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The Conference of State Bank Supervisors ("CSBS"), the nationwide organization of state banking regulators in the United States, challenges the Office of Comptroller of the Currency and Comptroller Keith Noreika's (collectively, "OCC") decision to create a new special-purpose national bank charter for financial technology ("fintech") and other nonbank companies (the "Nonbank Charter Decision"). CSBS contends that OCC lacks the requisite statutory authority under the National Bank Act ("NBA") to encroach upon the regulation of nonbanks by issuing national bank charters to institutions that do not take deposits, and therefore do not engage in the "business of banking," as that term is defined under the NBA and related federal banking laws.

OCC's actions allow chartered nonbanks to operate outside the bounds of existing state regulation, undermining the states' abilities to enforce their own laws and interfering with state sovereignty.

In December 2016, OCC formally announced a decision to begin chartering nonbanks after more than a year of study and deliberation. Compl. ¶¶ 52-55. It subsequently published a supplement to its Licensing Manual, which crystalized its position that it had the authority to issue national banking charters to institutions that neither take deposits nor are insured by the Federal Deposit Insurance Corporation ("FDIC"), and explicitly invited interested parties to initiate the application process. Id. ¶¶ 67-71. In an effort to distance itself from these actions, OCC relies upon unsworn assertions of counsel and a speech made months after the Complaint was filed to suggest that the future of the nonbank charter is uncertain. But the Court must evaluate standing, finality, and ripeness at the time Complaint is filed—and an agency cannot defeat these showings via post-hoc characterizations.

OCC portrays this case as premature, but that is incorrect. The case presents a well- defined, purely legal issue that is presumptively reviewable. Moreover, CSBS is entitled to "special solicitude" in the standing analysis because it brings this action on behalf of its sovereign state members. Massachusetts v EPA, 549 U.S. 497, 520 (2007). Courts repeatedly have held that mere conflict or tension between federal and state law constitutes sufficient injury for standing, and CSBS's allegation that the OCC's decision will interfere with the states' ability to enforce their consumer-protection and other laws is sufficient. CSBS has also sufficiently alleged a procedural injury resulting from OCC's failure to afford proper notice and comment before taking steps that affect substantive rights.

CSBS has also sufficiently alleged "final agency action." It is indisputable that 12 C.F.R. §5.20(e)(1) is final. As for the Nonbank Charter Decision, the agency has "made up its mind" to move forward, and its actions reflect the agency's definitive legal position on a purely legal question of statutory authority. Viewing finality pragmatically, as the Court must, it is clear that OCC is not retreating from the underlying statutory interpretation that CSBS challenges here.

The Court can and should test that underlying legal premise now—there is no point in either OCC or its charter applicants devoting resources to ultra vires charters that will be invalidated. And because this case presents a purely legal question, no further factual development is needed, and ripeness is presumed.

Nor is there merit to OCC's argument that CSBS's challenge to Section 5.20(e)(1) is time- barred. First, OCC's assertion that the statute of limitations must be strictly construed relies on bad law. In any event, OCC's reliance upon Section 5.20(e)(1) in making its more recent Nonbank Charter Decision, and its "reopening" of the issues underlying the regulation, permit CSBS to bring this action. And as a practical matter, CSBS still has the right to file a petition to rescind the regulation, which also would render its challenge timely. OCC's contention that CSBS has failed to state a claim is also unsupported. When all the traditional tools of statutory construction are taken into account, the proper interpretation of the "business of banking" is clear and unambiguous. The Court must consider the statutory context of the term, including a regulatory regime that encompasses not only the NBA, but also other federal banking statutes. Read together, these statutes reflect Congress' intent that the "business of banking" necessarily includes the taking of deposits.

First, the NBA expressly bars OCC from issuing a national bank charter unless the entity can lawfully engage in the business of banking—and to lawfully engage in the business of banking an entity must comply with the Federal Reserve Act ("FRA") by becoming an "insured bank" under the Federal Deposit Insurance Act ("FDIA"). Since the FDIA requires that a national bank take deposits before it can become an insured bank, an association cannot lawfully engage in the business of banking unless it receives deposits—unless Congress expressly exempts it from this requirement.

Additionally, any interpretation of the "business of banking" in the NBA must be consistent with the Bank Holding Company Act's ("BHCA") definition of "bank," given the complementary regulatory role of these statutes and the agencies that oversee them. Whitney v. National Bank of New Orleans & Trust Co., 379 U.S. 411 (1965). OCC cannot approve a charter that would have the effect of violating the BHCA—and the BHCA defines a "bank" as an organization that, at a minimum, engages in the business of receiving deposits and whose deposits are insured. OCC's interpretation improperly allows a nonbank to become an OCC-chartered national bank that escapes regulation under the BHCA.

The legislative history and historical context of the NBA further support the conclusion that a national bank must exercise the power of receiving deposits. Courts repeatedly interpreted deposit taking as indispensable to the business of banking during the years before and after the enactment of the NBA, and members of Congress referenced the central role of deposit taking during the debates surrounding the passage of the Act. OCC looks to an irrelevant 1866 tax statute that a contemporary scholar recognized was "valueless" outside of the tax context.

OCC mistakenly relies upon cases like Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995), to established alleged ambiguity. But that case did not consider, much less determine, whether OCC possesses the authority to charter a bank that does not exercise the power to receive deposits. Rather, the Court addressed the entirely separate question of whether OCC could permit an already chartered, full-service and insured bank to engage in additional banking activities beyond those that qualified it to receive a national bank charter. Thus, the case addressed the outer limits of the "business of banking," not the inner limits that are at issue here.

Ultimately, OCC has the power to charter a national bank only if it is organized to carry on the "business of banking" (which, under current law, requires taking deposits, at a minimum) or where Congress has provided specific authorization to charter an entity to carry on a special purpose. Where OCC has exceeded the limits of its chartering authority, the courts have struck down those efforts. See, .e.g., Indep. Bankers Ass'n of Am. v. Conover, 1985 U.S. Dist. LEXIS 22529, at *11 (M.D. Fla. Feb. 15, 1985). In some instances, Congress has adopted targeted legislation providing a limited expansion of OCC's chartering authority— in the case of trust

banks, for example. Had Congress believed OCC possessed broad authority to issue a charter to organizations not engaged in the business of banking, there would have been no need for such legislation. In fact, decades ago Congress declined to expand OCC's authority to charter "nonbank banks" and, instead, passed certain amendments to the BHCA closing a loophole that previously allowed nonbanks to escape regulation under that statute.

Even if the "business of banking" were ambiguous, OCC's interpretation fails because it is not based on a permissible construction of the statute. OCC ignores the statutory interplay and historical background surrounding the requirements for the establishment of a national bank and, instead, relies upon statutory provisions related to the establishment of, and restrictions on, bank branches. This interpretation nullifies any distinction between a "national banking association" and a mere "branch" of such an association. It also improperly expands OCC's chartering power through statutes that were designed to limit it. Further, the Supreme Court case upon which OCC heavily relies, Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987), offers no support for its interpretation.

OCC's attempt to wrest control over nonbank financial services providers by administrative fiat also violates the Tenth Amendment. When a federal agency seeks to expand its power into areas traditionally occupied by states, courts require a clear showing that Congress, acting through the agency, has approved such a result. OCC has no such approval, nor does it even argue that it has balanced state considerations, as required.

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