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

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

17 Plaintiffs,

18 v.

19 **THE FEDERAL DEPOSIT INSURANCE**
 20 **CORPORATION,**

21 Defendant.

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

**PLAINTIFFS’ OPPOSITION TO
 DEFENDANT’S MOTION FOR
 SUMMARY JUDGMENT AND REPLY
 IN SUPPORT OF PLAINTIFFS’
 MOTION FOR SUMMARY JUDGMENT**

Date: August 6, 2021
 Time: 9:00 a.m.
 Courtroom: Oakland Courthouse,
 Courtroom 5 – 2nd Floor
 Judge: The Honorable Jeffrey S. White
 Action Filed: August 20, 2020

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SUMMARY OF ARGUMENT

1
2 The provision at issue (“Provision”) impermissibly expands preemption of state interest-rate
3 caps, which 12 U.S.C. § 1831d grants exclusively to FDIC Banks, to buyers of FDIC Bank loans.
4 12 C.F.R. § 331.4(e); 12 U.S.C. § 1831d. Contrary to the FDIC’s claims, the Provision exceeds
5 statutory authority, and the FDIC acted arbitrarily and capriciously in its rulemaking. The
6 Provision must therefore be set aside as unlawful. 5 U.S.C. § 706(2).

7 The statute is unambiguous and does not permit the FDIC’s interpretation, which is not
8 entitled to any deference. Because Congress made clear through the statutory text, purpose, and
9 context that § 1831d preemption applies only to FDIC Banks, the inquiry ends there; the FDIC’s
10 interpretation is not entitled to deference, either on its position that the statute is ambiguous or its
11 purported clarification. *See, e.g., Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (no agency
12 deference if Congress was clear); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005) (§
13 1831d “appl[ies] only to . . . state chartered banks, not to non-bank [loan] purchasers”); *compare*
14 12 U.S.C. § 1831d *with* 12 U.S.C. § 1735f-7a (§ 1831d preemption applies to FDIC Banks,
15 whereas § 1735f-7a preemption applies to loans). The FDIC attempts to manufacture ambiguity
16 where there is none by injecting and interpreting terms not in § 1831d, adopting a strained reading
17 of the statute that ignores the rules of grammar and common sense, conflating the state-law-
18 created power to make and transfer loans with the purported power to transfer preemption
19 privileges, and relying on inapplicable contract-law assignability principles. These efforts fail.
20 *See, e.g., Nat’l Enterprises, Inc. v. Smith*, 114 F.3d 561, 564 (6th Cir. 1997) (statutory right
21 granted specifically to entity cannot be transferred to assignee). The FDIC also lacks authority to
22 issue the Provision because it unlawfully regulates the conduct of non-banks.

23 Even if the Court finds § 1831d to be ambiguous, the Provision impermissibly expands the
24 scope of preemption and is not a reasonable interpretation of the statute.

25 The FDIC also acted arbitrarily and capriciously in its decision-making because it failed to
26 consider important aspects of the problem, provide the minimal level of analysis required, or
27 acknowledge its departure from its previous policy against rent-a-bank schemes. *See Motor*
28 *Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

INTRODUCTION

1
2 The Non-bank Interest Provision (“Provision”) substantively and procedurally violates the
3 Administrative Procedure Act (“APA”) and thus must be set aside. The plain language of 12
4 U.S.C. § 1831d unambiguously preempts state interest-rate caps as to federally insured, state-
5 chartered banks and insured branches of foreign banks (“FDIC Banks”). The Provision
6 impermissibly expands the scope of § 1831d¹ to preempt state rate caps as to non-bank loan
7 buyers of FDIC Bank loans. The FDIC also attempts to impermissibly expand its regulatory
8 power because the Provision dictates the interest rates that can be charged by non-banks, which
9 the FDIC does not have the authority to regulate.

10 The FDIC, however, claims that § 1831d is ambiguous and that its purported clarification
11 through the Provision is entitled to this Court’s deference. The Court, and not the agency, is the
12 arbiter of whether the statute is ambiguous. The statute is not. To adopt the FDIC’s view would
13 require the Court to read powers into the statute that Congress did not grant to FDIC Banks, to
14 ignore the rules of grammar and common sense, and to turn a blind eye to § 1831d’s place in the
15 statutory scheme that Congress enacted.

16 The FDIC claims, among other things, to interpret § 1831d as implicitly including the
17 power to transfer loans, and that this implicit power to transfer loans further includes the implicit
18 right to assign § 1831d’s interest-rate protections to loan buyers. Congress, however, did not
19 grant FDIC Banks the power to make or transfer loans in §1831d or anywhere else, because these
20 powers come from state, not federal, law. The FDIC further attempts to bolster its argument that §
21 1831d’s interest-rate preemption rights are assignable by relying on the inapplicable “historical
22 and legal context” of contract law. But even if § 1831d were ambiguous, which it is not, the
23 presumption against preemption applies and the Provision is not a reasonable interpretation of the
24 statute.

25 Separately, the Provision is arbitrary and capricious because the FDIC, among other things,
26 ignored important aspects of the problem that the Provision purportedly addresses.

27 Plaintiffs respectfully ask the Court to reject the FDIC’s attempted regulatory overreach, to
28

¹ Statutory citations refer to sections of Title 12 of the current U.S. Code unless otherwise noted.

1 safeguard the states’ historic police power to prohibit usurious interest rates charged by non-
 2 banks, and to maintain the separation of powers by giving effect to the intent of Congress rather
 3 than the policy preferences of an administrative agency.

4 ARGUMENT

5 **I. SECTION 1831D UNAMBIGUOUSLY ALLOWS FDIC BANKS—AND ONLY FDIC** 6 **BANKS—TO CHARGE INTEREST WITHOUT REGARD TO STATE USURY LAW**

7 Section 1831d is plain: it permits FDIC Banks to “take, receive, reserve, and charge”
 8 interest on their loans at specified rates, usually the rate allowed by their home state, and
 9 preempts other states’ rate caps. It does not allow FDIC Banks that sell their loans to also transfer
 10 § 1831d’s preemption right as part of the sale. This reading of the statute is further supported by
 11 § 1831d’s express purpose and the statutory context.

12 **A. The Plain Text of § 1831d Makes Clear that § 1831d Preempts State Law** 13 **as to FDIC Banks Only**

14 To determine a statute’s meaning, courts look first to the text itself. If the statutory
 15 language is plain, that is the end of the matter. “[C]ourts must presume that a legislature says in a
 16 statute what it means and means in a statute what it says there. When the words of a statute are
 17 unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Barnhart v.*
 18 *Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (quotation marks and citations omitted).

19 Congress used straightforward language to grant FDIC Banks—and only FDIC Banks, not
 20 their loan buyers—the privilege of preemption: “[A] State bank or such insured branch of a
 21 foreign bank [*i.e.*, an FDIC Bank] may, notwithstanding any State constitution or statute which is
 22 hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan
 23 or discount made . . . interest at a rate” 12 U.S.C. § 1831d(a). An FDIC Bank, then, is
 24 permitted to “take, receive, reserve, and charge” the permissible interest on “any loan” it holds.
 25 An FDIC Bank that sells a loan no longer takes, receives, reserves, or charges interest on the loan;
 26 it is the loan’s new owner that does those things.

27 In their opening brief, Plaintiffs cite several cases for the proposition that § 1831d applies
 28 only to FDIC Banks, not to non-bank loan buyers. Plaintiffs’ Motion for Summary Judgment

1 [Dkt. No. 47] (“Pls.’ Br.”) at 9-10. The FDIC claims that these cases are inapt because the banks
 2 did not “validly originate” the loan. *See* Defendant’s Motion for Summary Judgment [Dkt. No.
 3 56] (“FDIC Br.”) at 16. This is beside the point: § 1831d’s continuing application does not
 4 depend on whether the FDIC Bank “validly originated” a loan, but whether the FDIC Bank
 5 continues to hold an interest in the loan. *E.g., In re Cmty. Bank of N. Va.*, 418 F.3d 277, 296 (3d
 6 Cir. 2005) (§ 1831d “appl[ies] only to . . . state chartered banks, not to non-bank [loan]
 7 purchasers”); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1200 (N.D. Cal. 2012) (denying non-
 8 bank buyer’s motion to dismiss on preemption grounds because “it is not clear whether or to what
 9 extent [the bank] retained any significant stake in or control over [the] loan”); *Madden v. Midland*
 10 *Funding, LLC*, 786 F.3d 246, 252 (2d Cir. 2015) (extending preemption to non-bank buyer
 11 “would create an end-run around usury laws for [non-bank] entities that are not acting on behalf
 12 of a . . . bank”). Even if the FDIC Bank “validly originates” the loan, these cases confirm that
 13 once a non-bank buys that loan and receives or charges interest on its own behalf, § 1831d no
 14 longer applies.

15 **B. The Express Purpose of § 1831d Supports the Conclusion that § 1831d**
 16 **Applies Only to FDIC Banks**

17 Section 1831d’s purpose, as codified in the statute, is to “prevent discrimination against
 18 State-chartered insured depository institutions . . . with respect to interest rates” to achieve parity
 19 with national banks. 12 U.S.C. § 1831d(a); *Gavey Props./762 v. First Fed. Sav. & Loan Ass’n*,
 20 845 F.2d 519, 521 (5th Cir. 1988) (“Without federal legislation, [state-chartered] institutions were
 21 being battered by competition from national banks that were allowed to charge higher rates of
 22 interest by federal law.”). That purpose is effectuated by allowing FDIC Banks to charge and
 23 receive interest at specified rates on the loans they hold, just as national banks are allowed to do.
 24 It is not served by extending § 1831d’s interest-rate privilege to non-bank buyers of FDIC Bank
 25 loans.²

26 ² National banks’ statutory preemption privileges do not extend to non-bank loan buyers. Three of
 27 the plaintiff States in this action have also challenged the Office of the Comptroller of the
 28 Currency’s (“OCC”) parallel rule purporting to extend preemption to non-bank buyers of
 national-bank loans (12 C.F.R. §§ 7.4001(e), 160.110(d)), which violates the APA for the same

(continued...)

1 Ignoring § 1831d’s codified purpose, the FDIC asserts that the statute’s “plain purpose” is
 2 to provide FDIC Banks “a meaningful right” to originate loans in excess of state usury limits, and
 3 that banks’ § 1831d preemption right is only “meaningful” if they can transfer it to loan buyers
 4 because, otherwise, “loans sales to the ‘secondary market’ would be ‘uneconomic.’” FDIC Br. at
 5 11. The FDIC wrongly asks this Court to disregard Congress’s stated purpose (to prevent interest-
 6 rate discrimination) and instead to adopt the FDIC’s interpretation of Congress’s purpose (to
 7 increase loans’ resale value and liquidity). “The ‘plain purpose’ of legislation . . . is determined in
 8 the first instance with reference to the plain language of the statute itself.” *Bd. of Governors of the*
 9 *Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986) (rejecting the Federal
 10 Reserve’s effort to use statute’s purported “plain purpose” to justify a banking regulation defining
 11 the statutory term “banks”); *see also Bob Jones Univ. v. U.S.*, 461 U.S. 574, 586-87 (1983) (cited
 12 in FDIC Br. at 11) (statute’s purpose to grant tax exemption just to charitable organizations
 13 “underl[ies] all relevant parts of the Code” and “appears explicitly” in statute with “virtually
 14 identical” list that Congress intended to have same meaning as in statute at issue). In evaluating
 15 the purpose of a statute, courts should be “reluctant to inject into the statute a purpose not
 16 codified within it.” *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v.*
 17 *Schwarzenegger*, 602 F.3d 1019, 1034 (9th Cir. 2010). Additionally, an agency cannot invoke the
 18 purported “plain purpose” of legislation “at the expense of the terms of the statute itself”: doing
 19 so “takes no account of the processes of compromise and, in the end, prevents the effectuation of
 20 congressional intent.” *Dimension Fin.*, 474 U.S. at 374. The FDIC fails to provide support for its
 21 authority to promulgate a regulation in service of its own views on § 1831d’s purpose.

22 Congress did indicate that facilitating loan sales to the secondary market was one purpose
 23 of the Depository Institutions Deregulation and Monetary Control Act (“DIDA”), the legislation
 24 that enacted § 1831d. Congress’s concern, however, was specific to “the functioning of a national
 25 secondary market *in mortgage lending*.” S. Rep. No. 96-368, at 19 (1979), *reprinted in* 1980

26 _____
 27 reasons, among others, as does the FDIC’s Provision. *California v. Office of the Comptroller of*
 28 *the Currency*, No. 4:20-cv-05200 (N.D. Cal.) (filed July 29, 2020). Moreover, unlike national
 banks, state-chartered FDIC Banks derive their power to make and transfer loans from state law,
 not federal law. *See infra* Section II.C.2(a).

1 U.S.C.C.A.N. 236, 255 (emphasis added). Congress achieved this purpose through another DIDA
 2 provision, § 1735f-7a, in which, unlike in § 1831d, Congress preempted state rate caps for certain
 3 mortgage loans, regardless of who holds those loans or if they are transferred. *See Brown v.*
 4 *Investors Mortg. Co.*, 121 F.3d 472, 475 (9th Cir. 1997) (noting that Congress intended to
 5 “promote home ownership by increasing the flow of available mortgage money” and that
 6 § 1735f-7a was to be “interpreted narrowly in light of federalism concerns”); *see* Pls.’ Br. at 14.

7
 8 **C. The Statutory Context of § 1831d Supports the Conclusion that § 1831d
 Applies Only to FDIC Banks**

9 In construing a statute, courts may look to statutory context. *E.g., Pereira v. Sessions*, 138
 10 S. Ct. 2105, 2114-15 (2018) (looking to neighboring statutory provisions in determining that
 11 statute is unambiguous); *Barnhart*, 534 U.S. at 452-54 (comparing provision to simultaneously
 12 enacted provisions in determining that statute is unambiguous). Here, § 1831d’s statutory context
 13 confirms that Congress intended to limit preemption to FDIC Banks.

14 **1. Section 1831d(b)**

15 The fact that Congress provided remedies for § 1831d violations only as to FDIC Banks,
 16 when taken together with § 1831d’s plain language, makes clear that § 1831d applies only to
 17 FDIC Banks. *See* Pls.’ Br. at 21. Section 1831d(b) provides that persons who paid interest greater
 18 than that allowed by § 1831d “may recover . . . an amount equal to twice the amount of the
 19 interest paid from such State bank or such insured branch of a foreign bank taking, receiving,
 20 reserving, or charging such interest.” 12 U.S.C. § 1831d(b). FDIC Banks can only receive interest
 21 on a loan while they hold the loan. If an FDIC Bank originates a loan with an interest rate that
 22 violates § 1831d and sells that loan to a non-bank that continues to charge that rate, it is unclear
 23 what, if any, remedies apply. The FDIC does not address § 1831d(b) in its brief, and its comment
 24 that state-law remedies apply to rent-a-bank schemes, FDIC Br. at 23, is not responsive. By
 25 allowing non-bank loan buyers to enjoy § 1831d preemption without facing liability for violating
 26 the statute, the Provision creates a potential loophole that Congress could not have intended.

27 **2. Section 1735f-7a**

28 The contrasting language Congress used in § 1735f-7a, which was simultaneously enacted

1 as part of the same legislation as § 1831d, also supports the conclusion that Congress limited
2 § 1831d preemption to FDIC Banks. In § 1831d, Congress provided that preemption applies to
3 certain *entities*, which it expressly gave the right to “take, receive, reserve, and charge” specified
4 interest rates. In contrast, Congress provided in § 1735f-7a that preemption applies to certain
5 mortgage *loans*, using the passive phrase “[state rate caps] which may be charged, taken,
6 received, or reserved shall not apply to any loan,” because the focus is on the loan, not the entity
7 charging or taking interest. Pls.’ Br. at 13-14.

8 When Congress uses different language in simultaneously enacted provisions, as it did with
9 §§ 1831d and 1735f-7a, courts construe those provisions differently. “[I]t is generally presumed
10 that Congress acts intentionally and purposely in the disparate inclusion or exclusion” when it
11 uses particular language in one provision, but not another provision, of the same legislation.
12 *Barnhart*, 534 U.S. at 452 (quotation marks and citations omitted); *see also INS v. Cardoza-*
13 *Fonseca*, 480 U.S. 421, 432 (1987) (the “contrast between the language used” in two
14 simultaneously enacted provisions of the same Act “certainly indicate[s] that Congress intended
15 the two standards to differ”).

16 In *Barnhart*, the Court construed a provision of the Coal Act that allowed beneficiaries to
17 be assigned to signatory operators or other specified entities but that did not specify a signatory
18 operator’s successor in interest as one of those entities. 534 U.S. at 450-52. The Court held that
19 the provision “is unambiguous”: “The statutory text instructs that the Coal Act *does not permit*
20 the Commissioner to assign beneficiaries to the successor in interest of a signatory operator.” *Id.*
21 at 450. It also compared the provision with others in the Coal Act, noting that “[w]here Congress
22 wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by
23 other sections in the Act,” which were “in direct contrast” to the provision at issue. *Id.* at 452-453.
24 Because the statute “does not contain conflicting provisions or ambiguous language,” the Court
25 held that its “inquiry [was] complete” and that it “need not contemplate deferring to the agency’s
26 determination.” *Id.* at 461-62 (quotation marks and citations omitted).

27 Applying the Supreme Court’s reasoning here, it is presumed that Congress intentionally
28 and purposefully used different language in §§ 1831d and 1735f-7a. The Court “need not

1 contemplate deferring” to the FDIC’s determination that they should operate the same. If
 2 Congress intended to preempt state usury laws for FDIC Bank loans, “it could have done so
 3 clearly and explicitly,” *Barnhart*, 534 U.S. at 454, as it did in § 1735f-7a. It did not.

4 Despite Congress’s intentional use of different language in these two statutes, the FDIC
 5 argues that they should be interpreted the same. First, the FDIC claims that because § 1735f-7a is
 6 commonly understood to apply to transferred loans even though it does not expressly refer to loan
 7 transfers, Congress “understood that usury exemptions implicitly continue to apply after the
 8 loan’s transfer.” FDIC Br. at 13. To the contrary, Congress indicated otherwise in § 1735f-7a by
 9 expressly exempting the loans themselves from state law. 12 U.S.C. § 1735f-7a. Second, contrary
 10 to the FDIC’s claim that both statutes apply to “loans made by specified entities,” FDIC Br. at 13,
 11 the structure of § 1735f-7a’s text makes clear that its preemption applies to certain *loans* (which,
 12 Plaintiffs agree, are made by specified entities), whereas the structure of § 1831d’s text makes
 13 clear that its preemption applies to *FDIC Banks* (with respect to loans they make). Third, the
 14 FDIC cites cases standing for the unremarkable proposition that silence does not necessarily
 15 signal a prohibition on agency action. FDIC Br. at 13-14. Section 1831d, though, is not silent; it
 16 specifically preempts state law for FDIC Banks, in contrast with § 1735f-7a’s preemption for
 17 loans. Finally, the FDIC claims that Congress implied that preemption applies after transfer
 18 because it was “commonly understood” that the right to make loans includes the right to transfer
 19 them. FDIC Br. at 14. The FDIC misreads the case upon which it relies, *Planters’ Bank of Miss.*
 20 *v. Sharp*, 47 U.S. 301 (1848), and confuses the right to transfer loans with the right to transfer the
 21 statutory privilege of preemption. *See infra* Section II.A at 9, Section II.C.2(b).

22 **II. BECAUSE § 1831D IS UNAMBIGUOUS, THE FDIC’S INTERPRETATION IS NOT**
 23 **ENTITLED TO THIS COURT’S DEFERENCE**

24 The meaning of § 1831d is clear—it preempts state interest-rate caps only while the FDIC
 25 Banks “take, receive, reserve, and charge” interest on the loans—so that is the end of the inquiry,
 26 and the FDIC is not entitled to deference.³ “If the intent of Congress is clear, that is the end of the

27 ³ Courts have held that “*Chevron* deference does not apply to preemption decisions by federal
 28 agencies” unless Congress has expressly authorized the agency to preempt state law directly. *E.g.*,
 (continued...)

1 matter; for the court, as well as the agency, must give effect to the unambiguously expressed
 2 intent of Congress.” *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-
 3 43 (1984). “[T]he Court need not resort to *Chevron* deference . . . for Congress has supplied a
 4 clear and unambiguous answer to the interpretive question at hand.” *Pereira*, 138 S. Ct. at 2113;
 5 *see also SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“Even under *Chevron*, we owe
 6 an agency’s interpretation of the law no deference unless . . . we find ourselves unable to discern
 7 Congress’s meaning.”); *Medina Tovar v. Zuchowski*, 982 F.3d 631, 634 (9th Cir. 2020) (“To
 8 maintain the proper separation of powers between Congress and the executive branch, we must
 9 ‘exhaust all the traditional tools of construction’ before we ‘wave the ambiguity flag.’”) (citation
 10 omitted).

11 The text of § 1831d itself answers the interpretive question at hand: only FDIC Banks—not
 12 their loan buyers or other entities—may charge interest at the rates permitted by § 1831d. The
 13 express statutory purpose and statutory context support this conclusion. The FDIC is not due any
 14 deference on its view that the statute is ambiguous. *Massachusetts*, 93 F.3d at 892 (“the judiciary,
 15 not the agency, ‘is the final authority on issues of statutory construction’”) (quoting *Chevron*, 467
 16 U.S. at 843 n.9).⁴

17 Despite the plain statutory text and § 1831d’s codified purpose and context, the FDIC
 18 attempts to create ambiguity in § 1831d where there is none by purporting to interpret terms that

19 _____
 20 *Grosso v. Surface Transportation Bd.*, 804 F.3d 110, 116-17 (1st Cir. 2015) (declining to apply
 21 *Chevron* deference to agency’s determination that statutory term “transportation” included
 22 activities at issue, where statute preempts state law governing such “transportation”); *see Wyeth v.*
 23 *Levine*, 555 U.S. 555, 576-77 (2009) (no deference is given to agency’s conclusion that state law
 24 is preempted; agencies have “no special authority to pronounce on pre-emption absent delegation
 25 by Congress”). The Provision is a preemption decision because it preempts state usury laws as to
 26 non-bank buyers of FDIC Bank loans, and the FDIC does not, and cannot, identify an express
 27 statutory delegation of preemption authority. In any event, as in *Massachusetts v. U.S.*
 28 *Department of Transportation*, this Court “need not determine whether an agency’s interpretation
 of a statute on the preemption question is subject to *Chevron* analysis in order to decide this case,
 as the agency’s determination here cannot be upheld with or without deference.” 93 F.3d 890, 892
 (D.C. Cir. 1996).

⁴ The FDIC’s cited cases, in which the Court deferred to the OCC’s interpretation of § 85, § 1831d’s National Bank Act (“NBA”) counterpart for national banks, are inapt. FDIC Br. at 4-5. In those cases, the Court first determined the terms at issue were ambiguous. Furthermore, those cases were decided before Congress stripped the OCC of *Chevron* deference regarding NBA rulemaking that preempts state consumer financial laws and so have no ongoing application.

1 Congress did not include in the statute, contorting the grammatical structure of Congress’s
2 language to its breaking point, and purporting to fill gaps that do not exist.

3 **A. The FDIC Purports to Construe Terms Not in § 1831d**

4 The FDIC claims that “the banks’ power to make loans under § 1831d” implies the power
5 to transfer loans, and that the implied power to transfer loans further implies the power to assign §
6 1831d’s interest-rate protections along with those loans. For example, the FDIC claims that it is
7 interpreting “the banks’ power to make loans under § 1831d” and that “the statutory terms
8 granting banks the power to make loans charging certain interest rates are best understood as
9 necessarily including the power to transfer enforceable rights in those loans.” FDIC Br. at 3, 19;
10 *see also id.* at 17 (claiming to construe “a bank’s statutory authority to make loans”). Congress,
11 however, did not grant FDIC Banks the power to make loans in § 1831d or anywhere else; as the
12 FDIC acknowledges, state law gives FDIC Banks that power. *See infra* Section II.C.2(a). The
13 FDIC reads into § 1831d a power to make loans that does not exist in the statute, claiming that the
14 term “to make loans” is ambiguous and then purporting to clarify that term, insisting on this
15 Court’s deference to the meaning it comes up with. This far exceeds the FDIC’s, or any agency’s,
16 authority.

17 Because the FDIC purports to interpret a term that Congress did not include in § 1831d—
18 because that term concerns a power granted by state law—its reliance on *Evans v. Nat’l Bank of*
19 *Savannah*, 251 U.S. 108 (1919), and *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), are
20 inapposite. Those cases concerned the interpretation of specific statutory banking terms that
21 Congress used without defining. In *Evans*, the Court read the term “discounting” in a federal
22 statute to include the power to reserve interest in advance; in *Smiley*, it read the term “interest” in
23 a federal statute to include late fees. *Evans*, 251 U.S. at 108-09; *Smiley*, 517 U.S. at 737, 744-45.
24 Here, by contrast, the FDIC is not seeking to clarify the definition of any statutory term; instead,
25 it is asking the Court to read a new concept (the power to make loans) into § 1831d, to determine
26 that the concept is ambiguous and could include the power to transfer loans, and to defer to the
27 FDIC’s interpretation that this could include the power to transfer the statutory right of
28 preemption. In short, the FDIC is rewriting and extending the scope of § 1831d.

1 The FDIC’s reliance on *Planters* is also misplaced. The FDIC claims that the Supreme
2 Court’s decision in *Planters* marked a turning point after which Congress understood that the
3 power to make loans implied the power to transfer loans. FDIC Br. at 11. Here, § 1831d does not
4 grant FDIC Banks the power to make loans. Additionally, in *Planters*—which did not interpret
5 federal law but rather banks’ state-law powers to make and transfer notes—the Court found an
6 implicit right to transfer notes based not on the bank’s right to make notes but rather on other
7 provisions of the bank’s state charter, such as the provision allowing it to “grant, demise, alien, or
8 dispose of” notes. *Planters*, 47 U.S. at 302, 320-22.

9 Importantly, neither *Planters* nor *Evans* addresses the transferability of loans in general or
10 the transferability of the right to enforce a particular interest rate on a loan. Like *Nichols v.*
11 *Fearson*, 32 U.S. 103 (1833), and *Gaither v. Farmers & Mechs. Bank*, 26 U.S. 37 (1828), the
12 antebellum cases that proponents of the so-called “valid-when-made” theory improperly rely
13 upon, these cases concern a specific type of debt instrument—discounted and negotiable notes—
14 that are no longer common today. See *First Nat. Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th
15 Cir. 1975) (declining to extend *Evans*, which involved discounting short-term commercial paper,
16 to the modern practice of lending on installment paper because doing so would “extend [*Evans*] to
17 a materially different factual situation and into a new economic setting”); Administrative Record
18 (“AR”)⁵ [Dkt. No. 44] at 396-97 (noting that the sale of discounted notes, a practice widespread
19 in the nineteenth century, “does not give rise to the evasion of state usury laws like the ‘valid-
20 when-made doctrine [does]”); Pls.’ Br. at 12 n.5.

21 Even if § 1831d could be read as implicitly incorporating the power to make loans, and
22 even if the FDIC could reasonably interpret the power to make loans as including an implicit
23 power to transfer loans, that power to transfer loans is distinct from, and does not imply, a power
24 to transfer the privilege of preemption. The contract-law principle of assignability does not apply
25 to statutory privileges granted to specific entities; therefore, the existence of the contract-law
26 principle of assignability does not render § 1831d ambiguous on whether its statutory privilege is

27 _____
28 ⁵ Relevant pages of the Administrative Record are identified throughout by the significant digits
at the end of each Bates stamp. For example, “AR 397” refers to FDIC-AR-00397.

1 assignable. *See infra* Section II.C.2(b). Furthermore, the power to transfer loans is a creature of
 2 state law that the FDIC has no authority to interpret. *See infra* Section II.C.2(a).

3 **B. The FDIC Contorts § 1831d’s Plain Text**

4 The FDIC argues that § 1831d is ambiguous because other interpretations of it are
 5 “possible.” FDIC Br. at 8. Because § 1831d is unambiguous and not in need of the FDIC’s
 6 interpretation, and because the FDIC’s alternatives require contortion of the statute, the Court
 7 need not credit these implausible alternatives. When construing a statute, courts assume “that the
 8 ordinary meaning of [the statute’s] language accurately expresses the legislative purpose.” *Gross*
 9 *v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (quotation marks and citation omitted).
 10 Where, as here, the statute is plain, an implausible alternative cannot create ambiguity. *See*
 11 *Barnhart*, 534 U.S. at 450 (statute allowing agency to assign beneficiaries to signatory operators
 12 and other specified entities unambiguously “does not permit” agency to assign beneficiaries to
 13 signatory operator’s successor in interest). *Regions Hospital v. Shalala*, on which the FDIC relies,
 14 is consistent: a statute is ambiguous only if it can “plausibly be read to mean” different things.
 15 522 U.S. 448, 457 (1998); *accord id.* at 457-58 (statutory term “recognized as reasonable” was
 16 ambiguous because parties’ interpretations were both plausible: term could refer either to
 17 agency’s past or future determination of reasonableness).

18 The FDIC’s interpretation of § 1831d as applying to “any loan” made by an FDIC Bank,
 19 regardless of who holds that loan, requires the Court to ignore the rules of grammar and common
 20 sense. The FDIC’s claim that § 1831d “plainly applies to certain loans (namely, to loans made by
 21 FDIC banks),” FDIC Br. at 8, is based on a misreading of the statutory text’s subject (the bank)
 22 and object (the loan). Section 1831d allows FDIC Banks (the subject) to charge the permissible
 23 interest rates “on any loan” (the object). Loans do not “take, receive, reserve and charge interest”;
 24 banks do.⁶ This is not a drafting error on FDIC’s part; there is no linguistically sound, common-
 25 sense reading of the statute’s text that supports the FDIC’s position. *See United States v. Ron Pair*

26 ⁶ The FDIC’s defense of its construction is itself grammatically incorrect: it makes no sense to
 27 say that “a bank’s statutory authority to make *loans that ‘take, receive, reserve, and charge’*
 28 *interest* at the home-state [rate] implies the authority to transfer those loans,” FDIC Br. at 17
 (emphasis added), because loans do not “take, receive, reserve, and charge” interest. Also, as
 discussed in Section II.A, there is no “statutory authority to make loans” in § 1831d.

1 *Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (looking to “natural reading” of statutory phrase and
 2 “grammatical structure of the statute”). Moreover, had Congress intended to apply § 1831d to
 3 loans made by FDIC Banks, rather than to FDIC Banks themselves, it could have simply stated as
 4 much—as it did in § 1735f-7a. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*,
 5 530 U.S. 1, 6-7 (2000) (where statute “authorizes specific action and designates a particular party
 6 empowered to take it,” only those parties may act; Congress “could easily have used [a different]
 7 formulation” if it had intended otherwise).

8 The FDIC also argues that § 1831d is ambiguous as to whether preemption may be
 9 transferred because it does not expressly use the term “privilege,” “exemption,” or a “non-
 10 transferable” right. FDIC Br. at 8. But Congress was not required to use the FDIC’s preferred
 11 words for the Court to be able to discern Congress’s meaning. A statute does not need to contain
 12 particular words to create a privilege. *See, e.g., Exch. Nat’l Bank of Chi. v. Abramson*, 45 F.R.D.
 13 97, 105 (D. Minn. 1968) (explaining that it is “well established” that the federal law in that case,
 14 which used the permissive phrase “may be” but not the term “privilege,” “creates a personal
 15 privilege for national banks” to choose venue). The statute makes clear that FDIC Banks may
 16 charge interest at specified rates “notwithstanding” any state law, which “is hereby preempted.”
 17 12 U.S.C. § 1831d(a). The FDIC’s rulemaking acknowledges as much. AR 210-11.

18 The FDIC further argues that even if Congress had used the term “non-transferable
 19 privilege,” the statute would still be ambiguous. FDIC Br. at 9-10. The FDIC’s argument appears
 20 to rest on the erroneous premise that to be clear, a statute must foreclose every possible
 21 interpretation, however unnatural. That is not the standard. The Court must be able to discern the
 22 intent of Congress, and it can do so from the plain language of § 1831d.

23 **C. Section 1831d Does Not Contain Gaps for the FDIC To Fill**

24 The FDIC also attempts to create the appearance of ambiguity by conflating two issues: (1)
 25 what happens to the validity of a loan’s interest rate after subsequent changes in state usury law,
 26 and (2) what happens to the validity of a loan’s interest rate after an FDIC Bank transfers the
 27 loan. FDIC Br. at 7-10. The FDIC’s framing of these issues as a question about the “point in time
 28 the validity of the interest rates should be determined” is an attempt to create gaps that do not

1 actually exist: changes in state law generally are not retroactive, and as discussed above, § 1831d
2 itself states that it applies to FDIC Banks and thus does not apply after FDIC Banks transfer their
3 loans. Put simply, § 1831d provides that an FDIC Bank may charge interest as allowed by the law
4 of its home state (or at other specified rates) and disregard the usury law of its host state; it does
5 nothing more. Contrary to the FDIC’s argument, the Provision does not fill any “gaps”; rather, it
6 impermissibly expands the scope of § 1831d, intruding into areas regulated by state law.

7 As discussed in Plaintiffs’ opening brief, all statutes necessarily speak to certain issues but
8 remain silent on others. Each statute, too, is necessarily limited in scope; an agency is not
9 authorized to promulgate rules extending the statute’s reach under the guise of filling gaps. A
10 “statute’s silence on a given issue does not confer gap-filling power on an agency unless the
11 question is in fact a gap—an ambiguity tied up with the provisions of the statute.” *Lin-Zheng v.*
12 *Att’y. Gen.*, 557 F.3d 147, 156 (3d Cir. 2009) (quotation marks and citation omitted). In *Lin-*
13 *Zheng*, for example, the court held that a statute granting refugee status to a “person who has been
14 forced to . . . undergo” forced sterilization was not ambiguous, even though it was silent on
15 whether spouses were eligible. *Id.* at 155-57 (also stating that Congress could have drafted
16 different language if it had intended otherwise). The court held that the agency “‘put aside’ the
17 very statutory text that should have controlled its inquiry into congressional intent” and erred in
18 concluding that the statute’s omission of spouses was not determinative. *Id.* at 157. Just because a
19 statute does not “explicitly preclude[]” an interpretation does not mean there is a statutory gap:
20 “That approach would create an ‘ambiguity’ in almost all statutes, necessitating deference to
21 nearly all agency determinations. Nothing in the Supreme Court’s *Chevron* opinion suggests this
22 result, which is inconsistent with traditional modes of statutory interpretation.” *Prestol Espinal v.*
23 *Att’y Gen.*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting attempt to “manufacture[] an ambiguity
24 from Congress’ failure to specifically foreclose each exception that could possibly be conjured or
25 imagined”); *see also Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 525 (2009) (“the
26 presence of some uncertainty does not expand *Chevron* deference to cover virtually any
27 interpretation of [the statute]”).

28 In the context of preemption, where a federal statute grants an agency the authority to

1 displace state law on certain issues but is silent on others, courts regularly interpret this silence to
 2 mean that Congress did not intend for the agency to regulate those issues and, instead, intended to
 3 leave regulation to the states. *See, e.g., Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)
 4 (“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that
 5 matters beyond that reach are not pre-empted”); *In re Volkswagen “Clean Diesel” Mktg., Sales*
 6 *Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201, 1220 (9th Cir. 2020) (Congress’s ‘certain awareness
 7 of the prevalence of state’ law, coupled with its ‘silence on the issue,’ ‘is powerful evidence that
 8 Congress did not intend’ to preempt [state] laws.”) (quoting *Wyeth v. Levine*, 555 U.S. 555, 575
 9 (2009)). That is, when a statute expressly preempts state law in some areas but is silent on others,
 10 Congress has unambiguously left the areas not addressed to state law, and so outside the
 11 boundaries of the agency’s regulatory authority. As the FDIC’s cited authority states,
 12 “*Chevron* and later cases find in unambiguous language a clear sign that Congress
 13 did *not* delegate gap-filling authority to an agency” *United States v. Home Concrete &*
 14 *Supply, LLC*, 566 U.S. 478, 488 (2012).⁷

15 1. There Is No Timing Gap

16 The first purported “gap,” concerning when the validity of an interest rate is determined,
 17 supposedly clarifies an ambiguity about situations in which the home state’s usury law changes
 18 after a loan is made. FDIC Br. at 7. Although Plaintiffs do not challenge the FDIC’s rule as it
 19 pertains to changes in state law so long as the FDIC Bank continues to hold the loan, there is no
 20 ambiguity to clarify: changes in state law generally do not retroactively alter contractual
 21 obligations. *See, e.g., Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) (“the presumption
 22 against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine
 23 centuries older than our Republic”); *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835
 24 (9th Cir. 1997), *opinion amended on denial of reh’g*, 125 F.3d 1281 (9th Cir. 1997) (“Cases

25
 26 ⁷ The FDIC selectively quotes *Home Concrete* for the proposition that statutory silence means
 27 that Congress has “likely delegate[ed] gap-filling power to the agency.” FDIC Br. at 7. But *Home*
 28 *Concrete* makes clear that there must be more than mere silence to conclude that an agency has
 “gap-filling power.” *Home Concrete*, 566 U.S. at 488-90 (following judicial precedent that
 construed statute’s scope based on statutory language, legislative history, and statutory context
 and concluding that there was no gap for agency to fill).

1 involving settled contract and property rights, for example, require predictability and stability and
2 are generally inappropriate candidates for statutory retroactivity. Similarly, the courts
3 presumptively should not apply statutes affecting substantive rights, liabilities, or duties to
4 conduct arising before their enactment.” (quotation marks and citations omitted)); *Smith v.*
5 *Mercer*, 172 S.E.2d 489, 494 (N.C. 1970) (“Ordinarily, an intention to give a statute a retroactive
6 operation will not be inferred.” (citation and quotation marks omitted)).

7 The FDIC fails to show there is any ambiguity as to whether permissibility of interest rates
8 under § 1831d would be affected retroactively by subsequent changes in state usury law.
9 Accordingly, this nonexistent gap is not a valid justification for the Provision allowing FDIC
10 Banks to transfer their preemption rights to non-banks.

11 **2. There Is No Transfer Gap**

12 The FDIC asserts that “§ 1831d is silent with respect to what happens, upon loan transfer, to
13 the validity of the interest-rate terms of loans made under its authority” and that the Provision
14 clarifies that interest rates permissible under § 1831d are not affected by loan transfer. FDIC Br.
15 at 3, 8; 12 C.F.R. § 331.4(e) (“Whether interest on a loan is permissible under [§ 1831d] is
16 determined as of the date the loan was made. Interest on a loan that is permissible under [§
17 1831d] shall not be affected by . . . the sale, assignment, or other transfer of the loan . . .”). The
18 FDIC arrived at this conclusion by purporting to interpret FDIC Banks’ “power to make loans
19 under Section 1831d,” which is not a power that Congress granted in § 1831d, but which instead
20 comes from state law. But even if the power to transfer loans were implicit in § 1831d (and it is
21 not), it does not imply the power to transfer the statutory privilege of preemption.

22 **a. The FDIC Is Not Authorized To Interpret the State-Law-** 23 **Created Power To Make or Transfer Loans**

24 The FDIC acknowledges, as it must, that FDIC Banks obtain their powers to make and
25 transfer loans from state law. AR 213 (“State banking laws . . . typically grant State banks the
26 power to sell or transfer loans, and more generally, to engage in banking activities . . . and
27
28

1 activities that are ‘incidental to banking.’”).⁸ The FDIC does not contest that its rulemaking
 2 authority does not extend to the interpretation of state law. Nor does it contest that it lacks
 3 expertise to construe the states’ laws and that it is entitled to no deference when it does so. *See*
 4 *Pls.’ Br.* at 17-18. The FDIC does not, because it cannot, explain the source of its authority to
 5 interpret these state-created powers to make and transfer loans as including the power to transfer
 6 the interest rate permitted by § 1831d.

7 Nevertheless, the FDIC insists that it is interpreting § 1831d, not state law. It argues that, as
 8 in *Evans* and *Smiley*, state law supplies the “‘maximum permitted interest rate’ that banks may
 9 charge, not the meaning of terms in the federal statute.” FDIC Br. at 16-17. The Court in *Evans*
 10 and *Smiley*, however, interpreted banking terms (“discount” and “interest,” respectively) that
 11 Congress actually used in the relevant federal statutes. *See supra* Section II.A. The FDIC does no
 12 such thing here, but rather refers to activities in which FDIC Banks engage, like their state-
 13 authorized power to make loans, then vaguely claims that it is interpreting “statutory language.”
 14 The FDIC’s imprecision cannot mask the reality that it is not, in fact, interpreting any part of §
 15 1831d. Moreover, *Evans* and *Smiley* (as well as *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1
 16 (2003), another case the FDIC cites) involved national banks, which derive their power to engage
 17 in banking activities from federal law. 12 U.S.C. § 24(Seventh) (granting national banks “all such
 18 incidental powers as shall be necessary to carry on the business of banking”). State banks,
 19 however, receive such powers from state, not federal, law. *See, e.g.*, Cal. Fin. Code § 109; 205 Ill.
 20 Comp. Stat. Ann. 5/3; N.Y. Banking Law § 96(1); *see also* AR 213.

21 **b. The Power To Transfer Loans Does Not Include the Power To**
 22 **Transfer the Statutory Privilege of Preemption**

23 To bolster its claims that FDIC Banks have the implicit power to transfer loans at interest
 24 rates permitted by § 1831d, the FDIC repeatedly invokes the contract-law doctrine of assignment.
 25 Relying on the “historical practice and fundamental principles of contract law regarding
 26 assignments,” along with the absence of the words “non-transferable privilege” or “exemption” in

27 ⁸ State law also regulates non-bank lenders, which are required to obtain state licenses and follow
 28 state-law restrictions. *See, e.g.*, Cal. Fin. Code §§ 22009, 22100; 815 Ill. Comp. Stat. 122/3-3;
 N.J. Stat. Ann. § 17:11C-1 *et seq.*

1 § 1831d, the FDIC argues that ordinary contract principles apply and that FDIC Banks' right to
2 charge interest at the rate permitted by § 1831d may be transferred with the loan. FDIC Br. at 8-9.
3 While a contractual interest-rate term might be transferred under the principles of contract law, a
4 statutory right—like § 1831d's right to charge that contract rate even if state law does not permit
5 it—cannot be transferred without statutory authorization. Thus, there is no significance to be
6 gleaned from Congress's omission of words like “non-transferrable privilege” and no inferences
7 to be made based on the state of contract law when Congress passed § 1831d.⁹

8 The Sixth Circuit's opinion in *National Enterprises, Inc. v. Smith* makes clear that statutory
9 rights granted to certain entities may not be sold, transferred, or assigned as part of a contractual
10 assignment, even if the statute at issue does not expressly use the terms “privilege” or “non-
11 transferable.” 114 F.3d 561 (6th Cir. 1997). In *Smith*, the defendant-borrower leased a yacht from
12 a bank. *Id.* at 562. The bank subsequently failed, and its assets, including the yacht lease, were
13 taken over by a federal agency, the Resolution Trust Corporation (“RTC”). *Id.* Later, RTC “sold
14 and assigned all of its rights, title and interest in the Lease” to the plaintiff, a private company,
15 and after the defendant failed to make his required monthly payments, the plaintiff filed suit
16 against him in federal court. *Id.* at 562-63. A federal statute gave RTC the right to bring suits in
17 federal court, and the plaintiff claimed that RTC, by assigning the lease and its rights to the
18 plaintiff, had assigned RTC's statutory right to sue in federal court. *Id.* at 563. The court rejected
19 that argument, holding that the statutory right “applies solely to RTC” and that assignment of the
20 lease “could not effectively transfer” that right to the plaintiff. *Id.* at 563, 565. The court, noting
21 that “RTC cannot contractually assign federal jurisdiction to another party absent statutory
22 authorization,” stated that “[i]f Congress had wished to extend the right to sue in federal court to
23 the RTC's assignees, it could have explicitly done so in the statutory language.” *Id.* at 564. Other
24 courts have similarly held that statutory rights cannot be assigned by contract. *E.g.*,
25 *DaimlerChrysler Servs. N. Am., LLC v. Comm'r of Revenue Servs.*, 875 A.2d 28, 38, 39 (Conn.

26
27 ⁹ The FDIC invokes *Planters, Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005),
28 and *Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735 (1979), in support of its assignability
arguments. FDIC Br. at 9, 10. These cases are inapposite. See *supra* Section II.A at 9; see *infra*
Section II.C.2(b) at 18-19.

1 2005) (the right to a sales tax credit, which “arises by virtue of a statute,” “is not one incident to
2 the contract and assignable on that basis” but rather may be assigned only if that right “is
3 conferred pursuant to statute”; “absent an express indication from the legislature that such a right
4 could be assigned, the plaintiff cannot invoke the tax credit by virtue of its status as an assignee”).
5 Thus, an FDIC Bank may sell or transfer its loans, but it cannot sell or transfer its statutory right
6 to preempt otherwise applicable state law.

7 Although the FDIC does not expressly rely on the purported “valid-when-made” “doctrine,”
8 its explanation for the Provision is essentially identical to it: if a loan’s interest rate is “valid”
9 under § 1831d when an FDIC Bank originates the loan, it should remain so—and state usury law
10 should be preempted—even after the bank sells it to a non-bank. AR 844; FDIC Br. at vii, 3, 7, 8.
11 But this “doctrine” is, in fact, a modern invention whose purported antecedents, *Nichols* and
12 *Gaither*, have nothing to do with the transferability of preemption privileges. These cases
13 involved the now-obsolete law of transferable notes and merely held that, if a lender originates a
14 non-usurious loan and then sells the loan at a discount, whether the interest rate is usurious is
15 calculated based on the principal amount borrowed, not based on the price at which the assignee
16 purchased the loan. *See* Pls.’s Br. at 12 n.5; AR 355-56, 390-91, 396-99; Br. of Prof. Adam J.
17 Levitin as *Amicus Curiae* [Dkt. No. 50] at 13-15.

18 Even the handful of modern cases cited by the FDIC and *amici* that supposedly apply the
19 “valid-when-made” “doctrine” are inapplicable. *Robinson v. Nat’l Collegiate Student Loan Tr.*
20 *2006-2*, No. 20-cv-10203, 2021 WL 1293707 (D. Mass. Apr. 7, 2021), and *FDIC v. Lattimore*
21 *Land Corp.*, 656 F.2d 139 (5th Cir. 1981), both concerned national banks, not FDIC Banks, that
22 receive their powers to charge interest from federal, not state, law. Moreover, in *Robinson*, the
23 plaintiffs did not dispute the validity of the OCC’s “valid-when-made” rule; thus, the court
24 applied that rule without questioning the legitimacy of the “valid-when-made” concept underlying
25 the rule. 2021 WL 1293707 at *5. In *Lattimore*, the national bank was the assignee, not the
26 assignor, so the transferability of that bank’s statutory preemption privileges was not at issue. 656
27 F.2d at 141. Three other cases that the FDIC and its amici cite—*Galatti v. Alliance Funding Co.,*
28 *Inc.*, 644 N.Y.S.2d 330 (App. Div. 1996); *Olvera*, 431 F.3d at 285; and *Strike*, 92 Cal. App. 3d at

1 735—do not mention § 1831d or § 85 at all and instead merely address whether state laws exempt
 2 certain assignees from those same states’ interest-rate caps. Even if these cases suggest that some
 3 state laws incorporate aspects of “valid-when-made,” they do not provide support for the FDIC’s
 4 argument that Congress intended to do so in § 1831d.

5 **D. The Provision Unlawfully Regulates the Conduct of Non-banks**

6 The FDIC does not dispute that it lacks authority to regulate non-banks, but argues instead
 7 that the Provision only regulates the conduct and rights of FDIC Banks. FDIC Br. at 15-16. But as
 8 the FDIC admits, the Provision applies not to FDIC Banks but to “*loans made by [FDIC Banks]*
 9 regardless of whether such loans are held by the bank to maturity, or are ‘subsequently assigned
 10 to another bank or to a non-bank.’” *Id.* at 15 (emphasis added). The Provision has no direct effect
 11 on the permissible actions of FDIC Banks, since § 1831d already preempts state rate caps as
 12 applied to FDIC Banks and, as the FDIC concedes, banks’ power to sell or transfer loans is
 13 granted by state law, not federal law. AR 213. That is, when a loan originated by an FDIC Bank is
 14 “held by the bank to maturity,” or is “subsequently assigned to another bank,” FDIC Br. at 15, §
 15 1831d already applies to preempt state rate caps. As such, the only application of the Provision is
 16 where a loan originated by an FDIC Bank is “subsequently assigned . . . to a non-bank.” *Id.* In
 17 other words, *only* the conduct of non-banks is directly governed.

18 The FDIC claims the Provision has only “indirect effects” on non-banks, which “do not
 19 place the rule outside the agency’s authority.” FDIC Br. at 16 (citing *FERC v. Electric Power*
 20 *Supply Ass’n*, 577 U.S. 260 (2016)). In *FERC*, the Court made clear that the agency, which had
 21 statutory authority to regulate wholesale but not retail electricity sales, could not “take an action
 22 transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates” because
 23 regulation of retail sales “is a job for the States alone.” *FERC*, 577 U.S. at 279-80. The agency’s
 24 rule, which required wholesale market operators to make certain payments at certain rates,
 25 directly regulated the wholesale market; even if it had indirect effects on the retail market, the
 26 rule “addresse[d]—and addresse[d] only—transactions occurring on the wholesale market.” *Id.* at
 27 265, 282. Here, in contrast, the Provision applies only upon an FDIC Bank’s “sale, assignment, or
 28 other transfer of the loan.” 12 C.F.R. § 331.4(e). By extending § 1831d preemption to non-bank

1 loan buyers, the FDIC governs the rate those non-banks can charge, which “is a job for the States
2 alone.”

3 **E. The Court Need Not Consider *Chevron*’s Second Step, But If It Does, the**
4 **FDIC Has Not Construed the Statute in a Permissible Way**

5 As discussed above, § 1831d unambiguously limits state rate cap preemption to FDIC
6 Banks; thus, the Provision impermissibly contradicts the statute. However, even if § 1831d were
7 ambiguous and *Chevron* step two is warranted, the Provision is unlawful because it is an
8 unreasonable interpretation of § 1831d.

9 In *Chevron* step two, courts determine whether an agency reasonably interpreted an
10 ambiguous statute. Courts proceed to *Chevron*’s second step “[i]f, but only if, the statute is
11 ambiguous after using ordinary tools of construction.” *Medina Tovar*, 982 F.3d at 635. Further,
12 “[b]ecause the range of permissible interpretations of a statute is limited by the extent of its
13 ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges
14 from any realistic meaning of the statute lest the agency’s action be held unreasonable.”
15 *Massachusetts*, 93 F.3d at 893. Courts should also apply traditional presumptions—including the
16 presumption against preemption of state laws in areas of traditional state regulations—and other
17 canons of construction in determining whether an agency’s interpretation is reasonable, since
18 those canons constrain the number of reasonable ways a statutory ambiguity may be interpreted.
19 *Id.* at 893-94.¹⁰

20 Even if the Court finds § 1831d to be ambiguous, the FDIC’s expansion of preemption to
21 non-banks is not a permissible interpretation of it. As the *Massachusetts* court held, “[i]n light of
22 the powerful and well-established presumption against extending a preemption statute to matters
23 not clearly addressed in the statute in areas of traditional state control, [the court] cannot credit an
24 interpretation of an explicit preemption provision” that “may sweepingly preclude state rules” in

25 ¹⁰ The FDIC argues that Plaintiffs’ arbitrary and capricious claim, *see* Pls.’ Br. at 18-24, should
26 be analyzed under the same standard as *Chevron* step two. FDIC Br. at 21 (“Because the FDIC’s
27 interpretation is reasonable under *Chevron* Step Two, it is not arbitrary and capricious.”).
28 Plaintiffs maintain the two claims are separate and should be analyzed separately. *See infra*
Section III.A. If the Court considers the two together, however, Plaintiffs’ arguments that the
Provision is arbitrary and capricious support the conclusion that the Provision is not a reasonable
interpretation of § 1831d. *See* Pls.’ Br. at 18-24.

1 those areas of traditional state control. *Massachusetts*, 93 F.3d at 896. Usury law, which protects
2 consumers from predatory loans, is an area of traditional state control and so the presumption
3 against extending preemption applies. *See* Pls.’ Br. at 16. The FDIC’s interpretation of § 1831d
4 would eviscerate state rate caps and usher in increased predatory lending “rent-a-bank” schemes.

5 Although the FDIC claims, citing *Smiley*, that the presumption against preemption should
6 not apply because the provision purportedly interprets the substantive meaning of § 1831d, FDIC
7 Br. at 18, these are not mutually exclusive categories: an agency’s construction of a statute’s
8 “scope and meaning” may preempt state law. The Supreme Court has squarely rejected the claim
9 that rules “merely interpret[ing]” a statute’s meaning are not preemptive. *Cuomo*, 557 U.S. at 535
10 (quotation marks and citation omitted). In *Cuomo*, the Court rejected the argument that the OCC’s
11 regulation did not declare the preemptive scope of a statute but merely interpreted the statutory
12 term “visitorial powers.” *Id.* It held that the regulation was preemptive because, since the purpose
13 and function of the statute was to allocate authority between state and federal government, any
14 interpretation of it “necessarily declares the pre-emptive scope of the NBA.” *Id.* (quotation marks
15 and citation omitted). Likewise, the Provision “necessarily declares” § 1831d’s preemptive scope
16 by expanding to loan buyers the statute’s exemption from state usury law.

17 The FDIC’s other arguments that its interpretation is reasonable under *Chevron* step two
18 also fail. Although the FDIC claims the Provision carries out the purpose of § 1831d, FDIC Br. at
19 19-20, Congress’s stated purpose in passing the statute does not support the Provision. *See supra*
20 Section I.B. The FDIC’s claims regarding the historical and legal context of § 1831d’s terms and
21 the “well-established principles of contract law,” FDIC Br. at 19-20, rely on inapt case law and
22 conflate contract-law principles with statutory privileges. *See supra* Section II.A at 9, Section
23 II.C.2(b). And far from “buttress[ing]” the FDIC’s interpretation, FDIC Br. at 19, § 1735f-7a
24 supports § 1831d’s plain text that Congress intended to limit preemption to FDIC Banks. *See*
25 *supra* Section I.C.2. Finally, *Strike* and *Olvera*, which the FDIC claims support the Provision,
26 FDIC Br. at 20-21, are irrelevant to the issues in this case because they address issues of state
27 law.

28 The FDIC insists that the Court must uphold its interpretation of § 1831d because the

1 statute’s text does not “unambiguously preclude” it. FDIC Br. at 7. This is not the standard. As
2 the court in *Massachusetts* stated in rejecting a similar argument, an agency’s interpretation,
3 “while perhaps not conclusively forbidden by the statute itself, could not be deemed reasonable in
4 light of the [statutes’] text and structure *as well as* the traditional presumption against the federal
5 preemption of state rules in areas of traditional state regulation.” *Massachusetts*, 93 F.3d at 894
6 (also stating that “even if we defer, we cannot conclude that a reading of [the statute] that could
7 easily preclude most, if not all, such local regulation . . . reasonably resolves any ambiguity that
8 might lurk in the statute”); *see also Prestol*, 653 F.3d at 220-21 (rejecting agency’s argument that
9 court should accept its interpretation where “nothing in the text of the statute explicitly precludes”
10 it, noting that would “necessitat[e] deference to nearly all agency determinations” and “is
11 inconsistent with traditional modes of statutory interpretation.”) Here, in light of these factors, the
12 FDIC’s construction is not reasonable.

13 **III. THE PROVISION IS ARBITRARY AND CAPRICIOUS**

14 The Court should also set aside the Provision for the independent reason that it is arbitrary
15 and capricious.

16 **A. The Factors Established in *Motor Vehicle Mfrs. Ass’n v. State Farm* Apply**

17 The FDIC argues that the Supreme Court’s decision in *Motor Vehicle Mfrs. Ass’n v. State*
18 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), has no bearing on this case, claiming that the
19 “arbitrary and capriciousness” inquiry is answered under *Chevron* step two and “[a]ccordingly,
20 the Court can stop its inquiry here.” FDIC Br. at 21. To the contrary, the Ninth Circuit has made
21 clear that *State Farm* and *Chevron* provide “related but distinct standards”: courts apply *State*
22 *Farm* to “evaluate whether a rule is procedurally defective as a result of flaws in the agency’s
23 decisionmaking process,” and *Chevron* to “evaluate whether the conclusion reached at the end of
24 that process—an agency’s interpretation of a statutory provision it administers—is reasonable.”
25 *Altera Corp. v. IRS*, 926 F.3d 1061, 1075 (9th Cir. 2019); *see also Encino Motorcars, LLC v.*
26 *Navarro*, 136 S. Ct. 2117, 2125 (2016) (“where a proper challenge is raised to the agency
27 procedures, and those procedures are defective, a court should not accord *Chevron* deference to
28 the agency interpretation”). A litigant, then, may challenge both the reasonableness of a rule

1 under *Chevron* and the “procedural adequacy of the APA process” under *State Farm*, although
2 there are “circumstances when the two analyses may overlap.” *Id.* at 1075, 1075 n.5. Here,
3 Plaintiffs challenge the Provision on the grounds that the FDIC’s decision-making process was
4 defective and that the conclusion it reached at the end of that process was unreasonable; therefore,
5 the *State Farm* factors apply.¹¹

6 The FDIC also claims that *State Farm* “does not apply to an agency regulation addressing
7 an issue of statutory interpretation for the first time, as here.” FDIC Br. at 21. But while “*the*
8 *reasonableness* of ‘[a]n agency’s initial interpretation of a statutory provision should be evaluated
9 only under the *Chevron* framework,’ which looks to whether the interpretation is substantively
10 reasonable, [b]y contrast, ‘*State Farm* is used to evaluate whether a rule is procedurally
11 defective’” *Nat. Res. Def. Council, Inc. v. EPA*, 961 F.3d 160, 170 (2d Cir. 2020) (quoting
12 *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 521, 523 (2d Cir.
13 2017), and citing *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 502 n.20 (2002))
14 (emphasis added). Where both the agency’s substantive interpretation and its procedure is
15 challenged, both standards apply, even where an agency interprets a statute for the first time. *Id.*
16 at 170-71 (evaluating procedural challenge to agency’s “initial interpretation” of statute under
17 *State Farm* and evaluating substantive reasonableness of interpretation under *Chevron*); *see also*
18 *In re Vestavia Hills, Ltd. U.S. Small Bus. Admin.*, No. 20-cv-01308, 2021 WL 1165038 at *1-2, 8-
19 9, 13-14 (S.D. Cal. Mar. 26, 2021) (applying *Chevron* analysis to evaluate whether agency, in its
20 first interpretation of the Paycheck Protection Program statute, had statutory authority to issue
21 interim final rules interpreting Paycheck Protection Program statute as excluding businesses in
22 bankruptcy from loan eligibility, and applying *State Farm* analysis to evaluate whether agency’s
23 procedure in issuing interim final rules was arbitrary and capricious).

24 ¹¹ None of the FDIC’s cited cases are to the contrary. *See Agape Church, Inc. v. FCC*, 738 F.3d
25 397, 410 (D.C. Cir. 2013) (noting only that the analysis is “often” the same and applying the *State*
26 *Farm* standard to the “arbitrary and capricious” review); *Judulang v. Holder*, 132 S. Ct. 476, 483
27 n.7 (2011) (conducting “‘arbitrary [or] capricious review’ under the APA” and declining to apply
28 *Chevron* step two because agency action “is not an interpretation of any statutory language—nor
could it be, given that [statute] does not mention deportation cases [subject of agency’s action]”);
Harkonen v. DOJ, 800 F.3d 1143, 1150 (9th Cir. 2015) (applying *Chevron* step two to
regulation’s definition of “dissemination” to exclude information distributed through press
releases).

1 **B. The Provision is Arbitrary and Capricious**

2 As Plaintiffs demonstrated in their opening brief, the Provision is arbitrary and capricious
3 because the FDIC failed to consider important aspects of the problem that the Provision
4 purportedly seeks to address, provide the minimal level of analysis required by the APA, or
5 acknowledge and explain its departure from its previous policy against rent-a-bank schemes. Pls.’
6 Br. at 18-24. The FDIC’s responses lack merit.

7 The FDIC continues to gloss over the Provision’s facilitation of rent-a-bank schemes and its
8 impact on the true lender doctrine, as well as how it conflicts with the agency’s stated position
9 against rent-a-bank schemes. The FDIC does not contest that the Provision allows non-bank
10 buyers of FDIC Bank loans to charge interest at the same rates that the FDIC Bank charged even
11 if those rates exceed state rate caps. Because rent-a-bank schemes rely on precisely this type of
12 arrangement, the FDIC is wrong to deny that consideration of the Provision’s effect on rent-a-
13 bank schemes is an important aspect of the problem. As explained in Plaintiffs’ opening brief, the
14 interplay between the true lender doctrine and the Provision also required the FDIC to
15 meaningfully consider the true lender doctrine in its rulemaking; the FDIC did not. Pls.’ Br. at 20-
16 21.

17 The FDIC claims that it is not reversing position and that the Provision does not implicate
18 rent-a-bank schemes or the true lender doctrine because the Provision only applies “if a bank
19 actually made the loan.” FDIC Br. at 22. But many rent-a-bank schemes involve loans
20 purportedly originated by banks, *see, e.g.*, AR 903-05, a fact the FDIC ignores. The APA requires
21 agencies to acknowledge concerns raised by “relevant and significant public comments” and to
22 “respond to them in a meaningful way, not blithely dismiss them as ‘outside the limited scope of
23 this rulemaking.’” *Catholic Legal Immigr. Network v. Exec. Off. for Immigr. Rev.*, No. 20-cv-
24 03812, 2021 WL 184359, at *12 (D.D.C. Jan. 18, 2021) (citation omitted); *accord PPG Indus.,*
25 *Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980) (granting petition for review of agency action
26 where agency gave only “perfunctory treatment” of comments and “conclusory” statements that it
27 had considered all relevant factors). The FDIC’s mere statement that it does not condone rent-a-
28 bank schemes is an insufficient response to comments that the Provision furthers those schemes,

1 and choosing to not address true-lender issues is an insufficient response to comments that the
2 Provision creates significant uncertainty about those issues. The Provision is arbitrary and
3 capricious not because the FDIC arrived at a “policy balance” that Plaintiffs disagree with, *see*
4 FDIC Br. at 23, but because it paid only “lip service acknowledgement of the problems,”
5 “fail[ing] to contend meaningfully with the valid concerns and criticisms raised by commenters.”
6 *District of Columbia v. U.S. Dep’t of Agric.*, 496 F. Supp. 3d 213, 244 (D.D.C. 2020)
7 (invalidating agency rule). While agencies may take incremental steps to address a regulatory
8 problem, the Provision exacerbates rent-a-bank problems and increases uncertainty about true
9 lender issues and the number and complexity of true lender disputes. The Provision constitutes, in
10 substance if not form, a reversal of the FDIC’s previous stance, and the FDIC was obligated to
11 acknowledge and explain this inconsistency.

12 The FDIC argues that it was not required to provide empirical studies, FDIC Br. at 23-24,
13 rebutting an argument that Plaintiffs never made. Plaintiffs argued that the FDIC may not rely on
14 speculation about *Madden*’s negative effects or ignore evidence that contradicts the agency’s
15 premise that the inability to transfer preemption of state rate caps constrains bank liquidity. Pls’
16 Br. at 22-23. As this Court has held, a rule may be arbitrary and capricious if the agency
17 “ignore[s] information presented during the notice and comment period that contradict [the
18 agency’s] beliefs.” *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 540 (N.D. Cal. 2020).
19 The FDIC acknowledged that it “is not aware of any widespread or significant negative effects on
20 credit availability or securitization markets” resulting from the *Madden* decision, and the Record
21 includes evidence that banks’ inability to transfer preemption to loan buyers does not hamper
22 bank liquidity.” AR 220; Pls.’ Br. at 22-23. While the FDIC argues that Plaintiffs did not go into
23 detail about the evidence in the record, Plaintiffs cited examples in the Administrative Record that
24 the FDIC failed to address. Pls’ Br. at 22 (citing AR 353-54); *id.* at 22 n.7 (citing AR 856).

25 CONCLUSION

26 For the foregoing reasons, the Provision violates the APA and must be held unlawful and
27 set aside. 5 U.S.C. § 706(2)(A), (C).

28

1 Dated: June 17, 2021

Respectfully Submitted,

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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 PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT, AND VACATING DEFENDANT’S RULE

On August 6, 2021 at 9:00 a.m., the Court heard the Motion for Summary Judgment [Dkt. No. 47] brought by Plaintiffs the People of the State of California, the District of Columbia, the People of the State of Illinois, the People of the Commonwealth of Massachusetts, the State of Minnesota, the State of New Jersey, the People of the State of New York, and the State of North Carolina (collectively, “Plaintiffs”), asking that that the Court hold unlawful and set aside a provision of Defendant the Federal Deposit Insurance Corporation’s (“FDIC”) Federal Interest Rate Authority Rule, codified as part of 12 C.F.R. § 331.4(e), that provides, “Whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined as of the date the loan was made. Interest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act [12 U.S.C. § 1831d] shall not be affected by . . . the sale, assignment, or

1 other transfer of the loan, in whole or in part,” 85 Fed. Reg. 44,146-58 (July 22, 2020) (“Non-
2 bank Interest Provision” or “Provision”), and the Cross-Motion for Summary Judgment [Dkt. No.
3 56] brought by Defendant FDIC. Having considered the Administrative Record [Dkt. No. 44], all
4 papers filed in support of and in opposition to summary judgment, oral arguments of counsel, and
5 all other pleadings and papers filed herein, the Court grants summary judgment in Plaintiffs’
6 favor, denies Defendants’ cross-motion for summary judgment, and vacates the Non-bank Interest
7 Provision.

8 States have long used interest-rate caps to prevent predatory lending. *See Griffith v. State of*
9 *Conn.*, 218 U.S. 563, 568-69 (1910). Congress granted federally chartered national banks the
10 statutory right to charge interest at certain rates, exempting from compliance with state rate caps.
11 12 U.S.C. § 85 (allowing national banks to “take, receive, reserve, and charge” interest in excess
12 of state law). To ensure that federally insured, state-chartered banks and insured branches of
13 foreign banks (“FDIC Banks”) could compete on a level playing field with national banks,
14 Congress later gave FDIC Banks this same statutory privilege. 12 U.S.C. § 1831d. For the
15 following reasons, the FDIC’s Provision unlawfully extends preemption of state rate caps to any
16 entity—bank or not—that buys loans from an FDIC Bank. 85 Fed. Reg. at 44,146-58.

17 The FDIC’s interpretation, as expressed in the Provision, conflicts with the unambiguous
18 statutory text of § 1831d, which preempts state rate caps for FDIC Banks alone. 12 U.S.C. §
19 1831d (“[An FDIC Bank] may, notwithstanding any State constitution or statute which is hereby
20 preempted . . . take, receive, reserve, and charge on any loan or discount made . . . interest” at
21 certain rates”); *see, e.g., In re Cmty. Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005). Section
22 1831d’s codified purpose and statutory context also make clear that Congress intended to preempt
23 state law for FDIC Banks only, not to non-bank buyers of FDIC Banks loans. 12 U.S.C. §§
24 1831d(a)-(b), 1735f-7a; *Gavey Props./762 v. First Fed. Sav. & Loan Ass’n*, 845 F.2d 519, 521
25 (5th Cir. 1988) (“Without federal legislation, [state-chartered] institutions were being battered by
26 competition from national banks that were allowed to charge higher rates of interest by federal
27 law.”). Because the statute is clear, the FDIC lacks authority to extend preemption to non-bank
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1 loan buyers. *E.g.*, *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (where statute
2 is unambiguous, “judicial inquiry is complete”).

3 Because the statutory language is unambiguous, the FDIC’s interpretation is not entitled to
4 any deference. *E.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (no agency deference if
5 Congress was clear). Contrary to the FDIC’s assertions, § 1831d contains no ambiguity or
6 statutory gap as to what is exempted from state interest-rate caps: it exempts FDIC Banks. The
7 statute’s silence as to when the validity of a loan’s interest rate is determined and what happens to
8 that interest rate upon the loan’s transfer does not constitute gaps because § 1831d makes clear
9 that preemption only applies so long as an FDIC Bank holds the loan. *See Lin-Zheng v. Att’y.*
10 *Gen.*, 557 F.3d 147, 156 (3d Cir. 2009) (not all silences confer gap-filling power on an agency).
11 The FDIC’s claim that the power to make loans at certain interest rates implies the power to
12 transfer loans at those rates fails because § 1831d does not grant FDIC Banks the power to make
13 loans; that power comes from state law. AR 213. Furthermore, state rate cap preemption is a
14 statutory right that FDIC Banks may not sell, transfer, or assign. *See National Enterprises, Inc. v.*
15 *Smith*, 114 F.3d 561, 562 (6th Cir. 1997). The Provision also impermissibly regulates the conduct
16 of non-banks.

17 Even if § 1831d were ambiguous and analysis under *Chevron* step two were warranted, the
18 FDIC’s interpretation must be viewed in light of the well-established presumption against
19 preemption in areas traditionally regulated by the states, and is unreasonable. *See Chevron U.S.A.,*
20 *Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Altria Grp., Inc. v. Good*,
21 *555 U.S. 70, 77* (2008); *Massachusetts v. U.S. Dep’t of Transp.*, 93 F.3d 890, 897 (D.C. Cir.
22 1996).

23 The FDIC’s action is also arbitrary and capricious. Contrary to the FDIC’s arguments, the
24 Supreme Court’s opinion in *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463
25 U.S. 29 (1983), supplies the appropriate standard to evaluate whether the Provision is
26 procedurally defective. The FDIC failed to address important aspects of the problem its Provision
27 purports to address, including the Provision’s facilitation of “rent-a-bank” schemes and its
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1 creation of a regulatory vacuum. The evidence in the Administrative Record also undermines the
2 FDIC's alleged basis for the Provision, and the Provision conflicts with the FDIC's stated
3 position against predatory lending. *See State Farm*, 463 U.S. at 43; *Encino Motorcars v. Navarro*,
4 136 S. Ct. 2117, 2125-26 (2015).

5 For these reasons, the Court finds that the Provision is arbitrary, capricious, an abuse of
6 discretion, and otherwise not in accordance with law; is in excess of statutory jurisdiction,
7 authority, and limitations, and short of statutory right; and constitutes agency action taken without
8 observance of procedure required by law. The Provision thus violates the Administrative
9 Procedure Act, 5 U.S.C. § 706(2), and must be set aside.

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

- 11 1. Plaintiffs' Motion for Summary Judgment is **GRANTED**;
- 12 2. Defendant's Cross-Motion for Summary Judgment is **DENIED**; and
- 13 3. The Non-bank Interest Provision, 85 Fed. Reg. 44,146-58 (July 22, 2020) (codified as part
14 of 12 C.F.R. § 331.4(e)), is **VACATED**.

15
16
17 Dated:

By: _____
United States District Judge Jeffrey S.
White