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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

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

BRIEF OF AMICUS CURIAE AMERICAN FINTECH COUNCIL IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: August 6, 2021
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Judge: Hon. Jeffrey S. White

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I. INTEREST OF AMICUS CURIAE

The American Fintech Council ("AFC") is an association of banks, financial technology ("fintech") companies, and investors operating in the marketplace lending industry. AFC was formed in March 2021 when the Marketplace Lending Association merged with the Online Lending Policy Institute. Marketplace lending is at the cutting edge of financial innovation, often involving fintech companies using advanced algorithms to pair lenders with borrowers who are often underserved by traditional banks. In one widespread form of marketplace lending, known as the bank partnership model, fintech companies partner with a bank. Using this model, fintech companies and banks work together to offer a variety of products online, including consumer and student loans, small business loans, equipment financing, and lines of credit.[1] The fintech company generally markets and processes loan applications through an online platform, while the bank originates and funds the loan. Although each partnership differs, the fintech company generally purchases the loan from the bank and either holds it, resells it into the secondary loan market, or packages it into a security that is then sold to an investor. This, in turn, frees up the bank's balance sheet to make more loans, often to underserved borrowers in underserved communities.

In structuring and developing responsible bank partnerships, AFC members rely on longstanding federal precedent recognizing the "valid when made" principle. That principle holds, consistent with the rule promulgated by the Federal Deposit Insurance Corporation ("FDIC") at issue in this case, that interest on a loan that is lawful at the time the loan is made by a bank remains lawful upon the sale of the loan to third parties. *See* Federal Interest Rate Authority, 85 Fed. Reg. 44146 (July 22, 2020). Members of AFC include both publicly and privately held companies, and investors have invested billions of dollars in these companies—and their technologies and capabilities—in reliance on this federal precedent.

The result is greater choice and transparency for consumers and small businesses seeking access to credit on fair terms. AFC's members originated, or helped originate, approximately $50 billion in loans in 2019 alone to borrowers that are not adequately served by traditional lenders. These loans are fair to

[1] *See generally* U.S. Dep't of the Treasury, *Opportunities and Challenges in Online Marketplace Lending* (2016) [hereinafter *2016 Treasury Report*], https://www.treasury.gov/connect/blog/Documents/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf.

borrowers: AFC's members have agreed to (i) not offer or acquire credit products, such as consumer loans, that exceed 36% APR; (ii) not characterize financial services products as something otherwise to avoid regulation; (iii) adhere, in facilitating loans to small businesses, to the Small Business Borrowers' Bill of Rights; (iv) require at least one year of operating history for admission to the association; and (v) advance standards of fairness and nondiscrimination.[2] As a Federal Reserve study has observed, loans made or facilitated by AFC's members often carry lower interest rates as compared to credit cards.[3] Indeed, the average personal loan made or facilitated by AFC's members through 2020 has a 15% APR.

AFC's goal is to promote a transparent, efficient, and customer-friendly financial system by supporting the responsible growth of the bank partnership lending model and the use of the secondary loan market to free capital to provide additional loans, fostering innovation in financial technology, and encouraging sound public policy. When banks partner with fintech companies to offer loans, the partnership (not just the bank) is subjected to federal oversight and scrutiny to ensure that it operates in a responsible manner—which the vast majority of bank partnerships, including those involving AFC's members, do. For those few fringe players that do not operate responsibly, the FDIC (as well as state regulators) has numerous tools at its disposal to shut down abusive lending programs—tools it has not hesitated to use when necessary (*see infra* pp. 20–21).

AFC and its members have a strong interest in the questions presented in this case. As many of AFC's members operate through responsible partnerships with state-chartered FDIC-insured banks and participate in the secondary loan market, they would be significantly affected should this case result in a determination that—contrary to the FDIC's rule—fintech companies may not rely on their bank partners to originate loans, and then sell them to third parties with their interest-rate terms intact. These strategic, responsible bank partnerships and the availability of a highly liquid secondary loan market are at the core of AFC members' business models. Without these partnerships or the ability to participate in the

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[2] *See Small Business Borrowers' Bill of Rights*, http://www.borrowersbillofrights.org.

[3] Eldar Beiseitov, *Unsecured Personal Loans Get a Boost from Fintech Lenders*, Fed. Rsrv. Bank of St. Louis (Jul. 16, 2019) (Figure 1), https://www.stlouisfed.org/publications/regional-economist/second-quarter-2019/unsecured-personal-loans-fintech.

secondary market, AFC members could not commit to lend tens of billions of dollars to underserved borrowers at no greater than 36% APR. For that reason, AFC previously submitted a letter strongly supporting the FDIC's rule in the administrative proceedings below.[4]

Plaintiffs' attempt to invalidate the FDIC's rule, if upheld, would call into question a well-established line of federal precedent, threatening AFC members' entire business model and the functioning of the secondary loan market and, with it, AFC members' ability to help the highest-risk borrowers access affordable credit. The responsible lending programs in which AFC members participate help to empower consumers to take control of their financial well-being and offer a safe and sound alternative to predatory lending products that perpetuate cycles of debt. A finding that disregards the federal rights of fintech companies' bank partners to make and then sell loans with their interest rates intact would detrimentally impact consumers nationwide by restricting access to credit for underserved consumers and small businesses, and upending expectations in the secondary market.

[4] The letter was submitted by the Marketplace Lending Association, which merged with the Online Lending Policy Institute to form AFC on March 3, 2021. *See* Administrative Record ("AR") 641–55. The Marketplace Lending Association filed an amicus brief in support of the OCC's motion for summary judgment in the parallel action. *See* Brief of Amicus Curiae Marketplace Lending Association, *California v. OCC*, No. 4:20-cv-05200-JSW (N.D. Cal. Jan. 22, 2021), ECF No. 66.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Responsible bank partnership models play a vital role in providing consumers access to affordable credit, while adhering to longstanding federal precedent regarding the power of banks to make and sell loans with their interest-rate terms intact. The FDIC rule ensures that this model remains a viable option for AFC's members, which include banks and fintech companies that partner to lower the cost of credit and increase access to capital. Plaintiffs' challenge to this rule threatens this model—and seeks to upend years of precedent—by claiming that state banks' right under federal law to make loans nationwide at the rates allowed by their home states, and then sell those loans to third parties, should be limited because of the banks' partnerships with nonbanks.

AFC urges this Court to protect the bank partnership model by upholding the FDIC's rule.

First, the FDIC's rule reasonably interprets section 27 of the Federal Deposit Insurance Act ("FDIA") and, therefore, this Court should defer to the FDIC's interpretation under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In construing this statute's ambiguities regarding when the validity of a loan's interest term should be determined and whether a bank can sell the loan to a third party with the interest term intact, the FDIC reasonably interprets a bank's authority to charge home-state interest rates consistent with the valid-when-made principle recognized under longstanding federal precedent. This federal precedent holds that interest on a loan that is lawful at the time the loan is made by a bank remains lawful upon the sale of the loan to a third party.

Second, the FDIC's decision to adopt the rule falls well "within the bounds of reasoned decisionmaking" and, therefore, is not arbitrary and capricious. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019). In support of the rule, the FDIC (i) recognizes that responsible bank partnerships with third parties play a critical role in increasing online access to credit in underserved communities; (ii) recognizes the adverse economic consequences of the Second Circuit's *Madden* decision that the rule would address, with the rule thus facilitating the sale of loans on the secondary loan market (which in turn frees up capital for banks to make additional loans); and (iii) reaffirms the FDIC's commitment to ensuring that third-party lending relationships are conducted in a responsible manner, consistent with FDIC guidance and the high lending standards of AFC members, which have been and remain committed to lending at no greater than 36% APR.

III. ARGUMENT

The FDIC's well-reasoned rule should be upheld under the deferential framework that applies to plaintiffs' challenge to the agency's rule. In reviewing a challenge to an agency rule, a court analyzes the "reasonableness of an agency's interpretation" of an ambiguous statute under the deferential *Chevron* framework, while the "reasonableness of an agency's decision-making *processes*" is reviewed under the Administrative Procedure Act's narrow arbitrary-and-capricious standard of review. *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (emphasis in original). Because the FDIC reasonably interprets an ambiguous federal statute consistently with the longstanding valid-when-made principle, and the FDIC's rule rests on a careful consideration of the relevant factors, this Court should reject plaintiffs' challenge.

A. The FDIC's Rule Reasonably Interprets Section 27 of the Federal Deposit Insurance Act Consistent With the "Valid When Made" Principle.

The FDIC's rule reasonably interprets section 27 of the Federal Deposit Insurance Act ("FDIA") governing state-chartered banks and insured branches of foreign banks (collectively, "state banks") and, thus, plaintiffs cannot prevail under the deferential framework set out in *Chevron*. The financial system relies heavily on federal laws and the consistency they offer to provide consumers with access to financial products and services at rates that work for them. AFC and its bank and fintech members understand the importance of each state's financial services regulatory requirements, but the variability in these requirements imposes significant burdens on those seeking to provide nationwide access to credit.

For this reason, more than 150 years ago (in 1864) Congress passed the National Bank Act, giving rise to a longstanding federal preemption and regulatory framework that continues today. *See* 12 U.S.C. § 85. As the Supreme Court has explained, "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking . . . is precisely what the NBA was designed to prevent." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13–14 (2007). Section 85 of the NBA grants a national bank the power to charge interest at the rates allowed in its home state in any state where the bank does business. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 313-14 (1978). Courts have long recognized that such "exportation" of interest rates prevents a state from enforcing its

usury laws against out-of-state national banks; but it is well established that such impairment "has always been implicit in the structure of the National Bank Act." *Id.* at 318.

This case involves the FDIC's interpretation of section 27 of the FDIA, which extended to state banks the same federal preemption of state usury laws enjoyed by national banks. In 1980, Congress enacted section 27 with the express goal of "prevent[ing] discrimination against State-chartered insured depository institutions . . . with respect to interest rates." 12 U.S.C. § 1831d(a). To achieve parity between national and state banks, Congress incorporated language from section 85 of the NBA into section 27, which grants a state bank the power to "charge on any loan or discount made . . . interest . . . at the rate allowed by the laws of the State . . . where the bank is located." *Id.*; *see* 12 U.S.C. § 85 (incorporating identical language). The laws of other states that purport to set different limits on interest rates are expressly "preempted for the purposes of" section 27. 12 U.S.C. § 1831d(a). Because section 27 was patterned after section 85 of the NBA, courts have held that the two provisions "should be interpreted the same way," or *in pari materia*. *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992). Accordingly, section 27 has consistently been applied to state banks in the same manner as section 85 has been applied to national banks. *See, e.g., id.*

The FDIC seeks to maintain continued parity between national and state banks through its rule, which is "fundamentally the same" as the OCC's parallel rule interpreting section 85 of the NBA. 85 Fed. Reg. at 44154. Specifically, the FDIC's rule resolves ambiguities in section 27 regarding (1) when the validity of the interest-rate term on a loan should be determined, and (2) whether a state bank (such as AFC's member banks) has the power to assign or sell loans at home-state interest rates to a third party (such as the fintech companies and investors that also comprise AFC's membership). *See* 85 Fed. Reg. 44146. Consistent with the OCC's parallel rule, the FDIC's rule provides that "[w]hether interest on a loan is permissible under section 27 . . . is determined as of the date the loan was made," and "shall not be affected by . . . the sale, assignment, or other transfer of the loan, in whole, or in part." 85 Fed. Reg. at 44158.

The FDIC reasonably interprets section 27 "consistent with" the valid-when-made principle of usury law (85 Fed. Reg. 44149), which the Supreme Court has characterized as a "cardinal rule." *Nichols v. Fearson*, 32 U.S. 103, 109 (1833). Specifically, the FDIC interprets section 27 to "reinforce[] parties'

established expectations" that interest on a loan that is permissible—that is, not usurious—when the loan is made does not become usurious when the loan is sold or assigned. 85 Fed. Reg. at 44149, 44151. This principle was well established when section 85 was enacted in 1864. *See Nichols*, 32 U.S. at 109. Congress is presumed to have enacted section 85 with the expectation that this well-established common law principle would apply, and to have incorporated it into section 27, which was patterned after section 85. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (noting, in the context of applying adjudicatory principles, that there is a presumption that Congress has legislated with the common law in mind). Accordingly, the FDIC appropriately interprets section 27 consistent with the common law principle that is today called "valid when made," which both Democratic and Republican administrations have embraced.[5]

Likewise, the FDIC reasonably resolves the two ambiguities in section 27 that the agency identifies in its rule. The FDIC reasonably construes the first ambiguity—when the validity of the interest-rate term should be determined—in a way that provides a "logical and fair rule." 85 Fed. Reg. at 44149. This aspect of the rule addresses situations where, for example, the usury laws of the state where a bank is located change after the bank makes a loan, and the loan's interest rate would be non-usurious under the old law but usurious under the new law. *See id.* at 44148. Section 27 does not explain whether the validity of the interest-rate term should be determined when the loan is made, or when a particular interest payment is taken or received. *See id.* at 44149. If the validity of the interest-rate term were determined when a particular interest payment is taken or received, borrowers would face uncertainty as to the permissible interest rate on their loans at any given time. By clarifying that its validity should be determined "as of

[5] U.S. Dep't of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* 93 (2018) (recognizing the "longstanding ability of banks and other financial institutions . . . to buy and sell validly made loans without the risk of coming into conflict with state interest-rate limits") [hereinafter *2018 Treasury Report*], https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf; Brief for the United States as Amicus Curiae, *Midland Funding, LLC v. Madden*, No. 15-610, 2016 WL 2997343, at *10–12 (U.S. May 24, 2016) (stating that section 85 "should be understood to incorporate" the valid-when-made principle) [hereinafter *United States Brief*].

the date the loan was made," the FDIC's interpretation "protects the parties' expectations and reliance interests at the time a loan is made," and provides a rule that is "easy to apply." *Id.*

The FDIC reasonably construes the second ambiguity—whether a state bank has the power to assign or sell loans at home-state interest rates to third parties—in a way that is consistent with a state bank's express power under section 27 "to make loans at particular rates." 85 Fed. Reg. at 44149. The FDIC recognizes that, since at least the mid-nineteenth century, the power to assign loans has been understood to be implicit in a state bank's power to make loans. *Id.* at 44149 & n. 31. For example, in 1848, the Supreme Court held that such a power was implicit in a state bank charter providing the power to make loans. *Planters' Bank v. Sharp*, 47 U.S. 301, 322–23 (1848). As the Supreme Court explained, "in discounting notes and managing its property in legitimate banking business . . . [a bank] must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more [liquidity] in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts." *Id.* at 323. Thus, a state bank's express power under section 27 to make loans at particular rates "necessarily includes the power to assign the loans at those rates." 85 Fed. Reg. at 44149.

While banks today have different reasons and opportunities to sell loans or interests in loans than they did in the mid-nineteenth century, the FDIC's rule recognizes that the ability to sell loans to a secondary market remains "indispensable" to a state bank's operations. 85 Fed. Reg. at 44151. That indispensability has persisted for over 150 years and continues to persist today through responsible partnerships with fintech companies, to which state banks sell loans to more efficiently meet customer needs (*see infra* pp. 9–13). By selling loans, banks also free up additional capital that can be used to make new loans. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 n.10 (1982) (recognizing as "critical" a savings association's ability to sell loans "to obtain funds to make additional home loans"). In addition, state banks continue to rely on the ability to sell loans "to properly maintain their capital and liquidity." 85 Fed. Reg. at 44151. However, a loan is not readily marketable unless its value can be ascertained. If ascertaining that value requires obtaining a legal opinion on which state's law governs the interest term of the loan after a sale, the combination of the compliance cost of doing so and the discounted price for the loan would burden the exercise of the authority to sell to an extent inconsistent with the grant of the power. *See McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 892 (9th Cir. 2020)

(imposing state compliance costs on purchasers of federal savings associations' loans decreases the value of the loan, thereby impeding the savings associations' ability to securitize and sell the loans). There is no evidence that Congress in 1980, or any Congress subsequently, intended that result.

The FDIC's authority to interpret section 27 is clear. The FDIC is charged with enforcement of banking laws, including section 27, and the FDIC's interpretations of the FDIA are entitled to substantial deference, particularly given "the complex statutory scheme that the FDIC administers." *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 430–32 (1986) (deferring to FDIC interpretation of FDIA); *see also, e.g.*, *Inv. Co. Inst. v. FDIC*, 815 F.2d 1540, 1550 (D.C. Cir. 1987) (same). Accordingly, the FDIC's reasonable interpretation of section 27, which maintains parity between national and state banks, is entitled to *Chevron* deference.

B. The FDIC's "Valid When Made" Rule Is Not Arbitrary and Capricious.

Plaintiffs fare no better in arguing that the FDIC's valid-when-made rule is arbitrary and capricious and therefore violates the Administrative Procedure Act. The scope of review under the arbitrary-and-capricious standard is "narrow": so long as an agency has "articulated a satisfactory explanation" for its decision based on "relevant data," a reviewing court cannot substitute its judgment for that of the agency. *New York*, 139 S. Ct. at 2569. Because the FDIC's decision to adopt the rule falls well "within the bounds of reasoned decisionmaking," plaintiffs cannot prevail on the grounds that the rule is arbitrary and capricious. *Id.*

1. The Rule Recognizes the Important Role the Marketplace Lending Industry Serves by Partnering with Banks to Minimize Costs and Increase Access to Credit.

The FDIC's rule confirming the valid-when-made principle rests, in part, on its recognition that responsible bank partnerships with fintech companies and third parties, such as those involving AFC's members, play an important role in "improv[ing] [the] availability of credit from State banks." 85 Fed. Reg. at 44155. The critical role filled by these partnerships is most significant in underserved communities, where banks have historically been unable to meet the credit demands of customers. By confirming the valid-when-made principle, the FDIC's rule ensures that such partnerships remain a viable option for banks to more efficiently meet customer needs in communities that, "in the absence of the final

rule, . . . might be unable to obtain credit from State banks, and might instead borrow at higher interest rates from less-regulated lenders." *See id.* at 44155.

Plaintiffs argue that the FDIC should have given more weight to the risks created when these partnerships are conducted irresponsibly (*see* Plts. Mot. at 18–21)—even though comprehensive standards governing such partnerships already exist, and the FDIC and other federal regulators can take and have taken enforcement action against abusive lending programs (*infra* pp. 19–22). It is not a reviewing court's role to "second-guess[] the [agency's] weighing of risks and benefits." *New York*, 139 S. Ct. at 2571.

The benefits of responsible bank partnerships with fintech companies, moreover, are amply supported. Such partnerships fill a void within consumer lending left vacant by most state banks. In 2015, an estimated 27% of American households were unbanked, meaning that no one in the household had a checking or savings account, or underbanked, meaning that the household used alternative financial services in the prior year, including payday loans.[6] Most banks simply do not have the technology to successfully underwrite loans for such underserved communities. Fintech companies, on the other hand, like AFC's members, are able to harness data to identify the millions of Americans who may have low credit scores but demonstrate the income or favorable payment history to pay off a loan.[7] In short, fintech companies are "effective in identifying the 'invisible prime' from the subprime pool of borrowers," whom banks might otherwise overlook or charge excessive interest rates to.[8]

Fintech companies have also provided banks with new and diverse sources of capital by paving a path for investors to participate in—and grow—the secondary loan market. In particular, when a bank makes a loan through a responsible partnership, the fintech company will often purchase the loan, and

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[6] FDIC, *National Survey of Unbanked and Underbanked Households* 1 (2016), https://www.fdic.gov/analysis/household-survey/2015/2015report.pdf.

[7] William M. Isaac, *Congress Should Intervene to Let More Banks Make Small-Dollar Loans*, American Banker (Nov. 29, 2017), https://www.americanbanker.com/opinion/congress-should-intervene-to-let-more-banks-make-small-dollar-loans.

[8] Julapa Jagtiani & Catharine Lemieux, *The Roles of Alternative Data and Machine Learning in Fintech Lending: Evidence from the LendingClub Consumer Platform* 13 (Fed. Reserve Bank of Phila., Working Paper No. 18–15, revised 2019) (commenting on LendingClub), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2018/wp18-15r.pdf.

then resell the loan (often through securitization) to individuals and institutions who are interested in investing in the loans. These investors buy billions of dollars in bank-originated loans annually—generating liquidity that enables banks to make even more loans to underserved consumers, and fueling economic growth in the process.[9]

The result is that bank-fintech partnerships offer underserved consumers a safe and sound alternative to payday or credit card loans, which are riskier and carry significantly higher interest rates than those of traditional bank loans. As a report from the Federal Reserve Bank of St. Louis has observed, "[o]n average and for every credit risk level, fintech lenders offer lower annual percentage rates (APRs) when compared with those of credit card firms."[10] Likewise, another report from the Federal Reserve of Philadelphia observed that default rates of a fintech company's loans in one study were nearly the lowest that could be achieved by any bank, despite serving customers deeper in the risk spectrum than the customers of over 85% of the top traditional banks.[11] The study attributed these low default rates to the fintech company's use of "more advanced technology, more complex algorithms, and alternative data sources" to identify creditworthy borrowers that were not adequately served by more traditional lenders.[12] The experience of AFC's own members is consistent with these studies: the valid-when-made principle allows AFC's members to make or facilitate tens of billions of loans to underserved borrowers at an average personal loan APR of 15% through 2020, far less than the typical credit card interest rate.

The FDIC has recognized the promise of technology for promoting financial inclusion and expanding financial services to the underserved, and even established an office of innovation, the FDIC

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[9] *See generally 2016 Treasury Report*, *supra* note 1, at 3 ("Access to credit is the lifeblood of business and economic growth.").

[10] Beiseitov, *supra* note 3.

[11] Joseph P. Hughes et al., *Consumer Lending Efficiency: Commercial Banks Versus a Fintech Leader* 16–17, 21–22 (Fed. Reserve Bank of Phila., Working Paper No. 19–22, 2019), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2019/wp19-22.pdf.

[12] *Id.*

Tech Lab, to promote these goals.[13] The FDIC's rule will help to foster this kind of responsible innovation within the fintech industry, including responsible partnerships between banks and fintech companies. These bank-fintech partnerships are essential to the modern credit industry and have generated significant growth in online lending and increased access to credit, in part, by driving growth in the secondary loan market. In fact, the FDIC has recognized that banks and nonbank innovators can benefit from collaboration and is "in the process of developing and implementing updates to its information technology systems to bring much needed improvements to the systems that banks and non-banks use to interface and exchange information with the FDIC."[14] As nearly all borrowers move to the digital space, these responsible partnerships provide the resources necessary to effectively access creditworthiness and make credit decisions about funding small-dollar loans.

In short, fintech companies "that operate as a service provider to an issuing bank partner can provide significant benefits to borrowers by offering responsible and innovative credit products, within a strong regulatory framework."[15] The rule will make it more likely that fintech companies enter the market, thus increasing access to credit especially for lower-income borrowers, as empirical studies confirm (*see infra* pp. 15–17). Without the FDIC's rule, banks and their partners face increasing litigation risk when they purchase, service, or securitize bank loans—litigation risk that could eliminate the responsible bank-fintech partnership model, and in turn cause the highly liquid secondary loan market to dry up. This litigation risk is real, not hypothetical: banks and their fintech partners have repeatedly been sued on the erroneous theory that federal interest rate preemption no longer applies to a loan when the loan is sold by

[13] *See Overseeing the Fintech Revolution: Domestic and International Perspectives on Fintech Regulations: Hearing Before the Task Force on Financial Technology of the H. Comm on Fin. Servs.*, 116th Cong., 1st Sess., 100 (June 25, 2019) (statement of FDIC), https://financialservices.house.gov/uploadedfiles/chrg-116hhrg39497.pdf.

[14] *See id.*

[15] *Examining Opportunities and Challenges in the Financial Technology ("Fintech") Marketplace Before the Subcomm. on Fin. Inst. & Consumer Credit of the H. Comm. on Fin. Servs.*, 115th Cong. 50 (2018) (testimony of Nathaniel L. Hoopes, Executive Director, Marketplace Lending Association).

a bank.[16] If interest rate preemption does not apply, the price to sell loans on the secondary market will decrease, and banks will lose access to capital that can be used to offer loans to additional borrowers. Such a result would have an outsized impact on smaller banks that lack the resources of larger banks to purchase the requisite technology or to hire in-house resources and, as a result, rely more heavily on bank-fintech partnerships.

The FDIC's rule thus promotes the stability and certainty necessary to ensure that banks, especially smaller ones, and pioneering fintech firms, are able to collaborate to expand access to financial services.[17] In other words, the FDIC's rule will, by ensuring the vitality of the secondary loan market, provide banks and fintech firms the legal certainty needed to develop new and improved ways in which to offer both individuals and businesses better access to credit. Bank and fintech members of the AFC are constantly looking for ways to lower the cost of credit, increase access to capital, and provide the groundwork for a stronger financial system. The stability that the FDIC's rule provides will do just that—fueling more innovation and ultimately driving down costs for consumers.

Plaintiffs speculate that the FDIC's rule will promote high-interest rate loans. As explained above, that is not true for AFC's members, who helped make or facilitate approximately $50 billion loans in 2019 alone at an average personal loan APR of 15%. The rule ensures that such loans can be sold on the secondary market. As to the high-interest rate loans attacked by plaintiffs, the participants in those schemes would not appear to benefit from the FDIC's rule because plaintiffs and their amici provide no evidence that those loans are sold in the secondary market. It is AFC's experience in working with rating agencies and data aggregators that virtually all consumer loans that are securitized have interest rates that do not exceed 36% APR—the maximum rate AFC's members may charge.

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[16] *See, e.g.*, *Petersen v. Chase Card Funding, LLC*, 2020 WL 5628935, at *1–*2 (W.D.N.Y. Sept. 21, 2020) (lawsuit challenging as usurious under New York law the interest rate charged on national bank-originated loans securitized and sold to nonbanks); *Cohen v. Capital One Funding, LLC*, 2020 WL 5763766, at *1–*4 (E.D.N.Y. Sept. 28, 2020) (same); *Meade v. Avant of Colorado*, LLC, 307 F. Supp. 3d 1134, 1137–39 (D. Colo. 2018) (lawsuit challenging as usurious under Colorado law the interest rate charged on state-chartered bank-originated loans sold to a fintech company); *Meade v. Marlette Funding LLC*, 2018 WL 1417706, at *1–*2 (D. Colo. Mar. 21, 2018) (same).

[17] *See generally* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. Rev. 232 (2018).

2. The Rule Recognizes and Addresses the Adverse Economic Consequences of the Second Circuit's *Madden* Decision.

Although the bank partnership model—a critical component of which is the ability to sell bank-originated loans on the secondary market with the interest-rate term intact—has been successfully used for many years, the viability of that partnership model was called into question following the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). In that case, the Second Circuit disregarded the valid-when-made principle in the context of a national bank's sale of charged-off credit card debt to a third-party debt collector. Instead, *Madden* held that the interest term of a loan originated by a national bank and then sold depends on who holds the loan after it has been sold. *Id.* at 249–53.

Both Democratic and Republican administrations sharply criticized *Madden*, and federal banking regulators were called upon to "use their available authorities to address challenges posed by *Madden*."[18] The FDIC has done exactly what it was asked to do. The FDIC's rule recognizes "the significant uncertainty resulting from *Madden*"; indeed, that is one of the primary problems the rule would remedy. 85 Fed Reg. at 44156 (identifying the *Madden* decision as the first of "reasons why this rulemaking is being finalized").

The *Madden* decision rattled the financial markets in which banks participate. This uncertainty stems from the inability under that decision to determine the interest term—and thus the value—of a loan originated by a bank until after the loan is sold. Subsequent sales of a loan by the initial loan purchaser, which are common, could also cause the interest term to change multiple times throughout the life of the loan.

This uncertainty about the value of a loan has adversely affected credit availability by limiting direct lending, including to underserved borrowers, in two ways. First, it has threatened the viability of banks' participation in the secondary market, which provides liquidity to banks, thereby freeing up their balance sheets to make more loans. Second, it has raised questions (even in jurisdictions beyond the Second Circuit where there is concern that *Madden* could be followed by other courts) about whether

[18] *2018 Treasury Report*, *supra* note 5, at 93; *United States Brief*, *supra* note 5, 2016 WL 2997343, at *6, *12.

borrowers whose loans have been sold have any obligation to repay them. By clarifying that the interest term of a loan that is valid when made remains valid if the loan is sold, assigned, or otherwise transferred, the FDIC's rule will help stabilize the secondary market for bank loans, with attendant positive consequences for banks' liquidity and, in turn, credit availability.

The FDIC's solution to the problems arising from, and highlighted by, *Madden* rests on "relevant data" and, thus, is not arbitrary and capricious. *New York*, 139 S. Ct. at 2569. The FDIC recognized that there is "considerable evidence of uncertainty following the *Madden* decision," and that, following the Second Circuit's decision, empirical studies assessing the case's impact concluded that, by impairing the secondary market for loans, the decision led to a considerable decline in credit availability in jurisdictions within that Circuit. 85 Fed Reg. at 44155 (recognizing empirical studies "discussing the effects of *Madden* in the Second Circuit," and that these empirical studies concluded that "there were pronounced reductions of credit to higher risk borrowers" in states within the Second Circuit). This decline in credit is significant; credit availability serves as a "crucial ingredient in any advanced economy's recipe for economic growth because credit can support investment in productive enterprises and can smooth household spending from fluctuations in income."[19]

For example, one study the FDIC cites, which relied on data from fintech companies, concluded that lenders "restricted credit availability—measured by both loan size and volume—after the [*Madden*] decision, with the largest impact being on high-risk borrowers."[20] Such impairment of banks' ability to extend credit has wide-ranging economic consequences, including "the potential to hinder investment and

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[19] James McAndrews, Fed. Reserve Bank of N.Y., *Credit Growth and Econ. Activity after the Great Recession*, Remarks at the Econ. Press Briefing on Student Loans (Apr. 16, 2015), https://www.newyorkfed.org/newsevents/speeches/2015/mca150416.html.

[20] Colleen Honigsberg, Robert J. Jackson, Jr., & Richard Squire, *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 J. L. & Econ. 673, 709 (2017); *see* 85 Fed Reg. at 44155 & n.68 (citing authors' study); AR 447–86 (copy of empirical study submitted with authors' comment). Coauthor Robert J. Jackson, Jr., is a former commissioner at the U.S. Securities and Exchange Commission. *See also* Charles Horn & Melissa Hall, *The Curious Case of Madden v. Midland Funding and the Survival of the Valid-When-Made Doctrine*, 21 N.C. Banking Inst. 1, 3–4 (2017) (explaining that firms have started to exclude some Second Circuit states from lending programs and even removed loans to borrowers in the Second Circuit from securitization pools).

adversely affect the overall economy."[21] Borrowers with FICO scores below 625 bore the brunt of *Madden*'s negative impact most acutely: the study showed that, following *Madden*, loans made to borrowers with FICO scores below 625 dropped by 52%. Yet, outside the Second Circuit, loans to these same borrowers increased by 124%. Moreover, there was almost no difference in loan growth for borrowers with FICO scores above 700—that is, those borrowers who would not have been affected by *Madden* (given the interest rates on their loans).[22] *Madden* affected loan size as well as the volume of borrowing, reducing the average loan by roughly $400 more than would otherwise be expected, with the greatest decrease in loan size hitting the highest-risk borrowers—those who already have the most difficult time accessing the banking system.[23]

Another study on *Madden*'s impact cited by the FDIC similarly concluded that low-income households' access to credit had been severely reduced after the *Madden* decision.[24] The study shows, for example, that lending to borrowers with incomes under $25,000 fell by 64% compared with the control group; yet lending to borrowers with incomes above $100,000 saw almost no change. The study also found that borrowing fell drastically for certain borrowers: those seeking loans for debt-refinancing (15%); small business loans (33%); and medical procedures (68%). Indeed, the authors of the study explained that the volume and number of marketplace loans fell sharply after *Madden*, and fell particularly hard on those individuals in the greatest need of outside funding to withstand income shocks and unexpected expenses, like medical bills and refinancing debt.[25] In other words, the economic impact of *Madden* hit hardest those least able to absorb the impact.[26]

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[21] McAndrews, *supra* note 19.

[22] Honigsberg et al., *supra* note 20, at 697–98.

[23] *Id.* at 700–01.

[24] *See* Piotr Danisewicz & Ilaf Elard, *The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy* (2018); *see* AR 792–842 (copy of study submitted with comment).

[25] Danisewicz & Elard, *supra* note 24, at 20–22.

[26] *See also* Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 Vand. J. Ent. & Tech. L. 129, 188 (2017) (explaining that "experience of marketplace lenders post-*Madden*" is one "where uncertainty about the legality of loans has crippled access to lending for certain borrowers").

This same study found that the restriction in marketplace lending caused by *Madden* also led to more bankruptcy filings. In particular, the study found that the reduced credit availability caused by *Madden* triggered an 8% increase in bankruptcy filings in the Second Circuit compared to non-Second Circuit states. In explaining the data, the authors of the study noted that the "results suggest that marketplace lending may help households, particularly those on low incomes, avoid bankruptcy and suggest that the screening and lending technology behind marketplace credit may have some positive welfare effects compared with other forms of costly credit, such as payday loans and credit card debt, associated with worsening personal bankruptcy."[27]

The adverse consequences of *Madden* are not limited to the marketplace lending context. In a 2018 report, the Treasury Department predicted that other credit markets such as "bank/loan intermediary partnerships, debt collection activities, loan securitization activities, and simple loan transfers" would also be affected if *Madden* were adopted more broadly.[28] This prediction has come true. After *Madden*, to adjust to the increased legal risk, lenders were forced to take losses when selling notes backed by loans in states within the Second Circuit.[29] In short, *Madden* has not only led to a less efficient market; it has also affected the marketability of loans, and thus banks' ability to maintain sufficient liquidity (which in turn drives access to credit). Other scholarly work has warned of similar costs associated with failing to enforce the valid-when-made principle.[30]

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[27] Danisewicz & Elard, *supra* note 24, at 21–22.

[28] *2018 Treasury Report*, *supra* note 5, at 92.

[29] *See* Honigsberg et al., *supra* note 20, at 674–75 (finding that lenders reduced the price of notes backed by loans in states within the Second Circuit).

[30] *See, e.g.*, Kirby M. Smith, *Banking on Preemption: Allowing National Bank Act Preemption for Third-Party Sales*, 83 U. Chi. L. Rev. 1631, 1681 (2016) ("[A] finding that preemption does not continue upon sale of a loan would harm all consumers by increasing the cost of credit likely cutting some marginal debtors out of the market."); Michael Marvin, Note, *Interest Exportation and Preemption: Madden's Impact on National Banks, the Secondary Credit Market, and P2P Lending*, 116 Colum. L. Rev. 1807, 1848 (2016) (explaining that the costs of *Madden* include both "a fixed operational cost associated with implementing new transaction structures and as a variable risk liability tied to the possibility that the loans originated and assigned through the new structures will fail to entitle the assignees to NBA preemption under Madden"); *cf.* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv. L. Rev. 1593, 1639–40 (2014) (explaining that "the standard neoclassical analysis is that usury laws are inefficient, resulting in high-risk borrowers being cut off from credit").

Madden has also created legal uncertainty over the circumstances under which it applies, "reinforcing the need for clarification by the FDIC." 85 Fed. Reg. at 44156 (recognizing that "courts across the country continue to address legal questions raised in the *Madden* decision"). Following *Madden*, several suits had been brought within the Second Circuit challenging securitization structures on the grounds that the originating national bank's interest rate is no longer permissible. *See, e.g.*, *Petersen v. Chase Card Funding, LLC*, 2020 WL 5628935 (W.D.N.Y. Sept. 21, 2020); *Cohen v. Capital One Funding, LLC*, 2020 WL 5763766 (E.D.N.Y. Sept. 28, 2020). While *Petersen* and *Cohen* were dismissed after the FDIC issued its rule, the district courts' attempts in those cases to carve out fact-specific exceptions to *Madden* are likely to inject even *more* uncertainty, as banks and courts grapple with difficult questions about the circumstances under which *Madden* applies. *See, e.g.*, *Petersen*, 2020 WL 5628935, at *7 (distinguishing *Madden* on the grounds that the originating national bank retained a "substantial interest" in the plaintiff's "account").

The FDIC's rule provides certainty and clarity by setting forth a bright-line rule: a loan that was valid when made remains valid upon sale, assignment, or other transfer. Without the FDIC's rule, the adverse economic consequences of *Madden* could spread outside the Second Circuit. *See* Order Regarding Pl. Mot. for Determination of Law at 5–7, *Fulford v. Marlette Funding, LLC*, No. 17-CV-30376 (Colo. Dist. Ct. June 9, 2020) (adopting *Madden*'s flawed reasoning in a lawsuit brought against a bank and its fintech partner). As empirical studies show, the economic consequences of *Madden* "are not good for the cause of financial inclusion," and, if *Madden* is adopted nationally—as the plaintiffs appear to invite this Court to effect—"the average citizen is the one who will have to pay more [for credit]" when fintech companies and investors "leave the field."[31] This is because the approach followed by *Madden* "would in effect prohibit—make uneconomic—the assignment or sale by banks of their commercial property to a secondary market," which provides banks with the liquidity necessary to make credit more broadly available in the first place. *Strike* v. *Trans-West Discount Corp.*, 92 Cal. App. 3d 735, 745 (1979).

[31] Peter Conti-Brown, *Can Fintech Increase Lending? How Courts are Undermining Financial Inclusion*, Brookings Inst. (Apr. 16, 2019), https://www.brookings.edu/research/can-fintech-increase-lending-how-courts-are-undermining-financial-inclusion.

Stemming the economic fallout from *Madden* is particularly important because of the threat it poses to the expanded access to credit that fintech companies, among others, can offer to consumers and small businesses. The growth of fintech companies over the past decade has been well documented—these companies offer both more efficient and expanded access to credit for less-established individuals and businesses, and they can do so online. To continue to deliver these benefits, the fintech industry requires and depends on clarity in the law. Fintech companies partnering with banks must be able to count on banks' ability to issue, sell, and securitize those loans on a nationwide basis under federal law. The FDIC's rule—seeking to clarify that a loan is valid when made remains valid upon its sale to a third party—will not only stabilize the market for bank loans but will also promote credit availability, especially for underserved borrowers.

3. The Rule Reaffirms the FDIC's Commitment—Shared by the American Fintech Council—to Responsible Lending Programs.

Some commenters—and now plaintiffs and their supporting amici—have raised concerns that the FDIC's rule would facilitate predatory lending by promoting "rent-a-bank" schemes, in which a bank allegedly receives a fee to make loans on behalf of a third party, enabling the third party to evade state interest caps. *See* 85 Fed. Reg. at 44153. To address these concerns, plaintiffs ultimately ask this Court to invalidate the longstanding valid-when-made principle and, thus, to eviscerate the bank partnership model and the corresponding ability to sell loans on the secondary market on which banks rely, including the attendant positive consequences for underserved borrowers (*see supra* pp. 9–13). However, contrary to plaintiffs' argument that the FDIC ignored these concerns (Plts. Mot. at 18–21), the FDIC's rule makes clear that it "continues" to "view unfavorably" predatory lending schemes, 85 Fed. Reg. at 44146–47, as articulated in FDIC guidance, which set standards that more directly and effectively address such schemes.

The FDIC's reaffirmed commitment, together with the existing regulatory and supervisory authorities at regulators' disposal, ensures that predatory lending will not gain a foothold in the state banking system. The FDIC can—and has—set standards for state banks' lending programs, including those programs that involve partnerships with nonbanks. *See, e.g.*, FDIC, Proposed Examination Guidance for Third-Party Lending, FIL-50-2016 (July 29, 2016) [hereinafter *FDIC Third-Party Lending 2016 Guidance*]; FDIC, Guidance for Managing Third-Party Risk, FIL-44-2008 (June 6, 2008)

[hereinafter *FDIC Third-Party Risk 2008 Guidance*]; *see also* FDIC, *Conducting Business with Banks: A Guide for Fintechs and Third Parties* (Feb. 2020), https://www.fdic.gov/fditech/guide.pdf. For example, the FDIC has made it clear that abusive payday lending arrangements, where the bank's involvement is nominal and the sole purpose of the arrangement is to avoid state interest-rate regulation, are not welcome in the state banking system. *See* FDIC, Guidelines for Payday Lending, FIL-52-2015 (Revised Nov. 2015). More recently, acting pursuant to the consumer-protection authority conferred on it by the Dodd-Frank Act, the Consumer Financial Protection Bureau has issued a regulation targeting unfair and abusive lending practices in payday, auto vehicle title, and certain high-rate installment loans. *See* 12 C.F.R. § 1041.1 (noting that the purpose of the regulations is to "identify . . . and set forth requirements for preventing such acts or practices").

This extensive federal regulatory environment provides ample opportunities to make predatory lenders lives' very difficult. Indeed, the FDIC can take and has taken supervisory and, in an appropriate case, enforcement action when a state bank does not conduct its programs in accordance with applicable guidelines. *See, e.g.*, *In re Republic Bank & Tr. Co.*, Amended Notice of Charges for an Order to Cease and Desist, FDIC-10-079b, 2011 WL 2574392, at *1–2, *5 (May 3, 2011) (notice of charges against bank relating to tax refund products offered through third-party tax preparers, including for violations of prior cease-and-desist order requiring bank to manage third-party risk); FDIC Press Release PR-47-2008, "FDIC Seeks in Excess of $200 Million Against Credit Card Company and Two Banks for Deceptive Credit Card Marketing" (June 10, 2008) (commencing enforcement actions against two banks and third party for predatory lending practices), https://www.fdic.gov/news/press-releases/2008/pr08047.html; *In re Merrick Bank*, Consent Order, FDIC-13-0446b (Sept. 29, 2014) (ordering bank to pay $15 million in restitution and to ensure that servicing of credit card add-on products, "including those provided by third parties," comply with consumer protection laws), https://www.fdic.gov/news/press-releases/2014/pr14080a.pdf.

In some cases, the FDIC has even terminated these abusive partnerships. *See, e.g.*, *In re Bancorp Bank*, Consent Order and Order to Pay Civil Money Penalty, FDIC-11-698b, 2012 WL 7186312, at *4–5 (Aug. 7, 2012) (requiring bank to provide to the FDIC details relating to the termination of its relationship with a third-party operator of bank's student debit card account program and to significantly increase its

management of third-party risk); *In re Bank of Agric. & Comm.*, Order to Cease and Desist, FDIC-08-408b, 2009 WL 998563, at *2, *4 (Feb. 19, 2009) (requiring bank to end a payment processing relationship with a third party, in part, for "operating inconsistently with the FDIC's Guidance for Managing Third Party Risk"). Even one of the amici supporting plaintiffs—the Center for Responsible Lending—has observed that the FDIC's "guidelines effectively ended the 'rent-a-bank' scheme, in which storefront payday lenders partnered with national banks to evade state laws."[32]

Nor does the FDIC's rule create a "gap in oversight" over the conduct of bank partners, as plaintiffs contend. Plts. Mot. at 21. Congress long ago placed bank partners within the regulatory reach of the FDIC. Under the Bank Service Company Act of 1962, a bank partner that performs services that the bank would otherwise provide "shall be subject to regulation and examination by [the applicable federal banking] agency *to the same extent as if such services were being performed by the depository institution itself on its own premises*." 12 U.S.C. § 1867(c) (emphasis added); *see also FDIC Third-Party Risk 2008 Guidance* (stating that this statute also "requires insured financial institutions to notify" the FDIC "of contracts or relationships with third parties that provide certain services to the institution"). Therefore, when a fintech company performs activities on behalf of a bank in a bank-fintech lending program, "the FDIC evaluates [those] activities . . . as though the activities were performed by the institution itself." *See FDIC Third-Party Risk 2008 Guidance*. Indeed, because the FDIC may examine the fintech company to the same extent as a bank performing the same services for itself, the FDIC may require the fintech company to undergo an "on-site examination." *See* 12 C.F.R. § 337.12(a) (describing FDIC authority in examining state banks).

As a result, when a bank offers loans through a bank-fintech partnership, the FDIC holds the bank responsible for the conduct of its fintech partner. Contrary to plaintiffs' assertion that a bank may serve as a "mere pass-through" entity (Plts. Mot. at 19), the FDIC repeatedly confirms in guidance that offering loans through such partnerships "in no way diminishes the responsibility of the [the bank's] board of directors and management to ensure that the third-party activity is conducted in a safe and sound manner

[32] Center for Responsible Lending, *Payday Lending Abuses and Predatory Practices* 11 n.21 (Sept. 2013), https://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf.

and in compliance with applicable laws, regulations, and internal policies." *FDIC Third-Party Risk 2008 Guidance*; *see also FDIC Third-Party Lending 2016 Guidance* (stating that the bank "retain[s] the ultimate responsibility to conduct lending activities in a safe and sound manner, in accordance with existing supervisory guidance, and in compliance with applicable laws and regulations"). In other words, the instant a bank makes a loan through a bank-fintech partnership, the bank assumes the legal, compliance, and other risks associated with the fintech company's conduct—regardless of whether and when that loan may be sold to a third party—and the program *itself* becomes subject to federal regulatory oversight and scrutiny and, in turn, the prospect of shut-down if it violates safe and sound lending practices. As discussed above, if a bank fails to appropriately supervise a bank partner, the FDIC can—and has—shut down predatory lending programs (*see supra* pp. 20–21).

AFC shares the FDIC's commitment to responsible lending programs and offers proof that within the existing regulatory framework—including valid-when-made—responsible lending programs flourish: AFC members, which include banks and fintech companies, have committed to the highest lending standards in the industry, including a commitment to lend at no greater than 36% APR, protecting the integrity of the financial system. Many fintech members' partners are banks, of course, but those members also partner with asset managers, registered investment companies, and insurance companies. Because AFC's members sell to a broad market, they are firmly in the mainstream of credit providers. Indeed, AFC's members originated or helped originate approximately $50 billion in loans in 2019 alone. As regulated entities themselves, bank partners of AFC members hold AFC members accountable and expect them to adhere to high standards.

AFC members meet that expectation; they do adhere to high standards consistent with principles of safety and soundness. When AFC members participate in bank-fintech partnerships to offer loans, whether the member is a bank or a fintech company, they ensure that any lending program is consistent with the high standards set forth in the FDIC's guidance applicable to such partnerships more generally. *See FDIC Third-Party Lending 2016 Guidance*; *FDIC Third-Party Risk 2008 Guidance*. Consistent with that guidance, AFC members require that such lending programs:

- Not offer loans made in connection with the partnership at an APR greater than 36%;

- Transparently disclose prices to all borrowers, including the APR for consumer loans and the annualized interest rate or APR for commercial loans;
- Transparently disclose any fees or scheduled charges for loans, including any charge that functions as a prepayment penalty;
- Provide banking regulators with access to examine, review, and audit the fintech partner;
- Place ultimate approval authority over loan origination services, marketing materials, website content, and credit policies with the bank;
- Disclose that the bank is the lender of loans originated under the program in borrower agreements, marketing materials, and website content;
- Prohibit the bank from committing, in advance, to sell loans to the fintech partner; and
- Prohibit the fintech partner from indemnifying the bank for losses resulting from the performance of loans retained by the bank.

These standards, including a maximum 36% APR, demonstrate that the irresponsible lending programs paraded by plaintiffs and the amici are extreme outliers, and will not be promoted by the FDIC's rule. That rule does nothing to alter—and in fact *reinforces* the FDIC's commitment to—the robust framework that already exists to govern bank-fintech lending programs like the programs in which AFC members participate. The valid-when-made principle is not new (*see supra* pp. 6–7), and the FDIC's rule simply "affirms the pre-*Madden* status quo." 85 Fed. Reg. at 44157. Before the FDIC issued the rule, the FDIC's guidance on responsible lending practices provided adequate protection against abusive lending practices, as demonstrated by AFC members' adherence to high standards while the FDIC shut down fringe players abusing the bank partnership model.

There is no basis to conclude that the rule, which is consistent with longstanding federal precedent and industry practice, will suddenly lead to the proliferation of rent-a-bank schemes. To the contrary, AFC is, and will continue to be, an advocate for responsible partnerships between fintech companies and regulated financial institutions that help empower consumers to take control of their financial health and well-being, in stark contrast to the marginal players offering abusive financial products that perpetuate cycles of debt. Indeed, AFC strongly advocates for legislation lowering state interest rate caps for consumer loans to a maximum 36% APR. AFC, *American Fintech Council Endorses Illinois Predatory*

Loan Prevention Act, Urges Governer Pritzker to Sign Bill (Mar. 15, 2021), https://fintechcouncil.org/march-15; AFC, *American Fintech Council Backs New Mexico Bill to Lower State Interest Rate Cap* (Mar. 12, 2021), https://fintechcouncil.org/sb66-release.

Striking down the valid-when-made principle reflected in the FDIC's rule—and consequently decreasing access to affordable credit in underserved communities—will not affect these abusive lending relationships. While plaintiffs may disagree with the FDIC's ultimate dismissal of some commentators' irresponsible lending concerns, the FDIC's reaffirmed commitment to ensure that such partnerships continue to be conducted in a responsible manner, as reflected in FDIC guidance, addresses those concerns. *See All. Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996) (holding that an agency's decision is not arbitrary or capricious simply because a court may "disagree with it").

IV. CONCLUSION

Contrary to plaintiffs' claims, the FDIC's rule reflects a reasonable interpretation of ambiguities in section 27 of the FDIA, and rests on a careful consideration of the relevant factors. Accordingly, under the deferential framework that applies to a review of agency rulemaking, this Court should uphold the FDIC's rule.

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Respectfully submitted,

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