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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, v. THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, and BLAKE PAULSON, in his official capacity as Acting Comptroller of the Currency, Defendants.	Case No. 4:20-cv-05200-JSW **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: March 19, 2021 Time: 9:00 a.m. Place: Oakland Courthouse, Courtroom 5 Before: Judge Jeffrey S. White Action Filed: July 29, 2020

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SUMMARY OF ARGUMENT

The Office of the Comptroller of the Currency's ("OCC" or Agency") Motion for Summary Judgment demonstrated that the challenged Final Rule is a reasonable interpretation of § 85 of the National Bank Act and should be upheld. Plaintiffs' Opposition is premised on the erroneous assumption that the Final Rule preempts state law and inappropriately extends § 85 to non-banks. However, the Final Rule does no such thing; rather, the Final Rule clarifies that the originally agreed-upon interest rate for a national bank loan continues if the loan is later sold, assigned or otherwise transferred. *See* Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530-36. (June 2, 2020) ("Final Rule").

Plaintiffs' challenges to the Final Rule are significantly flawed. *First*, the OCC is entitled to *Chevron* deference and Plaintiffs' assertion otherwise inexplicably ignores numerous decisions applying *Chevron* deference to OCC interpretations of the National Bank Act and, specifically, § 85. *See, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996). *Second*, the Final Rule clarifies the "conspicuous" ambiguity identified in § 85 and confirms national banks' authority to transfer loans with the originally agreed-upon interest terms intact. Plaintiffs' assertions otherwise are based on their failure to recognize statutory provisions and caselaw confirming national banks' broad ability to transfer loans, or their misplaced reliance on later-enacted statutes outside the National Bank Act that reflect similar ambiguities to those interpreted in the Final Rule. *Third*, the Final Rule does not make § 85 preemption assignable to third parties. The Final Rule does not transfer any powers but merely interprets national banks' authority to charge interest under § 85. *Fourth*, 12 U.S.C. § 25b is inapplicable to the Final Rule and the cases Plaintiffs cite are distinguishable. Because the Final Rule does not preempt state law, nor is a preemption determination, the Final Rule need not undergo either a § 25b analysis, or a *Barnett Bank* analysis, which Congress explicitly incorporated into § 25b. *Finally*, the Final Rule is not arbitrary and capricious. The Final Rule is based on the evidence in the record coupled with the OCC's supervisory expertise. The OCC considered all important aspects of the problem and, competing policy considerations, in promulgating the Final Rule.

ARGUMENT

I. THE FINAL RULE VALIDLY INTERPRETS THE NATIONAL BANK ACT

The OCC's Motion for Summary Judgment explained how the Final Rule addresses a "conspicuous[]" gap in the National Bank Act: whether interest charged on loans pursuant to 12 U.S.C. § 85 remains permissible after a national bank exercises its authority to sell, assign, or otherwise transfer these loans to third parties. Defs.' Mot. at 8-11 (quoting *Baldwin v. United States*, 921 F.3d 836, 842 (9th Cir. 2019)).[1] Specifically, the Final Rule recognizes that § 85 (i) authorizes national banks to "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located;" (ii) is the sole provision governing the interest permissible on a loan made by a national bank; and (iii) yet does not "expressly address how the exercise of a national bank's authority to transfer a loan and assign the loan contract affects the interest term." *See* AR at 842 (quoting 12 U.S.C. § 85).

Plaintiffs' efforts to gloss over this gap suffers from four primary flaws.

First, Plaintiffs downplay numerous court decisions applying *Chevron* deference to OCC interpretations of the National Bank Act, generally, and § 85, specifically. These decisions confirm that the Court should evaluate the Final Rule, which focuses on § 85's substantive meaning rather than its preemptive effect, under the *Chevron* framework. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) (recognizing the difference between "the substantive (as opposed to pre-emptive) *meaning* of" § 85 and applying *Chevron* deference to the OCC's rule interpreting § 85). Plaintiffs' related suggestion that 12 U.S.C. § 25b somehow lessens the level of deference afforded to the Final Rule contradicts the plain language of § 25b. As explained below, § 25b(b)(5)(A) does not apply to the Final Rule because it does not preempt state law. Alternatively, § 25b(f) specifies that § 25b does not affect or alter the authority under § 85 for charging interest. Moreover, § 25b(b)(5)(B) preserves "the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation" of § 85.

[1] These arguments also apply to savings associations' parallel authority to charge interest as permitted by the laws of the state in which the association is located. *See* 12 U.S.C. § 1463(g). As the OCC discussed in its opening submission, the OCC and courts interpret §§ 85 and 1463(g) *in pari materia*. *See* Defs.' Mot. at 1 n.1; *see also* AR at 845.

Second, Plaintiffs incorrectly assert that the Final Rule is beyond the OCC's authority because it "regulate[s] interest rates charged by non-bank buyers of National Bank loans." Pls.' Opp'n at 18. This argument obscures the Final Rule's actual result—ratification of national banks' power to transfer loans with the agreed-upon interest terms intact. This power forms "a characteristic fundamental to national banks since their inception." AR at 846 (collecting cases). To that end, the OCC possesses both express and implied Congressional authority to issue the Final Rule through its general rulemaking authority, 12 U.S.C. § 93a, and the "conspicuous" ambiguity identified in § 85. AR at 843 (quoting *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

Third, Plaintiffs' mistakenly claim that §§ 85 and 86's references to "associations" render them unambiguous on their applicability to loan transfers. This reading overlooks these provisions'—and the National Bank Act's—broader statutory context. Specifically, Plaintiffs overlook other statutory provisions and Supreme Court caselaw confirming national banks' broad ability to transfer loans. These authorities underscore the gap reflected in § 85 that is addressed in the Final Rule: what happens to the interest term when a loan is transferred. Similarly, Plaintiffs' reliance on later-enacted statutes outside the National Bank Act—12 U.S.C. §§ 1735f-7a and 1831d—ignores how these statutes highlight, rather than clarify, the ambiguity addressed in the Final Rule.

Fourth, Plaintiffs incorrectly argue that the Final Rule makes "§ 85 preemption . . . assignable to non-banks." Pls.' Opp'n at 20. The Final Rule does no such thing; it merely interprets national banks' authority to charge interest under § 85 and affirms the settled expectations of both parties to a national bank loan at origination. Plaintiffs' parallel suggestion that the OCC improperly relied on the so-called "valid-when-made" principle when issuing the Final Rule also fails. The OCC did not "override § 85's plain text" by referencing this principle. Pls.' Opp'n at 21. Rather, the OCC cited this and other common-law principles as authorities "inform[ing] its reasonable interpretation of section 85," not as independent authority for the Final Rule. AR at 844.

For these reasons, the Court should defer to the OCC's "construction of a statutory scheme it is entrusted to administer" and uphold the Final Rule as a valid interpretation of § 85's substantive scope. *See Chevron*, 467 U.S. at 844; *see also Smiley*, 517 U.S. at 739; *NationsBank of N.C., N.A. v. Variable*

Annuity Life Ins. Co., 513 U.S. 251, 257 (1995); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971).

A. The OCC's Final Rule Is Entitled to *Chevron* Deference

Agencies' interpretations of the statutes they administer are, if reasonable, entitled to judicial deference under *Chevron*. Based on their mischaracterization of the Final Rule as a preemption rule, Plaintiffs wrongly argue that the Court may not defer to the OCC's interpretation of §§ 85 and 1463(g) but must instead independently assess the Final Rule's validity under 12 U.S.C. § 25b(b)(5)(A). *See* Pls.' Opp'n at 10-11. This provision provides that "[a] court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or [12 U.S.C. § 371] shall assess the validity of such determinations" consistent with the standard established in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). 12 U.S.C. § 25b(b)(5)(A). Plaintiffs' fundamental error derives from their refusal to recognize the Final Rule as an interpretation of § 85's substantive meaning. Interpreting § 85's substantive meaning, as opposed to determining that the statute preempts a particular state law, is *not* a preemption determination. *See* 12 U.S.C. § 25b(b)(1). Accordingly, the Final Rule is properly evaluated under the *Chevron* framework. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996); AR at 842-48.

Nevertheless, Plaintiffs incorrectly assert that Congress stripped the OCC of *Chevron* deference in § 25b. Pls.' Opp'n at 10. As explained in more detail below, however, § 25b(f) exempts the Final Rule from § 25b's requirements. This exemption includes §25b(b)(5)(A). Even assuming *arguendo* that § 25b(f) does not exempt the rule from §25b's requirements, none of the authorities Plaintiffs cite—a Senate Report and judicial decisions—discuss or prescribe the deference courts afford to the OCC's substantive interpretations of § 85. Pls.' Opp'n at 10. Indeed, contrary to Plaintiffs' assertions, 12 U.S.C. § 25b(b)(5)(B) specifically preserves the deference afforded to the OCC when it interprets Federal law, providing that nothing in § 25b "shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title [62] of the Revised Statutes or other Federal law." 12 U.S.C. § 25b(b)(5)(B). Section 85 is part of title 62 of the Revised Statutes, the Final Rule is an OCC interpretation of § 85's substantive meaning, and *Smiley*

clearly established that substantive OCC interpretations of § 85 are afforded *Chevron* deference. Accordingly, the Final Rule is entitled to *Chevron* deference.

B. The National Bank Act Delegates Comprehensive Rulemaking Authority to the OCC, Including Authority to Issue the Final Rule

Courts have repeatedly recognized the OCC's broad authority to issue rules interpreting § 85's terms and scope. *See, e.g.*, *Smiley*, 517 U.S. at 746; *Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 134 (1st Cir. 2019); *Richardson v. Nat'l City Bank of Evansville*, 141 F.3d 1228, 1230 (7th Cir. 1998); *Norwest Bank Minn., N.A. v. Sween Corp.*, 118 F.3d 1255, 1259 (8th Cir. 1997). This recognition follows from a more general principle; namely, that "[t]he OCC is charged with the enforcement of banking laws to an extent that warrants [deference] with respect to [its] deliberative conclusions as to the meaning of those laws." *Clarke*, 479 U.S. at 403-04; *see also NationsBank*, 513 U.S. at 257; *Camp*, 401 U.S. at 626-27.

Plaintiffs level three interrelated challenges against the OCC's established authority to interpret § 85's substantive terms. None withstand scrutiny.

First, Plaintiffs' contention that the OCC lacks authority to issue the Final Rule because the Final Rule governs the conduct of so-called "non-banks" is specious. Pls.' Opp'n at 11. Again, Plaintiffs' claim that only the conduct of non-banks is directly governed by the Final Rule relies on their mischaracterization of the Final Rule as preempting state interest caps for non-bank buyers of national bank loans. *See id*. The Final Rule does no such thing. Rather, the Final Rule interprets § 85, which provides that the permissible interest on national bank loans is generally governed by the laws of the state in which the bank is located. In this way, § 85 incorporates, rather than eliminates, state law. The Final Rule regulates the conduct of national banks when they sell, assign, or otherwise transfer loans by clarifying an ambiguous—but important—portion of the statutory interest rate regime for national banks. This clarification provides certainty for national banks' loan transfer activities. Plaintiffs argument that the OCC does not have authority to issue the Final Rule because it would regulate the interest rate a non-bank may charge "after a bank transfers a loan" lacks merit. *See* Pls.' Opp'n at 11-12. The Final Rule is consistent with § 85's purpose to facilitate national banks' ability to operate lending programs on a nationwide basis. *See Marquette Nat. Bank of Minneapolis v. First of Omaha Serv.*

Corp., 439 U.S. 299, 315–18 (1978) (concluding that Congress was aware of, and intended to facilitate, interstate lending when it enacted § 85).[2]

Second, Plaintiffs wrongly argue that § 85 is clear and unambiguous regarding its applicability to a loan that a national bank transfers or sells to a third party. In support of that argument, Plaintiffs erroneously assert—without support—that "Congress did not delegate authority to the OCC to preempt state rate caps beyond that which is provided in § 85." Pls.' Opp'n at 17. This argument again misstates the Final Rule's scope, which the OCC specifically based on the authority granted by § 85. AR at 846. Even so, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, *implicitly or explicitly*, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (emphasis added); *see also United States v. Mead Corp.*, 533 U.S. 533 U.S. 218, 231 n.13 (2001) (recognizing broad deference due to the OCC's "deliberative conclusions as to the meaning of" the National Bank Act). For reasons stated in the Final Rule, § 85's silence regarding its applicability to national bank loan transfers constitutes an implicit delegation of Congressional authority to interpret this silence—especially when viewed alongside national banks' recognized authority to make and assign contracts, the National Bank Act's deliberate facilitation of interstate lending, longstanding common law principles affirming the assignability of loan contracts, and the OCC's successful history of issuing regulations interpreting § 85's substantive scope. *See* AR at 843-44.

Third, Plaintiffs argue that the OCC's comprehensive rulemaking authority, set forth in 12 U.S.C. § 93a, does not support the Agency's authority to issue the Final Rule. Pls.' Opp'n at 18. But § 93a's statutory text—which Plaintiffs omit from their submissions—expressly vests the Comptroller with broad rulemaking authority "to carry out the responsibilities of the office." 12 U.S.C. § 93a; *see also SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 189 (2d Cir. 2007) (citing § 93a and acknowledging that the OCC has "broad authority from Congress to prescribe rules and regulations to carry out its

[2] Plaintiffs are correct that *McShannock* does not directly address the issues under consideration in this case; however, the Ninth Circuit in *McShannock* and other courts have recognized the legal uncertainty resulting from the *Madden* decision. Defs.' Mot.at 3. This legal uncertainty informed the OCC's decision to issue the Final Rule. *See* AR at 843 (stating that the Final Rule aims "to clarify that a bank may transfer a loan without impacting the permissibility or enforceability of the interest term in the loan contract, thereby resolving the legal uncertainty created by the *Madden* decision").

responsibilities"). Section 93a's text also lays out three narrow and specific exceptions to that broad authority: (i) where "that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency;" (ii) where the rulemaking relates to the provisions of 12 U.S.C. § 36; or (iii) where the rulemaking pertains to certain "securities activities of National Banks." *Id.* None of these exceptions apply here, and Plaintiffs have not argued otherwise. Accordingly, the statutory language—coupled with the OCC's recognized authority to issue regulations interpreting the National Bank Act—separates the instant case from those cited by Plaintiffs.[3]

C. The Final Rule Should Be Upheld

1. Section 85 Does Not Unambiguously Address Its Applicability to Loan Transfers

Neither § 85 nor any other provision of the National Bank Act "unambiguously directs" how the sale, assignment, or other transfer of national bank-originated loans affects the loan's interest term. This statutory "gap" grows more glaring when considering § 85's role within the National Bank Act's comprehensive statutory scheme. *See Cuozzo Speed Techs. v. Lee*, 136 S. Ct. 2131, 2142 (2016) (granting agencies "leeway to enact rules that are reasonable in light of the text, nature, and purpose" of the statutes they are charged with administering); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (examining statutory language by "look[ing] to the provisions of the whole law, and to its object and policy" (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)); *see also Marquette*, 439 U.S. 314-15 (examining distinct provisions of "the National Bank Act

[3] *Amer. Bus. Ass'n v. Slater*, 231 F.3d 1, 2-3 (D.C. Cir. 2000) (holding that agency could not expand number of available remedies where underlying statute's enumerated remedies evidenced Congressional intent that such remedies be exclusive); *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 666 (D.C. Cir. 1994) (construing provision of Railway Labor Act that itself "impose[d] strict limitation[s] on the [National Mediation] Board's power," including "four significant conditions that must be satisfied as a prelude to the Board's authority to investigate a representation dispute," despite the Board arguing that the court should "presume a delegation of power from Congress absent an express withholding of such power"); *Merck & Co. v. U.S. Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81, 88 (D.D.C. 2019) (concluding that agency did not have authority to regulate the marketing of prescription drugs where agency relied solely on its general rulemaking authority and the "absence of an express limitation" on the agency's authority to act); *PayPal v. Consumer Fin. Prot. Bureau*, Civ. No. 19-3700, 2020 WL 7773392, at *6 (D.D.C. Dec. 30, 2020) (holding that agency could not rely on its general rulemaking authority to issue regulation mandating certain disclosure clauses where statute expressly directed it to "issue *model* clauses for optional use" (quoting 15 U.S.C. § 1693b(b) (emphasis in original))).

of 1864, its legislative history, and its historical context" to inform the Court's interpretation of § 85).[4] For over 170 years, the Supreme Court has recognized that banks "must be able to assign or sell [their] notes when necessary and proper." *Planters' Bank of Miss. v. Sharp*, 47 U.S. 301, 322-23 (1848). Similarly, federal law empowers national banks to lend money, make contracts, and transfer loans. *See* 12 U.S.C. §§ 24(Third), 24(Seventh), 371; *see also id.* § 1464. The National Bank Act also provides national banks with "all such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24(Seventh). Because § 85 remains "silent or ambiguous with respect to th[is] specific issue," *see Chevron*, 467 U.S. at 843, the OCC reasonably exercised its delegated authority to fill this statutory gap, *see Smiley*, 517 U.S. at 746.

Tellingly, Plaintiffs' brief fails to meaningfully discuss these authorities or their interaction with § 85. *See* Pls.' Opp'n at 13-19. Instead, Plaintiffs assert that § 85's perfunctory reference to "associations," or national banks, forecloses the Final Rule's conclusion that a loan's agreed-upon interest rate survives the loan's transfer to a third party. *Id.* at 13-14. The OCC agrees § 85's reference to "associations" provides that national banks may charge interest up to the rate permitted by the statute. But Plaintiffs' reading goes too far. Statutory readings informed by legal context often require an interpretation not immediately apparent from the text itself. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). So too here. Plaintiffs' narrow interpretative approach distorts § 85's close relationship to other federal banking provisions, each of which underscore § 85's "fundamental ambiguity" on its applicability to loan sales, assignments, and transfers. *Cf. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (finding a "fundamental ambiguity" from potential inferences across statutory sections); *see also Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 959 n.12 (9th Cir. 2005) (observing that "[t]he absence of any reference to operating subsidiaries in the [National] Bank Act does not unambiguously provide

[4] Plaintiffs dispute the OCC's reliance on *Cuozzo*, claiming that the statute in that case had granted the agency "an express delegation of authority." Pls.' Opp'n at 18. But Congress has granted the OCC broad authority to interpret the National Bank Act's terms. *See supra* pp. 4-6. Even so, the OCC cited *Cuozzo* for the general proposition that agencies are entitled to fill statutory "gaps" where "no statutory provision unambiguously directs the agency to use one standard or the other." *Cuozzo*, 136 S. Ct. at 2142. And importantly, *Cuozzo* cited *United States v. Mead Corp.* in support of this conclusion, a decision that expressly recognized the Comptroller's "personal authority" to interpret "the meaning of [the National Bank Act]." 533 U.S. at 231 n.13 (quoting 1 M. Malloy, Banking Law and Regulation, § 1.3.1 (1996)).

that national banks may not create and perform banking functions through such entities"); *Sierra Club v. Envtl. Prot. Agency*, 793 F.3d 656, 666 (6th Cir. 2015) (concluding that "statutory context alone" was "sufficiently ambiguous for [the agency] to clear the first step of *Chevron*").

Plaintiffs' half-hearted suggestion that statutory context supports their reading of § 85, Pls.' Opp'n at 13-14, falls flat. For example, Plaintiffs cite 12 U.S.C. § 86's parallel reference to "association[s]," claiming that this reference shows that § 85 only applies to loans held by national banks. As the OCC explained in its opening brief, however, § 86's reference to "association[s]" reflects the same ambiguity contained in § 85. Defs.' Mot. at 11 n.4. While the OCC agrees that § 86 applies to "associations," *i.e.*, national banks, the provision remains silent concerning its application when a national bank sells, assigns, or otherwise transfers a loan originated pursuant to § 85. Nor does it conclusively answer whether § 85 only applies to loans held by national banks. *See Regions Hosp. v. Shalala*, 522 U.S. 448, 460 (1998) (concluding that plaintiff could not defeat the agency's interpretation at *Chevron* Step One where plaintiff's interpretation was "not the 'only possible interpretation' and was "not . . . inevitable" (quoting *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990))).[5]

Similarly, Plaintiffs' reliance on textual differences between two statutes outside the National Bank Act—12 U.S.C. §§ 1735f-7a and 1831d—is misplaced. Pls.' Opp'n at 14-15. Specifically, Plaintiffs reiterate their claim that Congress enacted § 1735f-7a, which exempts specific loans from certain state usury laws, while concurrently enacting § 1831d, which Plaintiffs argue only applies to loans originated and held by state banks. *Id.* Plaintiffs' ensuing conclusion—that § 1735f-7a demonstrates that Congress knew how to exempt loans from state usury laws, yet chose not to do so in § 1831d or its national-bank analog, § 85—stretches both §§ 1735f-7a and 1831d beyond their textual limits. As the Final Rule makes clear, § 1735f-7a does not expressly state that it applies to loans that are subsequently sold, assigned, or transferred to third parties. AR at 843-44. The statute merely announces that it applies to "any loan, mortgage, credit sale, or advance . . . secured by" first-lien residential

[5] Plaintiffs' related argument that § 25b construes § 85 as being limited to national banks, Pls.' Opp'n at 14, fails for similar reasons. Section 25b(f)—which states that § 25b does not have any effect on "the authority conferred by [§] 85"—incorporates §85's ambiguity on this issue. Moreover, § 25b(f) ratifies § 85's importance to, and ongoing viability in, the modern national banking system. Section 25b(f) also demonstrates Congressional intent to separate preemption issues—*e.g.*, those related to national bank subsidiaries and affiliates, 12 U.S.C. §§ 25b(b)(2), (e)—from issues related to § 85's ongoing application to national bank-originated loans.

mortgages that meet certain criteria. 12 U.S.C. § 1735f-7a. Reflecting this, § 1735f-7a—much like §§ 85 and 1831d—remains silent concerning what happens upon sale, assignment, or other transfer of loans, mortgages, credit sales, or advances originated pursuant to the statute. *See id.* In any event, courts have stated that affirmative language in one statute—*e.g.*, § 1735f-7a—and statutory silence in another—*e.g.*, §§ 85 and 1831d—can indicate that Congress intended to provide the administering agency with discretion to interpret the latter statute. *See, e.g.*, *Catawba Cty., N.C. v. Envtl. Prot. Agency*, 571 F.3d 20, 36 (D.C. Cir. 2009).

Plaintiffs' cited caselaw also does not "compel" the result they urge. *See Chevron*, 467 U.S. at 860. Plaintiffs misstate the fundamental import of these cases: they either deal with situations where the national bank retained an economic interest in the loan or where the national bank had not originated the loan *in the first instance*. *See* Pls.' Opp'n at 16. None of these cases considered circumstances where the national bank validly originated a loan with an interest rate term permitted under§ 85 and then sold, assigned, or transferred *all* economic interest in the loan to a third party.[6] For that reason, these cases do not suggest that the answer to the present statutory question is "unambiguously manifest," *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995), such that § 85 "cannot bear the interpretation adopted by the [OCC]," *see Sullivan*, 494 U.S. at 92.

Finally, Plaintiffs' reliance on *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134 (D. Colo. 2018), *Meade v. Marlette Funding*, LLC, No. 17-cv-00575-PAB-MJW, 2018 WL 1417706 (D. Colo. Mar. 21, 2018), and other similar cases is misplaced. Pls.' Opp'n at 15-16. These decisions were limited to whether § 1831d—which applies to state-chartered institutions and not national banks—completely preempted state law, thereby transforming the state-law usury claims at issue into federal causes of action giving rise to a right of removal to federal court. *See, e.g.*, *Meade*, 307 F. Supp. 3d at 1137; *Marlette Funding*, 2018 WL 1417706, at *3. This focused and limited jurisdictional inquiry differs substantially from the Final Rule's analytical framework, which focuses on § 85's silence

[6] Plaintiffs also attack the OCC's separate rulemaking addressing issues related to the so-called "True Lender" doctrine. Pls.' Opp'n at 16. As the Final Rule explains, this doctrine "raise[s] issues distinct from, and outside the scope of, this narrowly tailored rulemaking." AR at 847. Put differently, the Final Rule only applies where a loan is "made" by the national bank—*i.e.*, where the bank is deemed the "true lender." Accordingly, the Final Rule and the "True Lender" rule stand on their own merit. Therefore, cases discussing the "True Lender" concept bear comparatively little interpretive weight when assessing § 85's applicability to transfers of loans validly originated by national banks.

concerning the permissible interest when a national bank transfers a validly originated loan to a third party. AR at 843. Accordingly, none of these cases foreclose § 1831d's application to loans originated by state banks after a transfer, let alone § 85's application to loans originated by national banks after a transfer. *See, e.g.*, *Meade*, 307 F. Supp. 3d at 1145 (acknowledging that removal question differed from whether defendants could assert express or conflict preemption defenses on the merits of plaintiff's claims).

2. The Final Rule Reasonably Interprets the National Bank Act

Having established § 85's silence on the question at hand, the OCC's Motion for Summary Judgment outlined the many reasons why the Final Rule represents "a permissible construction" of § 85. Defs.' Mot. at 11-18. Specifically, the OCC explained how the Final Rule's interpretation of § 85 not only complements national banks' authority to make and assign contracts and transfer loans, *see* AR at 844, but also conforms with Congress's goal of "provid[ing] a symmetrical and complete scheme" for national bank operations, *see Easton v. Iowa*, 188 U.S. 220, 231 (1903), and aligns with common law principles regarding the assignability of contracts, *see* AR at 844 (collecting cases). The OCC also explained how the Final Rule's interpretation aligned with the Agency's statutory mission of promoting national banks' safe and sound operations. *See* 12 U.S.C. §§ 1, 93a; *see also Planters' Bank of Miss.*, 47 U.S. at 323 ("[Banks] must be able to assign or sell [their] notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house.").

Revealingly, Plaintiffs' submissions spend little time addressing these principles. Instead, Plaintiffs insist that the OCC should have ignored these authorities and instead adopted an interpretation of the National Bank Act that has no basis in modern or historical practice. *See also Marquette*, 439 U.S. at 315-18 (acknowledging that Congress intended the National Bank Act to foster "the interstate nature of American banking" and that § 85's enactment "occurred in the context of a developed interstate loan market" and declining to interpret § 85 in a manner that would "throw into confusion the complex system of modern interstate banking"). Plaintiffs' conclusion would "defeat [the] plain purpose" of the National Bank Act. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *cf. M&M Leasing Corp. v. Seattle First Nat. Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (concluding that

the National Bank Act "must be construed so as to permit the use of new ways of conducting the very old business of banking"). Accordingly, the Final Rule's reasoning preserves national banks' ability to serve the current "business needs of the country," *see Merchants' Nat'l Bank v. State Nat'l Bank*, 77 U.S. 604, 648 (1870), and represents a rational interpretation of § 85.

D. The Final Rule Does Not Assign Preemptive Powers to Non-Banks

Plaintiffs' further assail the Final Rule as contrary to law by contending that the Final Rule purports to make preemption assignable to non-banks and that it overrides the plain text of the statute. Pls.' Opp'n at 19-21. Both contentions fail, however, as they misconstrue the OCC's interpretation of § 85, as set forth in the Final Rule.

First, Plaintiffs assert that the OCC's interpretation of § 85 confuses contract rights with statutory rights of privilege because preemption is a privilege personal to a national bank that is not assignable. Pls.' Opp'n at 19-20. But this misstates the OCC's interpretation. As the OCC previously explained, the Final Rule does not authorize the transfer of preemption to non-banks. *See, e.g.*, Defs.' Mot. at 24. Section 85 determines the rate of interest a national bank may charge on any loan it makes. This interest term is reflected in the loan agreement. Following legal precedent and context and historical practice, the OCC has concluded that when a national bank transfers a loan agreement, the transferee steps into the shoes of the bank and may enforce the interest term of the loan agreement. Defs.' Mot. at 15; AR at 843. Indeed, the rule merely "reaffirm[s] the longstanding understanding that a bank may transfer a loan without affecting the permissible interest term." AR at 842. This does not confer any independent authority onto the transferee under § 85. Thus, the Final Rule does not purport to assign grants of statutory privilege to non-banks—these entities obtain no national bank powers as a result of holding a national-bank originated loan. Instead, the Final Rule simply confirms, consistent with the settled expectations of the original parties to a loan and the National Bank Act's overall structure, the common-sense concept that the originally agreed-upon interest rate, reflected in the loan contract, endures after assignment. *See* AR at 844 (noting the principle that "[t]he usurious or non-usurious character of a contract endures through assignment").

Plaintiffs cite two cases to advance their theory. Pls.' Opp'n at 20. Both are inapposite, however, as they are factually distinguishable and, as previously explained, do not address the issue the

Final Rule identified: whether interest permissible under § 85 remains permissible when a loan is sold, assigned, or otherwise transferred to a third party and the national bank originating the loan retains no ongoing interest in the credit relationship. *See* Defs.' Mot. at 15-16; *see also, e.g., In re Cmty. Bank of N. Va.*, 415 F.3d 277, 297 (3d Cir. 2005) (loans at issue were made and serviced by a non-depository institution and bought by non-bank); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D.N.C. 2002) (concluding that *Younger* abstention doctrine warrants dismissal of claims because of unresolved factual dispute as to whether national bank or nonbank is the de facto lender). Plaintiffs' hypothetical examples in support of their argument—the non-assignability of a driver's license and a credit union's tax-exempt status—fare no better because they posit factual circumstances wholly distinct from the issue the Final Rule addresses. Accordingly, Plaintiffs argument fails.

Second, Plaintiffs wrongly contend that the OCC's interpretation of § 85 holds that the common law principle of "valid-when-made" overrides § 85's plain text. Pls.' Opp'n at 21. But that is a patent misreading of the Final Rule's reference to that principle. Because § 85 does not expressly address its application when a national bank sells, assigns, or otherwise transfers its loans to third parties, the OCC looked to several foundational common law and contract principles, including cases establishing the "valid-when-made" principle—and those establishing the inverse—to inform its reasonable interpretation of this statutory gap. AR at 844; Defs.' Mot. at 7, 12-13. Thus, the OCC did not reference the "valid-when-made" principle to override § 85's plain text. Rather, regarding these principles, including the "valid-when-made" principle, "the OCC is not citing these tenets as independent authority for this rulemaking but rather as tenets of common law that inform its reasonable interpretation of section 85." AR at 844. Therefore, when viewed in the context of national banks' authority to make and assign contracts, the OCC's interpretation of § 85's statutory gap is a "reasonable policy choice for the agency to make" to which this Court should defer. *Sharemaster v. U.S. Sec. & Exch. Comm'n*, 847 F.3d 1059, 1067 (9th Cir. 2017) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005)). Accordingly, Plaintiffs' contention that the Final Rule overrides the plain text of § 85 is without merit.

II. NO PREEMPTION ANALYSIS WAS REQUIRED HERE BECAUSE THE FINAL RULE DOES NOT PREEMPT STATE LAW

A. The Final Rule Does Not Preempt State Law

Despite Plaintiffs' assertions to the contrary, Pls.' Opp'n at 2-7, the Final Rule does not preempt state law but merely clarifies the scope of federal authority granted by § 85 – *i.e.*, that the interest rate established at origination remains unchanged if the loan is later sold, assigned, or otherwise transferred. To the extent § 85 displaces any state usury law (which the OCC does not concede), it occurs at the time the national bank originates the loan due to the operation of § 85 that well pre-dates the Final Rule. Therefore, the Final Rule simply preserves the *status quo* established at origination—the agreed-upon and permissible interest rate—for the life of the loan; nothing changes the borrower's expectations or obligations regarding the interest term. Thus, the Final Rule does not preempt state law.

Plaintiffs incorrectly assert that simply because § 85 itself may affect the applicability of certain state laws, the Final Rule must also preempt state law. Pls.' Opp'n at 3-5. In *Smiley*, the Court recognized the distinction between "the substantive . . . *meaning* of a statute [and] *whether* a statute is pre-emptive." *Smiley*, 517 U.S. at 745 (emphasis in original). Specifically, the Court addressed whether a national bank could charge late fees consistent with South Dakota law—where the bank was located for purposes of § 85—when those fees would be inconsistent with California law—where the borrower resided. *Id*. The Court held that the question of "whether the statutory term 'interest' encompasses late-payment fees," as defined in an OCC regulation, did not "deal with pre-emption" and thus upheld the OCC's interpretation. Under the same logic, whether interest charged on loans originated pursuant to § 85 remains permissible after a bank exercises its authority to sell, assign, or otherwise transfer the loans to third parties "does not . . . deal with pre-emption" any more than the definition of interest does. *Id*. For the reasons explained above, like the rule at issue in *Smiley*, the Final Rule only answers a question about the substantive meaning of § 85 and thus does not preempt any state law.

Further, Plaintiffs reliance on *Cuomo* is misplaced. Pls.' Opp'n at 4-6. Plaintiffs contend that "[t]he Supreme Court has squarely rejected the claim that rules 'merely interpret[ing]' a statute's meaning are not preemptive." *Id*. at 6. However, they failed to disclose that the "mere interpretation" at issue established that "[s]tate officials may not … prosecut[e] enforcement actions" against national

banks. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 535 (2009). Thus, far from being a "mere interpretation," the very language of the rule at issue affirmatively prohibited state officials from engaging in certain actions authorized under state law, and it was in response to this prohibition that the Court stated "[i]f that is not pre-emption, nothing is." *Id*. Unlike in *Cuomo*, here the Final Rule simply clarifies the Federal authority granted by § 85—that the interest term of a loan agreement is preserved following a sale, assignment, or is otherwise transferred—and does not purport to limit a state's authority to enforce applicable laws. *Smiley*, 517 U.S. at 745. For these reasons, the Final Rule does not invalidate any state law.

B. Section 25b Does Not Apply to the Final Rule Even if Some State Law Is Displaced

Plaintiffs read the relevant section of § 25b(b)(1)(B) too broadly. The plain language of the statute states that it applies only when the Comptroller makes a "preemption determination," that is, only after the Comptroller determines, on a "case-by-case basis," that a "particular state consumer financial law" is preempted pursuant to the standard for conflict preemption set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). *See* 12 U.S.C. §§ 25b(b)(1)(B) and (b)(3). Under this definition, the Final Rule is clearly not a "preemption determination." The Final Rule says nothing about whether, or which, state law is preempted and thus can hardly be called a "determination." *See* 12 U.S.C. § 25b(b)(5) (recognizing the distinction between OCC determinations that state law is preempted and OCC determinations regarding the meaning of Federal laws). Here, the Final Rule—which clarifies that the interest rate that applied when the loan was originally made, does not change when the loan is sold, assigned or otherwise transferred—is an interpretation of the substantive scope and meaning of § 85, and not a "preemption determination" under § 25b. *See Smiley*, 517 U.S. at 747 (recognizing distinction between a rule interpreting the meaning of statute from the question of whether the statute has preemptive effect); Defs.' Mot. at 18-19; *see also* OCC Interpretive Letter 1173 (explaining what is a "preemption determination" under § 25b).[7]

[7] Plaintiffs incorrectly claim that the Court may not consider OCC Interpretive Letter 1173, which describes the OCC's interpretation of the standards and requirements of § 25b and summarizes the OCC's framework for compliance. Pls.' Opp'n at 7. The OCC is not now, nor has it ever claimed that this Letter was considered during the rulemaking. Rather, the Letter is being used to support the OCC's legal argument that § 25b is not applicable to the Final Rule. Further, the reasoning in the Letter is consistent with the reasoning used in the Final Rule.

C. Section 25b(f) Explicitly Exempts the Final Rule From § 25b Requirements, Including Any *Barnett Bank* Analysis

Congress explicitly exempted "the authority conferred by section 85. . . for the charging of interest by a national bank" from § 25b's requirements. 12 U.S.C. § 25b(f). Regardless of Plaintiffs' contentions to the contrary, *see* Pls.' Opp'n at 7-8, "the authority conferred by section 85" reasonably includes the right to ensure that the interest rate which was agreed upon at loan origination remains the same regardless of whether it has been sold, assigned, or otherwise transferred. Plaintiffs' contention that § 25b(f)'s exemption does not encompass the OCC's ability to issue rules interpreting section § 85 is not persuasive.

Furthermore, despite Plaintiffs' assertions otherwise, the OCC was not required to apply the *Barnett Bank* preemption analysis to the Final Rule irrespective of the applicability of § 25b. Pls.' Opp'n at 8-9.[8] *Barnett Bank* addresses the issue of conflict preemption. *See Barnett Bank of Marion Cty., N.A.*, 517 U.S. at 31 ("In this case we must ask whether or not the Federal and State Statutes are in 'irreconcilable conflict.'"). Congress codified the *Barnett Bank* conflict preemption standard by incorporating that standard into the requirements under 12 U.S.C. § 25b for making preemption determinations. As discussed above, the Final Rule does not preempt state law. Accordingly, no preemption analysis is required. Even assuming *arguendo* that some preemptive effect occurs by operation of § 85, the OCC still need not conduct a *Barnett* analysis before issuing the Final Rule because any such effect would occur as a matter of law. *See Marquette*, 439 U.S. at 318 (recognizing that any impact on state usury laws that results from an interpretation of § 85 "has always been implicit in the structure of the National Bank Act"). Congress understood this difference when it enacted § 25b(f), which explicitly exempts § 85 from § 25b's requirements, including any attendant *Barnett* analysis. *See* 12 U.S.C. § 25b(f).

[8] Plaintiffs wrongly assert that the OCC has waived any argument that *Barnett Bank* does not govern because it was not addressed in the Agency's opposition papers. However, despite their statement that their motion squarely addressed *Barnett Bank* preemption, a review of their motion papers demonstrates that the *Barnett Bank* standard was only mentioned in the context of § 25b and not as a stand-alone argument. *See* Pls.' Mem. at 16-19. Therefore, the OCC has not waived any defense that *Barnett Bank* is unnecessary for the Final Rule.

III. THE FINAL RULE IS NEITHER ARBITRARY NOR CAPRICIOUS

A. The Rule is Supported by Record Evidence and the OCC's Supervisory Experience

Plaintiffs contend that the Final Rule is based on speculation and is contradicted by evidence in the record. Pls.' Opp'n at 22-23. This is erroneous. As the OCC has shown, the evidence in the record and the OCC's reasoned explanation of the need for the Final Rule, based on its supervisory experience, demonstrate that the Final Rule should be upheld.

The OCC promulgated the Final Rule to resolve the legal uncertainty the *Madden* decision created regarding the ongoing permissibility of an interest rate after a bank sells, assigns, or transfers a loan. AR at 842. As the Agency explained, "the OCC has observed considerable evidence of this uncertainty." *Id.* at 846 & n.11. Furthermore, the administrative record contains ample evidence, including comments on the NPR from industry representatives, demonstrating the existence of this legal uncertainty.[9] *Id.* at 846 n.54; Defs.' Mot. 20-21 & n.11.

Despite the OCC's observations and the evidence in the record, Plaintiffs inexplicably assert that the Final Rule is arbitrary and capricious and based entirely upon speculation because the OCC "did not conduct or review any empirical studies in considering" the impact of the *Madden* decision. Pls.' Opp'n at 23. But this misstates the OCC's obligations under the APA. Rather, as the Ninth Circuit has held, an agency is not required under the APA to develop and rely on detailed statistical evidence as part of the rulemaking process. Instead, so long as an agency provides a reasoned explanation for a rule it promulgates—as the OCC has done here—it "is entitled to invoke its experience as a justification for" that rule. *Peck v. Thomas*, 697 F.3d 767, 775-76 (9th Cir. 2012); *see also Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("[t]he APA imposes no general obligation on agencies to produce empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation."). Additionally, "agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise. An agency need not suffer the flood before building the levee." *Stilwell*, 569 F.3d at 519.

[9] Plaintiffs wrongly assert that the OCC was required to support its rule with "substantial evidence," as defined by 12 U.S.C. § 25b(c). Pls.' Opp'n at 22. As explained above, the Final Rule is not a preemption determination subject to the requirements of § 25b. Accordingly, Plaintiffs' contention that the OCC was obligated to support the Final Rule with substantial evidence, as defined by § 25b, is misplaced.

Here, the OCC provided a reasoned explanation for the Final Rule. Specifically, the OCC explained, "[b]ased on its supervisory experience, the OCC believes that unresolved legal uncertainty [caused by *Madden*] may disrupt banks' ability to serve consumers, businesses, and the broader economy efficiently and effectively, particularly in times of economic stress." AR at 842. The OCC thus reasonably concluded, based on its supervisory experience and the evidence in the record, that "enhanced legal certainty [from the Final Rule] may facilitate responsible lending by banks, including in circumstances when access to credit is especially critical." *Id.* This conclusion was also consistent with caselaw recognizing that the importance of the legal principle articulated in the rule to bank operations. *See* AR at 845 n. 39 (citing *Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735, 745 (Cal. Ct. App. 1979) and *LFG Nat'l Capital, LLC* v. *Gary, Williams, Finney, Lewis, Watson & Sperando P.L.*, 874 F. Supp. 2d 108, 125 (N.D.N.Y. 2012)).

Plaintiffs also contend that the Final Rule is arbitrary and capricious because a different agency, the FDIC, in a similar rulemaking, observed that it is "not aware of any widespread or significant negative effects . . . as a result of the *Madden* decision" and because the OCC observed, in 2019, that capital and liquidity were "near historic highs." Pls.' Opp'n at 23-24. But neither observation shows that the Final Rule was arbitrary and capricious.

The OCC did consider the FDIC's observations, AR at 1190-98, but ultimately concluded that the legal uncertainty the OCC identified justified its issuance of the Final Rule. This FDIC statement alone does not show that the OCC's rule is arbitrary and capricious. Rather, it merely shows that different agencies, with related but separate missions, undertaking similar but separate rulemakings, with discrete administrative records, reached different conclusions on certain aspects of the evidence before them.[10] This is of no moment, however, because in reviewing a rule under the APA, a court is "prohibited from 'second-guessing the [agency]'s weighing of risks and benefits and penalizing [it] for departing from the . . . inferences and assumptions of others." *California v. Azar*, 950 F.3d 1067, 1096

[10] The FDIC directly supervises state-chartered banks and savings associations that are not members of the Federal Reserve System.

(9th Cir. 2020) (alterations in original) (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019)).[11]

Similarly, the OCC's observations in 2019 about capital and liquidity levels do not support invalidating the Final Rule. These observations and the OCC's concerns about the effects of the *Madden* decision are not mutually exclusive, and Plaintiffs have made no showing that the 2019 observations undermine the OCC's reasoned explanation for promulgating the Final Rule. Accordingly, the Final Rule is not arbitrary and capricious and should be upheld.

B. The OCC Did Not Fail to Consider an Important Aspect of the Problem

As the agency explained in its opening brief, the OCC considered the important aspects of the problem during this rulemaking, including the concern that the Final Rule would facilitate predatory lending arrangements. Defs.' Mot. at 22-24; AR at 842, 846. Therefore, Plaintiffs' contention that the OCC failed to consider this problem is without merit. Pls.' Opp'n at 24-25.

Under the APA, agency action is arbitrary and capricious and must be set aside where, *inter alia*, the agency "entirely fails to consider an important aspect of a problem." *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1075 (N.D. Cal. 2018) (citations omitted). In reviewing whether an agency considered an important aspect of the problem, a court "may only ensure that the agency's decision is supported by reasoned judgment and that the agency considered the factors it was required by law to consider." *Id*. at 1087 (citations omitted). But Plaintiffs mere disagreement with the policy decision the Agency reached is not the same as failure to consider an alleged important aspect of the problem. *See id.* at 1087 ("An 'important aspect of the problem' is not simply whatever plaintiffs would like the [agency] to consider.").

During the rulemaking, the OCC acknowledged the commenters' concerns, including those that Plaintiffs raise here, that the Final Rule would purportedly facilitate predatory lending by promoting so-called "rent-a-charter" relationships between national banks and non-banks and undermine or eliminate state interest caps. AR at 842, 846; Pls.' Opp'n at 24. The OCC responded to these concerns in a

[11] It should also be noted that, despite the FDIC's observations, it nevertheless still considered the legal uncertainly caused by the *Madden* decision to be sufficiently problematic to issue its own rule to address that uncertainty. *See* Federal Interest Rate Authority, 85 Fed. Reg. 44,146-58 (July 22, 2020) (to be codified at 12 C.F.R. §§ 331.1-.4).

meaningful way, explaining that the "agency takes the risks created by predatory lending, including through third-party relationships, very seriously but . . . does not believe that this rule will facilitate predatory lending through these relationships" and noting that the Final Rule does not amend or rescind any OCC issuances, which by Plaintiffs' own admission reflect the OCC's "strong condemn[ation]" of predatory lending through rent-a-charter relationships. *Id*. at 846; Pls.' Opp'n at 25.

With respect to the concern that the Final Rule would undermine state interest caps, the OCC explained that this concern was unfounded because it was issuing the rule only "to clarify its position with regard to the proper interpretation of sections 85 and 1463(g)(1), which relates to a core element of banks' ability to engage in safe and sound banking: The ability to transfer loans." *Id.* The OCC further explained that "sections 85 and 1463(g) incorporate, rather than eliminate, these state caps . . . [t]hus, disparities between the interest caps applicable to particular bank loans result primarily from differences in the state laws that impose these caps. The Final Rule does not change that." *Id.*[12]

Thus, the OCC acknowledged and considered the purported problems Plaintiffs raise, but in balancing the policy considerations, the OCC concluded it was reasonable to issue the Final Rule. Plaintiffs "may disagree with this policy balance, but it does not reflect a failure to consider relevant factors" under the APA. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 211 (D.C. Cir. 2007).

C. The OCC Did Not Reverse its Policy on So-Called Rent-a-Bank Schemes

Finally, Plaintiffs erroneously assert that the Final Rule should be overturned because the OCC purportedly changed its long-standing policy towards so-called "rent-a-bank" schemes. Pls.' Opp'n at 25. Plaintiffs are wrong. As the OCC explained in the Final Rule, "the agency has consistently opposed predatory lending, including through relationships between banks and third parties. Nothing in this rulemaking in any way alters the OCC's strong position on this issue, nor does it rescind or amend any related OCC issuances." AR at 846. Accordingly, this claim should be rejected.

[12] Plaintiffs' argument is also specious because, as explained above, the Final Rule retains the *status quo* of the original loan vis-à-vis the borrower by maintaining the agreed-upon interest rate for the life of the loan.

CONCLUSION

For these reasons, as well as those in the Agency's opening brief, this Court should grant Defendants' Motion for Summary Judgment and deny Plaintiffs' Cross-Motion for Summary Judgment.

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Respectfully submitted,

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