



Second Circuit Dismisses New York State Challenge to OCC's Fintech Charter Authority

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On June 3, 2021, in *Lacewell v. Office of the Comptroller of the Currency*, the U.S. Court of Appeals for the Second Circuit [dismissed](#) a challenge by the New York State Department of Financial Services (DFS) to a regulation of the Office of Comptroller of the Currency (OCC) under which OCC will consider applications for special purpose national bank (SPNB) charters by non-depository financial institutions, particularly financial technology companies (fintechs). In *Lacewell*, the three-judge panel unanimously held that DFS failed to present a justiciable claim because it had not alleged a sufficient injury to establish either its standing to challenge OCC's regulation or that its claims were ripe for adjudication. The Second Circuit's decision reversed a 2019 district court [judgment](#) holding that deposit-taking is a requirement of the National Bank Act's (NBA's) "[business of banking](#)" clause and barring OCC from issuing SPNB charters to non-depository fintechs anywhere in the country.

[Fintechs](#) provide an array of products and services. Some supply the financial services industry with digital and software technologies. Others deliver web-based, technology-enhanced financial services to businesses and consumers. Such services include loans, payment processing, financial planning, and digital currencies. Currently, the regulation and supervision of [fintechs offering bank-like services](#), such as lending or payment processing, is a matter of state law, meaning that fintechs generally may operate only in states in which they are registered and must comply with the varied laws of those states. A national bank charter would mean that a fintech could benefit from federal [preemption](#) of state licensing and consumer protection requirements.

This Legal Sidebar first discusses the background and court decisions in *Lacewell*. Next, it provides a description of initial filings in *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency* (*CSBS v. OCC*), a similar federal district court case. Finally, the Sidebar offers considerations for Congress.

Background

The NBA [authorizes](#) OCC to charter national banks "to commence the business of banking" and refers to national banks as "associations to carry on the business of banking." Based on this statutory language, OCC [promulgated](#) a regulation in 2003, [12 C.F.R. § 5.20\(e\)\(1\)\(i\)](#) ([Section 5.20\(e\)\(1\)\(i\)](#)), declaring its authority to charter SPNBs, which are defined as institutions that conduct at least one of "three core banking

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functions: [r]eceiving deposits; paying checks; or lending money.” As the Second Circuit explained in *Lacewell*, this regulation represents OCC’s first explicit assertion of power to charter national banks that do not engage in deposit-taking. In July 2018, after a series of actions detailed in an earlier [Legal Sidebar regarding national bank charters](#), OCC decided to begin receiving non-depository fintech applications for SPNB charters (the Fintech Charter Decision). Thereafter, the Conference of State Bank Supervisors (CSBS) and DFS filed separate challenges to OCC’s exercise of this authority, which achieved different results at the district court level. The U.S. District Court for the District of Columbia [dismissed](#) the CSBS suit as unripe and for lack of standing. The U.S. District Court for the Southern District of New York (district court) issued the [judgment](#) in favor of DFS that was on appeal in *Lacewell*.

District Court Decision

In *Lacewell*, DFS claimed that both the Fintech Charter Decision and [Section 5.20\(e\)\(1\)\(i\)](#) exceeded OCC’s authority under the NBA because the “business of banking” inherently requires deposit-taking. OCC moved to dismiss DFS’s complaint on the grounds that: (1) DFS failed to allege a sufficient injury to establish either that it had standing to bring its claims or that those claims were ripe for adjudication under Article III of the Constitution; and (2) the term “business of banking” in the NBA is ambiguous, thus requiring a court to defer to OCC’s interpretation of the term under the [Chevron framework](#). The district court rejected OCC’s standing and ripeness arguments and declined OCC’s call for [Chevron deference](#). Relying on 19th century dictionaries and the NBA’s post-enactment history, the district court interpreted the NBA provision allowing OCC to charter firms engaged in the “business of banking” as unambiguously requiring that national banks accept deposits, and [held](#) that OCC had therefore exceeded its authority in issuing [Section 5.20\(e\)\(1\)\(i\)](#). On this basis, the district court set aside [Section 5.20\(e\)\(1\)\(i\)](#) “with respect to all fintech applicants seeking a national bank charter that do not accept deposits.”

Second Circuit Decision

On appeal, OCC renewed its argument that DFS had not alleged an injury sufficient to satisfy the Constitution’s standing and ripeness requirements. DFS—which [supervises](#) 600 non-bank financial services companies—countered with the argument that New York State could potentially lose regulatory power and revenue because the fintechs that OCC would charter as SPNBs would avail themselves of federal preemption and remove themselves from the reach of New York’s regulatory and consumer protection authority. The Second Circuit rejected DFS’s argument, [reasoning](#) that “no New York law or regulation has been preempted because the OCC has not received an SPNB charter application from, or granted an SPNB charter to, any non-depository fintech and, . . . it is unclear at this juncture whether New York law will ever be preempted in the ways DFS fears.” The Second Circuit thus held that DFS’s claim was “too speculative” to satisfy the standing requirements of Article III, under which the plaintiff must establish that it will suffer an imminent injury. The appellate court rejected on similar grounds DFS’s claim that it would lose revenue due to OCC’s Fintech Charter Decision. According to the court, [this claim fails](#) “[a]t least until a non-depository fintech that DFS currently regulates—or would otherwise regulate—decides to apply for an SPNB charter.” The court took a skeptical view that the kind of “[regulatory disruption](#)” that DFS predicted would occur “even if OCC grants an SPNB charter to *some* non-depository fintech[s].” The court dismissed DFS’s claims on constitutional ripeness grounds “[for substantially the same reasons](#).”

Based on its holding, the Second Circuit reversed the district court’s judgment for DFS and remanded the case to the district court with orders to dismiss DFS’s complaint without prejudice. The Second Circuit made clear, however, that its decision did not rule “[or express any view on](#)” whether the district court correctly interpreted the term “business of banking” in the NBA to require deposit-taking or whether the district court’s nationwide injunction was appropriate.

CSBS Suit Challenging Figure Technologies, Inc., National Bank Application

Another suit, *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, which is at a preliminary stage, also challenges OCC's Fintech Charter Decision. In a [complaint](#) filed on December 23, 2020, in the U.S. District Court for the District of Columbia, CSBS [again](#) challenged OCC's plan to grant SPNB charters to fintechs. The complaint specifically aims to prevent OCC from acting on the national bank charter application of Figure Technologies, Inc. (Figure), a non-banking fintech that provides technology-based financial services, including payment processing. CSBS [characterizes](#) the application as "Figure's application for a Nonbank Charter." According to OCC's [motion to dismiss](#), filed on April 29, 2021, Figure is not applying for an SPNB charter but for a charter to operate as a "fully digital, branchless *de novo* national bank to be headquartered in Reno, Nevada, and operated nationwide" that will take "institutional deposits" but not apply for FDIC insurance.

In its [complaint](#), CSBS alleges that issuing a national bank charter to Figure would violate the NBA, as well as "historical chartering practice." It further alleges that both the [Federal Reserve Act](#) (FRA) and the [Federal Deposit Insurance Act](#) (FDIA) require national banks to maintain FDIC deposit insurance. CSBS has asked the court to hold OCC's "[Nonbank Charter Program](#)" unlawful and to enjoin OCC from approving all such applications, [claiming](#) that OCC solicited the Figure charter application in "an effort to avoid the death blow dealt by the 2019 [[Lacewell](#)] . . . Ruling, and to salvage its efforts to grant charters to nonbank institutions regulated by CSBS's members."

The CSBS complaint includes a broad attack on OCC's preemption regulations. CSBS alleges that OCC's [purpose](#) in granting charters such as that sought by Figure, as well as SPNB charters to fintechs, is to offer fintechs a means of using NBA federal preemption to avoid having to comply with state laws and state banking regulations. CSBS argues that the court should set aside OCC's preemption regulations—which are codified at 12 CFR §§ [7.4007](#), [7.4008](#), and [34.4](#)—as invalid and not conforming to the statutory standards that Congress imposed in the [Dodd-Frank Act](#), 12 U.S.C. [25\(b\)](#). That statutory provision includes a general preemption standard and "[a number of other provisions narrowing OCC's preemption authority](#)," but none mention OCC's chartering authority.

OCC filed a [motion](#) to dismiss CSBS's complaint on standing and ripeness grounds, among others. OCC asserts that the same court dismissed CSBS's earlier [challenge](#) to OCC's Fintech Charter Decision on ripeness and standing grounds and raises similar arguments for dismissal of this case. [According to OCC's filing](#), CSBS has suffered no injury, OCC has yet to make a decision on the Figure application, and OCC has no SPNB charter application. Thus, the present claim is unripe, and CSBS lacks standing. Regarding CSBS's attack on the Figure application, OCC [argues](#) that "OCC's authority to charter a deposit taking institution is not inextricably linked to an institution obtaining FDIC deposit insurance." [According to OCC](#), no NBA provision has ever required that every national bank obtain deposit insurance, and neither the FRA nor the FDIA limit OCC's authority to issue bank charters under the NBA. OCC also [asserts](#) that CSBS's challenge to OCC's preemption regulations suffers from standing and ripeness deficiencies because there are no OCC preemption decisions regarding Figure and no Figure bank exists to preempt state regulations or to inflict harm on any of the members of CSBS.

Considerations for Congress

Until May 10, 2021, when Secretary of the Treasury Janet Yellen appointed Michael Hsu as Acting Comptroller of the Currency, OCC had several approaches to bringing fintechs under the agency's supervision. According to a June 2, 2021, [press report](#), the agency is reviewing all of these avenues.. These approaches included the plan for SPNB charters, the possibility of providing Figure with a national bank charter without requiring deposit insurance, and the plan to establish a [national payments charter](#) in the form of a national money-transmitter license. In addition, OCC had provided conditional approval for

three cryptocurrency companies ([Anchorage](#), [Protego](#), and [Paxos](#)) to operate under national [trust bank charters](#), a non-depository charter that [Congress has authorized](#).

Notwithstanding these potential avenues, Congress might consider crafting a statutory framework to encourage and/or regulate various types of financial technology companies or enacting legislation clarifying the role of OCC in chartering fintechs. Legislation could explicitly authorize OCC to charter fintechs or establish standards for that process.

Congressional committees have held hearings focusing on the role of the federal government in fostering innovation in financial technology and overseeing the regulatory framework for fintechs. In September 2018, a [hearing](#) of the Senate Committee on Banking, Housing, and Urban Affairs on “Fintech: Examining Digitization, Data, and Technology” included testimony [cautioning](#) that regulatory changes are warranted “only if existing law is proven to be inadequate and the benefits of changing the law will outweigh the costs.” In September 2020, the House Financial Services Committee’s Task Force on Financial Technology held a [virtual hearing](#) focusing on the “License to Bank: Examining the Legal Framework Governing Who Can Lend and Process Payments in the Fintech Age.” Among the topics [discussed](#) were OCC’s proposals for SPNB charters for non-depository fintechs and for national payments charters, prompting arguments on the opportunities offered for welcome innovation and a nation-wide license, as well as concerns about avoidance of state consumer protection laws and doubts about whether OCC would provide sufficiently robust supervision.

In the current Congress, the Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Economic Policy held a [hearing](#) on “Building a Stronger Financial System: Opportunities of a Central Bank Digital Currency,” which the Committee Chair characterized as a means of countering [difficulties](#) in the current payment system emerging with the rise of cryptocurrencies. In April 2021, the House Financial Services Committee’s Subcommittee on Consumer Protection and Financial Institution Charters held a [virtual hearing](#) on “Banking Innovation or Regulatory Evasion? Exploring Trends in Financial Institution Charters.” One of the purposes of the hearing was to consider a draft “[Banking Charter Review Act](#).” Testifying for the National Association of Federally-Insured Credit Unions, Carlos Pacheo [recommended](#) that Congress subject non-depository SPNBs to “the same capital, liquidity, and consumer protection rules applicable to traditional banks and credit unions.” At the hearing, Former Acting Comptroller of the Currency Brian P. Brooks [advocated](#) a policy of federal supervision of fintechs as a means of economic growth and financial inclusion.

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