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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**OAKLAND DIVISION**

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|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>THE FEDERAL DEPOSIT INSURANCE CORPORATION,<br><br>Defendant. | Case No. 4:20-cv-05860-JSW<br><br>**MOTION OF THE BANK POLICY INSTITUTE, THE STRUCTURED FINANCE ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**<br><br>Judge: Hon. Jeffrey S. White<br>Hearing Date: August 6, 2021<br>Hearing Time: 9:00 a.m.<br>Courtroom: Oakland Courthouse, Courtroom 5 – 2nd Floor |

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the Bank Policy Institute ("BPI"), the Structured Finance Association ("SFA"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), and the Chamber of Commerce of the United States of America ("the Chamber"), through their undersigned counsel, will move this Court, in Courtroom 5 of the Oakland Courthouse, 1301 Clay Street, Oakland, California 94612, on August 6, 2021 at 9:00 a.m. for leave to file a brief as *Amici Curiae* in this litigation. This Motion is supported by the accompanying proposed order granting the Motion.

Through this Motion, *Amici* respectfully request that the Court grant them permission to file a brief as *Amici Curiae* in support of Defendant's Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. A copy of *Amici*'s proposed brief is attached hereto as Exhibit A. The undersigned counsel have consulted counsel for the parties in this matter, and all parties have consented to the filing of that brief.

## INTEREST OF *AMICI CURIAE*

BPI is a nonpartisan public policy, research, and advocacy group representing the nation's leading banks. BPI's members include universal banks, national banks, state banks, and major foreign banks doing business in the United States. Collectively, BPI's members employ nearly two million Americans, originate 68% of all loans, including nearly half of the nation's small business loans, and serve as an engine for financial innovation and economic growth.

SFA is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market to help its members and public policy makers responsibly grow credit availability for consumers and business across all communities. With over 370 members, SFA represents all stakeholders in the securitization market, including consumer and commercial lenders, institutional investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers, and trustees. SFA was established with the core mission of supporting a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. As part of that core mission, SFA is dedicated to furthering public understanding among members, policy makers, consumer and business advocacy groups, and other constituencies about structured finance, securitization, and related capital markets.

ABA is the principal national trade association and voice of the banking industry in the United States. Its members, located in each of the 50 states and the District of Columbia, include national and state banks, savings associations, and nondepository trust companies of all sizes. ABA's members hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

CBA is the trade association for today's leaders in retail banking—*i.e.*, national and state banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

*Amici* and their members have a substantial interest in the issues presented in this proceeding and, as trade associations and advocacy groups whose members collectively represent all sectors of the banking, credit, and securitization markets, *Amici* have a unique perspective that can aid the court in its resolution of the parties' Motions for Summary in this litigation.

## ARGUMENT

The Court possesses broad discretion over the question of whether to grant permission to file an *amicus* brief, and "generally courts have exercised great liberality" in permitting such briefs. *Woodfin Suite Hotels, LLC* v. *City of Emeryville*, No. 06-CV-1254, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007) (internal quotation omitted). "There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful or otherwise desirable to the court." *California* v. *U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019). "District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Sonoma Falls Developers, LLC* v. *Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (internal quotation omitted). *Amici*'s proposed brief fulfills that purpose.

The outcome of this litigation will affect credit markets throughout the United States. As explained in *Amici*'s proposed brief, the regulation at issue here promulgated by the Federal Deposit Insurance Corporation ("FDIC") correctly reaffirmed the centuries-old "valid-when-made" doctrine, which states that a loan free from usury at the time of its origination cannot become usurious through a subsequent transaction provided that the loan was valid at its inception. Through this rulemaking, the FDIC resolved the disruptions to the multi-trillion–dollar U.S. credit markets caused by the Second Circuit's decision in *Madden* v. *Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). Plaintiffs' suit seeks to overturn the FDIC's regulation, and so would restore the uncertainty caused by the *Madden* decision and result in great harm to U.S. credit markets, *Amici*'s members, and the consumers and small businesses that benefit from the increased access to credit that the capital markets facilitate.

In addition, because *Amici*'s members are active in all aspects of the U.S. credit markets, they have a unique perspective to offer the Court. Specifically, *Amici* can draw on their and their members' experience and expertise in the credit markets to explain how preserving the ability of state banks to transfer their loans to non-banks is important to ensuring access to needed liquidity, how the *Madden* decision has affected credit markets and the participants in those markets, and how the FDIC's regulation ensures continued access to credit for lower-income borrowers and small businesses in the United States. Just as the Court granted *Amici*'s motion to file an *amicus* brief in the related OCC litigation, it should also grant their Motion here. Because their perspective will be useful in determining whether the FDIC's regulation is reasonable, *Amici* believe it will help in resolving the parties' Motions for Summary Judgment.

**CONCLUSION**

For the foregoing reasons, *Amici Curiae* respectfully request an order granting leave to file their proposed brief.

Dated: May 27, 2021

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# Exhibit A

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**UNITED STATES DISTRICT COURT**

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| PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>THE FEDERAL DEPOSIT INSURANCE CORPORATION,<br><br>Defendant. | Case No. 4:20-CV-05860-JSW<br><br>**BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, THE STRUCTURED FINANCE ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**<br><br>Hearing Date: August 6, 2021<br>Hearing Time: 9:00 a.m.<br>Courtroom: Oakland Courthouse, Courtroom 5 – 2nd Floor |

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## SUMMARY OF ARGUMENT

In the regulation at issue in this case, the Federal Deposit Insurance Corporation ("FDIC") correctly reaffirmed the centuries-old "valid-when-made" doctrine, which states that a loan free from usury at the time of its origination cannot become usurious through a subsequent transaction. In doing so, the FDIC confirmed that the Federal Deposit Insurance Act ("FDIA") provisions allowing a federally insured state-chartered bank or an insured branch of a foreign bank ("FDIC Banks") to originate loans at interest rates of the state in which it is located also allow such loans to be transferred to a third party with the original interest rate intact. The regulation resolves disruptions to the U.S. credit markets caused by the Second Circuit's decision in *Madden* v. *Midland Funding, LLC*, which ignored the valid-when-made doctrine and held that applying a different state's usury laws to a national bank's loans after assignment does not interfere with a bank's statutory powers under the National Bank Act ("NBA"). As the relevant FDIA provisions are substantially the same as those in the NBA, *Madden* also impacted the FDIA.

Plaintiffs now erroneously assert that valid-when-made is a modern invention and ask this Court to strike down the FDIC's regulation. Plaintiffs' arguments should be rejected for two reasons.

*First*, the U.S. Supreme Court recognized valid-when-made as a "cardinal rule" of usury law nearly two centuries before the *Madden* decision. *E.g.*, *Nichols* v. *Fearson*, 32 U.S. 103, 109 (1833). Arising at a time when there was, as there is today, substantial variation in the usury laws among and within the states, valid-when-made was crucial to the credit markets, ensuring that a lender could assign a loan without that loan becoming usurious by reason of the assignee's status. Congress thus incorporated this rule into the NBA in 1864, and then into the FDIA in 1980. Plaintiffs attempt to dismiss this history, but fail to cite a single pre-*Madden* case holding that a validly originated loan becomes usurious by an assignment and are forced to acknowledge that courts regularly apply valid-when-made in this context.

*Second*, as the Ninth Circuit recently recognized, and as legal and finance scholars have shown, *Madden* negatively affected both banks and consumers. *Madden* created uncertainty about national banks' ability to assign loans, thus raising loan origination costs, impeding loan securitizations, and restricting the extension of credit to borrowers living in the Second Circuit, particularly lower-income Americans and small businesses who are most in need of access to liquidity. *See McShannock* v. *JP Morgan Chase Bank NA*, 976 F.3d 881, 892 (9th Cir. 2020), *reh'g en banc denied* (Jan. 4, 2021).

The Bank Policy Institute ("BPI"), the Structured Finance Association ("SFA"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), and the Chamber of Commerce of the United States of America (the "Chamber") respectfully submit this brief as *Amici Curiae* in support of Defendant's Motion for Summary Judgment and its Opposition to Plaintiffs' Motion for Summary Judgment.[1]

**INTEREST OF *AMICI CURIAE***

BPI is a nonpartisan public policy, research, and advocacy group representing the nation's leading banks. BPI's members include universal banks, national banks, state banks, and major foreign banks doing business in the United States. Collectively, BPI's members employ nearly two million Americans, originate 68% of all loans, including nearly half of the nation's small business loans, and serve as an engine for financial innovation and economic growth.

SFA is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market to help its members and public policy makers responsibly grow credit availability for consumers and business across all communities. With over 370 members, SFA represents all stakeholders in the securitization market, including consumer and commercial lenders, institutional investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers, and trustees. SFA was established with the core mission of supporting a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. As part of that core mission, SFA is dedicated to furthering public understanding among members, policy makers, consumer and business advocacy groups, and other constituencies about structured finance, securitization, and related capital markets.

ABA is the principal national trade association and voice of the banking industry in the United States. Its members, located in each of the 50 states and the District of Columbia, include national and state banks, savings associations, and nondepository trust companies of all sizes. ABA's members

[1] None of the *Amici* associations is a subsidiary or affiliate of any publicly owned corporation. *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their members contributed any money to fund its preparation or submission.

hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

CBA is the trade association for today's leaders in retail banking—*i.e.*, national and state banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

*Amici*'s members—which include state and national banks and other financial institutions that routinely originate, sell, purchase, and securitize loans—have a substantial interest in this action because Plaintiffs' claims threaten to undermine the FDIC's reasoned attempt to restore predictability to the multi-trillion–dollar U.S. credit markets. Specifically, Plaintiffs' goal is to eliminate a "cardinal" rule—recognized by law for hundreds of years—that a loan validly originated cannot become invalid as a violation of usury laws because it is subsequently sold or assigned to another party. The positions taken by Plaintiffs in this action, if accepted, would recreate the uncertainty engendered by the erroneous *Madden* decision that the FDIC's regulation was designed to eliminate, at great harm to U.S. credit markets, to *Amici*'s members, and to the consumers and small businesses that benefit from the increased access to credit at a lower cost that the lending and capital markets facilitate.

## PRELIMINARY STATEMENT

For over 200 years, the U.S. credit markets have relied on the cardinal rule that, if a loan is valid and not usurious in its inception, it cannot be rendered usurious subsequently, including by being sold or transferred to a third party. *See, e.g.*, *Gaither* v. *Farmers & Mechs. Bank of Georgetown*, 26 U.S.

37, 43 (1828); *Nichols*, 32 U.S. at 109.[2] That rule, often called the "valid-when-made" doctrine, is vital to the correct operation of 12 U.S.C. § 1831d (also referred to as Section 27 of the FDIA), which since 1980 has authorized FDIC Banks to make loans charging interest at the rate permitted by the state where the bank is located, or at one percent in excess of the 90-day commercial paper rate, whichever is greater. Section 1831d is modeled after the earlier-enacted 12 U.S.C. § 85, which provides the same power for national banks. *See Greenwood Tr. Co.* v. *Massachusetts*, 971 F.2d 818, 826–27 (1st Cir. 1992). Congress patterned Section 1831d after 12 U.S.C. § 85 in order to achieve "parity" and "competitive equality" between state and national banks in the interest-rate area. *Id.* (citations omitted).

Without the valid-when-made doctrine, FDIC Banks making loans in reliance on the interest rates authorized by the FDIA would have a severely limited ability to sell or assign loans to third parties, who would fear that different states' patchwork of contradictory usury laws might thereupon apply. This fear would, in turn, restrict the operation of the credit markets and increase the cost of credit to American households and small businesses.

In *Madden* v. *Midland Funding, LLC*, the Second Circuit broke from—by ignoring—a long line of decisions by the U.S. Supreme Court and federal Courts of Appeals that universally endorsed the valid-when-made doctrine. *Madden* did so in the context of NBA preemption, holding that application of states' usury laws to a bank's loans after they are assigned to a non-bank third party does not interfere with the bank's powers under the NBA. 786 F.3d 246, 250 (2d Cir. 2015). In other words, the Second Circuit held that a loan validly originated by a national bank that was not usurious at origination could become usurious upon transfer to a non-bank. Although *Madden* concerned the assignment of a loan by a national bank, because Section 1831d is substantially similar to, and interpreted in the same way as, the

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[2] Even before these U.S. Supreme Court decisions, valid-when-made was a venerable and well-recognized principle of law. *See, e.g.*, *Tuttle* v. *Clark*, 4 Conn. 153, 157 (1822) (holding that "this note, free from the taint of usury, in its origin," did not become usurious by the subsequent sale); *Tate* v. *Wellings* (1790) 100 Eng. Rep. 716, 721 (KB) (opinion of Buller, J.) ("Here the defence set up is that the contract itself was illegal; and in order to support it, it must be shewn that it was usurious at the time when it was entered into; for if the contract were legal at that time, no subsequent event can make it usurious."); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379–80 n.32 (18th London ed., W.E. Dean 1838) ("The usury must be part of the contract in its inception . . . .").

relevant provision of the NBA,[3] *Madden* also had direct implications for Section 1831d, highlighting the need for the FDIC to avoid misapplications of the FDIA interest rate provisions.[4]

Not only did *Madden* fatally err by failing even to consider the valid-when-made doctrine, but, as the Ninth Circuit recently recognized, *Madden* has had negative effects on the credit markets by causing restrictions in the extension of credit to borrowers in the Second Circuit, particularly for underserved borrowers such as lower-income Americans and small businesses. *See McShannock*, 976 F.3d at 892.

The FDIC's recent regulation reaffirming the cardinal rule and making clear that the FDIA's provisions apply to loans originated by an FDIC Bank, even after the transfer of such loans, is crucial to fixing the legal fallacy and economic damage that *Madden* has created. *See Federal Interest Rate Authority*, 85 Fed. Reg. 44,146 (Aug. 21, 2020) (codified as part of 12 C.F.R. § 331.4(e)) ("FDIC Rule"). This Court should grant the FDIC's motion for summary judgment and reject Plaintiffs' erroneous legal and economic argument for two reasons.

*First*, Plaintiffs wrongly contend that the foundational U.S. cases recognizing the valid-when-made doctrine are distinguishable from the current context because those courts could not have contemplated, prior to the passage of the NBA and FDIA, that the usurious nature of a loan could turn on whether the loan's assignee was subject to a different interest rate cap than was the originator.[5] This contention is demonstrably false: even before the NBA and FDIA, there was substantial variation in the usury laws among states—and even within a state—such that different entities would be subject to different interest rate caps. The valid-when-made doctrine was thus necessary to ensure that a validly originated loan did not become usurious merely by reason of its assignment. Moreover, Plaintiffs (and

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[3] FDIC General Counsel's Opinion No. 11, *Interest Charges by Interstate State Banks*, 63 Fed. Reg. 27,282, 27,283 (May 18, 1998) (to achieve "parity" and given the borrowed language, Section 1831d must receive the same interpretation as Section 85).

[4] The *Madden* decision also caused the OCC to reaffirm valid-when-made as it applies to Section 85 of the NBA. *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 C.F.R. §§ 7.40001(e) and 160.110(d)) ("OCC Rule"). And, although the OCC Rule simply reaffirms law that has been established in the U.S. since its inception, plaintiffs are challenging the validity of that regulation as well. *See California* v. *OCC*, No. 4:20-cv-05200-JSW (N.D. Cal. filed July 29, 2020).

[5] Pls.' Mot. for Summ. J., and Mem. of Points & Authorities ("Pls.' Mot.") at 12.

their *amici*) tellingly have not identified a *single* pre-*Madden* case in the history of American law—including in the 150 years between the enactment of the NBA in 1864 and *Madden* in 2015—holding that a validly originated loan became usurious as a result of an assignment or sale. The reason for this complete lack of caselaw is obvious: prior to *Madden*, there was no doubt about the valid-when-made doctrine's applicability to loans validly originated by banks and sold to non-banks, or, for that matter, a loan validly originated by any lender and subsequently sold to another party. Indeed, before *Madden*, several federal courts of appeals explicitly endorsed valid-when-made in the context of Section 1831d and its national bank analog. *See Olvera* v. *Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005) (Posner, J.); *Krispin* v. *May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000); *FDIC* v. *Lattimore Land Corp.*, 656 F.2d 139, 148–49, 149 n.17 (5th Cir. 1981). This history, among other factors, led the U.S. Solicitor General to assert in 2016 that the "court of appeals' decision [in *Madden*] is incorrect." Brief for the United States as *Amicus Curiae*, *Midland Funding, LLC* v. *Madden*, No. 15-610, 2016 WL 2997343, at 6 (U.S. May 24, 2016) ("OCC/SG Brief").

*Second*, as the Ninth Circuit realized in *McShannock*, and as shown by many legal and finance scholars, *Madden*'s deviation from the valid-when-made doctrine has caused significant harm to the credit markets. Specifically, the decision caused lenders to "extend[] 'relatively less credit to borrowers' and [to] 'discount[] notes backed by above-usury loans to borrowers in Connecticut and New York.'" *McShannock*, 976 F.3d at 892 (quoting Colleen Honigsberg *et al.*, *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 J.L. & ECON. 673, 675, 691 (2017)). Indeed, some lenders even "'declined to issue loans to the higher-risk borrowers most likely to borrow above usury rates'" altogether. *Id.* (quoting Honigsberg, *supra*, at 675). Thus, *Madden* restricted access to credit for the small businesses and individuals who are most in need of access to liquidity.

The FDIC Rule was developed to eliminate the uncertainty, reduced access to credit, and increased costs brought on by the erroneous *Madden* decision. Striking down the FDIC Rule would reintroduce those harms and allow them to spread, reducing the availability of credit and thereby harming the U.S. financial system and economy. Those harms will only grow when this country returns to historically normal interest rates, and allegations of usury become more common as a result. Accordingly, in ruling on the pending Motions for Summary Judgment, the Court should uphold the FDIC's recognition of the cardinal rule and reject any reliance on the erroneous *Madden* decision.

## ARGUMENT

### I. THE FDIC RULE IS CONSISTENT WITH LONGSTANDING LAW APPLYING THE VALID-WHEN-MADE DOCTRINE AND THE FDIA.

#### A. For Over 200 Years, It Has Been Well Established That a Valid Loan Cannot Be Rendered Usurious by a Sale or Assignment to a Third Party.

For the last two centuries, courts in this country have applied the valid-when-made doctrine as a well-established, fundamental legal principle. *See, e.g.*, *Tuttle*, 4 Conn. at 157 (holding that a "note, free from the taint of usury, in its origin," did not become usurious by a subsequent sale); *Salter* v. *Havivi*, 215 N.Y.S.2d 913, 919 (Sup. Ct. 1961) ("[A] contract not tainted with usury in its inception will not be affected by subsequent usurious transactions in connection therewith."); *Strike* v. *Trans-West Discount Corp.*, 155 Cal. Rptr. 132, 139 (Ct. App. 1979) ("[A] contract, not usurious in its inception, does not become usurious by subsequent events."); *see also* BLACKSTONE, *supra* note 2, at 379–80 n.32 ("[U]sury must be part of the contract in its inception . . . ."). The doctrine is consistent with the general contract principle that all contractual rights are assignable "in the absence of clear language expressly prohibiting the assignment and unless the assignment would materially change the duty of the obligor or materially increase the obligor's burden or risk under contract." 29 WILLISTON ON CONTRACTS § 74:10 (4th ed. 2020). Accordingly, under the valid-when-made doctrine, the right to charge interest under a contract is assignable notwithstanding any usury law that would otherwise apply to the assignee, provided that the loan was valid at its inception.

The valid-when-made doctrine was affirmed by the U.S. Supreme Court in 1828, when it held that a non-usurious loan could not become usurious by reason of its sale or assignment. *Gaither*, 26 U.S. at 43. Five years later, the Supreme Court again recognized that it is a "cardinal rule" of usury that the determination of whether a loan is usurious occurs at the time of origination. *Nichols*, 32 U.S. at 109. The Court observed that, without the doctrine, "a contract, wholly innocent in its origin, and binding and valid, upon every legal principle, [would be] rendered, at least, valueless, in the hands of the otherwise legal holder." *Id.* at 110. The FDIC Rule, in recognizing the valid-when-made doctrine, helps restore these settled principles of usury law that banks, regulators, and borrowers have relied upon for hundreds of years leading up to the *Madden* decision.

Notwithstanding the longstanding precedent with clear language articulating the valid-when-made doctrine, Plaintiffs inexplicably contend that it was "concocted" by "federal regulators and the financial industry" and that "[c]ase law and historical treatises are devoid of anything resembling" the doctrine. (Compl. ¶¶ 61, 70.) To support these arguments, Plaintiffs rely primarily on an *amicus* brief that was attached to a comment submitted by Professor Adam Levitin in connection with the separate case confronting the implications of *Madden*. (Compl. ¶ 70 n.76 (citing Brief of Professor Adam J. Levitin as *Amicus Curiae* in Support of Appellant, *Rent-Rite Super Kegs W., Ltd.* v. *World Bus. Lenders, LLC*, No. 1:19-cv-01552-REB (D. Colo. Sept. 19, 2019) ("Levitin *Rent-Rite* Brief").)[6] Plaintiffs' assertions, and the *amicus* brief upon which they are based, should be rejected for four reasons.

*First*, Plaintiffs assert that because *Nichols* and *Gaither* were decided before Congress enacted the NBA in 1864, and therefore long before Section 1831d was modeled on that national bank analogue in 1980, "the Court in *Nichols* and *Gaither* could not have contemplated that the usurious nature of a loan could turn on whether the loan was held by an entity statutorily protected from state rate caps or a non-protected assignee, and its holdings in those cases do not have any bearing on 'valid-when-made.'" (Compl. ¶ 73 (citing Levitin *Rent-Rite* Brief at 16).) But the valid-when-made doctrine has always been a fundamental *principle* of usury law, and is not limited to application of the NBA or the FDIA. To the contrary, there were substantial differences in usury laws among the states, and even within a state, depending on the type of borrower, lender, and loan. *See* Efraim Benmelech & Tobias J. Moskowitz, *The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century*, 65 J. FIN. 1029, 1037, 1038 tbl. 1 (2010) ("In 19th century America, there [wa]s substantial variation in usury laws across states and over time."); Cong. Globe, 38th Cong., 1st Sess. 2125 (1864) (statement of Sen. Henderson) (explaining, during Senate debate on the NBA, that under Missouri law interest on a loan was limited to six percent if no interest rate were specified in the contract or ten percent if the parties agreed

[6] Professor Levitin has also submitted a proposed *amicus* brief in this litigation that repeats many of the same arguments that are made in his submission from the FDIC's rulemaking process. (*See* Brief of Professor Adam J. Levitin as *Amicus Curiae* in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 50 ("Levitin FDIC Rule Brief").)

on a specified rate, but that banks of issue were only permitted to charge up to eight percent). Therefore, a validly originated loan historically could have been assigned or sold such that, absent the valid-when-made doctrine, the loan could have run afoul of another state's usury laws, or the usury laws of one state that varied in their application. The valid-when-made doctrine was, in fact, commercially and legally necessary well before Congress passed either the NBA or the FDIA. Neither Plaintiffs nor their *amici* provide any reason why loans issued pursuant to the relevant FDIA provisions here should be treated any differently.

*Second*, Plaintiffs and Professor Levitin argue that the holdings in *Gaither* and *Nichols* should be disregarded because "[n]one of these cases involved statutes exempting any party from state interest-rate caps" and they "have nothing to do with the interest rates non-banks may charge when they buy loans issued by FDIC Banks." (Compl. ¶¶ 73, 76 (citing Levitin *Rent-Rite* Brief at 16); *see also* Levitin FDIC Rule Brief at 13–15.) Instead, Plaintiffs characterize *Gaither* and *Nichols* as holding merely "that in determining whether a loan's interest rate is usurious, the effective interest rate should be calculated based on the original loan amount, not on whatever discounted price a buyer paid to the original lender for the loan." (Compl. ¶ 75.) But Plaintiffs' cramped characterization of these cases cannot withstand scrutiny. *Gaither* and *Nichols* cited the "cardinal" rule that "a contract free from usurious taint in its inception" cannot be "rendered . . . valueless, in the hands of the otherwise legal holder." *Nichols*, 32 U.S. at 109–10. That is not a mere prescription for a method of interest calculation, but rather is reaffirmation of a first principle of contract and usury law. Thus, *Gaither* and *Nichols* recognized the valid-when-made doctrine as a "preexisting maxim" and "applied it to a certain set of facts."[7] Plaintiffs and Professor Levitin also disregard later cases that read *Gaither* and *Nichols* as standing for the proposition that assignment of a loan to an entity that is located in a different state with a lower interest rate cap does not render the loan usurious. *See, e.g.*, *Lattimore*, 656 F.2d at 148–49, 149 n.17 (citing *Nichols* for the proposition that "[t]he non-usurious character of a note should not change when the note changes hands" and holding that a note that was not usurious under Georgia law when made did not

[7] *See* Brian Knight, *Credit Markets Need Legislative Guidance After* Madden *Decision*, AM. BANKER (Sept. 14, 2017), available at https://tinyurl.com/KnightMadden.

become usurious by reason of the assignment of an interest in the note to a national bank located in Tennessee—which has a lower rate limit).

*Third*, Plaintiffs' contention that "the first articulation of §§ 85 and 1831d 'valid-when-made' theory of § 85 appears in a 2015 brief asking the Second Circuit to reconsider *Madden*" (Compl. ¶ 70) is wrong, not only because of the above-cited nineteenth-century cases, but also because, as noted above, the doctrine continued to be uniformly applied in U.S. Courts of Appeals until the Second Circuit's erroneous decision in *Madden*. *See Krispin*, 218 F.3d at 924 ("[I]t makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies."); *Lattimore*, 656 F.2d at 148–49 ("The non-usurious character of a note should not change when the note changes hands."). In arguing that valid-when-made is a modern invention, Plaintiffs even overlook authority incorporating the doctrine into their own states' laws. As Judge Posner explained in 2005 in a decision interpreting the Illinois Interest Act, "once assignors were authorized [by statute] to charge interest, the common law [of assignments, which pre-dated the statute] kicked in and gave the assignees the same right . . . ." *Olvera*, 431 F.3d at 289. Courts in New York have also endorsed valid-when made. *See, e.g.*, *Galatti* v. *Alliance Funding Co., Inc.*, 644 N.Y.S.2d 330, 331 (App. Div. 1996) (holding that a note was exempt from the general prohibition against usury since the original mortgagee was a licensed mortgage banker and "defendants, as the lawful assignees of that mortgage, [were] similarly entitled to assert that exemption"). And after the California Court of Appeal's *Strike* decision reiterated the long-accepted rule that "a contract, not usurious in its inception, does not become usurious by subsequent events," 155 Cal. Rptr. at 139, the California legislature amended the state constitution to make clear that state usury restrictions do not apply to "any *successor in interest to any loan or forbearance* exempted under this article." CAL. CONST. art. XV § 1 (amended Nov. 6, 1979) (emphasis added).

Indeed, Professor Levitin concedes that "[a] handful of post-1980 cases arguably support the doctrine," but, in conclusory fashion, dismisses them as "founded on a misinterpretation" of a quote from *Nichols*. Levitin *Rent-Rite* Brief at 28.[8] To the contrary, these modern decisions each analyzed and

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[8] Professor Levitin's *amicus* brief merely concludes that "[t]he Seventh Circuit simply erred," because the statutory right to charge interest is supposedly non-assignable. (*See* Levitin FDIC Rule Brief at 19 n.28.) But this argument ignores Judge Posner's point that the Illinois statute at issue—like the

faithfully applied the valid-when-made doctrine. For example, in one of the first decisions, if not the first, to be published after the promulgation of the OCC Rule, the District of Massachusetts dismissed claims alleging that the defendants, thirteen statutory trusts, violated Pennsylvania usury law by charging more interest than was allowed by the state cap. *Robinson* v. *Nat'l Collegiate Student Loan Tr.*, 2021 WL 1293707 (D. Mass. Apr. 7, 2021). The court ruled in favor of the defendants, holding that the loans were validly originated by PNC, a national bank subject to Section 85, and that the loans were valid when made and not usurious when sold to the defendants. *Id.* at *4–8. The court also directly addressed the recent OCC Rule for national banks, which is substantially similar to the FDIC Rule, and stated that "[e]ssentially, the new regulation joins §§ 24 and 85, as well as *Gaither* and *Nichols*, in confirming that a national bank (a) may set an interest rate based on the state in which it is chartered, (b) may then sell or transfer a loan with that interest rate to an individual or entity within another state, and (c) the loan will remain valid after transfer—even if the interest rate on the loan conflicts with a usury law in the transferee state." *Id.* at *5. Thus, contrary to Plaintiffs' theory that valid-when-made is the invention of modern lobbyists, the *Robinson* court stated that the OCC Rule simply "confirmed longstanding Supreme Court precedent under *Gaither* and *Nichols*" and settled the "ambiguity" created by the *Madden* decision. *Id.*

To the extent Plaintiffs are suggesting that a lack of decisions expressly discussing the doctrine suggests it was not widely accepted, they are mistaken again. The fact that there are not even more modern decisions analyzing the valid-when-made doctrine reflects that the doctrine was universally accepted and, as binding Supreme Court precedent should be, largely unchallenged:

> [T]he relative paucity of modern case law (that is, decisions from the mid-20th century and later) more likely reflects the fact that valid-when-made is a core, and generally accepted, principle of the law of loans and contracts that litigants have not felt necessary to challenge, or the courts to decide. Certainly, as a business matter, the valid-when-made principle has been universally relied on in the lending business, inasmuch as the ability of a loan transferee to rely upon the enforceability and collectability in full of a loan that is validly made is central to the stability and liquidity of the domestic loan markets, to say nothing of core principles of commercial dealing. And, prior to *Madden*, there was no reason to believe that the courts viewed the matter otherwise.

Charles M. Horn & Melissa R.H. Hall, *The Curious Case of* Madden v. Midland Funding *and the Survival of the Valid-When-Made Doctrine*, 21 N.C. BANKING INST. 1, 7 (2017). Moreover, it is scarcely surprising

NBA—inherently incorporated the existing common law of assignments, thus making the right to charge interest assignable.

that there were no "scholarly articles" on such a well-settled and (until *Madden*) unchallenged principle of law. (*See* Levitin FDIC Rule Brief at 5.)

*Fourth*, it is much more telling that neither Plaintiffs nor their *amicus* can cite—out of the hundreds of years of precedent—even a single pre-*Madden* authority holding that the sale or transfer of a loan to a third party *can* render it usurious. In other words, not once in this country's history, before *Madden*, did a single disgruntled borrower or enterprising plaintiff's lawyer successfully bring a lawsuit based on the notion that the borrower was entitled to pay a lower rate of interest on a loan once the originating lender had sold or assigned the loan to a third party.

**B. The FDIA Incorporates the Cardinal Rule.**

Section 85 of the NBA permits a national bank to "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. § 85. The effect of this authority is to allow a national bank to charge, on a nationwide basis, interest on the loans it originates at rates permitted by its home state, notwithstanding the contrary usury laws of other states. *See, e.g.*, *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Svc. Corp.*, 439 U.S. 299 (1978). Because the valid-when-made doctrine was entrenched in American law when Congress enacted Section 85 of the NBA in 1864, Congress is also presumed to have incorporated that rule into Section 85. *See Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)) (citations omitted).

When Congress enacted Section 27 of the FDIA in 1980—with the stated goal of "prevent[ing] discrimination against State chartered insured depository institutions," 12 U.S.C. § 1831d—it extended to FDIC Banks the same interest rate authority allowed to loans made by national banks under the NBA. Specifically, Section 1831d permits an FDIC Bank to "charge on any loan . . . interest at the rate . . . allowed by the laws of the State . . . where the bank is located." *Id.* Because the text of Section 1831d was patterned after Section 85 of the NBA and borrows its language, and because Congress expressly intended to achieve parity between the application of the two statutes, courts and regulators have given Section 1831d and Section 85 the "same interpretation." *See, e.g.*, *Stoorman* v. *Greenwood Trust*

*Co.*, 908 P.2d 133, 135 (Colo. 1995); *Greenwood*, 971 F.2d at 827 (reading Section 1831d to allow exportation of interest rates just like Section 85 because "[t]he historical record clearly requires a court to read the parallel provisions of DIDA and [Section 85] *in pari materia*"); FDIC General Counsel's Opinion No. 11, *Interest Charges by Interstate State Banks*, 63 Fed. Reg. at 27,283 (to achieve "parity" and given the borrowed language, Section 1831d must receive the same interpretation as Section 85). Accordingly, Congress also incorporated the valid-when-made doctrine in Section 1831d of the FDIA, just as it did in Section 85 of the NBA, protecting assignees of loans validly originated by FDIC Banks from state-law usury claims.

The ability of FDIC Banks to sell and assign loans they have originated is crucial to the proper functioning of the loan markets, and it is implausible to suggest, as Plaintiffs do, that Congress intended to strip this ability from banks originating loans pursuant to that provision.[9] In the wake of *Madden* several years ago, the OCC and Solicitor General explained that the "power explicitly conferred on national banks . . . to originate loans at the maximum interest rate allowed by the national bank's home State" necessarily includes the "power to transfer a loan, including the agreed-upon interest-rate term, to an entity other than a national bank." *See* OCC/SG Brief at 7–8. More recently, the FDIC and OCC reiterated that "Section 1831d gives banks a right to transfer their home-state rates," and therefore "*Madden* is wrong because a state law that prohibits assignees from enforcing the transferred rates [of assigned loans] actually makes the *banks'* rights to transfer those interest rates non-assignable in practice." *See* Brief for the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency as *Amicus Curiae*, *Rent-Rite Super Kegs W., Ltd.* v. *World Bus. Lenders, LLC*, No. 1:19-cv-01552-REB, at 24 (D. Colo. Sept. 19, 2019) ("FDIC/OCC Brief"). The FDIC Rule at issue here merely codifies this fundamental principle.

Indeed, the U.S. Supreme Court recognized, even before the passage of the NBA or the FDIA, that a bank's authority to make promissory notes carried with it the "necessarily implied authority" to transfer those notes. *Planters' Bank of Miss.* v. *Sharp*, 47 U.S. (6 How.) 301, 322 (1848); *see also id.*

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[9] *See Statement by FDIC Chairman Jelena McWilliams on the Final Rule: Federal Interest Rate Authority*, FDIC (June 25, 2020), https://www.fdic.gov/news/speeches/spjun2520b.html ("The FDIC cannot maximize the return on sales of failed bank assets if the ability of banks to sell loans on the secondary market is undermined.").

at 323 (acknowledging that a bank "must be able to assign or sell [its] notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house"). It thus follows that "to avoid frustrating the purpose of Section 1831d, a bank's statutory authority to charge interest at the rate permitted by its home State must inherently encompass the power to convey that usury-exempted rate to an assignee" because, if FDIC Banks were unable to transfer loans with certainty that their interest rates would be valid, the loans would be rendered essentially unmarketable and the ability of the FDIC Banks to finance new loans would be undermined. FDIC/OCC Brief at 17–18; *see also Strike*, 155 Cal. Rptr. at 139 (holding that assignees of bank notes could continue to benefit from a provision of the California Constitution exempting banks from the usury laws, since a contrary conclusion "would in effect prohibit—make uneconomic—the assignment or sale by banks of their commercial property to a secondary market," which "would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance"). Therefore, "Congress's conferral of [a] federal right" to charge interest "up to the maximum rate allowed by the bank's home State" should "be understood to incorporate the understandings that (a) *sale of loans is an integral aspect of usual banking practice*, and (b) *a loan that was valid when made will not be rendered usurious by the transfer*." OCC/SG Brief at 9–10 (emphases added). The same logic and law, of course, applies to all FDIC Banks. *Cf. Greenwood*, 971 F.2d at 826–28 (holding that Massachusetts usury law was expressly preempted as far as FDIC Banks were concerned because Section 1831d's plain language and relation to the NBA "necessarily derails any state-sponsored attempt to regulate the maximum interest chargeable by a federally insured bank chartered in another state").

Tacitly recognizing that Congress incorporated valid-when-made into the NBA and FDIA, Plaintiffs wrongly contend that the FDIC "disclaims reliance on" the common law origins of the valid-when-made doctrine. (Pls.' Mot. at 12.) This contention glaringly misstates the FDIC's position. In the FDIC Rule itself, which is the source of the quoted language in the Plaintiffs' Motion, the FDIC recounts certain commenters' position that Congress incorporated the common law of usury into Section 1831d when it passed the 1980 amendments to the FDIA, and the FDIC disagrees, not with that proposition, but with the commenters' conclusion that the FDIC lacks legal authority to issue interest rate sale regulation as a result. *See* 85 Fed. Reg. at 44,151. Nothing in the FDIC's statements indicates that it disagrees with the proposition that the common law was incorporated into Section 1831d. Instead, the FDIC Rule unambiguously states that while "the proposed rule arises under section 27 rather than common law," the rule is "consistent with state banking powers and common law doctrines such as the 'valid when made' and 'stand-in-the shoes' rules" in order to "reinforce parties' established expectations." *Id.* at 44,149-151.

**C. The FDIC Rule Properly Reaffirms the Long-Recognized Cardinal Rule.**

To address the disruption caused by the erroneous *Madden* decision, the FDIC Rule reaffirms the valid-when-made doctrine, ensures that all FDIC Banks will continue to receive the protections provided for in the FDIA, and reiterates their importance to the functioning of the U.S. economy The statutory usury limit for insured banks and the valid-when-made doctrine are related doctrines. The former establishes the permissible rate of interest for insured banks (12 U.S.C § 85 for national banks and 12 U.S.C. § 1831d for state insured banks). The latter then establishes the doctrine, important to those banks, that the loan may be sold or transferred without rendering it usurious. Thus, the two legal standards work in tandem. The federal statute establishes the permissible rate of interest on the loan and the valid-when-made rate then protects that statutory standard from being undermined by questions upon the loan's sale.

The FDIC Rule codifies what was universally accepted prior to the *Madden* decision: pursuant to 12 U.S.C. § 1831d, "[i]nterest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act shall not be affected by . . . the sale, assignment, or other transfer of the loan, in whole or in part." 85 Fed. Reg. at 44,158. In its draft rule proposal, the FDIC thoroughly and persuasively analyzed the history, purpose, and text of the FDIA and its amendments, leading the FDIC to conclude that "[a] bank's power to make loans implicitly carries with it the power to assign loans, and thus, a State bank's statutory authority to make loans at this rate necessarily includes the power to assign loans at the same rate." *Federal Interest Rate Authority*, 84 Fed. Reg. 66,845, 66,848 (Dec. 6, 2019) (proposed rule). As the FDIC explained in the adoption of its final rule, the FDIC Rule simply "makes explicit that the right to assign loans is a component of banks' Federal statutory right to make loans at the rates permitted by section 27," rendering Section 1831d "consistent" with the valid-when-made principles recognized by courts well before the passage of the federal interest rate statutes for insured banks. 85 Fed. Reg. at 44,149.

### D. Plaintiffs' Arguments Regarding the True Lender Rule Are Irrelevant to the Consideration of the Valid-When-Made Doctrine.

Because Plaintiffs and their *amici* are wrong on the law, they are forced to make the erroneous argument that the FDIC Rule will embolden "rent-a-bank" schemes and "facilitate" predatory loans due to the Rule's alleged relation to the separate "true lender" doctrine. (*See* Pls.' Mot. at 18–21; Brief of *Amici Curiae* Center for Responsible Lending *et al.*, Dkt. No. 55, at 16–19.)[10] Contrary to Plaintiffs' and their *amici*'s arguments, however, the true lender rule is a distinct doctrine from valid-when-made and irrelevant for resolving this lawsuit. The true lender question determines which entity is the originator of a loan for the purposes of assessing the loan's validity under usury laws at the time the loan is made. For example, was the loan truly originated by a FDIC Bank, or by a non-bank entity working with the FDIC Bank? This question can become relevant if the non-bank entity has a lower (or higher) permissible rate of interest than the FDIC Bank. In this context, the valid-when-made doctrine only applies when the loan was *validly* originated in terms of the rate of interest, and only concerns whether transferring a loan *after* its valid origination can render the loan usurious.

Despite the fact that, pre-*Madden*, valid-when-made was the universally accepted rule of law throughout the country, prosecutors and regulators had no problem in effectively using the true lender doctrine to bring enforcement actions against "rent-a-bank" schemes.[11] And, as *Robinson* v. *National Collegiate Student Loan Trust* has shown, regulations affirming valid-when-made prevent neither plaintiffs from alleging true lender issues nor courts from appropriately assessing those claims. 2021 WL 1293707, at *8 (holding that the national bank was the true lender instead of the loan purchaser because it had an economic interest in the loans and it was named as the lender on the credit agreement). Thus, Plaintiffs' attempt to conflate the two doctrines and draw a connection between the valid-when-made

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[10] This brief does not take any position on various state true lender laws or the recent OCC rule relating to true lender.

[11] *See, e.g.*, *West Virginia* v. *CashCall, Inc.*, 605 F. Supp. 2d 781 (S.D. W. Va. 2009); *Consumer Fin. Prot. Bureau* v. *CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (initial complaint filed in 2013).

doctrine and "rent-a-bank" schemes is misguided. Those schemes do not implicate the valid-when-made doctrine, which is premised on the loan's origination being valid.[12]

Although a transfer of a loan from an insured bank to a non-bank simultaneously with or shortly after origination of the loan could implicate the question of the true lender, that is a question to be determined under that doctrine. And that determination is whether the loan had a permissible rate of interest at the time of origination. Not only is there doctrinal separation between the true lender and valid-when-made legal concepts, it would be nonsensical to repudiate centuries of precedent regarding valid-when-made to reinforce the true lender requirement.

Moreover, the OCC highlighted the doctrinal separation between true lender and valid-when-made when it promulgated two separate rules to address the valid-when-made and the true lender doctrines. *Compare* OCC Rule, 85 Fed. Reg. 33,530 *with National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 68,742 (Oct. 30, 2020). Instead of resolving both disputes in a single rule, which would make sense if the issues were as inextricably connected as Plaintiffs claim, the OCC addressed Plaintiffs' complaints directly, stating that its "[true lender] rulemaking would solve the rent-a-charter issues raised and ensure that banks do not participate in those arrangements." *Id.* at 68,744.[13] Therefore, by addressing the true lender/rent-a-bank issue in a separate rule, the OCC made

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[12] Further, the FDIC Rule does not permit state banks to assign their statutory right to originate loans at home-state interest rate limits, as Plaintiffs and their *amici* imply. Professor Levitin states that "[a]llowing the privileges of federal deposit insurance to spill over to entities not regulated as State Banks would undo Congress's carefully drawn regulatory boundaries and undermine the balance of privileges and obligations that attend federal deposit insurance." (Levitin FDIC Rule Brief at 1.) But an FDIC Bank assigning a loan it validly originated pursuant to Section 1831d does not disrupt or undermine the carefully drawn regulatory boundaries because only qualifying banks may originate loans under the FDIA. That origination right—as opposed to the rights accruing upon valid origination—cannot be transferred under the Rule, and all loans under Section 1831d must still be originated by an entity subject to the regulatory requirements of the FDIA. Instead, valid-when-made concerns the bank's ability to assign properly originated loans, thereby implicating banks' contractual rights, not statutory rights.

[13] A group of plaintiffs also filed a complaint challenging the OCC's recent rulemaking regarding the true lender rule. But even that suit recognizes the distinction between the valid-when-made and true lender doctrines. The complaint, filed in the Southern District of New York, references the related OCC valid-when-made litigation and states that "[s]everal States sued the OCC to invalidate the [OCC valid-when-made] rule arguing, among other things, that the OCC lacked statutory authority to issue the rule. . . . Those cases are currently pending. *The true lender rule is invalid regardless of their outcome.*" Complaint ¶ 49 n.49, *New York* v. *OCC*, No. 1:21-Civ.-00057 (S.D.N.Y. filed Jan. 5, 2021) (emphasis

clear that the true lender doctrine is separate from valid-when-made and is irrelevant to the determination in this litigation.

Although several commentators raised questions about the true lender issue, the FDIC Rule intentionally "did not address the circumstances under which a non-bank might be the true lender with respect to a loan, and did not allocate the task of making such a determination to any party." 85 Fed. Reg. at 44,153. This is because the FDIC, like the OCC, determined that the true lender doctrine is separate from valid-when-made. And although the final FDIC Rule states that the true lender issue implicated unique policy questions that warranted "consideration separate from this rulemaking," the FDIC concluded that those concerns "should not delay this rulemaking, which addresses the need to clarify the interest rates that may be charged with respect to State banks' loans and promotes the safety and soundness of State banks." *Id.* Thus, the FDIC's sound discussion and decision regarding the true lender and valid-when-made doctrines demonstrate that, even if it did not satisfy Plaintiffs and solve every legal ambiguity in a single rulemaking, the agency carefully considered all necessary factors before issuing the Rule at issue here.

## II. THE FDIC RULE PROVIDES PROTECTION AGAINST HARMFUL ECONOMIC CONSEQUENCES.

In creating the FDIC Rule, the agency took reasoned, careful steps to protect and facilitate the operation of healthy credit markets. Banks and savings associations routinely sell or assign loans in order to secure additional liquidity, capital, and support for their lending activities. As of approximately 2019, BPI's members alone had outstanding $2.5 trillion in loans to businesses and $3.1 trillion in household loans, representing 72% of all loans and nearly half of the nation's small business loans.[14] Those loans are often securitized or resold as whole loans to different banks and non-bank institutions in various jurisdictions that may re-sell the loans, sometimes resulting in a lengthy chain of ownership. Had the FDIC Rule failed to reaffirm the valid-when-made doctrine and allowed the *Madden* rule to remain the law and potentially be adopted by other courts outside the Second Circuit, it would have substantially

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added). Plaintiffs to that action thus acknowledge that they view the validity of the valid-when-made rule as independent and separate from the true lender issue.

[14] *See BPI Members' National Economic Contributions*, BANK POLICY INST., https://bpi.morningconsultintelligence.com/custom/reports/national.pdf (last visited May 26, 2021).

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reduced the availability of credit and increased the costs of selling loans by requiring banks and loan purchasers to navigate a patchwork of state-law usury limits, modify loans that could potentially violate various usury laws, and otherwise reduce the pool of potential loan purchasers.

For instance, sales of loans typically include representations and warranties that the loans are collectible in accordance with their terms, including the terms of the applicable interest rate. Plaintiffs' position, if accepted, would chill sellers from making such representations and warranties, further depressing the price of loans sold by originators or rendering sales infeasible due to the uncertainty of collectability. And, absent the valid-when-made doctrine, even when a bank could research and determine that a loan being sold would not be usurious under the laws of the state of the borrower, the price would nonetheless be reduced because the constraints on the purchaser's ability to resell the loan significantly reduce the pool of potential buyers. Under *Madden*, every single time a potential seller and buyer of a loan wish to transact, they will need to research whether the transaction will subject them to usury claims by the borrower due solely to the different status of the seller and buyer.

Plaintiffs' position would be particularly problematic and disadvantageous for smaller FDIC Banks that may have less resources with which to research and continuously monitor the laws of 50 states. Where a bank cannot sell or assign loans as a result of these increased hurdles, or needs to discount the loans because the purchaser of the loans must follow restrictions that the bank does not, the bank will necessarily have fewer resources to commit to other loans. Therefore, the significant added risk and administrative cost of loan origination will result in banks issuing fewer loans or increasing the interest rates they offer to future borrowers. As the Ninth Circuit noted in *McShannock*, "imposing substantial compliance costs on secondary buyers . . . decreases the value of the loans being held by federal savings associations, thereby reducing the amount of lending federal savings institutions can do." 976 F.3d at 892. As the FDIC determined when crafting its rule, the valid-when-made doctrine helps to avoid these detrimental impacts by ensuring that banks can continue to sell loans and, in turn, extend new credit to businesses and consumers.

Furthermore, because a bank's ability to sell its loans to third parties is a crucial liquidity and credit risk management tool, Plaintiffs' position threatens the safety and resilience of the banking system. Absent the FDIC Rule and the valid-when-made doctrine, FDIC Banks will be limited in their ability to generate liquidity or to reduce risks in their balance sheets by selling loans. This problem will be exacerbated when there are general market disruptions, such as in recent financial crises, where market liquidity is critical. And, in the extreme case of a bank failure, the job of federal regulators to dispose of the failed bank's assets would be severely circumscribed by the regulators' inability to assign the failed bank's loans to non-bank third parties.

The importance of the valid-when-made doctrine to the credit markets has been recognized by courts applying it before and after *Madden*. As Judge Posner observed, failure to recognize the valid-when-made doctrine would "make the credit market operate less efficiently" because banks would "face higher costs of collection and would pass much of the higher expense on to their customers in the form of even higher interest rates." *Olvera*, 431 F.3d at 288. Scholars have also warned how credit markets would be affected if valid-when-made were rejected. *See, e.g.*, U.S. DEP'T OF TREASURY, REPORT: A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES, NONBANK FINANCIALS, FINTECH, AND INNOVATION 92 (July 2018), available at https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf (explaining that *Madden* was wrongly decided and has the effect of "restricting access to credit"); Kirby M. Smith, *Banking on Preemption: Allowing National Bank Act Preemption for Third Party Sales*, 83 U. CHI. L. REV. 1631, 1682 (2016) (if Section 85 did not continue to apply after a loan originated by a national bank is transferred, it "would harm all consumers by increasing the cost of credit and likely cutting some marginal debtors out of the market").

These concerns are not hypothetical. Following *Madden*, "[s]ome lenders have decided to exclude the Second Circuit states . . . from their marketing and lending programs." *See* Horn & Hall, *supra*, at 22.[15] Such balkanization has impacted the securitization market as well, with firms removing loans made to borrowers in the Second Circuit from asset-backed securitizations due to interest rate cap concerns. *See id.*[16] Moreover, the impacts of *Madden* disproportionately harm lower-income borrowers

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15 *See also* Joy Wiltermuth, *Usury worries hit Avant collateral*, INT'L FIN. REV., Aug. 21, 2015, 2015 WLNR 2459283.

16 *See also AFFIRM ASSET 2021-A: DBRS Gives Prov. B Rating on Class E Notes*, 25 TROUBLED CO. REP., Feb. 21, 2021, 2021 WLNR 5850089 (noting that "[l]oans originated to borrowers in states with

by "reduc[ing] the flow of credit . . . to higher-risk borrowers." Honigsberg, *supra*, at 694; *see also id.* at 698 (noting, *inter alia*, that after *Madden*, "loans to borrowers with FICO scores below 644 virtually disappear[ed]"); *McShannock*, 976 F.3d at 892 (citing scholarly research observing that lenders made fewer and smaller loans to higher-risk borrowers in Connecticut and New York after *Madden* was decided); Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 VAND. J. ENT. & TECH. L. 129, 188 (2017) (noting that the "experience of marketplace lenders post *Madden*" is one "where uncertainty about the legality of loans has crippled access to lending for certain borrowers"). These harms will continue to expand to the extent other jurisdictions were free to adopt the *Madden* rule. *See* Horn & Hall, *supra*, at 1; 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, 1840 (Nov. 2016) ("The end result of th[e] price correction [caused by *Madden*] will be distorted investment decisions and concomitant inefficiencies.").

*Madden*'s disruption to U.S. credit markets will also grow even more as this country's economic situation normalizes and interest rates rise to their historical levels. Right now, many loans are made at rates that are far below states' usury rates because current interest rates in the market are extremely low. But as rates rise to long-run historical levels, usury claims on loans that are originated by FDIC Banks and assigned to non-banks will increase in jurisdictions that follow the *Madden* rule because lending rates will come closer to the fixed limits applicable in certain states. *See, e.g.*, 41 PA. CONS. STAT. § 201(a) (imposing a maximum annual interest rate of 6% for non-business loans of $50,000 or less in Pennsylvania); OHIO REV. CODE ANN. § 1343.01 (imposing a maximum annual interest rate of 8% for non-business loans of $100,000 or less). The FDIC Rule avoids this problem by restoring certainty to the credit markets in times of low and normal interest rates.

Plaintiffs and their *amici* attempt to undermine and minimize the evidence of *Madden*'s negative effects by selectively quoting statements from the FDIC and criticizing the empirical studies the FDIC did. (*See* Pls.' Mot. at 22–23; Br. of *Amici Curiae* Center for Responsible Lending *et al.*, Dkt. No.

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active litigation (Second Circuit (New York, Connecticut, Vermont) and Colorado) are either excluded from the pool or limited to each state's respective usury cap" for a recent securitization); *FREED ABS 2020-1: DBRS Assigns Prov. BB(low) Rating on C Notes*, 24 TROUBLED CO. REP., Jan. 26, 2020, 2020 WLNR 2563819 (same).

55, at 22–23.) However, in trying to poke holes in individual case studies and show that U.S. credit markets have not wholly collapsed in the five years since *Madden*, Plaintiffs miss the larger point: those same markets developed for two centuries under the valid-when-made doctrine, helping to spur this country's tremendous growth into the world's largest economy. American banks, borrowers, and financial institutions relied on the valid-when-made doctrine as a foundational premise. So, although it should not be ignored that it has taken only five short years for studies to show statistically significant findings that *Madden* has harmed borrowers, it is more salient that the valid-when-made doctrine was the law of the land for the entirety of U.S. history prior to the Second Circuit's *Madden* decision. Therefore, the FDIC Rule secures a return to that "cardinal" principle, relieves market uncertainty, and solidifies institutional reliance and expectations.

The FDIC Rule is designed to undo the harm caused by *Madden* and to prevent the market harm stemming from it from spreading to the rest of the United States. The evidence that is piling up in the short time since *Madden* makes clear that such protection is needed and vital to the continued health of the credit markets. The FDIC took all these potential effects into account when drafting its Rule, and acted well within its authority to ensure predictability and stability in the credit markets. Given the clear benefits of valid-when-made and the demonstrated harm in the Second Circuit in the wake of *Madden*'s failure to recognize valid-when-made, the FDIC acted within its authority in promulgating the FDIC Rule. Without the FDIC Rule, the availability of credit will be reduced, particularly for less financially well-established individuals and small businesses, smaller banks will be disadvantaged, uncertainty and costs will increase, and individuals and small businesses seeking access to credit will bear the brunt of those increased costs.

## CONCLUSION

For the foregoing reasons, this Court, in deciding the pending Motions for Summary Judgment, should reject any reliance on the Second Circuit's decision in *Madden* and affirm the FDIC's endorsement of the long-established cardinal rule that all relevant parties—lenders, borrowers, loan purchasers, and loan sellers—can rely on the valid legal status of a loan when originally made.

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