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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 PEOPLE OF THE STATE OF CALIFORNIA,
16 *et al.*,

17 Plaintiffs,

18 v.

19 FEDERAL DEPOSIT INSURANCE
20 CORPORATION,

21 Defendant.

Case No. 4:20-5860-JSW

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

Date: August 6, 2021

Time: 9:00 a.m.

Place: Oakland Courthouse, Courtroom 5

Before: Judge Jeffrey S. White

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on August 6, 2021, at 9:00 a.m. in Courtroom 5, 2d Floor, of the United States Courthouse, 1301 Clay Street, Oakland, California, before the Honorable Jeffrey S. White, Defendant the Federal Deposit Insurance Corporation (“FDIC”) will respectfully move this Court for an order granting summary judgment to the FDIC, pursuant to Federal Rule of Civil Procedure 56. As demonstrated in the accompanying memorandum of points and authorities, and the Administrative Record (“AR”), the FDIC’s rule on the Federal Interest Rate Authority, 85 Fed. Reg. 44,146 (July 22, 2020) (“Final Rule”) represents a reasonable interpretation of 12 U.S.C. § 1831d, and should be upheld under *Chevron*’s familiar two-step framework. The Final Rule is neither arbitrary or capricious, nor contrary to law, is consistent with the FDIC’s authority, and in compliance with applicable procedural requirements. The FDIC asks the Court to grant Defendants’ Motion for Summary Judgment and deny Plaintiffs’ Cross-Motion for Summary Judgment.

SUMMARY OF ARGUMENT

12 U.S.C. § 1831d allows state banks to make loans charging either the federal discount rate, or the interest rate allowed by their home states. But § 1831d does not address at what time the validity of a loan's interest rate should be determined, nor what happens to the validity of a loan's interest rate upon transfer. The FDIC's Final Rule reasonably filled these two statutory gaps by concluding that the validity under § 1831d of the interest-rate term of a loan is determined at the time when the loan is made, and is not affected by subsequent events, such as a change in the law or the loan's transfer. The rule, which enjoys widespread support from the banking industry, represents a reasonable interpretation of § 1831d, and should be upheld under *Chevron's* familiar two-step framework. *First*, Congress has not spoken to the two questions at issue. *Second*, the FDIC sensibly concluded that its reading would best effectuate the terms and purpose of the statute. Specifically, the FDIC's interpretation (1) carries out the purpose of the statute, whereas Plaintiffs' contrary interpretation would frustrate it, (2) interprets statutory terms in accordance with their common industry understanding and within their proper historical and legal context, whereas Plaintiffs' interpretation ignores that context, (3) is buttressed by Congress's views regarding the application of another federal statute providing exemptions from usury law, (4) is consistent with well-established principles of contract law regarding the assignment of contracts, whereas Plaintiffs' interpretation would require the untenable conclusion that Congress made an extreme departure from those principles through mere silence, and (5) provides a workable rule that is consistent with the parties' expectations at the time the loan was made. The reasonableness of the FDIC's interpretation is further underscored by court decisions adopting a similar interpretation of other statutes providing exemptions from usury law.

Plaintiffs fail to present a credible challenge to the rulemaking. They fail to cite, much less apply, *Chevron's* requisite analytical framework. And their challenges to the FDIC's authority do not help them escape that framework. Those challenges also fail because they misconstrue the Final Rule. The Final Rule does not regulate non-banks, does not interpret state law, and does not preempt state law. Rather, it regulates banks, interprets only a federal statute, and interprets only that statute's substantive meaning. Plaintiffs' *State Farm* arguments are equally unavailing.

BACKGROUND

1
2 *Statutory Background.* Section 27 of the Federal Deposit Insurance Act, codified at 12
3 U.S.C. § 1831d (hereinafter referred to interchangeably as “section 27” or “§ 1831d”), allows
4 federally-insured state banks to charge interest at the highest of (1) a federal rate tied to the dis-
5 count rate on 90-day commercial paper (the “federal discount rate”), or (2) “the rate allowed by
6 the laws of the State ... where the bank is located.” 12 U.S.C. § 1831d. Section 1831d borrowed
7 its language from the earlier-enacted 12 U.S.C. § 85, which allows national banks to charge these
8 same rates. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826–27 (1st Cir. 1992). Be-
9 cause § 1831d was patterned after § 85, courts and the FDIC have consistently construed § 1831d
10 in *pari materia* with § 85. *Id.* at 827 (“[t]he historical record clearly requires a court to read the
11 parallel provisions of DIDA and [§ 85] *in pari materia*”); *see also* AR 211.

12 Congress patterned § 1831d after § 85 in order to achieve “parity” and “competitive
13 equality” between state and national banks in the interest-rate area. *Greenwood*, 971 F.2d at 826–
14 27. Ensuring competitive equality through § 1831d was key to resolving the credit crunch and the
15 troubles prevalent in the state banking sector at the time of § 1831d’s enactment in 1980. “As the
16 1970s wound down, the Nation was caught in the throes of a devastating credit crunch. Interest
17 rates soared.” *Id.* “[S]tate lending institutions were constrained in the interest they could charge
18 by state usury laws which often made loans economically unfeasible from a lender’s coign of
19 vantage.” *Id.* Unable to make loans at the low rates required by state usury laws, state banks
20 could not serve their customers’ demand for credit and were thus “being battered by competition
21 from national banks that were allowed to charge higher rates of interest by federal law.” *Gavey*
22 *Properties/762 v. First Fin. Sav. & Loan*, 845 F.2d 519, 521 (5th Cir. 1988). Specifically, na-
23 tional banks enjoyed a competitive advantage under § 85 because they could charge the high fed-
24 eral discount rates prevailing then. If located in states with relaxed usury ceilings, they could also
25 export the higher interest rates of their home states to transactions with out-of-state borrowers.
26 The state banks’ inability to make loans charging the rates permitted to national banks further
27 deepened the credit crunch and reduced borrowers’ access to credit. Congress therefore passed
28 the Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDA”), which

1 added § 1831d, in order to level the playing field between state and national banks, and to “assure
2 that borrowers could obtain credit in states with low usury limits.” *Gavey*, 845 F.2d at 521.

3 *The FDIC’s Final Rule.* On December 6, 2019, the FDIC published a notice of proposed
4 rulemaking (NPR) to issue regulations implementing § 1831d. AR 214. Through the proposed
5 regulations, the FDIC sought to clarify the application of § 1831d and “reaffirm State banks’ abil-
6 ity to assign enforceable rights in the loans they made” under the authority of § 1831d. *Id.* The
7 FDIC received a total of 59 comment letters from a variety of individuals and entities, including
8 trade associations, insured depository institutions, and consumer and public interest groups and
9 other entities aligned with such groups. The comments received indicated that the Final Rule en-
10 joyed widespread support in the banking industry. *Id.* These commenters agreed that the FDIC
11 had authority to address this issue by regulation and that the agency’s proposed rule reflected a
12 permissible interpretation of federal banking laws. *Id.* These commenters welcomed the legal
13 certainty with respect to the two gaps addressed by the regulation, arguing that proposed rule
14 would “reaffirm longstanding views regarding the enforceability of interest rate terms on loans
15 that are sold, transferred, or otherwise assigned” and “reaffirm state banks’ ability to engage in
16 activities such as securitizations, loan sales, and sales of participation interests in loans, that are
17 crucial to the safety and soundness of these banks’ operations.” *Id.* Consumer advocates, how-
18 ever, opposed the rule, raising concerns regarding the FDIC’s authority to issue the rule given the
19 statutory silence on loan transfers, and regarding policy issues implicated by the rule, such as po-
20 tential abuses of banks’ § 1831d lending authority through so-called rent-a-bank schemes. *Id.*

21 In developing the Final Rule, the FDIC “considered all of the comments that it received in
22 response to the NPR.” AR 214. The FDIC explained that the statute’s silence on loan transfers
23 does not preclude the FDIC’s authority to issue the Final Rule. To the contrary, the “silence . . .
24 reinforces the FDIC’s authority to issue interpreting regulations to clarify an aspect of the statute
25 that Congress left open.” AR 214. The FDIC explained that under *Chevron*, “[a]gencies are per-
26 mitted to issue regulations filling statutory gaps and routinely do so,” and the rule addresses two
27 such gaps. *Id.* *First*, § 1831d “does not state at what point in time the validity of the interest rate
28 should be determined to assess whether a State bank is taking or receiving interest” in compliance

1 with § 1831d. AR 210. Situations may arise where the permissible home-state usury rate (or the
2 federal discount rate) changes after a loan is made, “and a loan’s rate may be non-usurious under
3 the old law but usurious under the new law.” *Id.*; AR 212. “To fill this statutory gap and carry out
4 the purposes of section 27, the FDIC conclude[d] that the validity and enforceability under sec-
5 tion 27 of the interest-rate term of a loan must be determined [at the time] when the loan is made,
6 not when a particular interest payment is ‘taken’ or ‘received.’” AR 212-13. And because the va-
7 lidity and enforceability of the interest rate term of a loan is determined at the inception of the
8 loan, the FDIC reasonably concluded that it is unaffected by subsequent events, such as the loan’s
9 transfer. *Id.* “This interpretation protects the parties’ expectations and reliance interests at the
10 time when a loan is made, and provides a logical and fair rule that is easy to apply.” AR 213.

11 The FDIC determined that this interpretation best addressed a second statutory gap as
12 well. Specifically, § 1831d is silent with respect to what happens, upon loan transfer, to the va-
13 lidity of the interest-rate terms of loans made under its authority. AR 213. To fill this gap, the
14 FDIC reasonably read the banks’ power to make loans under § 1831d within its “proper historical
15 and legal context.” AR 214. That context showed that a bank’s power to make loans was com-
16 monly understood as *implicitly* carrying with it the power to transfer those loans. AR 214-15 (cit-
17 ing *Planters’ Bank of Miss. v. Sharp*, 47 U.S. 301, 322-23 (1848)). The FDIC reasoned that read-
18 ing “the power to assign as an indispensable component of the power to make loans” would also
19 best effectuate the statute’s purpose, because “[t]he power to assign is indispensable in modern
20 commercial transactions, and even more so in banking: State banks need the ability to sell loans
21 in order to properly maintain their capital and liquidity.” AR 215. “Absent the power to assign
22 loans made under section 27, reliance on the statute could ultimately hurt State banks (instead of
23 benefiting them) should they later face a liquidity crisis or other financial stresses.” *Id.* The
24 FDIC’s interpretation helps “prevent such unintended results.” *Id.*

25 The FDIC further explained that “[l]eft unaddressed, the two statutory gaps could create
26 legal uncertainty for State banks and confusion for the courts.” AR 210. The FDIC also ex-
27 plained why none of the policy arguments raised by consumer advocates would preclude the
28 FDIC’s interpretation of the statute. AR 214-18. In particular, with respect to the commenters’

1 concerns about potential abuses of banks’ § 1831d lending authority through so-called rent-a-
 2 bank schemes, the FDIC explained that the Final Rule would not protect rent-a-bank schemes. To
 3 the contrary, the rule would only apply if the bank, not a non-bank partner, actually made the
 4 loan, and the Rule “is not intended to foreclose remedies available under State law” against rent-
 5 a-bank schemes, such as true lender defenses. AR 217. The Final Rule condemned abuses of
 6 § 1831d’s lending authority and reiterated “continue[d]” adherence to its position that FDIC
 7 “view[s] unfavorably entities that partner with a State bank with the sole goal of evading a lower
 8 interest rate established under the law of the entity’s licensing State(s).” AR 210-11. The FDIC’s
 9 responses to these and other comments are discussed more fully below.

10 LEGAL STANDARD

11 In this APA challenge to the FDIC’s rulemaking, the normal Rule 56 summary judgment
 12 standard does not apply. Instead, the FDIC’s interpretation of §1831d is analyzed under the fa-
 13 miliar two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,
 14 467 U. S. 837 (1984). The first step involves “the question whether Congress has directly spoken
 15 to the precise question at issue.” 467 U.S. at 842-43. “[I]f the statute is silent or ambiguous with
 16 respect to the specific issue,” the Court proceeds to the second step, where “the question for the
 17 court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at
 18 843. If it is, the court defers to the agency’s interpretation. *Id.*

19 ARGUMENT

20 **I. The Final Rule Represents A Reasonable Interpretation of § 1831d And 21 Should Be Upheld**

22 **A. The Final Rule—including Plaintiffs’ “Statutory Authority” Challenges—Is 23 Analyzed Under The Two-Step *Chevron* Framework**

24 “Judicial deference to reasonable interpretations by an agency of a statute that it adminis-
 25 ters is a dominant, well-settled principle of federal law.” *Nat’l R.R. Passenger Corp. v. Boston
 26 and Maine Corp.*, 503 U.S. 407, 417 (1992). Deference is particularly appropriate in the banking
 27 context. “Banking is one of the longest regulated and most closely supervised of public callings.”
 28 *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). The Supreme Court has repeatedly deferred, under
Chevron, to regulations interpreting the federal banking laws, including those interpreting § 85—

1 §1831d's national-bank counterpart. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739
2 (1996) (deferring to the OCC's interpretation of § 85); *NationsBank of North Carolina, N.A. v.*
3 *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (deferring to OCC's interpretation);
4 *Clarke v. Securities Indus. Assn.*, 479 U. S. 388, 403-404 (1987) (same).

5 In 12 U.S.C. § 1819(a), Congress gave the FDIC statutory authority to prescribe “such
6 rules and regulations as it may deem necessary to carry out the provisions of this chapter,” name-
7 ly Chapter 16 of Title 12 of the U.S. Code. § 1831d of Chapter 16, is a provision of “this chap-
8 ter.” The FDIC's Final Rule interpreting § 1831d was issued under this authority. Although
9 Plaintiffs devote significant energies to arguing that § 1819(a) merely provides “general” rule-
10 making power (Pls.' Mem. of Points & Authorities (“Br.”) at 15-16), the law is clear that
11 *Chevron* applies with the same force regardless of whether regulations are adopted under general
12 or specific rulemaking authority. *Mayo Found. for Med. Educ. & Research v. United States*, 562
13 U.S. 44, 57 (2011). In *Mayo*, the Supreme Court rejected pre-*Chevron* decisions suggesting that
14 less deference is due when rules are adopted under an agency's general rulemaking authority, and
15 held that the application of *Chevron* “does not turn on whether Congress's delegation of authority
16 was general or specific.” *Id.* (applying *Chevron*'s two-step framework to uphold regulation is-
17 sued under Treasury's general rulemaking authority).

18 Under *Mayo*, because the FDIC has general rulemaking authority and the Final Rule was
19 adopted through notice-and-comment rulemaking, it is reviewed using the two-step framework
20 outlined in *Chevron*. *Id.* *Chevron* Step One involves “the question whether Congress has directly
21 spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the
22 matter; for the court, as well as the agency, must give effect to the unambiguously expressed in-
23 tent of Congress.” *Chevron*, 467 U.S. at 842-43. The court employs “traditional tools of statuto-
24 ry construction” to ascertain whether “Congress had an intention on the precise question.” *Id.* at
25 843 n.9. “[I]f the statute is silent or ambiguous with respect to the specific issue,” the Court pro-
26 ceeds to Step 2, where “the question for the court is whether the agency's answer is based on a
27 permissible construction of the statute.” *Id.* at 843. The agency's construction need not be the
28 only possible permissible interpretation of the statute, nor must it be “even the reading the court

1 would have reached if the question initially had arisen in a judicial proceeding.” *Id.* at 843 n.11.
2 Rather, if the agency’s interpretation is reasonable or permissible, it is upheld, and the court will
3 not substitute its judgment for that of the agency. *Id.*

4 Plaintiffs studiously avoid the *Chevron* framework, failing to mention *Chevron*’s two-step
5 standard, and failing to provide even a citation to *Chevron* in their brief or table of authorities.
6 Although Plaintiffs style their arguments as going to the FDIC’s alleged lack of statutory authori-
7 ty to issue the regulations, Plaintiffs’ talismanic invocation of the term “authority” does not help
8 them escape the *Chevron* framework. Supreme Court precedent is clear that *Chevron* applies re-
9 gardless of whether the question is “framed as going to the scope of the [agency’s] delegated au-
10 thority” or as going to the agency’s interpretation of the statute. *City of Arlington v. FCC*, 569
11 U.S. 290, 300 (2013). All questions related to an agency’s interpretation of a statute can “be re-
12 framed as questions about the scope of agencies’ regulatory jurisdiction—and they are all ques-
13 tions to which the *Chevron* framework applies.” *Id.*

14 The Final Rule should be sustained under the *Chevron* framework. As shown below, the
15 Final Rule satisfies *Chevron* Step One because it addresses two statutory gaps in § 1831d. *See*
16 *Chevron*, 467 U.S. at 843 (agencies have authority to make rules to “fill any [statutory] gap left,
17 implicitly or explicitly, by Congress”). The rule also satisfies *Chevron* Step Two because it fills
18 the statutory gaps in a reasonable way. “If the [agency’s] reading fills a gap or defines a term in a
19 way that is reasonable,” courts give the agency’s “judgment ‘controlling weight.’” *NationsBank*,
20 513 U.S. at 257 (citing *Chevron*, 467 U.S. at 844). The Final Rule should therefore be upheld.

21 **B. The FDIC’s Final Rule Satisfies *Chevron* Step One**

22 The FDIC’s Final Rule passes *Chevron* Step One because Congress has not spoken to the
23 precise questions at issue. Nothing in § 1831d addresses at what point in time the validity of the
24 loan’s interest rate should be determined for purposes of assessing compliance with § 1831d, nor
25 does it address what happens to the validity of the loan’s interest rate upon transfer. Thus, nothing
26 in § 1831d precludes the FDIC’s interpretation that the validity under § 1831d of the interest-rate
27 term of a loan must be determined at the time when the loan is made, and is therefore not affected
28 by subsequent events, such as a change in the law or the loan’s transfer. Nor do any of the other

1 traditional tools of statutory construction compel the conclusion that Congress intended to pre-
2 clude the FDIC’s interpretation; to the contrary, they highlight the permissibility of the FDIC’s
3 interpretation. Therefore, the Final Rule survives *Chevron* Step One.

4 **a. The Text of § 1831d Does Not Unambiguously Preclude The FDIC’s Interpretation**

5 The Final Rule addresses two statutory gaps in § 1831d. Given § 1831d’s silence on the
6 two identified issues, Congress has not unambiguously spoken on the questions at issue. *United*
7 *States v. Home Concrete & Supply*, 566 U.S. 478, 488 (2012) (“A statute’s silence or ambiguity
8 as to a particular issue means that Congress has not ‘directly addressed the precise question at is-
9 sue’ (thus likely delegating gap-filling power to the agency)”). Plaintiffs do not show that the
10 statute unambiguously addresses either of those gaps.

11 *Timing.* The first statutory gap addressed by the Final Rule is the timing gap. As the Fi-
12 nal Rule explains, § 1831d “does not state at what point in time the validity of the interest rate
13 should be determined to assess whether a State bank is taking or receiving interest in accordance
14 with [§ 1831d].” AR 210. “Situations may arise when the usury laws of the State where the bank
15 is located change after a loan is made (but before the loan has been paid in full), and a loan’s rate
16 may be non-usurious under the old law but usurious under the new law.” *Id.* To fill this statutory
17 gap, the FDIC concluded “that the validity and enforceability under [§ 1831d] of the interest-rate
18 term of a loan must be determined [at the time] when the loan is made, not when a particular in-
19 terest payment is ‘taken’ or ‘received.’” AR 213.

20 Plaintiffs contend that “there is no ambiguity or statutory gap as to when the validity of a
21 loan’s interest rate should be assessed.” Br.11. But Plaintiffs do not deny that § 1831d does not
22 state when the validity of the interest rate should be determined. *Id.* Instead, Plaintiffs appear to
23 take issue with the reasonableness of the FDIC’s interpretation, arguing that “the solution [FDIC]
24 has come up with” to resolve the gap the FDIC identified is impermissible because “1831d does
25 not apply to certain *loans*; rather, it applies to certain *entities*—FDIC Banks.” *Id.* But an argu-
26 ment that the agency’s solution to a statutory gap is inconsistent with the statute is an argument
27 that the agency’s construction fails under *Chevron* Step Two. Such argument does not show that
28 a statutory gap does not exist. Only a showing that the statute addresses “at what point in time

1 the validity of the interest rate should be determined” would show that there is no statutory gap.
2 Plaintiffs have conspicuously failed to make such a showing. Given § 1831d’s silence, § 1831d
3 does not unambiguously solve the issue, and the FDIC’s Final Rule passes *Chevron* Step One.

4 In any event, Plaintiffs’ interpretation—that “§ 1831d does not apply to certain loans; rather,
5 it applies to certain entities—FDIC Banks”—is not unambiguously compelled by the statutory
6 language. To the contrary, § 1831d plainly applies to certain loans (namely, to loans made by
7 FDIC banks), expressly stating that FDIC banks are allowed to charge the home state rate or the
8 federal discount rate “on any *loan* or discount made, or upon any note, bill of exchange, or *other*
9 *evidence of debt.*” 12 U.S.C. § 1831d (emphases added). Given this express language, § 1831d is
10 susceptible of FDIC’s interpretation that it applies to loans made by FDIC banks. Plaintiffs cannot
11 defeat an agency’s interpretation at *Chevron* Step One when the plaintiffs’ interpretation is
12 “not the ‘only possible interpretation.’” *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 (1998).

13 *Transfer.* A second statutory gap is also present because § 1831d is silent regarding what
14 happens, upon transfer, to the validity of the interest-rate terms of bank-made loans. AR 213.
15 Just as before, Plaintiffs do not deny that on its face, the text of § 1831d does not address this issue.
16 Rather, they argue that § 1831d precludes the FDIC’s interpretation because, in their view,
17 § 1831d provides a personal privilege to banks to charge certain interest rates, and that privilege
18 is not “transferrable.” Br.12-13. This argument fails for at least four reasons.

19 First, nowhere in the statute does Congress say that banks are granted a “privilege” or
20 “exemption” from usury law. Rather, the statute merely states that banks may charge certain rates
21 in their loans or other debt instruments. 12 U.S.C. § 1831d. Nor does the statute say anything
22 about a non-transferable privilege. To clarify, Plaintiffs do not mean non-transferable solely in
23 the modest sense reflected in the unobjectionable proposition that a bank cannot transfer its right
24 to *make* loans under § 1831d. Rather, they mean it in the broader sense that a bank also cannot
25 transfer to the buyer of a bank-made loan enforceable rights in the interest-rate term of the transferred
26 loan (*see* Br.12), notwithstanding well-settled law and historical practice permitting such
27 transfer. *See, e.g.*, 6 Am. Jur. 2d Assignments § 108 (an assignee of a contract “stands in the
28 shoes of the assignor” and can assert all rights under the contract to the same extent as the assign-

1 or). Plaintiffs’ proposed interpretation would require the Court to accept that Congress made this
2 dramatic departure from historical practice and fundamental principles of contract law regarding
3 assignments by choosing statutory language that is *silent* on assignment and is also *silent* on the
4 purported personal “privilege” that Plaintiffs advocate. The statutory silence cannot support,
5 much less compel, Plaintiffs’ extraordinary interpretation.

6 Second, the fact that § 1831d is addressed to *banks* and it allows *banks* to charge certain
7 interest rates does not necessarily confer on banks a personal privilege that is non-transferable in
8 the sense urged by Plaintiffs. The statutory language must be viewed in context. Banks do not
9 charge interest rates in the ether; rather, they charge interest on *loans* and other debt instruments,
10 as confirmed by the statute’s express language that banks may charge those rates “on any loan or
11 discount made.” 12 U.S.C. § 1831d. As the statute reflects, the interest rate charged pursuant to
12 the statute is not a stand-alone item, but a term incorporated in a transferrable legal instrument: a
13 loan agreement. By referring to interest charged on “on any loan[s],” which were commonly un-
14 derstood as *transferable* under legal precedent and historical practice (*see, e.g., Planters*), Con-
15 gress could have hardly intended to create a *non-transferable* privilege in the sense used by Plain-
16 tiffs. Plaintiffs’ interpretation therefore does not follow naturally from the statutory language.
17 Plaintiffs’ driver-license example is inapposite. Unlike statutes addressing a license to drive,
18 which is given independently of car ownership or of any contracts, § 1831d regulates the very
19 terms of a loan contract—the interest rate that can be charged in that contract. Because contracts,
20 including loan contracts, are transferrable, logic and common sense suggest that Congress could
21 not have intended to depart from well-settled principles that an assignor can transfer enforceable
22 rights in its contracts—or at least not without an explicit statement showing that it was doing so,
23 which it did not provide here.

24 Third, even if the statutory language had used the term “privilege,” and had further speci-
25 fied that such privilege is “non-transferable,” it would still be unclear whether Congress used the
26 term “non-transferable” in the narrow sense that banks cannot transfer their right to *make* loans
27 (which is fully consistent with the FDIC’s Final Rule), or in the out-of-the-ordinary sense that
28 Plaintiffs propose—that banks cannot transfer enforceable rights in their loans when they sell

1 those loans. Given this ambiguity, the Final Rule would still satisfy *Chevron*'s first step.

2 Fourth, courts have held that even statutes that are closer to granting a personal privi-
 3 lege—because they talk in terms of exemptions of certain entities from usury law—do not pro-
 4 vide a non-transferable privilege in the sense used by Plaintiffs. These courts have construed
 5 such statutes just as the FDIC construed § 1831d here: as *implicitly* allowing the exempted enti-
 6 ties to transfer enforceable rights in the loans they make. As Judge Posner concluded, “the as-
 7 signee of a debt [agreement] . . . is free to charge the same interest rate that the assignor . . .
 8 charged the debtor,” even if, unlike the assignor, “the assignee does not have a license that ex-
 9 pressly permits the charging of a higher rate.” *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 286,
 10 289 (7th Cir. 2005); *see also Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735, 745 (Cal. Ct.
 11 App. 1979) (concluding that the assignee of a bank note could continue to receive the rate the as-
 12 signing bank could, even if the assignee was not expressly exempted by the statute). These cases
 13 confirm that such statutes’ grant of a privilege entails the modest proposition that no other entity
 14 can *make* loans under that privilege. It does not entail Plaintiffs’ extraordinary proposition that a
 15 bank cannot transfer enforceable rights in the loan agreements the bank made. Accordingly, these
 16 cases, which adopt similar constructions to that adopted by the FDIC, show that the statute is sus-
 17 ceptible of FDIC’s interpretation. Thus, the Final Rule passes *Chevron* Step One.

18 **b. The Other Tools Of Statutory Construction Do Not Preclude The FDIC’s**
 19 **Interpretation, But Rather Highlight Its Permissibility**

20 The other tools of statutory construction do not preclude the FDIC’s interpretation, but ra-
 21 ther highlight its permissibility. *First*, as confirmed by decisions interpreting similar statutes,
 22 Plaintiffs’ interpretation would frustrate § 1831d’s purpose and lead to “unreasonable” and
 23 “senseless” results that Congress would have hardly intended. *Second*, Supreme Court decisions
 24 interpreting § 85 confirm that it is permissible—and indeed required—to interpret terms in §§ 85
 25 and 1831d in accordance with historical precedent and their common understanding in the bank-
 26 ing industry, even if that understanding is not explicitly stated in statutory language. As these
 27 decisions show, interpreting terms in a statute in accordance with their implicit meaning does not
 28 impermissibly rewrite the statute. *Third*, the FDIC’s interpretation of § 1831d is buttressed by

1 Congress’s views regarding § 1735f-7a, which show that Congress understood that a loan buy-
 2 er—“an investor who is not exempt under this section [§ 1735f-7a]”—can enforce the interest
 3 rates in a validly-originated loan, even if § 1735f-7a, like § 1831d, is silent on assignment.

4 **1. Purpose: Courts Interpreting Similar Statutes Have Rejected Readings Such**
 5 **As Plaintiffs’ As Contrary To The Statutory Purpose**

6 The statutory purpose—a common tool of statutory construction—counsels against Plain-
 7 tiffs’ interpretation. It is a “well-established canon of statutory construction” that courts avoid an
 8 interpretation that would “defeat [the] plain purpose” of a statute. *See Bob Jones Univ. v. U.S.*,
 9 461 U.S. 574, 586 (1983). Applying this principle in construing similar statutes, courts have re-
 10 jected an interpretation just like that proposed by Plaintiffs here, finding it “not conformable to”
 11 the statutory purpose. *Strike*, 92 Cal. App. 3d at 745; *see also Olvera*, 431 F.3d at 289. The pur-
 12 pose of statutes allowing banks or other entities to make loans charging rates exempt from usury
 13 law is to provide banks a meaningful right to make such loans. If banks cannot transfer enforcea-
 14 ble rights in the loan’s interest-rate terms (and assignees cannot enforce them), loans sales to the
 15 “secondary market” would be “uneconomic.” *Strike*, 92 Cal. App. 3d at 745. In other words,
 16 given this significant drawback to the loan’s resale value and liquidity, banks would not have a
 17 meaningful right to make loans, which would frustrate the statutory purpose. *Id.* The “unreason-
 18 able consequences” of an interpretation under which assignees cannot charge the interest rate con-
 19 tained in a loan “weigh heavily against it, even as a matter of interpretation.” *Olvera*, 431 F.3d at
 20 289; *id.* at 287 (preventing assignees from enforcing the loan’s interest rate would produce “sense-
 21 less results”). Thus, such interpretation is “not compelled” by the statutory language. *Id.* at 288.

22 **2. Context: Plaintiffs’ Interpretation Fails To Construe The Statutory Terms**
 23 **In Context**

24 Plaintiffs complain that the Final Rule impermissibly rewrote the statute and added words
 25 to it by addressing transfer. Br.10. Plaintiffs’ argument is easily refuted by the Supreme Court’s
 26 decision in *Planters*, where the Supreme Court did precisely what the FDIC did here: it interpret-
 27 ed the banks’ power to make loans as implicitly incorporating the power to transfer loans, even if
 28 the power to transfer was nowhere mentioned in the statute. 47 U.S. at 322-23. The fallacy in

1 Plaintiffs’ argument is further underscored by *Evans v. National Bank of Savannah*, where the
 2 Supreme Court interpreted the term “discount” in § 85 to *implicitly* allow banks to reserve interest
 3 in advance, even if the statute did not explicitly address the bank’s authority to reserve interest.
 4 251 U.S. 108, 114 (1919) (“[t]o discount . . . implies” the authority to “reserve[e] interest”). In
 5 reaching this interpretation, the court relied on the term’s common understanding in the banking
 6 industry and historical precedent—*i.e.*, on context. *Id.* Similarly, in *Smiley*, the Supreme Court
 7 accepted an interpretation of “interest” in § 85 as including late-payment fees, even if § 85 did not
 8 mention late-payment fees. 517 U.S. at 739. The Supreme Court did not add words to § 85 in
 9 these decisions; instead, it read statutory terms in accordance with their common meaning in the
 10 banking industry or historical practice. The FDIC did the same with respect to § 1831d. By con-
 11 trast, Plaintiffs’ interpretation fails to construe the statutory terms in context, and is inconsistent
 12 with these decisions and with the accepted principles of statutory construction they applied.

13 **3. *Other Statutes: The FDIC’s Interpretation of § 1831d Is Buttressed***
 14 ***(And Certainly Not Precluded) By A Simultaneously Drafted Statute***

15 Plaintiffs argue that unlike § 1831d, § 1735f-7a is not silent regarding loan transfers, and
 16 that Congress’s purported allowance of transfer in § 1735f-7a suggests that § 1831d’s
 17 comparative silence should be read to mean that “Congress deliberately chose not to” allow
 18 transfer in § 1831d. Br.14. This argument fails for three reasons: (1) § 1735f-7a and its
 19 legislative history actually support the FDIC’s interpretation; (2) Plaintiffs’ premise that § 1735f-
 20 7a expressly applies to loan transfers is incorrect; and (3) even if Plaintiffs’ premise were correct,
 21 § 1735f-7a does not *unambiguously* suggest an answer to the question here.

22 1. The FDIC’s interpretation of § 1831d is buttressed (and certainly not precluded) by
 23 § 1735f-7a, which exempts from usury laws certain first-lien loans. Just like § 1831d, § 1735f-7a
 24 is silent concerning what happens upon the transfer of loans originated under that statute. AR
 25 215. Despite § 1735f-7a’s silence regarding transfer, it is widely agreed that § 1735f-7a applies to
 26 transferred loans, and indeed its legislative history confirms this, stating that “loans originated
 27 under this usury exemption will not be subject to claims of usury even if they are later sold to an
 28 investor who is not exempt under this section.” S. REP. 96-368, 1980 U.S.C.C.A.N. 236, 254-55

1 (1980). Thus, § 1735f-7a supports the FDIC’s interpretation of § 1831d because it shows that
2 Congress understood that usury exemptions implicitly continue to apply after the loan’s transfer
3 despite the absence of any explicit language in the statute addressing transfer.

4 2. Plaintiffs counter that § 1735f-7a is not silent regarding transfer because, in their view,
5 § 1735f-7a exempts classes of *loans* from state usury laws, and “[b]y granting preemptive status
6 to *loans*, rather than *specific entities* holding them (as it did in § 1831d), Congress made clear [in
7 § 1735f-7a] . . . that transfer would not subject the [buyers] of these . . . loans to state rate caps.”
8 Br.14 (emphasis added). This argument fails because Plaintiffs’ premise that § 1735f-7a applies
9 to classes of loans, not to loans made by specified entities, is contrary to the plain text of § 1735f-
10 7a, which states that it only applies to loans “described in section 527(b) of the National Housing
11 Act,” which section, in turn, applies to loans made by *specific entities*. More precisely, section
12 527(b) states that it applies to four categories of loans, two of which are loans made by *specific*
13 *entities*, namely loans that are “made in whole or in part” by banks or other federally-regulated
14 lenders (*see* § 1735f-5(b)(2)(A)), or by “creditors” as defined in 15 U.S.C. § 1602 (*see* § 1735f-
15 5(b)(2)(D)). Thus, just like §1831d, § 1735f-7a applies to loans made by specified entities, and
16 just like §1831d, § 1735f-7a is entirely silent as to what happens when a loan made by one of
17 those specified entities is sold to an investor who is not among the specified entities, such as a
18 securitization trust that is not a creditor under 15 U.S.C. § 1602. The legislative history of
19 § 1735f-7a further reinforces that section’s application to loans made by specific entities, because
20 Congress discussed whether *specific entities*—such as investors—were “exempt under this sec-
21 tion.” S. REP. 96-368, 1980 U.S.C.C.A.N. 236, 254-55 (1980) (the statute’s exemption from usu-
22 ry endures after the loan’s transfer “to an investor who is not exempt under this section”).

23 3. Even if § 1735f-7a expressly applied to loan transfers, that provision would still not
24 unambiguously show that Congress precluded § 1831d from applying to loan transfers. The law
25 is clear that the contrast between affirmative language in one statute (*e.g.*, § 1735f-7a) and statu-
26 tory silence in another (*e.g.*, §§ 85 and 1831d) “can rarely if ever be the ‘direct[]’ [and unambigu-
27 ous] congressional answer required by *Chevron*” so as to invalidate the agency’s rulemaking at
28 *Chevron* step one. *Cheney R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). To the contrary,

1 “the contrast between Congress’s mandate in one context with its silence in another suggests not a
2 prohibition but simply a decision not to mandate any solution in the second context, *i.e.*, to leave
3 the question to agency discretion.” *Id.* In short, silence in one context coupled with affirmative
4 language in another indicates the presence of a gap that Congress wished the agency to fill:
5 “[s]ilence ... may signal permission rather than proscription,” and can suggest that Congress has
6 left a ‘question to agency discretion.’” *In Def. of Animals, Dreamcatcher Wild Horse & Burro*
7 *Sanctuary v. Dep’t of Interior*, 751 F.3d 1054, 1066 n.10 (9th Cir. 2014).

8 Moreover, there is an obvious reasons why Congress would have expressly mentioned
9 transfer in § 1735f-7a, but not in § 1831d, while intending for both statutes to apply to loan trans-
10 fers. There was no need for Congress to explicitly mention transfer in § 1831d since, after *Plant-*
11 *ers*, it was commonly understood that a bank’s right to make loans implicitly included the right to
12 transfer the loans. Unlike § 1831d, § 1735f-7a is not limited to loans made by banks. Thus, the
13 contrast between the two statutes does not unambiguously show that Congress intended for
14 § 1831d to not apply to loan transfers. Rather, it is equally possible that Congress concluded that
15 there was no need to be explicit about transfer in § 1831d because transfer was implicit under Su-
16 preme Court precedent, whereas no such precedent existed with respect to all classes of creditors
17 making loans under § 1735f-7a (*Planters* was limited to banks), suggesting a need to be explicit
18 in § 1735f-7a.

19 Plaintiffs’ reliance on congressional inaction relating to legislative proposals with argua-
20 bly similar effects to the Final Rule is likewise misplaced. Br.5-6. Congressional inaction “lacks
21 persuasive significance.” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511
22 U.S. 164, 187 (1994). “[S]everal equally tenable inferences may be drawn from such inaction,
23 including the inference that the existing legislation already incorporated the offered change.” *Id.*

24 **c. Plaintiffs’ Challenges To The FDIC’s Authority Are Meritless**

25 As shown, neither the text of § 1831d nor any of the other traditional tools of statutory
26 construction compel the conclusion that Congress unambiguously precluded the FDIC’s
27 interpretation. Consequently, Plaintiffs direct their efforts to challenging the FDIC’s authority to
28 issue the Final Rule. Specifically, Plaintiffs argue (1) that the FDIC lacks authority to regulate

1 non-banks; (2) that the FDIC lacks authority to interpret state law, and (3) that the FDIC lacks
2 authority to preempt state laws. All three contentions fail, however, as they misconstrue the
3 FDIC’s interpretation of § 1831d, as set forth in the Final Rule.

4 **1. The Final Rule Does Not Regulate Non-Banks Or Otherwise Assign**
5 **Preemptive Powers to Non-Banks**

6 Plaintiffs wrongly assert that the FDIC lacks authority to issue the Final Rule because the
7 Final Rule governs the conduct of “non-banks,” and the FDIC does not have authority to regulate
8 non-banks. Br.14-16. This argument fails because (1) the Final Rule regulates the conduct and
9 rights of *banks*, not non-banks; (2) any indirect effects the rule has on non-banks do not place the
10 rule outside the agency’s authority; and (3) Plaintiffs non-bank cases are inapposite.

11 The Final Rule does not regulate non-banks, much less assign preemptive powers to non-
12 banks. Rather, the Final Rule regulates the conduct and rights of *banks* when they sell, assign, or
13 transfer loans. As the Final Rule explains, “[t]he FDIC would not regulate non-banks through the
14 proposed rule; rather, the proposed rule would clarify the application of section 27 to State banks’
15 loans” by providing that “that the permissibility of interest on a loan under section 27 would be
16 determined as of the date the loan was made” by the *bank*. AR 214. “[T]his interpretation of sec-
17 tion 27 is necessary to establish a workable rule to determine the timing of compliance with the
18 statute”—an issue on which the statute is silent. *Id.* That the rule is not directed at non-banks is
19 also underscored by the fact that the rule would apply to loans made by State *banks* regardless of
20 whether such loans are held by the bank to maturity, or are “subsequently assigned to another
21 bank or to a non-bank.” *Id.*

22 Plaintiffs argue that the rule nevertheless regulates non-banks because one of its effects is
23 that “[a]n assignee can enforce [a] loan’s interest-rate terms to the same extent as the assignor.”
24 Br.16. But as the FDIC explained, any indirect effects the rule has on non-banks do not place the
25 rule outside the agency’s authority. AR 214. The rule explains that to the extent an assignee
26 “would be permitted to charge the contractual interest rate, that is because a State bank’s statutory
27 authority . . . to make loans at particular rates necessarily includes the power to assign the loans at
28 those rates.” AR 214. The regulation is directed at banks, and “would not become a regulation of

1 [non-bank] assignees simply because it would have an indirect effect on [non-bank] assignees.”
2 *Id.* Given the interconnected nature of transactions and markets, the Supreme Court made clear
3 that a regulation directed at market participants within the agency’s authority does not overstep
4 the agency’s authority simply because it has substantial effects on market participants outside the
5 agency’s authority. *See FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776 (2016) (where
6 federal statute limited agency jurisdiction to the wholesale market and reserved regulatory author-
7 ity over retail sales to the States, a regulation directed at wholesale transactions was not outside
8 the agency’s authority and did not intrude on the States’ authority, even if the regulation had sub-
9 stantial indirect effects on retail transactions). Therefore, any indirect effects the rule has on non-
10 banks do not place the rule outside the agency’s authority.

11 Plaintiffs’ “non-bank” cases are inapposite and do not compel the result they urge. Plain-
12 tiffs misstate the fundamental import of these cases: they deal with situations where the bank had
13 not originated the loan in the first instance. *See* Br.8-9. None of these cases considered the cir-
14 cumstances to which the Final Rule applies—where the bank validly originated a loan with an
15 interest rate term permitted under § 1831d and then sold or transferred the loan to a third party.
16 *See, e.g., In re Cmty. Bank of N. Va.*, 418 F.3d 277, 297 (3d Cir. 2005) (observing that the loans at
17 issue “were, in fact, made and serviced by . . . a non-depository institution”); *Ubaldi v. SLM*
18 *Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (addressing “claims against a loan servicer
19 that is alleged to have actually ‘made’ the loan, rather than the bank”).

20 **2. The Final Rule Interprets § 1831d—A Federal Statute—Not State Law**

21 Plaintiffs also incorrectly argue that the Final Rule interprets state law and the FDIC lacks
22 authority to do so. Br.17. The Final Rule does not interpret state law: the Rule interprets the
23 terms of Section 1831d, a federal statute, including ambiguities therein. Construing the terms of a
24 federal statute “is, and always has been, a matter of federal law.” *RTC v. Diamond*, 45 F.3d 665,
25 671 (2d Cir. 1995) (rejecting application of state law to interpret the terms of a federal banking
26 statute). As the Supreme Court stressed in interpreting § 1831d’s national-bank counterpart, fed-
27 eral law—not state law—determines whether a bank-made loan is in compliance with the federal
28 statute and therefore not usurious: “federal law . . . completely defines what constitutes the taking

1 of usury by a national bank, referring to the state law only to determine the maximum permitted
2 rate.” *Evans*, 251 U.S. at 114; *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 10 (2003).

3 In other words, state law merely provides a numerical benchmark—the “maximum per-
4 mitted rate” that banks may charge, not the meaning of terms in the federal statute. *Evans*, 251
5 U.S. at 114. *Evans* is illustrative. There, the bank’s home state (Georgia) deemed usurious the
6 practice of reserving interest in advance with respect to discounted notes even if the interest re-
7 served did not exceed the maximum permissible Georgia rate. *Id.* at 112. The Supreme Court
8 held that the bank’s practice was legal under the federal law, because the federal statute (a prede-
9 cessor of § 85) allowed the bank to discount notes, and “[t]o discount . . . implies reservation of
10 interest in advance.” *Id.* at 114 (emphasis added). The Court reasoned that Georgia law provides
11 the permissible rate of interest, but not the meaning of the word “discount” used in the federal
12 statute, which is a matter of federal law. So too here, state law provides the permissible *rate* of
13 interest, but not the meaning of § 1831d’s authorization of banks to make loans that “take, re-
14 ceive, reserve, and charge” interest at the home-state rate. The FDIC’s conclusion that a bank’s
15 statutory authority to make loans that “take, receive, reserve, and charge” interest at the home-
16 state implies the authority to transfer those loans is no less a matter of federal statutory interpreta-
17 tion than the Supreme Court’s conclusion that the authority “[t]o discount . . . implies” the author-
18 ity to “reserve[e] interest.” Plaintiffs’ suggestion that by interpreting a federal statute, the FDIC
19 engaged in an interpretation of state law is therefore belied by Supreme Court precedent.

20 If there were any lingering doubt after *Evans* that the meaning of statutory terms in §§ 85
21 and 1831d is a matter of federal law, it was removed by the Supreme Court’s decision in *Smiley*,
22 517 U.S. at 739. At the time *Smiley* was decided, state laws differed as to whether the term “in-
23 terest” can be construed to include late-payment fees. For example, late-payment fees were not a
24 component of interest under Texas law, but they were under North Carolina law. In *Smiley*, the
25 Supreme Court interpreted the term “interest” in § 85 as a matter of federal law (not home state
26 law), just like it did with the term “discount” in *Evans*. Specifically, the Court upheld an OCC
27 regulation that defined the term “interest” in § 85 to include late-payment fees, without regard to
28 whether the bank’s home state’s law would have included such late fees in the definition of inter-

1 est. 517 U.S. at 739. *Smiley* confirms that home state law provides the permissible *rate* of inter-
2 est (a numerical benchmark), but not the meaning of the word “interest” in § 85, which was de-
3 fined in the OCC regulation as a matter of *federal* law.

4 **3. The Final Rule Interprets The Substantive Meaning of § 1831d,** 5 **Not Its Preemptive Effect**

6 Plaintiffs incorrectly argue that the FDIC exceeded its authority because, in their view, the
7 Final Rule impermissibly preempts state law, and because the Rule allegedly violates the pre-
8 sumption against preemption. Br.16. Plaintiffs mischaracterize the Final Rule: the Rule merely
9 interprets the substantive meaning of § 1831d, it does not itself preempt state law. It is § 1831d
10 that preempts state law by expressly providing for preemption of any contrary state law. As the
11 Supreme Court explained, an agency’s interpretation of the substantive scope and meaning of a
12 preemptive statute does not itself preempt state law (rather, the statute does), and therefore does
13 not trigger the presumption against preemption. *Smiley*, 517 U.S. at 744. In *Smiley*, the Supreme
14 Court held that the presumption against preemption did not apply to an OCC regulation interpret-
15 ing the term “interest” in § 85 to include late-payment fees because “the question of the substan-
16 tive (as opposed to pre-emptive) meaning of a statute” is distinct from “the question of whether a
17 statute is pre-emptive,” and the OCC’s regulation did not “deal with pre-emption” but with the
18 substantive meaning of the term “interest” in § 85. *Id.* The Court reaffirmed that under its prior
19 holdings, “there is no doubt that § 85 pre-empts state law.” *Id.* Thus, any preemption arises from
20 the statute itself, not from the agency’s interpretation of the substantive meaning of the statute.
21 *See also Marquette Nat’l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299,
22 318 (1978) (recognizing that any impact on state usury laws that results from an interpretation of
23 § 85 “has always been implicit in the structure of the National Bank Act”).

24 Like the rule at issue in *Smiley*, the Final Rule only answers a question about the substan-
25 tive meaning of § 1831d’s terms, and does not itself preempt any state law, nor trigger the pre-
26 sumption against preemption.

27 **C. The Final Rule Represents A Permissible Interpretation Of The Statute And Thus** 28 **Should Be Upheld Under *Chevron*’s Deferential Step Two**

1 The question for the reviewing court at *Chevron* Step Two is “whether the agency’s answer [to the interpretive question] is based on a permissible construction of the statute.” *Mayo*,
2 562 U.S. at 54. A court will not disturb a rule at *Chevron* Step Two unless it is “arbitrary or capricious in substance, or manifestly contrary to the statute.” *Id.* at 53. Generally, an agency interpretation is not “arbitrary, capricious, or manifestly contrary to the statute” if it is “reasonable.”
3 *Id.* at 58 (“[T]he second step of *Chevron* . . . asks whether the [agency’s] rule is a ‘reasonable interpretation’ of the enacted text.”). Accordingly, “[a]n agency interpretation that enjoys *Chevron*
4 status must be upheld if it is based on a reasonable construction of the statute.” *Nw. Ecosystem*
5 *All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1143 (9th Cir. 2007).

6 The FDIC’s construction of the statute is reasonable, and thus should be upheld. As the
7 Final Rule explained, that “[t]he FDIC used its banking expertise to fill the gaps in section 27,
8 and its interpretation is grounded in the *terms* and *purpose* of the statute, read within their proper
9 historical and legal *context*.” AR 214 (emphases added). Specifically, as discussed, the FDIC’s
10 interpretation (1) carries out the purpose of the statute, whereas Plaintiffs’ contrary interpretation
11 would frustrate it, (2) interprets statutory terms in accordance with their common industry understanding and their proper historical and legal context, whereas Plaintiffs’ interpretation ignores
12 that context, (3) is buttressed by Congress’s views regarding the application of another federal
13 statute providing exemptions from usury law, (4) is consistent with well-established principles of
14 contract law regarding the assignment of contracts, whereas Plaintiffs’ interpretation would require the untenable conclusion that Congress made an extreme departure from those principles
15 through mere silence, and (5) provides a workable rule that is consistent with the parties’ expectations at the time the loan was made.

16 The Final Rule provided a reasonable explanation why, when viewed in context, the statutory terms granting banks the power to make loans charging certain rates are best understood as necessarily including the power to transfer enforceable rights in those loans. The historical and
17 legal context, such as the Supreme Court’s decision in *Planters*, shows that “[t]he power to assign
18 loans has been traditionally understood as a component of the power to make loans.” AR 214.

1 The Final Rule also sensibly explained why the FDIC’s interpretation best comports with
2 the statute’s purpose. AR 215. Relying on its expertise, the FDIC reasonably concluded that
3 “[a]bsent the power to assign loans made under section 27, reliance on the statute could ultimate-
4 ly hurt State banks (instead of benefiting them) should they later face a liquidity crisis or other
5 financial stresses. The FDIC’s interpretation of the statute helps prevent such unintended re-
6 sults.” *Id.* This is because “[t]he power to assign is indispensable in modern commercial transac-
7 tions, and even more so in banking: State banks need the ability to sell loans in order to properly
8 maintain their capital and liquidity.” *Id.* As the Supreme Court explained almost two centuries
9 ago, “in managing its property in legitimate banking business, [a bank] must be able to assign or
10 sell those notes when necessary and proper, as, for instance, to procure more [liquidity] in an
11 emergency, or return an unusual amount of deposits withdrawn, or pay large debts.” *Id.* (citing
12 *Planters*). These principles apply with added force in modern times. Loan sales and securitiza-
13 tions provide banks with a key “funding, capital, and risk management tool” by allowing banks
14 “to obtain lower cost funding, diversify [their] funding sources, . . . and increase [their] ability to
15 manage interest rate risk.” FDIC, Credit Card Securitization Manual, Introduction (2007),
16 https://www.fdic.gov/regulations/examinations/credit_card_securitization/ch1.html. Loan sales
17 also help banks maintain safe asset concentration levels. *Id.* In light of these concerns, the FDIC
18 reasonably concluded that Congress could not have intended to give banks a right to make loans
19 hampered by significant impairments to the loans’ resale value and liquidity such as would occur
20 if a bank could not transfer enforceable rights in the loans they made.

21 The reasonableness of the FDIC’s interpretation is further underscored by court decisions
22 adopting a similar interpretation of other statutes. In *Strike*, the court interpreted a statute silent
23 on transfer to implicitly allow banks to transfer enforceable rights in the loan’s interest-rate terms,
24 because loans sales to the “secondary market” would be “uneconomic” if assignees could not en-
25 force those rates. 92 Cal. App. 3d at 745. In *Olvera*, the Seventh Circuit also interpreted a statute
26 silent on transfer to allow assignees to enforce the rates of validly-made loans, as a contrary inter-
27 pretation would produce “senseless” results that could not have been intended by the legislature.
28 431 F.3d at 287. These cases confirm that the FDIC’s interpretation best comports with the pur-

1 pose of the statute. But the Court should defer to the agency’s judgment even if the FDIC’s inter-
2 pretation were not the best interpretation of the statute. Because the standard of review is highly
3 deferential, the agency’s view need not be “the only possible interpretation, nor even the interpre-
4 tation deemed *most* reasonable by the courts.” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208,
5 218, (2009) (emphasis in original).

6 **II. Plaintiffs’ *State Farm* Arguments Are Unavailing**

7 Plaintiffs also assail the Final Rule as arbitrary and capricious under 5 U.S.C. § 706(2)(A)
8 and *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), but
9 those arguments fail for three reasons. First, “[t]he same points that address [Plaintiffs’] *Chevron*
10 Step Two claim also make it clear that their arbitrary and capricious claim fails.” *Agape Church,*
11 *Inc. v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013); *Judulang v. Holder*, 132 S.Ct, 476, 483 n.7
12 (2011) (stating that, under either standard, the “analysis would be the same, because under
13 *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary or capricious in
14 substance’”). Accordingly, the Court can stop its inquiry here. Because the FDIC’s interpretation
15 is reasonable under *Chevron* Step Two, it is not arbitrary and capricious. *See also Harkonen v.*
16 *DOJ*, 800 F.3d 1143, 1150 (9th Cir. 2015) (holding that “the highly deferential standard of review
17 at Step Two of the *Chevron* analysis applies,” and that “analysis leads to the conclusion [that the
18 agency’s interpretation] was not arbitrary and capricious, or manifestly contrary to the statute”).

19 Second, to the extent that *State Farm* can be read as imposing a more stringent standard
20 than *Chevron* Step Two, *State Farm* does not apply to an agency regulation addressing an issue of
21 statutory interpretation for the first time, as here. The Supreme Court has cautioned that *State*
22 *Farm* is “inapposite to the extent that it may be read as prescribing more searching judicial re-
23 view” in a case involving an agency’s “first interpretation” of a statute. *Verizon Commc’ns Inc. v.*
24 *FCC*, 535 U.S. 467, 502 n.20 (2002). Therefore, a challenge to a regulation involving an agen-
25 cy’s first interpretation of an ambiguous statute “is properly analyzed under the *Chevron* frame-
26 work, which does not incorporate the *State Farm* standard.” *Catskill Mountains Chapter of Trout*
27 *Unlimited, Inc. v. EPA*, 846 F.3d 492, 523-24 (2d Cir. 2017). As the Second Circuit explained in
28 applying the *Chevron* framework instead of *State Farm*, certain aspects of *State Farm* that focus

1 on a rational connection between the facts found and the agency’s conclusion, are incongruent
2 with Supreme Court decisions holding that “agencies are not obligated to conduct detailed fact-
3 finding or cost-benefit analyses when *interpreting* a statute.” *Id.* at 523 (emphasis added). “*State*
4 *Farm* review may be appropriate in a case involving a non-interpretive rule or a rule setting forth
5 a changed interpretation of a statute; but that is not so in the case before us.” *Id.* at 521.

6 Third, even if *State Farm* applied, Plaintiffs’ arguments that the Final Rule does not meet
7 that standard are meritless. Plaintiffs incorrectly assert that the Final Rule “is inconsistent with
8 the FDIC’s stated position against rent-a-bank schemes” because the Rule would facilitate such
9 schemes. Br. 23-24. The Final Rule is fully consistent with the FDIC’s position because the rule
10 would not protect rent-a-bank schemes; to the contrary, the rule would only apply if a bank actu-
11 ally made the loan. AR 217. The Final Rule does not apply where a non-bank partner is deemed
12 to have made the loan under a true lender analysis, and it expressly states that it “is not intended
13 to foreclose remedies available under State law” against rent-a-bank schemes, such as true lender
14 defenses. *Id.* Far from being inconsistent with the FDIC’s prior positions, the Final Rule con-
15 demned abuses and reiterated “continue[d]” adherence to its position that FDIC “view[s] unfa-
16 vorably entities that partner with a State bank with the sole goal of evading a lower interest rate
17 established under the law of the entity’s licensing State(s).” AR 210-11. Plaintiffs’ argument al-
18 so fails because it relies on cases addressing a change in an agency’s interpretation of a statute.
19 *See* Br.23. Those cases are entirely inapposite because the FDIC has never taken a position in-
20 consistent with the rule’s conclusion that the permissibility of a loan’s interest rate is determined
21 at the loan’s inception; the FDIC has never addressed this issue before. Therefore, there is no
22 prior interpretation with which the Final Rule conflicts.

23 Plaintiffs also assail the Final Rule for failing to address “the application of the true lender
24 doctrine.” Br.19-21. The record demonstrates that the FDIC specifically considered whether the
25 Final Rule needed to address this issue, and that it reasonably determined that it did not, because
26 while both the true lender question and the question addressed by the current rulemaking “ulti-
27 mately affect the interest rate that may be charged to the borrower, the FDIC believes that they
28 are not so intertwined that they must be addressed simultaneously by rulemaking.” AR 216. As

1 the Final Rule explained, the two questions are separable because “in many cases . . . there may
2 not even be a non-bank involved in making the loan,” and thus the true lender question would not
3 even arise. The Second Circuit’s decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246
4 (2d Cir. 2015) was such a case where the bank validly made the loan and did not sell it to a non-
5 bank debt collector “until three years after the consumer opened the account.” AR 216. A recent
6 case provides another example: there, the debtor challenged a student loan charging 9% interest
7 as usurious simply because of its transfer to a securitization trust, a common vehicle that helps
8 banks manage their funding and liquidity. *Robinson v. Nat’l. Collegiate Student Loan Trust*,
9 *2006-2*, 2021 WL 1293707 (D. Mass. Apr. 7, 2021) (rejecting debtor’s claim under the OCC’s
10 recent regulation). In sum, Plaintiffs’ proposed interpretation places at risk countless validly-
11 made loans charging relatively low rates and not implicating true lender issues. In light of such
12 concerns, it was entirely permissible for the FDIC to make the transfer issue a priority. Agencies
13 have discretion on how to handle related, yet discrete, issues in terms of priorities and need not
14 solve every problem before them in the same proceeding. *Taylor v. FAA*, 895 F.3d 56, 68 (D.C.
15 Cir. 2018); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009) (“[n]othing
16 prohibits federal agencies from moving in an incremental manner” to address regulatory prob-
17 lems). And while the Final Rule does not address the true lender analysis, it does not prohibit its
18 application: the Final Rule expressly states that “is not intended to foreclose remedies available
19 under State law” against rent-a-bank schemes, such as true lender defenses. AR 217. The availa-
20 bility of these remedies also answers Plaintiffs’ related comment regarding the existence of a pur-
21 ported “vacuum” of remedies against non-banks. Br.21.

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

27 Plaintiffs also erroneously assert that the Final Rule’s interpretation of the statute should
28 be rejected because the FDIC failed to provide empirical evidence or studies. Br.22. But this

1 misstates the FDIC’s obligations under the APA. Rather, as the Ninth Circuit has held, an agency
2 is not required under the APA to develop and rely on empirical evidence as part of the rulemaking
3 process. Instead, so long as an agency provides a reasoned explanation for a rule it promul-
4 gates—as the FDIC has done here—it “is entitled to invoke its experience as a justification for”
5 that rule. *Peck v. Thomas*, 697 F.3d 767, 775-76 (9th Cir. 2012); *see also Stilwell v. OTS*, 569
6 F.3d 514, 519 (D.C. Cir. 2009) (“[t]he APA imposes no general obligation on agencies to produce
7 empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation.”). As
8 discussed in Part I.C. above, the FDIC has provided such reasoned explanation.

9 As a fallback, Plaintiffs argue that the rule is allegedly contrary to evidence in the record
10 because the FDIC stated in the NPR that it “is not aware of any widespread or significant negative
11 effects” as a result of the *Madden* decision, and “[t]his lack of expected cause-and-effect between
12 the Provision and the problem it purports to address underscores that the FDIC has not shown a
13 rational connection between the facts found and the choice made.” Br.22. But there is no such
14 contrary evidence: Plaintiffs’ argument mischaracterizes both the FDIC’s remark in the NPR, and
15 the problem addressed by the rulemaking. First, as the Final Rule explained, the NPR remark
16 simply meant that there were no *widespread* negative effects because the “available evidence
17 suggested that *Madden*’s effects on loan sales and availability of credit were *generally limited to*
18 *the Second Circuit* states in which the decision applied.” AR 216 (emphasis added). Second,
19 Plaintiffs misstate the problem addressed by the Final Rule: the rule addresses the two statutory
20 gaps, not the *Madden* decision. AR 210, 212. Those gaps—and the resulting ambiguity—exist
21 independent of *Madden*. *Madden* merely “highlight[s]” the ambiguity and “the need to issue clar-
22 ifying regulations.” AR 210.

23 At bottom, Plaintiffs’ “cause-and-effect” argument suggests that an agency may not en-
24 gage in a rulemaking that interprets a statutory gap without providing evidence that widespread
25 negative effects would occur (or have occurred) absent the regulation. This view does not com-
26 port with the APA, which, as shown, does not require empirical evidence to justify the need for a
27 rule. Before issuing a rule, an agency need not find that problems that need solving exist *in the*
28 *industry*. Rather, the agency can decide that the problem is the gap or ambiguity *in the statute*.

1 This is what the FDIC has done here. *See, e.g.*, AR 210 (explaining “[l]eft unaddressed, the two
2 statutory gaps could create legal uncertainty for State banks and confusion for the courts.”). There
3 is a rational connection between the problem the FDIC identified (the statutory gaps or ambiguity
4 as to when validity is determined and what happens upon transfer) and the FDIC’s solution (an
5 interpretation clarifying that validity is determined at the loan’s inception, and is not affected by
6 the loan’s transfer). The FDIC solved the ambiguity through its interpretation.

7 Plaintiffs also make a terse, one-sentence contention that the record contains “evidence”
8 that contradicts the FDIC’s “premise that state rate caps constrain bank liquidity or that selling
9 loans with interest rates that exceed state rate caps is a material source of bank liquidity.” Br.22.
10 But Plaintiffs do not tell the Court what that “evidence” is; what the FDIC’s responses were to the
11 comment providing that “evidence”; and why they should prevail notwithstanding those respons-
12 es. Plaintiffs’ one-sentence contention therefore fails for lack of adequate briefing. It also fails
13 because it responds to a straw man “premise” that both misconstrues and oversimplifies the
14 FDIC’s reasoning. The FDIC does not argue that “rate caps constrain bank liquidity”—it argues
15 that banks’ inability to transfer enforceable rights in the loans they made constrains the loans’
16 value and liquidity. *See I.C., supra*. The FDIC does not argue that selling loans with “rates that
17 exceed state rate caps is a material source of bank liquidity”—it argues that Congress intended to
18 provide banks a *meaningful right* to make loans under §1831, not a right to make loans with im-
19 paired value and liquidity resulting from the banks’ inability to transfer enforceable rights in the
20 loans they made. *Id.* Given this purpose and the historical context showing that the banks’ power
21 to make loans was traditionally understood to implicitly contain the power to transfer them, the
22 FDIC concluded that § 1831d’s purpose would not be best served by an interpretation under
23 which Congress provided banks the authority to make loans under that section, but envisioned the
24 banks as being restricted from doing with those loans what banks regularly and traditionally do
25 with loans, such as selling them and transferring enforceable rights in them upon sale.

26 CONCLUSION

27 For these reasons, this Court should grant FDIC’s Motion for Summary Judgment and de-
28 ny Plaintiffs’ Cross-Motion for Summary Judgment.

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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 FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Case No. 4:20-cv-05860-JSW

**[PROPOSED] ORDER GRANTING
FDIC’S MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFFS’ MOTION FOR SUMMARY
JUDGMENT**

For the reasons set forth in FDIC’s Motion for Summary Judgment and Opposition to Plaintiffs’ Motion for Summary Judgment, it is hereby ORDERED that FDIC’s Motion for Summary Judgment is Granted and Plaintiffs’ Motion for Summary Judgment is Denied. It is Further Ordered that FDIC’s Final Rule is Upheld.

IT IS SO ORDERED:

HONORABLE JEFFREY S. WHITE
United States District Judge