed that those "alleged anticipated" harms were "analogous to the financial harms alleged in" *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015). (JA 247). But in *Texas*, the federal government's recent enactments forced the state either to change its laws or to incur financial

costs associated with issuing additional driver's licenses. 787 F.3d at 748. New York, by contrast, is not faced with any such choice here—certainly not at this stage in the litigation, where OCC has not received, yet alone acted upon, an application whose approval would have any impact whatsoever on New York.

Equally unavailing is the district court's reliance on this Court's opinion *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013), in an effort to sidestep the hypothetical nature of DFS's alleged injuries. (JA 249-50). *Hedges* arose within the legally and factually distinct context of pre-enforcement challenges to the military's claimed authority to detain combatants under the laws of armed conflict. 724 F.3d at 174-86. Here, by contrast, the key issue for assessing standing and constitutional ripeness is not whether OCC might "act[ ] on its recent, non-moribund laws" (JA 249) by accepting an application from a fintech company—an act that, by itself, brings no harm to DFS—but rather whether OCC might grant a charter to a fintech company whose subsequent actions might reasonably cause the harms DFS alleges. At this stage, that chain of events is wholly speculative.

Finally, DFS cannot establish standing and constitutional ripeness under the "substantial risk" test. (JA 250-52). That test "does not replace the 'certainly impending' test, but rather provides an alternate standard that looks for costs incurred 'to mitigate or avoid [the anticipated] harm.'" *CSBS I*, 313 F. Supp. 3d at 296 (quoting *Clapper*, 568 U.S. at 414 n.5). The district court stated without any analysis that DFS satisfied the substantial risk test, but it did not—and

could not—identify any costs DFS would presently incur in order to mitigate harms occasioned by OCC's mere announcement that it would accept SPNB charter applications. (JA 250). DFS's complaint is similarly devoid of any allegation that it would be required to incur specific costs in an effort to mitigate or avoid its alleged harms.

In *CSBS I*, the D.C. district court identified four "contingent and speculative events" that needed to occur before any of the alleged harms stemming from OCC's fintech chartering proposal could materialize. 313 F. Supp. 3d at 296. To date, only one of those events—OCC formulating a procedure for accepting SPNB applications—has occurred. Because no applications have been submitted, OCC has not yet taken any steps to charter any fintech, let alone a fintech with a nexus to New York. That falls well short of the actual, imminent injury needed to establish standing. Accordingly, the district court lacked jurisdiction over DFS's premature claims.

B. DFS's Claims Are Not Prudentially Ripe

Even if DFS possessed standing, the district court still should have declined to reach the merits because DFS's claims are not prudentially ripe. Prudential ripeness allows a court to determine, in its discretion, "that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay." *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). Accordingly, the two-part test for prudential ripeness assesses "both the fitness of the issues for judicial decision and the hardship to the parties of

withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Both factors counsel against adjudication of DFS's claims in the present posture.

The district court erred in holding otherwise. (JA 251). Focusing exclusively on the first factor, the court concluded that "the very narrowness of the question raised in this action" rendered it ripe for adjudication. (JA 251). But although the existence of a "purely legal" question supports a finding of ripeness, it is not dispositive. *See National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) ("Although a question presented here is a purely legal one . . . we nevertheless believe that further factual development would significantly advance our ability to deal with the legal issues presented." (quotation marks omitted)). Moreover, "a regulation"—here, § 5.20(e)(1)—"is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990).

There has been no concrete action applying § 5.20(e)(1) in a manner that might harm DFS because no fintech company has even applied under that regulation for a charter. Thus, DFS's claims are not fit for judicial consideration because they remain "contingent on future events that may never occur." *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132

(2d Cir. 2008). The district court's assertion that "the identity and specific services offered by a given non-depository fintech applicant for an SPNB charter are irrelevant" (JA 251) is unfounded. Fundamentally, the identity of a particular fintech applicant is relevant because the chartering of an applicant with no nexus to New York would not cause the harms DFS alleges. *See CSBS I*, 313 F. Supp. 3d at 299 ("A national charter could injure Indiana without injuring Alaska, or vice versa."). Moreover, as the court in *CSBS I* explained, fintech companies offer "an almost unimaginably wide variety of services, from the traditional . . . to the more cutting edge," and adjudicating this matter without an actual, pending application from a specific fintech "require[s] the court to imagine the unimaginably wide range of possible Fintechs, and to draw distinctions between them." *Id.* at 300 (quotation marks omitted). For example, DFS's claimed harms arising from "payday lending" can only materialize if a fintech that engages in certain types of activities is chartered. (JA 26). That uncertainty alone renders DFS's claims unripe. *See Marchi v. Board of Cooperative Education Services*, 173 F.3d 469, 478 (2d Cir. 1999) (claim unripe when the court "would be forced to guess at how [the defendant] might apply the [challenged] directive and to pronounce on the validity of numerous possible applications of the directive, all highly fact-specific and, as of yet, hypothetical").

The district court ignored the hardship prong of the prudential ripeness test. But that factor also weighs against adjudication of DFS's claims. A showing of hardship turns on "whether the challenged action creates a direct and immediate dilemma for the parties."

Marchi, 173 F.3d at 478. "The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship." *Simmonds*, 326 F.3d at 360. DFS never alleges any present detriment based solely on OCC's decision to accept SPNB charter applications from non-depository fintechs. All of its purported injuries flow from a fintech conducting business in New York pursuant to a charter.

Furthermore, as a practical matter, DFS would not be prejudiced by waiting to resolve these claims until OCC takes affirmative steps to approve an application from a specific fintech with a nexus to New York. DFS would have ample opportunity to challenge such an application, because applicants for charters are required by regulation to give public notice of their applications at the time of filing, 12 C.F.R. § 5.8(a), and that notice is followed by a thirty-day public comment period, 12 C.F.R. § 5.10. Next, typically within about 120 days of the filing of an application, OCC decides whether to grant preliminary conditional approval. (JA 222). As its name suggests, preliminary conditional approval does not guarantee final approval of the charter application, and does not entitle the applicant to commence business; rather, it allows OCC to impose conditions on the applicant—such as attaining minimum capital levels and developing a contingency plan—that the applicant will need to satisfy in order to commence business pursuant to an approved charter. (JA 223). Preliminary conditional approval expires within twelve months if the applicant does not raise the required capital, and within eighteen months if the applicant is otherwise unable to commence business. 12 C.F.R. § 5.20(i)(5)(iv). "Until final approval is

granted and a charter is issued, OCC may alter, suspend, or revoke preliminary conditional approval." (JA 224).

These timeframes belie the district court's statement that "DFS faces the current risk that entities may, at any moment, leave its supervision to seek greener pastures" (JA 250), and underscore that this action is not yet ripe for review. SPNB charters simply are not approved overnight. Significant time would elapse between OCC's preliminary conditional approval of a charter application and its final approval of a charter entitling the fintech applicant to commence business in New York. During that time, DFS could properly bring the types of claims it asserts here. There is accordingly no hardship to DFS from not adjudicating this dispute now, and in the current posture, its claims are not justiciable.

POINT II

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

Because DFS's claims are not justiciable, this Court need not reach the merits. If it were to reach the merits, however, it should conclude that OCC's interpretation of its chartering authority under the National Bank Act is reasonable and entitled to *Chevron* deference.

Chevron proceeds in two steps. "Where a statute is clear, the agency must follow the statute." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2142

(2016). "But where a statute leaves a 'gap' or is 'ambigu[ous],' [courts] 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.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Moreover, the Court has expressly held that "[t]he 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." *NationsBank*, 513 U.S. at 256-57; *accord Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

Here, the National Bank Act is ambiguous on the question of whether deposit-taking is a necessary component of the "business of banking." Nowhere in the Act does Congress unambiguously require associations to receive deposits, or engage in any other particular banking function, in order to "commence the business of banking" as a national bank. And OCC's resolution of that ambiguity—permitting the chartering of associations that perform at least one of the three "core banking functions" identifiable elsewhere in the Act—is reasonable, particularly in light of the deference the agency's interpretation is owed.

The Supreme Court engaged in precisely the same analysis with respect to precisely the same language:

it found that the term "business of banking" is ambiguous with respect to the "outer limit" of activities in which national banks may engage, and that OCC's interpretation was entitled to deference. *NationsBank*, 513 U.S. at 256-57. *Chevron* leads to the same conclusion with respect to the core requirements in which national banks must engage, and the district court erred in holding otherwise.

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

The district court's conclusion that the National Bank Act unambiguously requires national banks to accept deposits was flawed in multiple respects. (JA 260-77).

Under *Chevron*, a reviewing court must first determine whether Congress has directly spoken to the precise question at issue. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012). In doing so, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Rather, it should "employ traditional tools of statutory construction"—examining the context of the statute as well as its text, structure, purpose, and, in appropriate circumstances, legislative history—to ascertain whether "Congress had an intention as to the precise question at issue that must be given effect." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*,

846 F.3d 492, 508 (2d Cir. 2017). All of the tools of statutory construction underscore the National Bank Act's ambiguity concerning the necessity of deposit-taking.

1. The National Bank Act Does Not Expressly Define the "Business of Banking"

At the threshold, and as the district court acknowledged, the Act never defines the "business of banking." (JA 262). That term appears in several of the Act's provisions, but it is not expressly defined and the surrounding text does not illuminate its meaning. *See* 12 U.S.C. §§ 21 ("Associations for carrying on the business of banking"); 24(Seventh) (dealing with bank powers); 26 (requirements to be complied with before an association may commence "the business of banking"); 27(b)(1) (the Comptroller of the Currency may issue a "certificate of authority to commence the business of banking" to a bankers' bank). Notably, the general chartering provision, § 27, 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). Thus, even the provision expressly providing OCC the authority to charter national banks does not identify any mandatory activities that a national bank must perform to "commenc[e] the business of banking."

The district court's attempt to read unambiguous meaning into the Act by turning to nineteenth-century dictionary definitions is unconvincing. (JA 263-65). Although the Webster's Dictionary definition of "banking" cited by the district court included "receiving deposits," it also included "lending money, discounting notes, issuing bills . . . collecting the money on notes deposited, negotiating bills of exchanges, &c.," without identifying any of those activities as mandatory. (JA 264). Worcester's Dictionary's definition of "bank" likewise included deposit-receiving within a broader description of characteristics: "a joint-stock association . . . whose business it is to employ in loans, or other profitable modes of investment, the common fund or capital, increased by the issue of notes to a certain amount payable on demand, and by such sums as may be temporarily deposited in their hands, by others, for safe-keeping." (JA 264). Even the district court found "ambiguity on this point" because the definitions it cited "do not define deposit-receiving as an indispensable part of banking." (JA 265). At best, those definitions suggest the scope of activity a bank *may* undertake, but they do not define the activities a bank *must* undertake. Indeed, the nineteenth-century Supreme Court suggested that deposit-taking is a typical, but not necessary, banking function. *See Oulton v. German Savings & Loan Society*, 84 U.S. 109, 118-19 (1872) (an institution is a bank "in the strictest commercial

sense" if it engages in any one of the three functions of deposit-taking, discounting, or circulation).

2. The Act's References to Receiving Deposits Do Not Create an Unambiguous Deposit-Taking Requirement

The Act's broader statutory language does not resolve the ambiguity of the term. The district court's assertion that "the original NBA is replete with provisions predicated upon a national bank's deposit-receiving power" (JA 266) is simply incorrect. In fact, the statutory language the district court repeatedly cited was not from the original version of the National Bank Act, but rather from the National Currency Act, which was repealed when the National Bank Act was enacted. (JA 263); *see* Act of June 3, 1864, ch. 106, § 62, 13 Stat. 99, 118. And in any event, the National Bank Act has never contained a requirement that a national bank receive deposits. For example, the national bank powers clause in § 24(Seventh), which is largely unchanged since the passage of the Act in 1864, provides that national banks are generally 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 ob-

> taining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

12 U.S.C. § 24(Seventh). That provision's reference to receiving deposits does not, as the district court concluded, establish deposit-taking as a necessary activity for every national bank, any more than it establishes that all national banks must "circulat[e] notes"—an activity national banks do not conduct in the modern era.

Indeed, the D.C. Circuit has recognized OCC's authority to limit a national bank's operations to less than the full scope of powers identified in § 24(Seventh). In *ICBA*, the court approved OCC's issuance of a charter that limited the operations of a national bank in order to ensure compliance with state-law restrictions on interstate banking. In doing so, the D.C. Circuit held that "[t]here is nothing in the language or legislative history of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory." 820 F.2d at 440. Rather, "[r]estriction 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." *Id.* And the determination of whether a limited-purpose charter is consistent with the Act is "a judgment within the particular expertise of the Comptroller and reserved to his chartering authority." *Id.*

The D.C. Circuit's reasoning in *ICBA* contradicts the district court's suggestion that § 24(Seventh) contains a deposit-taking requirement. The district court's attempts to distinguish that precedent are unconvincing. (JA 273-74). For example, the court stated that the D.C. Circuit "did not support [its] putative recitation of the applicable standard with a citation to authority." (JA 274). But the D.C. Circuit expressly drew on the "language [and] legislative history of the National Bank Act," as well as basic *Chevron* principles, which required it to "defer to the reasonable determinations of" OCC. *ICBA*, 820 F.2d at 440. Furthermore, the district court's assertion that "the banks at issue" in *ICBA* "did take deposits" is misleading. (JA 274). Although the charter application at issue—which was primarily aimed at providing credit card services—did propose limited deposit-taking to the extent permitted under state law, *ICBA*, 820 F.2d at 439, nothing in the opinion's reasoning suggests that the D.C. Circuit placed any weight on that nominal activity in concluding that OCC properly exercised its chartering authority.

Other provisions in the National Bank Act likewise fail to unambiguously establish deposit-taking as a necessary component of the business of banking for all national banks. The requirement at § 22(Second) that a bank specify in its organization certificate "[t]he place where its operations of discount and deposit are to be carried on, designating . . . the particular county, city, town, or village," 12 U.S.C. § 22(Second), simply requires a bank to describe the location where it carries out certain aspects of its business; it does not suggest, let alone unambiguously establish, that receiving

deposits—not to mention discounting notes—is mandatory. (JA 266). And the district court's citation of a repealed statutory provision for the calculation of a bank's reserve requirements based on a percentage of "the aggregate amount of its outstanding notes of circulation and its deposits" fares no better. (JA 267 (citing Act of Feb. 25, 1863, ch. 58, § 41, 12 Stat. 665, 677)). Again, this provision did not state that receiving deposits is mandatory; the district court's reasoning would require, under the terms of a repealed statutory provision, that all national banks must circulate notes—an activity in which they no longer engage.[2] That strained reading does not render deposit-taking an unambiguous requirement.

3. The Act's Provisions Concerning the Chartering of Trust Banks and Bankers' Banks Do Not Render Deposit-Taking Necessary for National Banks Generally

Further, the district court placed undue weight on Congress's amendments to the National Bank Act concerning the chartering of trust banks and bankers' banks. (JA 268-69). The district court pointed to these amendments as evidence that OCC has never chartered non-depository banks unless "Congress first amended the NBA explicitly to authorize OCC to do so." (JA 268). But that statement is factually incorrect;

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[2] The modern form of the reserve calculation rule, codified at 12 U.S.C. § 461, also does not establish minimum requirements for national banks.

far from being "illuminating" (JA 269), these amendments simply do not bear on the necessity of deposit-taking for the "business of banking."

Congress's enactment of 12 U.S.C. § 27(a) in relation to trust banks did not establish a new chartering authority—it merely confirmed the existence of authority that OCC already possessed and used. Before the amendment, OCC issued charters to trust banks under the general chartering authority of § 27. A bank that, among other things, offered trust services challenged OCC's authority to charter trust-only banks. *See National State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 227 (3d Cir. 1979) (describing underlying district court decision). The district court concluded that such charters were "contrary to law and invalid." *Id.* at 228. Consequently, Congress amended § 27(a) to overturn that decision and thus to confirm, rather than create, OCC's authority to charter trust banks. *Id.* at 231.

The Third Circuit reversed the district court, applying the terms of the newly amended § 27(a). Significantly, the court declined to address whether the district court's decision was correct at the time it was entered, and instead determined that the amendment to § 27(a) had "validated the Comptroller's action." *Id.* at 231-32. In other words, through the amendment to § 27(a), Congress "validate[d] retroactively as well as prospectively" the issuance of charters under the general chartering authority of § 27 to banks that engage only in trust activities. *Id.* at 231. The district court in this case therefore erred in characterizing the amendment as the creation of a new chartering authority for

a non-depository bank, and in relying on that incorrect characterization to find an unambiguous deposit-taking requirement. (JA 268).

The district court also mistakenly relied on Congress's enactment of 12 U.S.C. § 27(b), concerning bankers' banks. (JA 268). Its characterization of bankers' banks as "non-deposit" banks is wrong: bankers' banks chartered by OCC do take deposits, as demonstrated by publicly available data.[3] Their deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"). *See* 12 C.F.R. § 327.5(b) (outlining method for calculating deposit insurance assessment base for bankers' banks). Nothing in § 27(b), the rest of the National Bank Act, or OCC's rules suggests that a bankers' bank is a special purpose bank that does not take deposits. Rather than create a category of non-deposit banks, as the district court wrongly determined, Con-

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[3] National Banks' Reports of Condition and Income ("Call Reports") are available on the Federal Financial Institutions Examination Council's Central Data Repository's Public Data Distribution website, https://cdr.ffiec.gov/public/. The OCC currently has three bankers' banks chartered as national banks: First National Bankers' Bank, The Independent Bankers Bank, and Bank of America California, NA. All three banks reported volumes of deposits in their Call Reports for the quarter ending on March 31, 2019, prior to the district court's order, and in their Call Reports for quarter ending on December 31, 2019, preceding the filing of this brief.

gress's amendment simply described a category of special purpose national banks that would be owned exclusively by other banks to provide services to banks. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404, 96 Stat. 1469, 1511 (1982).

The purpose of Congress's amendment, codified at § 27(b)(2), was to allow the Comptroller to exempt bankers' banks from certain "existing statutory restrictions appropriate for full-service commercial banks [that] may prove incompatible with the operation" of a bankers' bank. *See* Senate Report 97-536, Depository Institutions Amendments of 1982, Report of the Senate Committee on Banking, Housing, and Urban Affairs, S. 2879, Aug. 17, 1982, p. 60. The new statutory text regarding the chartering of bankers' banks, codified at § 27(b)(1), was described as a clarification of the Comptroller's chartering authority, as opposed to the grant of new authority, to except bankers' banks from the generally applicable rules set forth at § 27(b)(2). *Id.* Congress did not intend for the bankers' bank provision to create non-deposit banks or to describe a new chartering authority. Accordingly, as with the trust bank amendments, the district court's reliance on this provision to find an unambiguous deposit-taking requirement was in error.

4. Legislative History Does Not Support a Finding That Deposit-Taking Is Necessary

The district court's brief exploration of the Act's purported legislative history is also unavailing. The

district court asserted that, in drafting the Act, "Congress relied heavily on New York's experiences" in drafting a similar law that expressly required deposit-taking. (JA 267 (quotation marks omitted)). To be sure, in 1848, New York amended its Free Banking Act to provide that "[a]ll banking associations, or individual bankers . . . or which shall hereafter be organized, shall be banks of discount and deposit as well as of circulation." 1848 N.Y. Laws 462, ch. 340, § 1. But although Congress incorporated other policies from New York's Free Banking Act into federal law, *compare* 1840 N.Y. Laws 306, ch. 363, *with* Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 675, it never adopted analogous language requiring national banks to be "banks of discount and deposit." *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (courts "generally presume that Congress is knowledgeable about existing laws pertinent to the legislation it enacts"); *Jama v. ICE*, 543 U.S. 335, 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"). Congress did, however, legislate to explicitly require federal savings banks—another type of institution now under the authority of OCC—to receive deposits, and could have done so with respect to national banks. *See* 12 U.S.C. § 1464(a) ("In order to provide thrift institutions for the deposit of funds . . . the Comptroller of the Currency is authorized to provide for the organization . . . of associations to be known as Federal savings associations . . . and to issue charters therefor . . ."); *see also Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2017 (2018) (courts "usually

presume differences in language like this convey differences in meaning" (quotation marks omitted)).

Put simply, nineteenth-century New York banking law offers no support for the necessity of deposit-taking under the National Bank Act. Certainly, it does not resolve the ambiguity inherent in the Act's use of the term "business of banking."

5. The Evolution of Banking Practices Demonstrates That "Business of Banking" Is Ambiguous

Finally, the district court's holding that the "business of banking" is unambiguous fails to account for the evolution of banking practices over the nearly 160 years since the passage of the National Bank Act. The activities that make up the "business of banking" have been, and remain, the subject of continual change.

The manner in which banks conduct the "business of banking" has evolved in response to developments in business practices and consumer needs. For example, early in the history of the National Bank Act, courts recognized the authority of national banks to certify checks—a service that a 21st century bank customer takes for granted, but which was an innovation in the 19th century. *See Merchants' Nat'l Bank v. State Nat'l Bank*, 77 U.S. 604, 648 (1870) ("The practice of certifying checks has grown out of the business needs of the country . . . . We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity."). Today, the "business of banking" is being shaped by the needs

of consumers and businesses for a wider array of banking services and products, and the ability of new technologies to provide those services and products. *See generally* Jesse McWaters, The Future of Financial Services: How Disruptive Innovations are Reshaping the way Financial Services are Structured, Provisioned and Consumed, World Economic Forum (June 2015), *available at* http://www3.weforum.org/docs/WEF_The_future__of_financial_services.pdf; *see also* Joseph Otting, Why do state regulators want to limit consumer choice?, 2018 WLNR 28638042, 183 Am. Banker 181 (Sept. 19, 2018) (OCC's SPNB charter "gives consumers and businesses greater choice and creates economic growth and opportunity").

This constant state of evolution necessarily means that the term "business of banking" does not have a single, static definition that remains permanently rooted in a particular moment in history. *See*, *e.g.*, *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) ("commentators uniformly have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms"); *see also* Henry Harfield, *The National Bank Act and Foreign Trade Practices*, 61 Harv. L. Rev. 782, 790 (1948) ("[t]he business of banking, then, is at any time coextensive with the businesses and range of businesses conducted by the society in which it operates"). The definition of the phrase must remain flexible; if the manner in which banking is conducted is subject to continual change and evolution over time, then banking activities or business structures that make up the "business of banking" must change along with it. *See, e.g., NationsBank*, 513

U.S. at 256-57 (explaining OCC's determination to allow national banks to broker annuities, and recognizing that "the Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by" the Act).

The framework of the National Bank Act reflects the correctness of this conclusion. The phrase "business of banking" is not defined anywhere in the Act—an important definitional gap that has afforded each successive Comptroller since 1864 the ability to interpret what it means to conduct the "business of banking," and "to permit the use of new ways [to] conduc[t] the very old business of banking" by, among other things, chartering institutions that meet the banking needs of the era. *M&M Leasing,* 563 F.2d at 1382.

B. OCC's Interpretation of the National Bank Act's Ambiguous Language Is Reasonable

At *Chevron* step two, OCC's interpretation of the National Bank Act's ambiguous language is reasonable, and therefore is entitled to deference. Courts must give "considerable weight" to an agency's interpretation of a statute it administers, *Chevron*, 467 U.S. at 844, and the Supreme Court has extended this substantial deference to OCC's interpretation of the banking laws, *NationsBank*, 513 U.S. at 256-57; *Smiley*, 517 U.S. at 742.

This Court will find an agency's statutory interpretation to be reasonable unless it is arbitrary or capricious in substance, or manifestly contrary to the underlying statute. *See Catskill*, 846 F.3d at 520. An agency's interpretation is reasonable if it is supported

by "valid considerations," and is "sufficiently reasoned to clear *Chevron*'s rather minimal requirement that the agency give a reasoned explanation for its interpretation." *Id.* at 501, 524.

OCC's interpretation of its chartering authority easily meets this standard. In considering the 2003 amendment to § 5.20(e)(1), OCC weighed the ways in which to give content to the ambiguous term "business of banking." 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)(i). In the preamble to the final rule, OCC explained that it added the "core banking functions" requirement by reference to 12 U.S.C. § 36, which defines a national bank "branch" as a place of business "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). Although § 36 does not include the term "business of banking," OCC took guidance from *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), in which the Supreme Court upheld as reasonable OCC's interpretation of the statutory phrase "[t]he general business of each national banking association" in 12 U.S.C. § 81, a provision that restricts the locations where a bank can do business, by reference to the core activities in § 36.

In *Clarke*, OCC had approved a national bank's application to offer discount brokerage services at, among other places, non-branch locations both inside and outside the bank's home state. 479 U.S. at 406. In doing so, OCC had rejected the argument that § 81's

reference to the "general business of each national banking association" should be read to limit where such services could be conducted. *Id.* The Supreme Court affirmed OCC's interpretation. It held that the phrase "general business of each national banking association" was ambiguous, and that OCC's interpretation was entitled to deference. *Id.* at 403-04. The Court observed that national banks engage in many activities, and there was no evidence that Congress intended all those activities to be subject to the geographical limitations of §§ 36 and 81. *Id.* at 406-09. Instead, the Court held that OCC's interpretation—that the general business of the bank under § 81 included only "core banking functions," not all incidental services that national banks are authorized to provide—was reasonable. *Id.* at 409. The Court also held that OCC reasonably included among the "core banking functions" those activities identified in § 36, which defined "branch" as any place "at which deposits are received, or checks paid, or money lent." *Id.* at 391.

The Supreme Court's endorsement of OCC's analysis in *Clarke* supports interpreting any one of the activities listed in § 36 as a minimum requirement for purposes of the National Bank Act's chartering provisions. Just as the "general business" of each national bank is undefined in the location restriction of § 81, the "business of banking" is undefined in the chartering provisions of §§ 21 and 27(a). The two phrases bear similar meanings, supporting OCC's use of § 36 for the interpretation of each. And because § 36's terms 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, Fla. v. Dickinson, 396 U.S. 122, 135 (1969) (because § 36 "is phrased in the disjunctive, the offering of any one of the three services . . . will provide the basis for finding that 'branch' banking is taking place").

There is "nothing illogical" in this interpretation. *Catskill*, 846 F.3d at 524-25. To the contrary, it provides symmetry and consistency between the chartering and location provisions of the National Bank Act.

OCC's interpretation also does not run afoul of federal banking laws generally. In concluding the phrase "business of banking" is unambiguous, the district court relied in part on its contention that allowing OCC to charter non-depository fintechs would conflict with requirements of the FRA and BHCA. (JA 271-73). The district court was wrong on both counts.

First, the district court was wrong to conclude that the FRA, 12 U.S.C. § 222, requires national banks to obtain federal deposit insurance and, by implication, receive deposits. (JA 271-72). Section 222 provides that "[e]very national bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located," become a member of the Federal Reserve System and "shall thereupon be an insured bank" under the FDIA. But § 222 has never functioned as an independent deposit insurance requirement. Although § 222 requires national banks to become members of the Federal Reserve System, a bank need not be FDIC-insured to do so—for example, trust banks that do not accept deposits other than trust funds are not eligible

for FDIC insurance but are still members of the Federal Reserve. *See* 12 U.S.C. § 282.

The language quoted by the district court, which was added in 1958 in contemplation of Alaska joining the Union, simply reflects the fact that, before certain amendments to the FDIA in 1989 and 1991, national banks located in U.S. states "engaged in the business of receiving deposits other than trust funds" automatically became "insured bank[s]" upon receiving a charter or becoming a member of the Federal Reserve System. *See* 12 U.S.C. § 1814(b) (1988). This automatic process stood in contrast to procedures available to deposit-taking national banks in U.S. territories. Those institutions—which did not need to join the Federal Reserve System, 12 U.S.C. § 466—were required to submit a separate application to the FDIC for deposit insurance. *See* Pub. L. 81-797, § 5(b), 64 Stat. 873 (1950) (codified at 12 U.S.C. § 1815(b)). Section 222 clarified that deposit-taking national banks located in newly admitted states, *e.g.*, Alaska, had to join the Federal Reserve System, and that those institutions would "thereupon be . . . insured bank[s] under the [FDIA]," thereby benefitting from the automatic deposit-insurance process available to national banks in already-admitted states.

By contrast, the current statutory framework governing deposit insurance specifies that, absent two exceptions not relevant here, "any depository institution which is *engaged in the business of receiving deposits other than trust funds* . . . , upon application to and examination by the [FDIC] and approval by the Board of

Directors, *may* become an insured depository institution." 12 U.S.C. § 1815(a)(1) (emphasis added). By including the word "may," Congress expressly envisioned the existence of uninsured banking institutions that are not "engaged in the business of receiving deposits other than trust funds." Likewise, Congress provided that OCC's authority to issue cease-and-desist orders applies "to any national banking association chartered by the Comptroller of the Currency, *including an uninsured association*." 12 U.S.C. § 1818(b)(5) (emphasis added). And Congress also specified that, under certain circumstances, OCC may appoint a receiver for a national bank, and "such receiver shall be the [FDIC] *if the national bank is an insured bank*." 12 U.S.C. § 191(a) (emphasis added). The district court's reading of § 222 implausibly asserts that the FRA nullifies these provisions of the FDIA by requiring all national banks to obtain deposit insurance and, consequently, take deposits.

The district court's analysis of the BHCA is likewise flawed. (JA 272-73). The court reasoned that because the BCHA requires companies to obtain approval before acquiring a bank, and because it defines banks as deposit-receiving institutions, allowing for the chartering of non-depository banks would improperly "create an exception to the BCHA's regulatory scheme without amending the statute." (JA 272). At the threshold, however, the later-enacted BHCA should not be read to limit OCC's authority to charter banks under the National Bank Act. *See Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) ("[T]he two provisions were enacted . . . years apart and deal with two different

types of banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies."); *see also id.* ("the Comptroller derived his authority solely under the [National Bank Act], and it was his responsibility to determine issues under that Act, not under the BHCA"); *Whitney Nat'l Bank in Jefferson Parish v. Nat'l Bank of New Orleans & Trust Co.*, 379 U.S. 411, 423 (1965) (analyzing OCC's ability to issue a certificate of authority for a new national bank separate from Federal Reserve Board's ability to approve related holding company arrangement).

Moreover, the BHCA addresses only "compan[ies]" that propose to own a bank. *See* 12 U.S.C. § 1841(c)(1)-(2). It does not apply if individual shareholders own a bank. And even when a bank is owned by a "company," the BHCA excludes many banks from its "bank" definition—including those institutions that do not qualify as a "bank" under the general definition or that fall under any of a series of specific statutory exceptions. *Id.* This definitional structure demonstrates a clear congressional intent to exclude classes of institutions —including certain national banks—from adhering to the BHCA's requirements, and further underscores the lack of any connection between the National Bank Act's chartering provisions and the BHCA.

OCC's interpretation of the "business of banking" as allowing the chartering of non-depository fintechs is in harmony with the provisions of the National Bank Act identifying core banking functions. It also does not run afoul of other federal banking regulations. Accordingly, it is reasonable and entitled to deference.

POINT III

DFS Was Not Entitled to Nationwide Relief

Finally, the district court erred in setting aside § 5.20(e)(1) with respect to any fintech, anywhere in the nation, regardless of whether that fintech has any nexus to New York. The district court brushed aside OCC's position on the proper, geographically limited scope of relief as an irrelevant "argument about the propriety of nationwide injunctions." (JA 296). But although the district court's judgment did not technically take the form of an injunction, its practical effect —precluding OCC from applying § 5.20(e)(1) to "all fintech applicants seeking a national bank charter that do not accept deposits" (JA 299)—was injunctive in nature. And in any event, OCC's arguments are in no way cabined to injunctions—rather, they are based on foundational constitutional and equitable principles, and apply to all forms of relief.

Even if a plaintiff establishes the other elements of standing, "standing is not dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quotation marks omitted). Accordingly, a court's power under Article III "exists only to redress or otherwise to protect against injury to the complaining party," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), and a remedy "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Here, DFS's alleged injuries, and thus any remedies to which it is entitled, are limited to New York. (JA 25-28). DFS has therefore only "allege[d] personal injury" from OCC's chartering decision with respect to that decision's potential impact on New York. It has not asserted, and cannot assert, any "concrete and particularized" "injury in fact" arising from the chartering of a non-depository fintech company that lacks a nexus to New York. *Lujan*, 504 U.S. at 560. Consequently, Article III requires that the judgment be limited to New York.

Traditional equitable principles likewise establish that remedies should not extend beyond what is necessary to redress the plaintiff's alleged injuries. *See, e.g.*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (holding an agency's regulation facially invalid, but vacating the district court's injunction insofar as it barred the agency from enforcing the regulation against entities other than the plaintiff); *Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263 F.3d 379, 393 (4th Cir. 2001) (vacating nationwide injunction and holding that "[p]reventing the [agency] from enforcing [the challenged regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff]"), *overruled in part on other grounds by The Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544 (4th Cir. 2012). This understanding of the scope of a court's authority is rooted in historical practice. *See, e.g.*, *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (court's authority to

enter injunctive relief is circumscribed by the type of relief "traditionally accorded by courts of equity"); *Trump v. Hawaii*, 138 S. Ct. 2392, 2427-28 (2018) (Thomas, J., concurring) (tradition of equity inherited from English law was premised on "providing equitable relief only to parties" because the fundamental role of a court was to "adjudicate the rights of individual[s]" before it (quotation marks omitted)).

Contrary to the district court's conclusion, Article III's standing requirements and centuries-old equitable principles do not cease to apply merely because DFS's claims arose under the APA. Although the APA provides that unlawful, arbitrary, or capricious agency action should be "set aside," 5 U.S.C. § 706(2), nothing in that provision mandates that agency action must be set aside globally, rather than as applied to the plaintiffs who brought the suit. *See Virginia Society for Human Life*, 263 F.3d at 393-94 ("[n]othing in the language of the APA" requires that a regulation be set aside "for the entire country"). Indeed, Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (courts "do not lightly assume that Congress intended to depart from established principles" regarding equitable discretion). Thus, the APA provides that the proper "form of proceeding" is a traditional suit for declaratory or injunctive relief. 5 U.S.C. § 703; *see also* 5 U.S.C. § 702(1) (APA's statutory right of review does not affect "the power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground"). Declaratory

and injunctive remedies, of course, are equitable in nature, and the relevant APA provisions confirm that "equitable defenses may be interposed" in an APA case. *Abbott Laboratories*, 387 U.S. at 155. The remedy afforded to DFS therefore should not extend beyond what is necessary to redress its alleged harms. *Madsen*, 512 U.S. at 765.

Indeed, this case illustrates the problems with reading the APA to require a global remedy that extends beyond the specific case at issue. The district court recognized that the "agency action" DFS challenges here is not § 5.20(e)(1) on its face, but only a particular application of the regulation that DFS alleges will cause harm. (JA 230 (construing DFS's claims "as a challenge only to so much of [§ 5.20(e)(1)] as purports to authorize OCC to issue SPNB charters to non-depository institutions")). It is entirely proper to interpret the APA to provide for a remedy that is tailored to that specific agency action—*i.e.*, a remedy that bars specific applications of the regulation. And once it is recognized that only specific applications of the regulation—not the regulation itself—should be "set aside," traditional equitable and Article III principles make clear that the category of applications set aside should be limited to "concrete action[s] applying the regulation to the claimant's situation that harm[] or threaten[] to harm him." *Lujan*, 497 U.S. at 891. The concrete action applying § 5.20(e)(1) in a manner that harms DFS could only be OCC's issuance of a charter to a non-depository fintech company with a nexus to New York.

The district court's entry of nationwide relief improperly prevents other courts from considering this issue. The Supreme Court has explicitly noted the importance of allowing for multiple lower court opinions, particularly where the government is involved: "[g]overnment litigation frequently involves legal questions of substantial public importance," and allowing one court to issue a definitive ruling against the government in such cases "substantially thwart[s] the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court"); *DHS v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring) (universal injunctions prevent "the airing of competing views" and provide a "nearly boundless opportunity [for plaintiffs] to shop for a friendly forum to secure a win nationwide"); *Virginia Society for Human Life*, 263 F.3d at 393 (rejecting nationwide injunction because it "preclud[ed] other circuits from ruling").

Judgments like the district court's also undermine the Supreme Court's instruction "that nonmutual offensive collateral estoppel simply does not apply against the government"—that is, that non-parties to an adverse decision against the government may not invoke the decision to preclude the government from continuing to defend the issue in subsequent litigation.

Mendoza, 464 U.S. at 162. Instead, nationwide judgments create a "one-way-ratchet" under which a prevailing party could obtain relief on behalf of all others, but a victory for the government would not preclude other potential plaintiffs from "run[ning] off to the 93 other district courts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., dissenting in part), *reh'g granted in part and vacated in part by City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268817 (7th Cir. Aug. 10, 2018). That concern is plainly implicated here, where the district court's judgment effectively nullified the D.C. district court's ruling in *CSBS II* by granting CSBS and all of its member regulators the ultimate relief they sought, despite a finding by a coordinate court that they lacked standing to bring their claims.

CONCLUSION

The judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,779 words in this brief.

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