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13 IN THE UNITED STATES DISTRICT COURT
 14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 **PEOPLE OF THE STATE OF**
 18 **CALIFORNIA, et al.,**

19 Plaintiffs,

20 v.

21 **THE OFFICE OF THE COMPTROLLER**
 22 **OF THE CURRENCY, et al.,**

23 Defendants.

Case No. 4:20-CV-05200-JSW

**PLAINTIFFS' NOTICE OF MOTION,
 MOTION FOR SUMMARY JUDGMENT,
 AND MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

Date: March 19, 2021
 Time: 9:00 a.m.
 Courtroom: Oakland Courthouse,
 Courtroom 5 – 2nd Floor
 Judge: The Honorable Jeffrey S. White
 Action Filed: July 29, 2020

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that the undersigned shall, and do herein, move this court, at the Ronald V. Dellums Federal Building & United States Courthouse, Courtroom 5 – 2nd Floor, 1301 Clay Street, Oakland, CA 94612, on March 19, 2021, at 9:00 a.m. for an order granting summary judgment to Plaintiffs the People of the State of California, the People of the State of Illinois, and the People of the State of New York (collectively, “Plaintiffs”) pursuant to Fed. R. Civ. P. 56 on the basis of the administrative record and for the reasons stated below.

Plaintiffs ask the Court to declare that the Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred (“Rule”), 85 Fed. Reg. 33,530-36, issued by the Office of the Comptroller of the Currency on June 2, 2020, violates the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs further ask the Court to hold unlawful and set aside the Rule and to grant other relief as the Court deems just and proper.

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1 **SUMMARY OF ARGUMENT**

2 States have long used interest-rate caps to prevent predatory lending. In light of the
3 comprehensive federal regulatory regime to which national banks are subject, Congress exempted
4 them from compliance with state rate caps in the National Bank Act (“NBA”). 12 U.S.C. § 85
5 (allowing national banks to “take, receive, reserve, and charge” interest in excess of state law);
6 *see also* 12 U.S.C. § 1463(g)(1) (same for federal savings associations). The Office of the
7 Comptroller of the Currency’s (“OCC”) rule unlawfully extends preemption of state rate caps to
8 any entity—bank or not—that buys loans from a national bank. Permissible Interest on Loans
9 That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530-36 (June 2, 2020).

10 The rule’s interpretation of §§ 85 and 1463(g)(1) would allow non-bank loan buyers to
11 charge interest in excess of state law. This interpretation conflicts with the unambiguous statutory
12 text, which preempts state rate caps in favor of national banks alone. *See In re Cmty. Bank of N.*
13 *Virginia*, 418 F.3d 277, 296 (3d Cir. 2005). Additional provisions of the NBA confirm that
14 Congress did not extend the benefits of § 85 to non-banks. *E.g.*, 12 U.S.C. §§ 25b, 86.

15 The OCC also ignored the procedural requirements Congress imposed on its rulemaking
16 authority. *See* 12 U.S.C. § 25b. Among other things, the OCC failed to apply the “significant
17 interference” standard for NBA preemption. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517
18 U.S. 25 (1996); 12 U.S.C. § 25b(b)(1)(B). The Court may not uphold a rule on grounds the
19 agency failed to consider, *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686
20 (9th Cir. 2007), and in any case, the OCC would not meet this standard because application of
21 state rate caps to non-banks does not significantly interfere with national banks’ power to charge
22 interest under § 85, *Madden v. Midland Funding*, 786 F.3d 246, 251 (2d Cir. 2015).

23 Finally, the OCC’s action is arbitrary and capricious because the agency failed to address
24 important aspects of the problem its rule is intended to address (including the rule’s facilitation of
25 “rent-a-bank” schemes and its creation of a regulatory vacuum), and the rule rests on contentions
26 that run counter to the evidence and conflicts with prior OCC interpretations. *Motor Vehicle Mfrs.*
27 *Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). For all these reasons, the OCC’s
28 rule violates the Administrative Procedure Act. 5 U.S.C. § 706(2).

INTRODUCTION

The Office of the Comptroller of the Currency (“OCC”) seeks to unlawfully extend the reach of interest-rate privileges that Congress granted exclusively to federally chartered banks. Provisions of the National Bank Act (“NBA”) and Home Owners’ Loan Act (“HOLA”) exempt national banks and federal savings associations (“National Banks”)¹ from compliance with state interest-rate caps. 12 U.S.C. §§ 85, 1463(g)(1). The OCC’s Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred (“Non-bank Interest Rule” or “Rule”) extends this preemption of state law to any entity that acquires loans from a National Bank, allowing non-bank assignees to charge interest in excess of rates permitted by state law. 85 Fed. Reg. 33,530-36 (June 2, 2020) (codified at 12 C.F.R. §§ 7.4001(e) and 160.110(d)).

The Rule violates the Administrative Procedure Act (“APA”) because it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; is in excess of the OCC’s statutory jurisdiction, authority, and limitations, and short of statutory right; and was promulgated without observance of procedure required by law. 5 U.S.C. § 706; *see also* Compl. [Dkt. No. 1] ¶¶ 212-224. Plaintiffs are entitled to summary judgment on all their claims because (1) the NBA and HOLA limit preemption under §§ 85 and 1463(g)² to National Banks, and the OCC lacks authority to deem otherwise; (2) the OCC failed to comply with the procedural requirements set forth in § 25b of the NBA; and (3) the OCC failed to consider relevant factors, explain contradictory policy positions, and provide adequate evidentiary support for the Rule.

BACKGROUND

I. STATE RATE CAPS AND NATIONAL BANKS

State interest-rate caps (also called usury caps) have long played a central role in the financial protection of consumers and small businesses. *See Griffith v. State of Conn.*, 218 U.S. 563, 569 (1910). Rate caps protect consumers from the debt traps of high-cost loans, scrupulous

¹ National banks and federal savings associations are subject to parallel statutory provisions that the OCC states “should be interpreted coextensively,” 85 Fed. Reg. at 33,533, so this brief refers to both national banks and federal savings associations collectively as National Banks.

² Statutory citations refer to sections of Title 12 of the current U.S. Code unless otherwise noted.

1 creditors (like landlords, suppliers, or auto lenders) from the threat of non-payment by debtors
 2 driven to insolvency by predatory lending, and taxpayers from the need to support families whose
 3 resources have been consumed by unsustainable interest payments. Administrative Record
 4 (“AR”)³ [Dkt. No. 35] at 317-18, 614-15, 703-04, 747-66; *see also* Compl. ¶¶ 3, 119, 122. For
 5 these reasons, the vast majority of states cap the rates creditors may charge. AR 371. For
 6 example, New York imposes a 16% rate cap on most consumer loans and criminalizes charging
 7 interest above 25%. N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Banking Law § 14-a; N.Y.
 8 Penal Law §§ 190.40, 190.42; *see also* Cal. Fin. Code §§ 22303-22306 (California rate caps).

9 Unlike most creditors, which must abide by state rate caps, National Banks are subject to a
 10 distinct federal regime that governs the interest rates they may charge. 12 U.S.C.
 11 §§ 85, 1463(g)(1). National Banks are chartered and regulated directly by the federal government
 12 and owe their existence to financial concerns arising out of the Civil War. Congress passed the
 13 NBA in 1864 to create a centralized federal banking system and finance the federal government’s
 14 war efforts, giving rise to a system of federally chartered national banks—or “associations,” as
 15 they are called in the NBA’s original text—subject to the federal government’s oversight through
 16 the OCC. 12 U.S.C. § 21 *et seq.*; AR 359-60. To prevent discrimination against these federally
 17 chartered banks by hostile states, Congress preempted state law and placed national banks in the
 18 position of most-favored creditor. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 10 (2003); AR
 19 718-19. Under § 85, “any association [*i.e.*, national bank] may take, receive, reserve, and charge”
 20 interest up to the highest of three statutory limits: (1) “the rate allowed by the laws of the State
 21 . . . where the bank is located”; (2) a floating rate set by the regional Federal Reserve Banks; or
 22 (3) the highest rate permitted for state-chartered banks. The first option governs in practice. In
 23 1989, Congress enacted HOLA, extending this same interest-rate privilege to federally chartered
 24 savings associations in language that mirrors that of § 85. 12 U.S.C. § 1463(g)(1).

25 National Banks rely on §§ 85 and 1463(g)(1) to charge interest at rates above those
 26 permitted by the law of the states where their borrowers live. Because a National Bank is

27 _____
 28 ³ Relevant pages of the Administrative Record are identified throughout by the significant digits
 at the end of each Bates stamp. For example, “AR 614” refers to OCC-AR-00000614.

1 “located” in “the place specified in its organization certificate,” National Banks often “locate”
2 themselves strategically in states with high, or no, interest-rate caps. 12 U.S.C. § 81; *Marquette*
3 *Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 310 (1978); Compl. ¶ 30
4 (Citibank and Wells Fargo Bank are “located” in South Dakota, which has no interest-rate cap for
5 banks); Answer [Dkt. No. 36] ¶ 30 (admitting same). Sections 85 and 1463(g)(1) allow those
6 National Banks to charge the interest rates permitted in their “home” states—*i.e.*, any rates the
7 banks choose—and to “export” those rates to borrowers in states that have interest-rate caps.
8 *Marquette Nat. Bank*, 439 U.S. at 310-11, 314-15, 318-19.

9 **II. THE PROBLEM OF RENT-A-BANK SCHEMES**

10 Although Congress exempted only National Banks from state rate caps, some non-bank
11 lenders have formed sham “rent-a-bank” partnerships designed to evade state law. *E.g.*, AR 369-
12 70. In these schemes, the bank acts as a mere pass-through with no financial risk or substantive
13 interest in the resulting loans. *Id.* The non-bank partner identifies potential borrowers, sets the
14 underwriting criteria, provides the capital, purchases the resulting loans shortly after the bank
15 ostensibly “originates” them, and goes on to charge and collect all interest payments. *Id.*

16 High-cost lenders have increasingly sought out these sham bank partnerships in response to
17 state efforts to regulate predatory lending. *See, e.g.*, AR 302, 372-76. For example, following
18 California’s recent enactment of a new interest-rate cap, a number of high-cost lenders announced
19 plans to evade those caps through rent-a-bank schemes. *See, e.g.*, AR 69-72 (letter from members
20 of the Senate Committee on Banking, Housing, and Urban Affairs regarding proposed rule); *see*
21 *also* Compl. ¶¶ 89-94. By exempting buyers of National-Bank-originated loans from state rate
22 caps, the OCC’s Rule encourages and facilitates these evasive schemes.

23 **III. MADDEN V. MIDLAND FUNDING AND SUBSEQUENT INDUSTRY ACTIONS**

24 As the OCC acknowledges, the aim of its Rule is to overturn the Second Circuit’s
25 construction of § 85 in *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015). AR 843, 847;
26 *see also* OCC, National Banks and Federal Savings Associations as Lenders (“True Lender
27 Rule”), 85 Fed. Reg. 68,742, 68,743 (Oct. 30, 2020) (describing Non-bank Interest Rule as the
28 “Madden-fix” rulemaking). In *Madden*, the Second Circuit rejected non-bank debt buyers’

1 argument that, because they bought loans from National Banks, § 85 preemption allowed them to
2 charge interest above New York’s usury cap. 786 F.3d at 250-53.

3 The court began with the standard framework describing the limited circumstances in which
4 federal law displaces state law: (1) “Congress has expressly preempted state law”; (2) the relevant
5 federal law “occupies an entire field of regulation and leaves no room for state law”; or (3) the
6 federal law “conflicts with state law.” *Madden*, 786 F.3d at 249. Two out of three—express and
7 field preemption—did not apply: Congress, in § 85, expressly preempted state law only as to
8 National Banks and declared in another provision that “[the NBA] does not occupy the field in
9 any area of State law.” 12 U.S.C. § 25b(b)(4); *see also id.* §§ 85, 1465(b) (no field preemption
10 under HOLA). The court considered whether conflict preemption blocks application of New
11 York’s usury cap to debt buyers and held it does not. *Madden*, 786 F.3d at 249-53.

12 The Second Circuit explained, “To apply NBA preemption to an action taken by a
13 non-national bank entity, application of state law to that action must significantly interfere with a
14 national bank’s ability to exercise its power under the NBA.” *Id.* at 250 (citing *Barnett Bank of*
15 *Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)). Application of state rate caps to non-bank
16 debt buyers, who are not subject to OCC oversight, does not meet this standard: Non-bank
17 assignees act “solely on their own behalves, as the owners of the debt,” not on behalf of National
18 Banks. *Id.* at 251. State rate caps do not prevent National Banks from selling debt to non-banks,
19 and even if they might decrease the price debt buyers are willing to pay, that does not amount to
20 significant interference. *Id.* As the court explained, “extending [§ 85’s] protections to third parties
21 would create an end-run around usury laws for non-national bank entities[.]” *Id.* at 252.

22 Despite the Second Circuit’s straightforward application of the NBA’s text and standard
23 preemption principles, financial-industry interest groups coalesced around *Madden* as a vehicle to
24 expand NBA preemption. The *Madden* defendants, with mass interest-group support, requested
25 rehearing and, later, certiorari, warning that *Madden* “threatens to cause significant harm to
26 [credit] markets, the banking industry, and the millions of families and businesses they serve.”
27 Brief of the Clearing House Association et al. as Amici Curiae in Support of Reh’g and Reh’g En
28 Banc 1, *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015) (No. 14-2131-cv), 2015 WL

1 4153963; Petition for Writ of Certiorari 3, *Midland Funding v. Madden*, 136 S. Ct. 2505 (2016)
 2 (No. 15-610), 2015 WL 7008804. The Second Circuit denied rehearing, the Supreme Court
 3 denied certiorari, and, despite the industry’s warnings, no catastrophic consequences came to
 4 pass. *Midland Funding v. Madden*, 136 S. Ct. 2505 (2016); Order Denying Pet. for Reh’g En
 5 Banc, *Madden v. Midland Funding*, 14-2131 (2d Cir. Aug. 12, 2015); AR 336-37. Unsatisfied,
 6 interest groups sought to overturn *Madden* via legislative action, to no avail.⁴

7 **IV. THE OCC’S RULEMAKING**

8 In November 2019, the OCC issued a proposed rule with language nearly identical to the
 9 failed legislation: “Interest on a loan that is permissible under 12 U.S.C. 85 [or 1463(g)(1)] shall
 10 not be affected by the sale, assignment, or other transfer of the loan.” AR 89. The OCC received
 11 numerous comments criticizing the proposed rule’s dubious legality, failure to comply with
 12 procedural requirements, and facilitation of rent-a-bank schemes. *E.g.*, AR 333-52, 353-452; *see*
 13 *also* AR 816-17. Despite these concerns, the OCC failed to address the questions raised, took no
 14 steps to comply with its procedural obligations, and made no changes to the proposed rule. On
 15 June 2, 2020, the OCC published the Rule, which took effect on August 3, 2020. AR 842-48.

16 **LEGAL STANDARD**

17 “Summary judgment . . . serves as the mechanism for deciding, as a matter of law, whether
 18 the agency action is supported by the administrative record and otherwise consistent with the
 19 APA standard of review.” *Tolowa Nation v. United States*, 380 F. Supp. 3d 959, 963 (N.D. Cal.
 20 2019). “In other words, the district court acts like an appellate court, and the entire case is a
 21 question of law.” *Id.* (internal quotation marks omitted).

22 “The Court must first review the construction of the . . . [a]ct giving the [agency] discretion
 23 to operate” and must set aside any interpretation unsupported by the “unambiguously expressed
 24 intent of Congress.” *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018). It must

25 ⁴ The Protecting Consumers’ Access to Credit Act of 2017 would have extended §§ 85 and
 26 1463(g) to cover any “third party” to whom a National-Bank-issued loan “is subsequently sold,
 27 assigned, or otherwise transferred”; but the Senate took no action, allowing the bill to expire. *See*
 28 H.R. 3299, 115th Cong. (2017-18), <https://www.congress.gov/bill/115th-congress/house-bill/3299/text>; S. 1642, 115th Cong. (2017-18), <https://www.congress.gov/bill/115th-congress/senate-bill/1642/all-info?r=2&s=2>.

1 “hold unlawful and set aside agency action” found to be “arbitrary, capricious, an abuse of
 2 discretion, or otherwise not in accordance with law”; “in excess of statutory jurisdiction,
 3 authority, or limitations, or short of statutory right”; or taken “without observance of procedure
 4 required by law[.]” 5 U.S.C. § 706(2)(A), (C), (D). “An agency rule is arbitrary and capricious
 5 when the agency ‘has relied on factors which Congress has not intended it to consider,’ ‘entirely
 6 failed to consider an important aspect of the problem,’ ‘offered an explanation for its decision that
 7 runs counter to the evidence before the agency,’ ‘or is so implausible that it could not be ascribed
 8 to a difference in view or the product of agency expertise.’” *Tolowa Nation*, 380 F. Supp. 3d at
 9 963 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
 10 (1983)).

11 ARGUMENT

12 I. THE NON-BANK INTEREST RULE IS CONTRARY TO THE STATUTORY SCHEME 13 CONGRESS ENACTED AND IS BEYOND THE OCC’S POWER TO PROMULGATE

14 “An agency’s power to promulgate legislative regulations is limited to the authority
 15 delegated to it by Congress.” *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C.
 16 Cir. 1990) (internal quotation marks omitted). “[A]n agency literally has no power to act, let
 17 alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress
 18 confers power upon it.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). In
 19 order to “displace state laws[.]” the agency “must point specifically to a constitutional text or a
 20 federal statute that does the displacing or conflicts with state law.” *Virginia Uranium, Inc. v.*
 21 *Warren*, 139 S. Ct. 1894, 1901 (2019) (internal quotation marks omitted). Whatever the statutory
 22 source, an agency may not alter the regulatory landscape if “Congress has supplied a clear and
 23 unambiguous answer to the interpretive question at hand.” *Pereira v. Sessions*, 138 S. Ct. 2105,
 24 2113 (2018). “If the intent of Congress is clear, that is the end of the matter; for the court, as well
 25 as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.*

26 The OCC invokes only two statutory provisions as the bases for its Rule: § 85, which
 27 governs the interest “any association [*i.e.*, national bank] may take, receive, reserve, and charge
 28 on any loan”; and § 1463(g)(1), which governs the same with respect to federal savings

1 associations.⁵ The language of § 1463(g)(1) mirrors that of § 85, the OCC states that “section
2 1463(g) should be interpreted coextensively with section 85,” and the Rule focuses on § 85.
3 AR 845. Thus, the arguments below focus on § 85 but apply with equal force to § 1463(g)(1). *See*
4 12 U.S.C. § 1465(a) (rules issued under HOLA must conform to the same “laws and legal
5 standards applicable to national banks regarding the preemption of State law”).

6 Because neither statute bears the agency’s interpretation, the Rule must be set aside.

7 **A. The Non-bank Interest Rule Conflicts with the Plain Language of § 85**

8 Sections 85 and 1463(g) expressly apply to National Banks only. The OCC claims its Rule
9 resolves “legal uncertainty” about whether non-bank assignees may benefit from § 85
10 preemption. But there is no uncertainty; Congress supplied the answer directly in the statute’s
11 text: “Any *association* [*i.e.*, national bank] may take, receive, reserve, and charge on any loan . . .
12 interest at the rate allowed by the laws of the State . . . where the bank is located[.]” 12 U.S.C.
13 § 85 (emphasis added); *id.* § 1463(g)(1) (“Notwithstanding any State law, a *savings association*
14 may charge interest on any extension of credit . . . at the rate allowed by the laws of the State in
15 which such savings association is located”) (emphasis added). As the Third Circuit explained,
16 § 85 “appl[ies] only to national . . . banks, not to non-bank purchasers”—the NBA “regulates
17 national banks and only national banks, which can be identified by the word ‘national’ in their
18 name.”” *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 296 (3d Cir. 2005) (quoting *Weiner v.*
19 *Bank of King of Prussia*, 358 F. Supp. 684, 687 (E.D.Pa. 1973)); *Colorado ex rel. Salazar v. Ace*
20 *Cash Exp.*, 188 F. Supp. 2d 1282, 1284 (D. Colo. 2002) (quoting same).

21 By extending National Banks’ power to “take, receive, reserve, and charge” interest at rates
22 above state caps to any entity—bank or not—that buys a loan from a National Bank, the OCC’s
23 Rule would permit non-bank buyers, assignees, and transferees to shelter in § 85’s protection
24 from state rate caps. The Rule effectively amends § 85 to read, “Any association [*or the buyer,*

25 ⁵ AR 843 (Non-bank Interest Rule stating, “Section 85 is the sole provision that governs the
26 interest permissible on a loan made by a national bank”), 845 (“This rulemaking addresses . . . the
27 meaning of section 85.”), *id.* (“With respect to the comments arguing that neither section
28 24(Third) nor section 24(Seventh) provides the OCC with authority to preempt state usury law,
the OCC does not cite these statutes for this purpose.”); *id.* n.50 (“[T]he OCC does not cite
[§ 24(Third) and (Seventh)] as direct authority for this rule or for their preemptive effect.”).

1 assignee, or transferee of any loan made by any association] may take, receive, reserve, and
2 charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is
3 located[.]” But Congress specifically chose to protect from state law only National Banks—not
4 whatever entity happens to acquire their loans.

5 Rather than contend with § 85’s text, the OCC characterizes the Non-bank Interest Rule as
6 addressing “the ongoing permissibility of [a loan’s] interest term after a bank transfers [the]
7 loan.” AR 842; *accord* AR 843, 844. This framing misleadingly suggests § 85 applies to certain
8 loans (that is, loans issued by National Banks) regardless of who holds them.

9 But that’s not how § 85 works. Section 85 does not bless the terms of certain *loans*; rather,
10 it gives specific *entities*—National Banks—the power to charge interest in excess of otherwise
11 applicable state law. This distinction is important. Congress exempted National Banks from state
12 rate caps, placing them in the position of most-favored creditor, principally because they are
13 subject to a comprehensive federal regulatory scheme. 12 U.S.C. § 85; 12 C.F.R. § 4.2; *see also*
14 *Beneficial Nat. Bank*, 539 U.S. at 10 (noting “the special nature of federally chartered banks”).

15 The OCC claims non-bank loan buyers may charge rates above state caps because
16 “contractual rights may be assigned[.]” AR 843. But rate-cap preemption under § 85 is not a
17 contractual right; it is a statutory right granted only to federally chartered National Banks.
18 12 U.S.C. § 85; AR 361, 629. The sale of property is not enough to transfer rights statutorily
19 conferred on specific entities. A licensed driver may sell her car, but the new owner will need his
20 own license to drive it. *E.g.*, Cal. Veh. Code § 12500. Similarly, credit unions are exempt from
21 federal income tax, but other entities do not become tax exempt when they buy a credit union’s
22 loans. *See* 26 U.S.C. § 501(c)(14)(A). Charging interest on a loan, of course, requires a contract;
23 but charging interest *above* state rate caps *also* requires a statutory right. Congress granted that
24 right only to duly chartered National Banks.

25 Crafting the NBA and HOLA, Congress chose to preempt state law in favor of these
26 heavily regulated federal entities, not in favor of the loans they issue. Sections 85 and 1463(g) are
27 clear: They apply to National Banks, and the OCC lacks the power to decree otherwise. Because
28 the Rule conflicts with Congress’s unambiguous answer to the interpretive question at hand—to

1 which entities does § 85 apply—it is contrary to law and must be set aside.

2 **B. The OCC Ignores Additional NBA Provisions that Demonstrate § 85**
 3 **Applies Only to National Banks**

4 In addition to flouting the plain language of §§ 85 and 1463(g), the OCC’s Rule fails to
 5 “account for both the specific context in which . . . language is used and the broader context of
 6 the statute as a whole.” *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (internal quotation
 7 marks omitted). Recent NBA amendments confirm Congress’s intent that § 85 apply only to
 8 National Banks. A savings clause added by the Dodd-Frank Wall Street Reform and Consumer
 9 Protection Act of 2010 provides, “No provision of [the NBA] shall be construed as altering or
 10 otherwise affecting the authority conferred by section 85 of this title for the charging of interest
 11 *by a national bank* at the rate allowed by the laws of the State . . . where the bank is located[.]”
 12 12 U.S.C. § 25b(f) (emphasis added); Pub. L. 111-203, 124 Stat. 1376 (2010). This provision
 13 reaffirms § 85’s scope: It applies only to “the charging of interest by a national bank,” not by
 14 third-party assignees. Other provisions in Section 25b make clear that the NBA—which includes
 15 § 85—does not preempt state law even as to subsidiaries, affiliates, or agents of National Banks.
 16 12 U.S.C. § 25b (b)(2), (e), (h)(2); *see* OCC Interpretive Letter No. 1132, 2011 WL 2110224, at
 17 *1 (May 12, 2011) (“The Act eliminates preemption of state law for national bank subsidiaries,
 18 agents, and affiliates”). Yet the OCC’s Rule would extend § 85 preemption, not just to National
 19 Bank affiliates (in conflict with § 25b), but even further afield to non-bank assignees that are
 20 entirely unaffiliated with a National Bank. This is contrary to the scheme Congress enacted.

21 Section 86 of the NBA and § 1463(g)(2) of HOLA, which provide penalties for National
 22 Banks that charge interest in excess of that permitted by §§ 85 or 1463(g)(1), further demonstrate
 23 Congress’s intent that only National Banks benefit from preemption of state rate caps. Section 86
 24 focuses exclusively on National Banks, imposing a penalty “twice the amount of the interest . . .
 25 from the *association* [*i.e.*, national bank] taking or receiving the same.” 12 U.S.C. § 86 (emphasis
 26 added). The parallel provision in HOLA likewise provides a remedy against any “*savings*
 27 *association* taking or receiving . . . [unlawful] interest” (emphasis added). These provisions house
 28 the exclusive remedies for violations of §§ 85 and 1463(g)(1). *Beneficial Nat. Bank*, 539 U.S. at

1 9-11 (addressing § 85). By providing remedies for violations of §§ 85 and 1463(g)(1) only as to
2 National Banks, Congress further indicated these provisions apply only to National Banks.

3 **C. Further Legislative Activity Confirms Congress Intentionally Declined To**
4 **Preempt State Interest-Rate Caps as to Non-bank Debt Buyers**

5 Congress knows how to preempt state rate caps for loan buyers when it wants to. It did so
6 with respect to a limited class of highly (and federally) regulated loans—first-lien residential
7 mortgage loans—in § 501 of the Depository Institutions Deregulation and Monetary Control Act
8 (“DIDA”), Pub. L. No. 96–221, 94 Stat 132 (1980) (codified at 12 U.S.C. § 1735f-7a). Unlike
9 §§ 85 and 1463(g)(1), which expressly apply to specific federally regulated entities (National
10 Banks), DIDA § 501 preemption expressly applies to the loans themselves (specifically, first-lien
11 mortgage loans), even after they are sold to other entities.

12 Notably, in a different provision of DIDA, § 521, Congress used language modeled on § 85
13 to preempt state rate caps with respect to state-chartered banks. 12 U.S.C. § 1831d (codifying
14 DIDA § 521). That is, while Congress expressed its intent to exempt certain *loans* in § 501, it
15 expressed its intent to exempt certain *entities* in § 521—just like it did in §§ 85 and 1463(g)(1).
16 Accordingly, “[s]ection[] 85 . . . of the NBA and Section 521 of the DIDA apply only to national
17 and state chartered banks, not to non-bank purchasers[.]” *In re Cmty. Bank of N. Virginia*, 418
18 F.3d at 296; *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1144–45 (D. Colo. 2018)
19 (DIDA § 521 “does not on its face regulate interest or charges that may be imposed by a
20 non-bank, including one which later acquires or is assigned a loan made or originated by a state
21 bank”).

22 Congress also declined to pass legislation nearly identical to the OCC’s Rule. The
23 Protecting Consumers’ Access to Credit Act of 2017, a bill introduced following *Madden* but
24 before the OCC proposed its Rule, contained language very similar to the Non-bank Interest Rule
25 and would have extended preemption under §§ 85 and 1463(g)(1) to non-bank loan buyers. H.R.
26 3299, 115th Cong. (2017-2018). The Senate took no action on the bill, allowing it to expire. *See*
27 S. 1642, 115th Cong. (2017-2018). This legislative context indicates Congress meant the words it
28 chose in §§ 85 and 1463(g)—preemption under those statutes applies only to National Banks.

1 **D. Courts Have Consistently Recognized that § 85 Preemption Applies Only**
2 **to National Banks**

3 Courts have consistently recognized that for § 85 preemption of state rate caps to apply, a
4 National Bank must be the real party in interest that “take[s], receive[s], reserve[s], and
5 charge[s]” interest on a loan. The Second Circuit noted in *Madden* that the NBA “expressly”
6 grants interest-rate privileges to National Banks. 786 F.3d 246 at 250. Because this express
7 preemption is limited to National Banks, the court considered whether conflict preemption
8 prevents application of state rate caps to non-bank loan buyers. *See id.* It held § 85 preemption
9 does not extend to non-bank buyers because they act “solely on their own behalves, as the owners
10 of the debt”; extending rate cap preemption to loan purchasers, the court noted, “would create an
11 end-run around usury laws for non-national bank entities[.]” *Id.* at 251, 252.

12 Courts focus on who holds the underlying interest in the loans because, as the Third and
13 Eighth Circuits have likewise affirmed, § 85 applies only to National Banks. *In re Cmty. Bank of*
14 *N. Virginia*, 415 F.3d at 296; *Krispin v. May Dept. Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000)
15 (“the NBA governs only national banks”); *see also Goleta Nat. Bank v. Lingerfelt*, 211 F. Supp.
16 2d 711, 717 (E.D.N.C. 2002) (“the NBA patently does not apply to non-national banks”). Due to
17 the complexity of modern commerce and some lenders’ attempts to evade state law, courts have
18 grappled with whether, under various circumstances, a National Bank holds the loan at issue—
19 that is, whether the bank is the entity charging interest on the loan. Until the OCC issued its Rule,
20 however, courts consistently held that § 85 preemption governs National Banks alone.

21 In *Krispin*, a case often noted for its distinctive facts, the National Bank was a wholly
22 owned subsidiary of a department store, established to offer credit to the store’s customers.
23 Although the store daily purchased the resulting accounts receivable—*i.e.*, the income stream of
24 due and pending loan payments—it was “the bank, and not the store, that issue[d] credit,
25 processe[d] and service[d] customer accounts, and set[] such terms as interest and late fees.”
26 *Krispin*, 218 F.3d at 924. Thus, the court held, § 85 applied. *Id.* That is, in order for § 85 to
27 preempt state rate caps, a National Bank must remain “the real party in interest” to the loan.
28 *Id.*; *see also, e.g., Cohen v. Capital One Funding*, No. 19-CV-3479, 2020 WL 5763766, at *15

1 (E.D.N.Y. Sep. 28, 2020) (§ 85 applies when National Bank “retains ownership and control [of
 2 the loan], remains the entity that lends money . . . , charges fees and interest . . . and receives
 3 principal and interest payments”); *In re Cmty. Bank of N. Virginia*, 415 F.3d at 297 (the NBA
 4 does not preempt state law where loans “were, in fact, made and serviced by” a non-bank and
 5 “were then bought by” another non-bank); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1202
 6 (N.D. Cal. 2012) (denying non-bank’s motion to dismiss on NBA preemption grounds because “it
 7 is not clear whether or to what extent [the National Bank] retained any significant stake in or
 8 control over [the underlying] loan”); *Peel v. Brooksameric Mortgage Corp.*, No. SACV 11-
 9 00079, 2014 WL 12589317, at *4 (C.D. Cal. Nov. 13, 2014) (“due to the passage of Dodd-
 10 Frank,” NBA preemption does not apply to loans obtained “from an operating subsidiary of a
 11 national bank or federal savings association”); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp.
 12 2d 1191, 1205 (N.D. Okla. 2004) (§ 85 did not apply because “[a]lthough the loan proceeds are
 13 paid to borrowers by checks purportedly drawn from County Bank,” non-bank partner “exerts
 14 ownership and control over these loans . . . carries out all interaction with the borrowers, accepts
 15 the ultimate credit risk, collects and pockets virtually all of the finance charges and fees, and
 16 owns and controls the branding of the loans”).⁶

17 The OCC’s Rule would extend rate-cap preemption to situations in which a National Bank
 18 has “sold [loans] outright to a new, unrelated owner, divesting itself completely of any continuing
 19 interest in them[.]” *Madden*, 786 F.3d at 252 n.2. In such cases, it is the non-bank buyers that
 20 “take, receive, reserve, and charge” the resulting interest, and §§ 85 and 1463(g) do not apply.

21 **E. The OCC Lacks Authority To Issue Rules Meant To Regulate Non-banks**

22 The OCC also lacks authority to issue the Non-bank Interest Rule because the Rule governs
 23 only the conduct of non-banks. As the agency itself described, “[t]he OCC . . . supervises national
 24 banks under the National Bank Act of 1864 and federal savings associations under the Home
 25 Owners’ Loan Act of 1933. Absent several exceptions not relevant here, Congress vested the

26 _____
 27 ⁶ Only one court has held to the contrary: In a bankruptcy appeal, a Colorado district court relied
 28 on the Rule—without any analysis as to its validity—to hold that a parallel statute preempting
 rate caps as to state-chartered banks also applied to non-bank loan assignees. *In re Rent-Rite
 SuperKegs W. Ltd.*, No. 19-CV-01552, 2020 WL 6689166, at *6 (D. Colo. Aug. 12, 2020).

1 Comptroller of the Currency with authority ‘to prescribe rules and regulations’ governing these
 2 entities’ business operations.” OCC Defendants’ Response to Administrative Motion to Consider
 3 Whether Cases 4:20-cv-05200-JSW and 3:20-cv-05860-CRB Should Be Related [Dkt. No. 25] at
 4 2 (quoting 12 U.S.C. § 93a) (internal citations omitted). The OCC has regulatory authority only
 5 over “the institutions and other persons subject to its jurisdiction”—that is, the National Banks it
 6 regulates and supervises. 12 U.S.C. § 1; *see also id.* § 93a; 12 C.F.R. § 4.2; AR 122. But the Non-
 7 bank Interest Rule regulates the interest rate a *non*-bank may charge “*after* a bank transfers a
 8 loan” to it. AR 842 (emphasis added). This is beyond the OCC’s jurisdiction and so the Rule must
 9 be set aside. 5 U.S.C. § 706(2)(C).⁷

10 **F. The OCC’s Constructions of §§ 85 and 1463(g)(1) Are Not Entitled to**
 11 ***Chevron* Deference**

12 Even if the Court determines § 85 is ambiguous as to who may “take, receive, reserve, and
 13 charge” interest in excess of state law, it may not defer to the OCC’s interpretation but must
 14 instead independently assess the validity of it. 12 U.S.C. § 25b(b)(5)(A). While most agencies’
 15 interpretations of the statutes they administer are, if reasonable, entitled to judicial deference
 16 under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the OCC’s
 17 statutory constructions regarding the NBA and HOLA’s preemption of state law are not.
 18 Congress declared that these interpretations are “entitled only to *Skidmore* deference,” under
 19 which “an agency’s views are ‘entitled to respect’ only to the extent that they have the ‘power to
 20 persuade[.]’” *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1192 (9th Cir. 2018), *cert. denied*, 139
 21 S. Ct. 567 (2018) (citing 12 U.S.C. § 25b(b)(5)(A) and *Skidmore v. Swift & Co.*, 323 U.S. 134,
 22 140 (1944)); 12 U.S.C. § 1465(a) (same requirements for rulemaking under HOLA). The Court
 23

24 ⁷ The OCC also lacks authority to issue the Rule because judicial construction of a statute trumps
 25 a subsequent agency interpretation when the court’s construction “follows from the unambiguous
 26 terms of the statute and thus leaves no room for agency discretion.” *Empire Health Found. for*
 27 *Valley Hosp. Med. Ctr. v. Azar*, 958 F.3d 873, 884 (9th Cir. 2020). The Second Circuit implicitly
 28 construed the unambiguous terms of § 85 in *Madden*, exploring whether conflict preemption
 displaces state rate caps as applied to non-banks because § 85’s express language does not. 786
 F.3d at 250-51. The OCC has not identified any ambiguity in § 85; it unlawfully offers an
 interpretation contrary to the statute’s text and to *Madden*’s construction of it.

1 may not defer to the OCC; it must instead “assess the validity of [the OCC’s] determinations,
2 depending upon the thoroughness evident in the consideration of the agency, the validity of the
3 reasoning of the agency, the consistency with other valid determinations made by the agency, and
4 other factors which the court finds persuasive and relevant[.]” 12 U.S.C. § 25b(b)(5)(A).

5 Because the OCC’s constructions of §§ 85 and 1463 lack thorough consideration and
6 support, proceed from invalid reasoning, and (as discussed below) are inconsistent with prior
7 OCC positions without explanation, the Court must disregard them and set aside the Rule.

8 **G. The OCC’s Extratextual Concerns Cannot Alter the Statutory Scheme**

9 In support of its Rule, the OCC recites a number of principles, concerns, and motivations
10 that run counter to the text of §§ 85 and 1463(g) and—in light of the agency’s own stated
11 foundations for the Rule—constitute no more than extratextual considerations and the OCC’s
12 wishful thinking about how the statutory scheme could be rather than how it is. However, it is a
13 “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its
14 own sense of how the statute should operate.” *Util. Air Reg. Grp.*, 573 U.S. at 328; *Engine Mfrs.*
15 *Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (an agency may not “avoid the Congressional
16 intent clearly expressed in the text simply by asserting that its preferred approach would be better
17 policy”). “When the express terms of a statute give us one answer and extratextual considerations
18 suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its
19 benefit.” *Bostock v. Clayton*, 140 S. Ct. 1731, 1737 (2020).

20 For example, the OCC contends that allowing § 85 preemption to travel with transferred
21 loans will improve National Banks’ liquidity and strengthen their ability to make and sell loans
22 because loans sold to non-banks will fetch higher prices. AR 842-45. But these justifications are
23 extraneous to § 85, which has nothing to do with the powers to make and sell loans: Section 85
24 only pertains to what interest a National Bank may charge. As the OCC has admitted in other
25 recent rulemaking, National Banks “do not obtain their lending authority from section 85 or 12
26 U.S.C. 1463(g).” True Lender Rule, 85 Fed. Reg. at 68,743. The powers to make and sell loans
27 arise from § 24(Third) and (Seventh) of the NBA and § 1464(c) of HOLA. But the OCC
28 disclaims that its Rule construes or relies on those statutes in attempt to avoid procedural hurdles

1 set by Congress. AR 845 n.50; *infra* Section II. n.12. Instead, it relies solely on § 85 and parallel
 2 language in § 1463(g)(1). The OCC may not read atextual propositions into § 85 because they
 3 will somehow enhance other powers it has chosen not to construe. The OCC’s view that National
 4 Banks would be better off if § 85 preemption were in fact transferable to non-bank buyers cannot
 5 justify rewriting the statute’s clear terms.

6 Likewise, the OCC’s erroneous interpretation of two nineteenth-century common-law cases
 7 that supposedly stand for a “valid-when-made” principle cannot override the plain text of § 85.
 8 *See* AR 844 (citing *Nichols v. Fearson*, 32 U.S. 103, 109 (1833) and *Gaither v. Farmers’ &*
 9 *Mechs.’ Bank of Georgetown*, 26 U.S. 37, 43 (1828)); *see also* Compl. ¶¶ 55-68. The OCC
 10 contends these cases stand for the common-law principle that a loan’s buyer could never be liable
 11 for usury if the initial lender complied with applicable law. AR 844. As a number of comments
 12 note, the OCC’s interpretation of the mid-1800s common law of usury is incorrect. AR 131-32,
 13 362-63, 493-95, 583-86; *see also* Compl. ¶¶ 64-68. Moreover, it is irrelevant to the interpretation
 14 of § 85. Indeed, in recent rulemaking, the OCC has denied that “section 85 incorporates the
 15 common law of usury as of 1864.” True Lender Rule, 85 Fed. Reg. at 68,743. It also admits that it
 16 “is not citing these tenets [of archaic common law] as independent authority for [the Non-bank
 17 Interest Rule.]” AR 844.⁸ While the OCC’s dubious reading of antique cases may represent how it
 18 *wishes* the statutory scheme worked, its citation to them cannot override § 85’s text.

19 * * *

20 Because the OCC relied on extratextual considerations, failed to account for important
 21 statutory and legislative context, ignored the plain text of §§ 85 and 1463(g), and issued a Rule
 22 that conflicts with precedent and is beyond its authority, the OCC’s action is arbitrary, capricious,
 23 an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, authority,
 24 and limitations, and short of statutory right. 5 U.S.C. § 706(2)(A), (C). Plaintiffs are thus entitled
 25 to summary judgment. *Id.*; *see also* Compl. ¶¶ 212-19.

26 _____
 27 ⁸ The OCC further lacks authority to preempt state law based on nineteenth-century federal
 28 courts’ exposition of common law because, as the Supreme Court has held since its 1938 decision
 in *Erie v. Tompkins*, “[t]here is no federal general common law.” *O’Melveny & Myers v. FDIC*,
 512 U.S. 79, 83 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)); AR 583-86.

1 **II. THE OCC FAILED TO APPLY THE *BARNETT BANK* STANDARD AND TO FOLLOW THE**
 2 **PROCEDURAL STEPS REQUIRED BY CONGRESS**

3 A court’s “review of an agency’s procedural compliance is exacting[.]” *Kern Cnty. Farm*
 4 *Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). It must ensure “statutorily prescribed
 5 procedures have been followed” and need not defer to the agency’s own view of whether it
 6 complied. *Id.* (quotations and citations omitted). The OCC complied with none of the obligations
 7 Congress prescribed for rules that preempt state consumer finance laws. *See* 12 U.S.C. § 25b.

8 Following the 2008 mortgage crisis, the Senate Committee on Banking, Housing, and
 9 Urban Affairs found that the OCC had “actively created an environment where abusive mortgage
 10 lending could flourish without State controls” with rules that preempted state anti-predatory
 11 lending laws. Senate Report. No. 111-176, at 15-17 (2010).⁹ In response, Congress cabined the
 12 OCC’s power to issue rules preempting state law. Before the OCC issues regulations that will
 13 preempt state consumer finance laws, it must (1) establish that the state laws “prevent[] or
 14 significantly interfere[] with the exercise by [a] national bank of its powers,” as set forth in
 15 *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); (2) consider, on a “case-by-
 16 case basis,” the impact of particular state laws on National Banks; (3) consult with the Consumer
 17 Financial Protection Bureau (“CFPB”) and take its views into account; and (4) adduce
 18 “substantial evidence, made on the record of the proceeding,” that “supports the specific finding
 19 regarding the preemption” of state law in accordance with *Barnett Bank*. 12 U.S.C. § 25b(b), (c);
 20 *id.* § 1465 (same requirements for rulemaking under HOLA); *Lusnak*, 883 F.3d at 1191-94.

21 Because the OCC ignored all these requirements, its Rule must be set aside. *See W.C. v.*
 22 *Bowen*, 807 F.2d 1502, 1505 (9th Cir.), *opinion amended on denial of reh’g*, 819 F.2d 237 (9th
 23 Cir. 1987) (rules issued without adherence to the procedures set by Congress are generally void);
 24 *Preminger v. Sec’y of Veterans Affairs*, 632 F.3d 1345, 1350 (Fed. Cir. 2011) (“failure to comply
 25 with notice-and-comment procedures, when required, is grounds for invalidating a rule”).

26
 27 ⁹ <https://www.govinfo.gov/content/pkg/CRPT-111/srpt176/pdf/CRPT-111srpt176.pdf> (also stating
 28 that federal regulators “routinely sacrificed consumer protection for short-term profitability of
 banks”).

1 **A. The OCC Ignored the *Barnett Bank* Standard Required by § 25b**

2 “The critical question in any pre-emption analysis is always whether Congress intended that
3 federal regulation supersede state law.” *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 369. Congress
4 stated its intent in the Dodd-Frank Act. OCC regulations may construe statutes to preempt state
5 consumer financial laws only in three narrow circumstances:

6 (A) application of a State consumer financial law would have a discriminatory effect
7 on national banks, in comparison with the effect of the law on [state-chartered banks];

8 (B) in accordance with the legal standard for preemption in the decision of the
9 Supreme Court . . . in *Barnett Bank* . . . , the State consumer financial law prevents or
significantly interferes with the exercise by the national bank of its powers . . . ; or

10 (C) the State consumer financial law is preempted by a provision of Federal law other
than [the NBA].

11 12 U.S.C. § 25b(b)(1). There is no doubt state rate caps are state consumer financial laws,¹⁰ and
12 the Rule’s sole legal effect is to preempt their application to non-banks that purchase National
13 Bank loans. *See* AR 848. Preemption options (A) and (C) are inapplicable: The OCC does not
14 contend application of state rate caps to non-banks would have a discriminatory effect on
15 National Banks, nor does it claim that any law other than the NBA preempts state rate caps.¹¹

16 Thus, before it could issue a rule construing § 85 to preempt state rate caps as to non-banks,
17 the OCC was required to apply *Barnett Bank* to determine whether application of those rate caps
18 to non-banks would “prevent[] or significantly interfere[] with” National Banks’ exercise of their
19 powers. 12 U.S.C. 25b(b)(1)(B); *see also Lusnak*, 883 F.3d at 1191-92. The OCC, however,
20 refused to conduct this analysis, claiming *Barnett Bank* and the other requirements of § 25b do
21 not apply to its rulemaking. AR 845. The Rule states two arguments for this position. Both fail.

22 First, the OCC claims that rules meant to construe the substantive meaning of § 85 need not
23 comply with § 25b; in its view, only rules that “focus on preemption” are bound by these limits.

24
25 ¹⁰ A “state consumer financial law” is a state law “that directly and specifically regulates the
26 manner, content, or terms and conditions of any financial transaction . . . or any account related
27 thereto, with respect to a consumer.” 12 U.S.C. § 25b(a)(2). State rate caps regulate the terms of
consumer financial transactions by limiting the interest that may be charged and thus fit squarely
within this definition. The OCC’s Rule makes no claim to the contrary.

28 ¹¹ These points likewise apply to HOLA, which is equivalently limited per 12 U.S.C. § 1465.

1 AR 845. This distinction is specious. All rules preempting state law must derive from the
2 substantive meaning of a statute; an agency “literally has no power” to preempt state law except
3 through statutory authority granted by Congress. *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 374.

4 Even if the OCC would rather not “focus on preemption,” the Rule’s straightforward
5 effect—indeed, its only purpose—is to preempt otherwise applicable state interest-rate caps; thus,
6 § 25b and *Barnett Bank* apply. *Lusnak*, 883 F.3d 1185, 1191-92. Section 25b(b)(1) governs all
7 cases in which OCC-administered statutes may preempt state consumer financial laws. Congress
8 could not have been clearer: “State consumer financial laws are preempted, only if” one of the
9 three stated conditions is met. 12 U.S.C. § 25b(b)(1). Additionally, any doubt about the Non-bank
10 Interest Rule’s preemptive purpose is answered by the titles of the regulations the Rule amends:
11 One amendment falls under “Subpart D—Preemption” and the other is titled “Most favored
12 lender usury preemption for all savings associations.” AR 848. As the Supreme Court put it, if a
13 rule with preemptive effect contained in the “preemption” section of OCC regulations “is not pre-
14 emption, nothing is.” *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 535 (2009).

15 Second, the OCC claims that a Dodd-Frank savings clause, which states that “[n]o
16 provision of [the NBA] shall be construed as altering or otherwise affecting the authority
17 conferred by [§ 85] for the charging of interest *by a national bank*,” exempts the Rule from § 25b.
18 12 U.S.C. § 25b(f) (emphasis added); AR 845. The OCC’s puzzling interpretation of this savings
19 clause also fails. As discussed above in Section I, § 25b(f) confirms that § 85 grants authority “for
20 the charging of interest” only to National Banks. But the OCC interprets it to mean that the rest of
21 § 25b’s requirements—including application of *Barnett Bank*—do not apply because the Rule
22 interprets § 85. In other words, as long as a rule claims to interpret § 85, no matter how broad or
23 unreasonable its preemptive effect, the OCC is free to ignore its procedural obligations. That is a
24 willful misreading of § 25b(f), which does nothing more than preserve § 85 preemption for the
25 only entities entitled to it: National Banks.¹²

26 _____
27 ¹² The OCC’s misinterpretation of § 25b(f) as exempting rules construing § 85 (but *only* rules
28 construing § 85) from compliance with § 25b’s requirements also explains why it disclaimed
reliance on the NBA provisions that give National Banks the power to sell loans in § 24. Despite

1 Moreover, regardless of § 25b(f), the OCC was required to apply *Barnett Bank* because that
 2 has long been the applicable standard for determining when the NBA preempts state law,
 3 irrespective of Dodd-Frank. As the Ninth Circuit explained, “with respect to NBA preemption,
 4 [Dodd-Frank] merely codified the existing standard established in *Barnett Bank*[.]” *Lusnak*, 883
 5 F.3d at 1188. Whatever authority § 25b(f) preserved, it did not free the OCC from its obligation
 6 to analyze its Rule under *Barnett Bank*’s significant-interference standard.¹³

7 No matter how the OCC attempts to characterize the Rule and its authority, *Barnett Bank*
 8 and § 25b govern its rulemaking process. Congress and case law are clear: Whenever an OCC
 9 rule will preempt state consumer financial laws, the agency must perform the analysis required by
 10 *Barnet Bank* and Dodd-Frank. 12 U.S.C. § 25b(b)(1). The OCC failed to do so here.

11 **B. The OCC Failed To Comply with All Other Requirements of § 25b**

12 In addition to disregarding *Barnett Bank*, the OCC also unlawfully ignored all other
 13 procedural requirements governing rules that preempt state consumer finance laws. Under the
 14 Dodd-Frank Act, the OCC was required to (1) evaluate, on a “case-by-case basis,” “the impact of
 15 a particular State consumer financial law on any national bank that is subject to that law” before
 16 issuing a rule preempting that state law; (2) consult the CFPB about the Rule and take its views
 17 “into account”; and (3) support its Rule with “substantial evidence, made on the record of the
 18 proceeding, [that] supports the specific finding regarding the preemption of [state law] in
 19 accordance with the legal standard of [*Barnett Bank*].” 12 U.S.C. § 25b(b)-(c); *id.* at § 1465. It is
 20 undisputed that the OCC did not comply with any of these requirements. *See* AR 845 (stating the

21 _____
 22 repeatedly justifying the Rule on the grounds that it will enhance National Banks’ ability to make
 23 and sell loans, the OCC denies that the Rule rests on the NBA provisions that actually grant those
 24 powers. AR 843 (citing 12 U.S.C. § 24(Third) and (Seventh) as providing National Banks’
 25 powers to make and sell loans); AR 845 n.50 (stating § 25b requirements do not apply because
 26 the OCC “does not cite [§ 24(Third) and (Seventh)] as direct authority for this rule or for their
 27 preemptive effect”). The OCC wants it both ways, claiming its Rule is about the ability to make
 28 and sell loans while denying reliance on the sections providing those powers.

13 If the Court determines *Barnett Bank* does not govern the Rule, it must employ the standard
 presumption against preemption, which protects states’ historic police powers. *See Altria Grp.,*
Inc. v. Good, 555 U.S. 70, 77 (2008) (“the historic police powers of the States” are not preempted
 “unless that was the clear and manifest purpose of Congress”); *Griffith*, 218 U.S. at 569 (interest-
 rate caps are among states’ historic police powers).

1 OCC's view that § 25b requirements "are inapplicable to this rulemaking").

2 By declining to follow the procedures set forth in § 25b and perform the analysis required
3 by *Barnett Bank*, the OCC's Rule is action taken "without observance of procedure required by
4 law." 5 U.S.C. § 706(2)(D). Its failure to make the showings required by statute and case law
5 renders the Rule "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
6 with law." *Id.* § 706(2)(A). And its promulgation of the Rule without regard for these
7 requirements is agency action "in excess of statutory jurisdiction, authority, or limitations, or
8 short of statutory right." *Id.* § 706(2)(C). Plaintiffs are thus entitled to summary judgment.

9 **III. THE RULE IS WITHOUT SUPPORT IN THE RECORD, AND THE OCC FAILED TO**
10 **CONSIDER RELEVANT FACTORS BEFORE ISSUING IT**

11 **A. The Court Cannot Rely on the *Barnett Bank* Standard, or Any Other**
12 **Grounds Rejected or Not Cited by the OCC, To Uphold the Rule**

13 A court "may only sustain an agency's action on the grounds actually considered by the
14 agency." *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007). It
15 "may not supply a reasoned basis for the agency's action that the agency itself has not given."
16 *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43. Any argument or evidence not relied on by the
17 OCC during the rulemaking process cannot now be considered as grounds for sustaining the Rule.
18 For example, because the OCC denies any reliance on statutory provisions authorizing National
19 Banks to make and sell loans and does not claim interference with those powers as a basis for its
20 Rule, AR 845 n.50 (disclaiming reliance on § 24(Third) and (Seventh)), the Court may not uphold
21 the Rule on these grounds. Similarly, because the OCC claims § 25b does not apply to this Rule
22 and performed no analysis pursuant to the *Barnett Bank* standard, *see* AR 845, the Court may not
uphold the Rule based on that standard.

23 Even if the OCC had applied *Barnett Bank*, it made no findings that could support its Rule
24 under that standard. *See* AR 305-06, 309-10, 366. The OCC merely speculates that the *Madden*
25 decision has caused "uncertainty" in some secondary credit markets. *E.g.*, AR 842. That is not
26 enough. "As Congress provided in Dodd-Frank, the operative question is whether [the state law]
27 prevents [a National Bank] from exercising its national bank powers or *significantly interferes*
28 with [its] ability to do so. Minor interference with federal objectives is not enough." *Lusnak*, 883

1 F.3d at 1194 (emphasis in original; citation omitted). Once a loan has been sold, the buyers act
2 not on behalf of National Banks but “on their own behalves, as the owners of the debt,” *Madden*,
3 786 F.3d at 251, and application of state rate caps to those buyers does not affect the interest
4 National Banks “may take, receive, reserve, and charge” under § 85. The OCC’s Rule cites no
5 evidence to the contrary and fails even to substantiate its weaker claim of “uncertainty.” *See* AR
6 128-29, 133, 305-06, 313-14, 576.

7 Moreover, application of state rate caps to non-banks does not significantly interfere with
8 National Banks’ ability to make and sell loans. As the Second Circuit explained, “state usury laws
9 would not prevent consumer debt sales by national banks to third parties.” *Madden*, 786 F.3d at
10 251. At most, they “might decrease the amount a national bank could charge for its consumer
11 debt in certain states (*i.e.*, those with firm usury limits, like New York), [but] such an effect
12 would not ‘significantly interfere’ with the exercise of a national bank power.” *Id.* National Banks
13 can also already sell their loans to more than 5,200 other federal and state banks, all of which
14 benefit from preemption under § 85 or parallel provisions. AR 128-30. With respect to making
15 loans, the OCC also ignored the FDIC’s finding in its parallel rulemaking that “[it] is not aware of
16 any widespread or significant negative effects on credit availability having occurred to this point
17 as a result of the *Madden* decision.” AR 630, 1195. Despite these facts and the Second Circuit’s
18 insights, the OCC fails to explain how its Rule resolves any “significant interference” with
19 National Banks’ powers. *E.g.*, AR 309-10, 366, 576.

20 The OCC makes oblique reference to “[t]wo commenters [who] provided empirical studies
21 analyzing the effects of the *Madden v. Midland Funding* decision[.]” AR 842-43. The Court
22 cannot rely on these studies to sustain the Rule. The Rule does not identify these studies by name
23 or author and provides no discussion of the methods used, the studies’ results, or the substantive
24 role, if any, they played in the OCC’s consideration of the Rule. AR 842. The Court may not
25 supply those missing links on the agency’s behalf. *Motor Vehicle Mfrs. Ass’n of U.S.*, 463 U.S. at
26 43. Indeed, because the OCC failed to explain whether and how its conclusions rest on these
27 studies, its reliance on them is itself arbitrary and capricious. *Id.* (agency must explain its reliance
28 on relevant data).

1 **B. The OCC Failed To Consider Relevant Factors and Important Aspects of**
2 **the Issue Its Rule Addresses**

3 Agency action is lawful only if it rests on “a consideration of the relevant factors” and must
4 be set aside if the agency “entirely failed to consider an important aspect of the problem[.]” *Motor*
5 *Vehicle Mfrs. Ass’n*, 463 U.S. at 42-43. Because the OCC failed to consider significant aspects of
6 the problem its Rule is meant to address, the Rule must be set aside.

7 **1. The OCC Failed To Consider the Rule’s Facilitation of Rent-a-Bank**
8 **Schemes**

9 The Rule’s facilitation of rent-a-bank schemes is an “important aspect of the problem” of
10 interest-rate transferability that the OCC was legally bound to consider. In these schemes, non-
11 bank lenders seek to evade state rate caps by “partnering” with banks that serve as mere pass-
12 through entities for high-cost loans and that bear no substantial financial interest in the loans. *See,*
13 *e.g.*, AR 348-49, 369-70. These schemes rely on precisely the type of transaction covered by the
14 Rule: origination of a loan by a bank and subsequent sale of that loan to the “partner” non-bank.

15 The record is replete with evidence showing that the Rule will facilitate rent-a-bank
16 schemes and result in borrower harm from predatory loans. *E.g.*, AR 313-14, 318, 338, 354-56,
17 373-402, 630-31, 732-38; *see also* AR 817 (OCC acknowledging many “commenters argued that
18 this rulemaking would facilitate predatory lending through rent-a-charter relationships”). For
19 instance, commenters cited research stating that the Rule “could encourage ‘rent-a-bank’ schemes
20 where payday and other high-cost lenders launder their loans through banks,” described how the
21 Rule “opens the door more widely for high-interest nonbank lenders to operate in ways that
22 contravene state protections for borrowers,” and detailed how borrowers targeted by rent-a-bank
23 schemes are likely to be harmed by the Rule. AR 586, 318, 388, 391-402, 747-61.

24 Despite these comments and other evidence in the record, the OCC ignored the rent-a-bank
25 issues its Rule raises, merely asserting that it “has consistently opposed predatory lending,
26 including through relationships between banks and third parties” and claiming that it has issued
27 guidance that will prevent predatory schemes. AR 846. This is not enough. The OCC must
28 engage with the evidence that its Rule will facilitate rent-a-bank schemes and explain how it has
29 taken the likely facilitation of these schemes into account. *See E. Bay Sanctuary Covenant v.*

1 *Barr*, 964 F.3d 832, 854 (9th Cir. 2020) (rule limiting asylum access was arbitrary and capricious
2 because agency’s “explanation in no way addresses the special vulnerability of unaccompanied
3 minors and the failure of the Rule to take that vulnerability into account”). The OCC must engage
4 with all aspects of the Rule—the problems it creates, as much as those that, in the OCC’s view, it
5 solves. *Id.* at 861 (“Having compiled a record that contained extensive evidence of safety
6 concerns . . . the agencies were required to give the safety issues more consideration than a single
7 paragraph in the rulemaking that does not meaningfully engage with the critical question”)
8 (Miller, J., concurring in part and dissenting in part). The OCC failed to do so. *See* AR 384-86.

9 The OCC also refused to consider the related question of whether and how the “true lender”
10 doctrine applies to the Rule, despite numerous comments asking the OCC to address the issue.
11 *E.g.*, AR 300-02, 558, 743-45, 817 (OCC stating “[s]everal commenters requested that the OCC
12 address true lender in its regulatory text”). In response to the growth of sham partnerships
13 designed to evade state law, courts have relied on a test known as the true lender doctrine, which
14 recognizes an entity as the true lender of a loan only when it holds “the predominant economic
15 interest in the transaction.” *E.g.*, *CFPB v. CashCall*, No. CV 15-7522, 2016 WL 4820635, at *6
16 (C.D. Cal. Aug. 31, 2016); *accord CashCall v. Morrissey*, No. 12-1274, 2014 WL 2404300, at
17 *14-15 (W. Va. May 30, 2014); *Flowers*, 307 F. Supp. 2d at 1205. Whether this test applies to
18 loan sales covered by the Rule bears directly on the Rule’s facilitation of rent-a-bank schemes—if
19 a National Bank is not the true lender, § 85 would not apply at all, irrespective of a later loan sale.
20 Nevertheless, in response to comments asking the OCC to address the true lender doctrine as it
21 applies to loans covered by its Rule, the agency merely stated that the question “raise[d] issues
22 distinct from, and outside the scope of, this narrowly tailored rulemaking.” AR 847.¹⁴

23
24 ¹⁴ After issuing the Rule, the OCC promulgated its True Lender Rule, which is the product of a
25 distinct rulemaking process and deems a National Bank the “true lender” so long as it is named as
26 the lender in loan documents *or* funds the loan. True Lender Rule, 85 Fed. Reg. 68,742-47. While
27 the separate True Lender Rule cannot satisfy the OCC’s obligation to consider the important
28 aspects of the Non-bank Interest Rule, the OCC acknowledged the two rules will “operate[]
together” to facilitate National Banks’ transfer of § 85 preemption to non-banks. *Id.* at 68,743. In
short, the Non-bank Interest Rule, rent-a-bank schemes, and the true lender doctrine are related
elements of the same problem, which the OCC was bound to consider in this rulemaking.

1 Because rent-a-bank schemes and the applicability of the true lender doctrine are important
2 issues concerning which transactions between National Banks and non-banks result in § 85
3 preemption—the very problem the Rule purports to address—the OCC’s failure to consider them
4 is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

5 **2. The OCC Failed To Consider that the Rule Creates a Regulatory**
6 **Vacuum**

7 The OCC failed to consider that its Rule would place some lending outside any meaningful
8 regulation. *See* AR 134-35. Congress exempted National Banks from state rate caps to place them
9 in the position of most-favored creditor and correspondingly imposed a comprehensive federal
10 regulatory regime, including regular supervisory visits. *See* 12 U.S.C. § 85; 12 C.F.R. § 4.2.
11 Non-bank loan buyers are not subject to federal regulation (except in very limited circumstances
12 unrelated to their mere purchase of loans), yet the OCC would grant them the same right to ignore
13 state rate caps. The Rule threatens to undermine state oversight of non-bank loan buyers, many of
14 which already argue that state oversight or licensing requirements do not apply when they partner
15 with National Banks. AR 301-02, 557-58. The absence of meaningful oversight is heightened
16 further by predatory lenders’ use of off-shore entities, entirely removed from any American
17 regulatory authority, that purchase loans to charge and receive the resulting interest. AR 134-35
18 (describing California lender’s use of a Cayman Islands special-purpose vehicle to purchase
19 assets from bank partners in a rent-a-bank scheme). But despite comments bringing these issues
20 to the OCC’s attention, the OCC failed entirely to consider this crucial aspect of its Rule.

21 Additionally, as noted above in Section I.B., the exclusive remedies for violations of §§ 85
22 and 1463(g)(1) apply specifically to National Banks. 12 U.S.C. § 86 (penalty is “twice the amount
23 of the interest thus paid from the association [*i.e.*, national bank]”); 12 U.S.C. § 1463(g)(2) (same
24 as to savings associations). The OCC has not considered whether those provisions apply to non-
25 bank buyers covered by its Rule. This creates uncertainty about what, if any, remedies apply
26 when those entities charge rates in excess of that permitted by §§ 85 and 1463(g)(1).

27 Because the OCC failed to consider the Rule’s consequences as well as important aspects of
28 the problem it seeks to address, the Rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

1 **C. The Rule Conflicts with the OCC’s Longstanding Interpretation of § 85**

2 When an agency departs from a previously held policy position, it “must at least display
3 awareness that it is changing position and show that there are good reasons for the new policy.”
4 *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal quotation marks
5 omitted). “[A]n ‘[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an
6 interpretation to be an arbitrary and capricious change from agency practice.’” *Id.* (quoting *Nat’l*
7 *Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

8 Prior to the present rulemaking, the OCC held the position that the preemptive power of
9 § 85 applies only to National Banks and cannot be transferred to others. As it explained in 2002,

10 The benefit that national banks enjoy by reason of [§ 85 preemption] cannot be
11 treated as a piece of disposable property that a bank may rent out to a third party that
12 is not a national bank. Preemption is not like excess space in a bank-owned office
building. It is an inalienable right of the bank itself.

13 AR 340 (quoting public remarks). The OCC expressed concern about rent-a-bank schemes, which
14 it called “an abuse of the national charter” that gives rise to “safety and soundness problems at the
15 bank.” AR 340-41, 404. The OCC confirmed in a 2018 Bulletin that it “views unfavorably an
16 entity that partners with a bank with the sole goal of evading a lower interest rate established
17 under the law of the entity’s licensing state(s).” AR 385; *see also* Compl. ¶ 181.¹⁵

18 The Rule conflicts with the agency’s long-held policy, and the OCC has failed to explain
19 why its stance has changed, rendering the Rule arbitrary and capricious. 5 U.S.C. § 706(2)(A).

20 **CONCLUSION**

21 The OCC’s Rule is unsupported by and contrary to the plain text of the NBA and HOLA;
22 the OCC ignored required rulemaking procedures; and the Administrative Record and the
23 agency’s reasoning undermine, rather than support, the Rule. For all of these reasons, the Non-
24 bank Interest Rule violates the APA and must be held unlawful and set aside. 5 U.S.C. § 706(2).

25 _____
26 ¹⁵ The OCC rescinded this Bulletin in May 2020, less than two weeks before it published the
27 Non-bank Interest Rule. The rescission announcement neither acknowledged nor explained any
28 change in policy. OCC Bulletin 2020-54, *Small-Dollar Lending: Interagency Lending Principles*
for Offering Responsible Small-Dollar Loans (May 20, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-54.html>; Compl. ¶ 181; Answer ¶ 181.

1 Dated: December 10, 2020

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, et al.,

Defendants.

Case No. 4:20-cv-05200-JSW

[PROPOSED] ORDER GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT AND VACATING DEFENDANTS’ RULE

On March 19, 2021 at 9:00 a.m., the Court heard the Motion for Summary Judgment brought by Plaintiffs the People of the State of California, the People of the State of Illinois, and the People of the State of New York (collectively, “Plaintiffs”), asking that that the Court hold unlawful and set aside Defendant the Office of the Comptroller of the Currency’s (“OCC”) Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred (“Non-bank Interest Rule” or “Rule”), 85 Fed. Reg. 33,530-36 (June 2, 2020) (codified at 12 C.F.R. §§ 7.4001(e) and 160.110(d)). Having considered the Administrative Record [Dkt. No. 35], all papers filed in support of and in opposition to summary judgment, oral arguments of counsel, and all other pleadings and papers filed herein, the Court grants summary judgment in Plaintiffs’ favor and vacates the Non-bank Interest Rule.

1 States have long used interest-rate caps to prevent predatory lending. *See Griffith v. State of*
2 *Conn.*, 218 U.S. 563, 569 (1910). In light of the comprehensive federal regulatory regime to
3 which national banks and federal savings associations (collectively, “National Banks”) are subject,
4 Congress exempted them from compliance with state rate caps in the National Bank Act (“NBA”) and
5 Home Owners’ Loan Act (“HOLA”). 12 U.S.C. § 85 (allowing national banks to “take,
6 receive, reserve, and charge” interest in excess of state law); 12 U.S.C. § 1463(g)(1) (same for
7 federal savings associations); *see also Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9-10 (2003).
8 The OCC’s Rule unlawfully extends preemption of state rate caps to any entity—bank or not—
9 that buys loans from a National Bank. 85 Fed. Reg. 33,530-36.

10 The Rule’s interpretation of §§ 85 and 1463(g)(1) would allow non-bank loan buyers to
11 charge interest in excess of state law. This interpretation conflicts with the unambiguous statutory
12 text, which preempts state rate caps in favor of National Banks alone. *See In re Cmty. Bank of N.*
13 *Virginia*, 418 F.3d 277, 296 (3d Cir. 2005). Additional provisions of the NBA confirm that
14 Congress did not extend the benefits of § 85 to non-banks. *E.g.*, 12 U.S.C. §§ 25b, 86; *see also id.*
15 § 1463(g)(2).

16 The OCC also ignored procedural requirements Congress imposed on its rulemaking
17 authority. *See* 12 U.S.C. §§ 25b, 1465(a). The Rule preempts state consumer finance laws and
18 thus the OCC was required to apply the “significant interference” standard for NBA preemption.
19 *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); 12 U.S.C. § 25b(b)(1)(B). The
20 Court may not uphold a rule on grounds the agency failed to consider. *Nw. Envtl. Def. Ctr. v.*
21 *Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007). In any case, the Administrative
22 Record demonstrates that application of state rate caps to non-banks does not significantly
23 interfere with National Banks’ exercise of their powers. The OCC also failed to comply with the
24 other requirements of 12 U.S.C. § 25b: It failed to (1) evaluate, on a “case-by-case basis,” “the
25 impact of a particular State consumer financial law on any national bank that is subject to that
26 law” before issuing its Rule, which preempts that state law; (2) consult the Consumer Financial
27 Protection Bureau about the Rule and take its views “into account”; and (3) support its Rule with
28 “substantial evidence, made on the record of the proceeding, [that] supports the specific finding

1 regarding the preemption of [state law] in accordance with the legal standard of [*Barnett Bank*].”
2 12 U.S.C. § 25b(b)-(c); *id.* § 1465.

3 Finally, the OCC’s action is arbitrary and capricious because the agency failed to address
4 important aspects of the problem its Rule is intended to address, including the Rule’s facilitation
5 of “rent-a-bank” schemes and its creation of a regulatory vacuum. The Rule also rests on
6 contentions that run counter to the evidence in the Administrative Record and conflicts with prior
7 OCC interpretations of National Banks’ interest-rate preemption authority. *See Motor Vehicle*
8 *Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

9 For these reasons, the Court finds that the OCC’s Non-bank Interest Rule is arbitrary,
10 capricious, an abuse of discretion, and otherwise not in accordance with law; is in excess of
11 statutory jurisdiction, authority, and limitations, and short of statutory right; and constitutes
12 agency action taken without observance of procedure required by law. The Rule thus violates the
13 Administrative Procedure Act, 5 U.S.C. § 706(2), and must be set aside.

14 Good cause appearing therefore, **IT IS HEREBY ORDERED THAT:**

- 15
- 16 1. Plaintiffs’ Motion for Summary Judgment is **GRANTED**; and
 - 17 2. The Rule on Permissible Interest on Loans That Are Sold, Assigned, or Otherwise
18 Transferred, 85 Fed. Reg. 33,530-36 (June 2, 2020) (codified at 12 C.F.R. §§ 7.4001(e)
19 and 160.110(d)) is **VACATED**.
- 20

21
22 Dated:

By: _____
UNITED STATES DISTRICT JUDGE