No. 19-15899

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN MCSHANNOCK, as Executrix of the Estate of Patricia Blaskower, on behalf of the Estate of Patricia Blaskower and all others similarly situated, *et al*.,

Plaintiffs-Appellees,

v.

JP MORGAN CHASE BANK N.A., dba CHASE BANK,

Defendant-Appellant.

On Interlocutory Appeal from the United States District Court for the Northern District of California, No. 3:18-cv-01873 (Chen, J.)

AMICUS CURIAE BRIEF OF PROFESSOR ADAM J. LEVITIN IN SUPPORT OF NEITHER PARTY

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INTRODUCTION

Appellant-Defendant JP Morgan Chase Bank, N.A. ("Chase") is supported in this case by an amicus brief filed by the Bank Policy Institute, the American Bankers Association, and the Chamber of Commerce of the United States of America (collectively "*Bank Amici*"). One of the arguments in *Bank Amici's* brief is founded on a historical claim about commercial law that has significant implications for consumer credit regulation. Specifically, *Amici* argue that the district court should be reversed because of the so-called "valid-when-made" doctrine that purports to hold that "where a contract was 'valid when made,' 'no subsequent event'—including its transfer or assignment—may invalidate its terms." *Bank Amici* Br. at 10-12. *Amici* claim this doctrine to be a "bedrock rule of law" that predates the founding of the United States, and which was part of the background against which the Home Owners Loan Act of 1933 was enacted. *Bank Amici* Br. at 11.[1]

[1] Notably, Chase does not itself make this argument. Instead, Chase refers to "valid-when-made" as a "corollary common-law principle" to its argument that Home Owners Loan Act preemption is assignable as a matter of the common law of assignments. Appellant's Br. at 40, n.12.

The vitality of the purported "valid-when-made" doctrine is the single most important consumer credit regulation issue in the courts today, because the purported doctrine is used to justify the assignability of federal preemption of state usury laws.

The typical deployment of the "valid-when-made" argument is in support of a claim that a non-bank lender may ignore state usury laws for loans it purchases from a bank that is exempt from those laws. If courts recognize a "valid-when-made" doctrine, high-cost, non-bank lenders, such as payday lenders and predatory small business lenders, will be able to evade long-standing state interest rate limits through "rent-a-bank" lending schemes, in which a non-bank lender uses a complicit bank to originate loans, which are promptly sold to the non-bank lender. Payday lenders have long attempted to use rent-a-bank schemes, which regulators have historically shut down, but these attempts are making a comeback.

The instant litigation raises "valid-when-made" not in its typical context regarding the application of state usury laws, but as a more generalized principle of commercial law regarding the assignability of federal preemption, and also in a context in which a loan is assigned from one type of federally-regulated bank (a federal savings association) to another (a national bank), rather than from a federally-regulated bank to a state-regulated non-bank. The atypical context is particularly problematic because it raises the possibility that the Court will address the "valid-when-made" doctrine without being fully apprised of the implications of a ruling. Given that the Court can resolve this appeal in favor of either party without addressing "valid-when-made," Professor Levitin urges the Court to approach the issue with caution and ideally to avoid it altogether.

If the Court believes it necessary to address "valid-when-made," however, then it is important to recognize that the doctrine is an entirely modern fabrication lacking in any historical roots, much less than pre-date the Home Owners Loan Act of 1933. Despite the claimed ancient pedigree for the "valid-when-made" doctrine, there is not a single case consistent with it prior to 1979. Indeed, the doctrine is not even so much as mentioned by name in a reported case prior to 2019. The doctrine is entirely unknown to any 19th century usury treatise or to any scholarly article. It first appeared in an amicus brief submitted to urge rehearing of the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). *See* Amicus Brief of the Clearing House Association, L.L.C., Financial Services Roundtable, Consumer Bankers Association, and Loan Syndication and Trading Association as *Amici Curiae* in Support of Rehearing and Rehearing *en banc*, *Madden v. Midland Funding,* LLC, No. 14-2131-cv, Dkt. #19 (2nd Cir. 2015). That amicus brief was authored by the very same law firm (and some of the same attorneys) who now represent *Bank Amici* in this litigation.

The reason the doctrine is unknown to law prior to 2015 is that it is founded on a misreading of 18th and 19th century cases. These cases all deal with the question of how to calculate the interest rate on a loan for purposes of usury law, specifically whether implied interest from a discounted sale of a note or from the borrower's exercise of a payment option is to be added to the stated rate of the note for usury purposes. While the case law has been consistent in holding that subsequent sales or exercises of options do not affect the calculation of the interest rate for usury purposes, they have nothing to do with the question of what usury law applies to the note upon assignment. *A fortiori*, these historical cases have nothing to do with the question of whether federal preemption of state law is an assignable property right that travels with a note when the note is assigned to an entity that does not itself enjoy the protections of preemption.

INTEREST OF AMICUS

Amicus curiae Adam Levitin is the Agnes N. Williams Research Professor and Professor of Law at Georgetown University Law Center in Washington, D.C. Professor Levitin's scholarship and teaching focuses on consumer finance regulation and commercial law, including the law of usury and the law of negotiable instruments. He has previously served on the Consumer Financial Protection

Bureau's Consumer Advisory Board, as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School, as the Scholar in Residence at the American Bankruptcy Institute, and as Special Counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program (TARP). The winner of the American Law Institute's 2013 Young Scholar's Medal, his publications include a textbook on consumer finance. ADAM J. LEVITIN, CONSUMER FINANCE: MARKETS AND REGULATION (WOLTERS KLUWER 2018).

Professor Levitin has previously written about the origins of the "valid-when-made" doctrine and the effects of preemption of state consumer protection laws in rent-a-bank transactions. *See* Adam J. Levitin, *"Madden Fix" Bills Are a Recipe for Predatory Lending*, AMERICAN BANKER, Aug. 28, 2017 (valid-when-made doctrine); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. REG. 145 (2009) (rent-a-bank transactions). He has also previously testified before Congress thirty times, including at a hearing specifically addressing the "valid-when-made" doctrine. Hearing Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, *Examining Opportunities and Challenges in the Financial Technology ("Fintech") Marketplace*, Jan. 30, 2018 (testimony of Professor Adam J. Levitin). Professor Levitin has also previously filed amicus briefs on the valid-when-made doctrine in litigation brought by the Colorado Uniform Consumer Credit Code Administrator against non-banks engaged in rent-a-bank transactions. Amicus Brief of Professor Adam J. Levitin in Support of Plaintiff, *Meade, Uniform Consumer Credit Code Administrator v. Marlette Funding, LLC*, No. 17-30376 (Colo. Dist. Ct.); Amicus Brief of Professor Adam J. Levitin in Support of Plaintiff, *Meade, Uniform Consumer Credit Code Administrator v. Avant of Colorado LLC*, No. 17-cv-30377 (Colo. Dist. Ct.). He has also previously filed an amicus brief on valid-when-made in a rent-a-bank case involving a subprime small business lender. Amicus Curiae Brief of Professor Adam J. Levitin in Support of Appellant, *Rent-Rite Super Kegs West, Ltd. v. World Business Lenders, LLC*, 1:19-cv-01552-REB (D. Colo.).

Professor Levitin's interest in this litigation is in ensuring a proper understanding of the so-called "valid-when-made" doctrine. Professor Levitin takes no position on other issues in this litigation and does not support either party to the litigation. Instead, he is concerned that this litigation presents an inappropriate vehicle for consideration of the "valid-when-made" doctrine. The doctrine has substantial implications for consumer finance regulation generally, but it generally arises in circumstances quite different from this case. Moreover, the doctrine which has not been extensively briefed to the court, but merely referenced in a footnote to the Appellant's brief and as a secondary argument of the *Bank Amici*.

Professor Levitin has authored and funded this brief entirely himself. He has no financial stake in the litigation.

ARGUMENT

A. The Court Should Avoid Addressing the "Valid-When-Made" Doctrine If Possible

1. The "Valid-When-Made" Doctrine Has Broad Implications for Consumer Credit Regulation

The vitality of a so-called "valid-when-made" doctrine is the single-most important consumer credit regulation issue in the courts today. The doctrine purports to allow the assignability of federal preemption by banks. The typical invocation of the "valid-when-made" argument is to support a claim that a non-bank lender may ignore state usury laws for loans it purchases from a bank that is exempt from those laws.

A handful of modern cases have ruled consistent with the doctrine (without ever referring to a "doctrine" as such), but the Second Circuit also notably rejected the idea of assignability of National Bank Act preemption of state usury laws in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). After the defendant in the *Madden* case unsuccessfully sought *certiorari* from the Supreme Court of the United States, 136 S. Ct. 2505 (2016), the financial services industry attempted to advance "*Madden* fix" legislation in Congress. *See* H.R. 3299 (115th Cong.); S. 1642 (115th Cong.). Numerous state attorneys generals[2] and over 200 consumer, civil rights, faith and other groups[3] voiced their opposition to the legislation, and Congress did not act to overturn the decision.

While *Madden* dealt with the application of state usury laws to the buyer of defaulted credit card debt from a national bank, its implications reach much farther. In particular, if courts recognize a "valid-when-made" doctrine, rather than follow the *Madden* rule, high-cost, non-bank lenders, such as payday lenders and predatory small business lenders, will be able to evade long-standing state interest rate limits[4]

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[2] *See* Letter from Cynthia H. Coffman, Attorney General of Colorado, *et al.* to Hon. Mitch McConnell *et al.,* opposing H.R. 3299 and S. 1642 (June 27, 2018), https://bit.ly/2kCyjlp.

[3] See letter from 202 state and national groups opposing H.R. 3299 (McHenry) and S. 1642 (Warner) (Nov. 29, 2017), https://bit.ly/2kNossK.

[4] States have set interest rate limits since the founding of our nation. *See* AMERICANS FOR FAIRNESS IN LENDING, THE HISTORY OF USURY (citing *James M. Ackerman, Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61 (1981)), https://bit.ly/2lSASjl.

through "rent-a-bank" lending schemes, in which a non-bank lender uses a complicit bank to originate loans, which are promptly sold to the non-bank lender. Payday lenders have long attempted to use rent-a-bank schemes, which regulators have historically shut down,[5] but these attempts are making a comeback. *See, e.g.*, *Meade, Uniform Consumer Credit Code Administrator v. Marlette Funding, LLC*, No. 17-30376 (Colo. Dist. Ct.); *Meade, Uniform Consumer Credit Code Administrator v. Avant of Colorado LLC*, No. 17-cv-30377 (Colo. Dist. Ct.).[6] The vitality of the doctrine also has implications for the securitization of non-mortgage debts.

2. The "Valid-When-Made" Doctrine Typically Arises in a Different Transactional Context

Appeals to the "valid-when-made" doctrine have previously been made solely in cases involving the application of state usury laws to non-bank assignees of banks. Banks enjoy preemption of state usury laws under various federal statutes. 12 U.S.C. §§ 85 (national banks), 1463(g) (federal savings associations), 1831d (FDIC-insured

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[5] *See* NATIONAL CONSUMER LAW CENTER, CONSUMER CREDIT REGULATION § 9.6.1 (2D ED. 2015), *updated at* www.nclc.org/library; *see also* ID. §§ 3.4.3.3, 3.4.3a.

[6] Professor Levitin has previously submitted amicus briefs on the "valid-when-made" doctrine in both of these cases.

state banks). Whether non-bank assignees of banks, such as debt buyers, payday lenders, or securitization trusts that are normally subject to state usury laws, enjoy the preemption privilege by virtue of the assignment from a bank is a hot fought issue that is the subject of a number of pending litigations.[7]

This case raises "valid-when-made" in an entirely different context. This cases raises "valid-when-made" in the context of whether HOLA preemption of a state law requiring payment of interest on escrowed mortgage payments applies when the loan is transferred to an entity other than a federal savings association. In this case, the transferee happens to be another type of federally regulated financial institution (that even shares the same regulator, just a different charter). In the typical "valid-when-made" usury case, however, the assignment is from a federally-regulated bank to a state-regulated non-bank. If preemption is upheld vis-à-vis the non-bank assignee, it creates a regulatory vacuum where state law is preempted, but

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[7] Additionally, the historical cases cited (incorrectly) in support of "valid-when-made" are *all* usury cases. Usury laws have always been shaped by particular statutes, and indeed, the preemption of state usury laws under HOLA is by a specific statutory provision, 12 U.S.C. § 1463(g), rather than by a HOLA field preemption claim.

federal regulation has no writ. The absence of that policy concern in this case makes this case an inopportune one for addressing "valid-when-made," if it is not necessary to do so.

3. The "Valid-When-Made" Doctrine Was Not Discussed in the Decision Below and Has Not Been Extensively Briefed in this Case

The "valid-when-made" doctrine was not discussed in the decision below. It has also not been extensively briefed in this appeal. The Appellant refers to the doctrine in a footnote that merely refers to it as a "corollary common-law principle" to its argument that an assignee stands in the shoes of the assignor and takes all rights and remedies and subject to all defenses.[8] Appellant's Opening Br. at 40, n. 12.

[8] It is worth noting that Appellant does not wholly accurately state the common law on this point. An assignee takes all rights *under the contract*, but does not accede to the assignor's non-contractual status, privileges, and rights. *See* Restatement (2d) of the Law, Contracts, § 317(2) ("A *contractual* right can be assigned….") (emphasis added). Were it otherwise, a sale of a car would also include a sale of a driver's license and perhaps spousal and parental rights. Professor Levitin expresses no opinion here about the application of this observation to the case.

Instead, "valid-when-made" appears as an argument in this litigation solely in the *Bank Amici*'s briefing, and even then it is a secondary argument. *Bank Amici* Br. at 10-12. The limited briefing on the issue means that the Court risks making a less-than-fully-informed ruling if it addresses the issue.

4. The Court Need Not Address "Valid-When-Made" to Resolve This Case in Favor of Either Party

The Court can resolve this case without addressing the "valid-when-made" doctrine. Appellant has put forth two arguments for reversal, neither of which directly involves "valid-when-made." First, Appellant argues that the sale price of loans that do not benefit from federal preemption will be lower such that it will unduly federal savings associations' power to sell mortgages. Second, Appellant argues that as a matter of contract law, the assignee takes all of the rights of the assignor, including federal preemption. Professor Levitin takes no position here on the merits of either of these arguments, but merely notes that both arguments can be addressed without addressing "valid-when-made."

B. The "Valid-When-Made" Doctrine Is a Modern Invention and Not Part of the Background of the Home Owners Loan Act of 1933

Bank Amici argue that the district court should be reversed because of the so-called "valid-when-made" doctrine that purports to hold that "where a contract was 'valid when made,' 'no subsequent event'—including its transfer or assignment—may invalidate its terms."[9] *Bank Amici* Br. at 10-12. Amici claim this doctrine to be a "bedrock rule of law" that predates the founding of the United States, such that it is necessarily incorporated in the Home Owners Loan Act of 1933.

Bank Amici's argument is without basis as a historical matter. The supposed historical roots of "valid-when-made" are spurious. Nothing approaching the claimed "valid-when-made" doctrine is to be found in cases, treatises, or scholarly articles that pre-date HOLA's 1933 enactment, such that this supposedly "bedrock" doctrine is not even mentioned by name prior to 2015, when it suddenly appeared as part of unsuccessful *amicus curiae* briefing by financial institution trade associations represented by the very law firm and lawyers who now represent *Amici*. *See* Brief of the Clearing House Association, L.L.C., Financial Services Roundtable, Consumer Bankers Association, and Loan Syndication and Trading Association as *Amici Curiae* in Support of Rehearing and Rehearing *en banc*, *Madden v. Midland Funding,* LLC, No. 14-2131-cv, Dkt. #19 (2nd Cir. 2015) (signed, *inter alia*, by H. Rodgin Cohen and Matthew A. Schwartz of Sullivan & Cromwell LLP, now counsel to *Bank Amici*). Astonishingly, this "cardinal" doctrine is not so much as mentioned

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[9] Again, Chase does not itself make this argument. *See supra* note 1.

by name in a reported case until this year—2019. No pre-1933 case deals with a transactional situation even remotely similar to the "valid-when-made" issue.

In the instant litigation *Bank Amici* rely entirely on two older cases to support the doctrine's claimed antiquity, *Tate v. Wellings*, 100 Eng. Rep. 716, 721 (K.B. 1790) (Buller, J., writing *seriatim*) and *Nichols* v. *Fearson*, 32 U.S. 103, 110 (1833).[10] Neither case has anything to do with a general "valid-when-made" principle.

Tate v. Wellings involved the question how to calculate the interest rate on a loan for purposes of the usury statute. The loan in question was a loan of stock that was repayable in stock after one year or in cash after two years at the borrower's option. Whereas a loan repayable in stock was not subject to the usury statute, but

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[10] In other litigation, other cases have been adduced as supposed support for the doctrine. In an amicus brief filed in other litigation, I show that every pre-1979 case that is claimed to support the doctrine is in fact dealing with a distinct situation and that the cases are used by proponent of "valid-when-made" through decontextualized and misleading quotations. Amicus Curiae Brief of Professor Adam J. Levitin in Support of Appellant, *Rent-Rite Super Kegs West, Ltd. v. World Business Lenders, LLC*, 1:19-cv-01552-REB (D. Colo.).

a loan repayable in cash was. The justices on the Kings Bench held that the option did not render the contract usurious because the contract was not inherently usurious when it was entered into because it could have been repaid in stock.

The issue in *Tate* has nothing to do with the "valid-when-made" doctrine as claimed by *Bank Amici* because there was no issue involving an assignment whatsoever. Instead, the issue was about the effect of a particular payment option on the calculation of the usury rate, a frequent issue in 18th and 19th century usury law. *Tate v. Wellings* has no connection to the notion that HOLA preemption is a freely assignable property right.

Some context is necessary to understand *Nichols v. Fearson*, the other case cited by *Amici*. A robust secondary market in bill and notes existed in the 19th century. These bills and notes were frequently sold at a discount from their face amount. The discount from face can be conceived as interest because the obligor on the note would owe the face amount irrespective of the discount to the purchaser.

For example, if a $120 note were purchased for $100, the purchaser would have a right to collect the full face amount of $120. Economically, however, the transaction is equivalent to the purchaser having made a $100 loan and received $20 in interest. Indeed, this concept is still regularly applied today in the tax and bankruptcy law, where "original issue discount" on bonds is treated as imputed interest. *See, e.g.*, Treas. Reg. § 1.61-7(c); *In re Chateaugay Corp.*, 961 F.2d 378 (2d Cir. 1992); *Matter of Pengo Indus. Inc.*, 962 F.2d 543 (5th Cir. 1992).

Nichols involved a discounted sale of a note indorsed by the defendant. 32 U.S. at 103. When the defendant indorsed the note, the defendant became jointly liable for the full face amount of the note, just as if it were the maker of the note. *See* UCC § 3-415(a) (providing a modern codification of the principle). The Supreme Court held that the usurious discounting did not void the original note, *id.* at 110, 112, observing that among the:

> cardinal rules of the doctrine of usury …[is] that a contract which in its inception is unaffected by usury can never be invalidated by any *subsequent* <u>*usurious*</u> *transaction*.

Id. at 109 (emphasis added). *See also id.* at 106 ("the rule of law is everywhere acknowledged that a contract free from usury in its inception shall not be invalidated by any *subsequent* <u>*usurious*</u> *transactions upon it*.") (emphasis added). The point is that the imputed interest in transaction #2 does not affect the interest rate in transaction #1 for usury law purposes. *Nichols* has nothing to do with the present question of whether a federal savings association can transfer its HOLA preemption privilege to an assignee to allow the assignee to purchase and enforce a loan on terms the assignee could not do on a loan it had originated itself.

There is no evidence of a "valid-when-made" doctrine existing prior to the 1980s, much less prior to HOLA's enactment in 1933. The doctrine is a modern invention read backwards into older cases through emphasizing decontextualized language.

CONCLUSION

There was no "valid-when-made" doctrine prior to the enactment of HOLA in 1933. Instead, the doctrine is a modern invention. The doctrine is based on a misreading of *Nichols v. Fearson* because of confusion about the issue of imputed interest in the discounting of the note. The concept of usurious discounting had all but disappeared from law by the end of the 19th century. *See* JAMES AVERY WEBB, A TREATISE ON THE LAW OF USURY, AND INCIDENTALLY, OF INTEREST § 151 (1899). *See also Holeman v. Hobson*, 27 Tenn. 127, 129-130 (Tenn. 1847) (distinguishing between discounting in a bona fide sale and discounting as part of a financing, where the seller/borrower was expected to repurchase the note). Accordingly, modern readers of *Nichols v. Fearson* are likely to misunderstand the case and latch on to decontextualized phrases that appear to support a "valid-when-made" doctrine.

The "valid-when-made" doctrine is not implicit in the common law of assignments or incorporated into HOLA. The doctrine is not valid, but made up.

Whether such a doctrine should exist is properly the province of Congress, not the courts, and Congress has thus far declined to advance "*Madden* Fix" bills that would enact a "valid-when-made" doctrine, and the Court would do well to avoid the issue in this case if possible.

Respectfully submitted this 16th day of October, 2019.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing AMICUS CURIAE BRIEF OF PROFESSOR ADAM J. LEVITIN IN SUPPORT OF NEITHER PARTY was served by email upon the following this 16th day of October, 2019:

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CERTIFICATE OF COMPLIANCE

I certify that this amicus curiae brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,633 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman Font

Dated this 16th day of October, 2019.

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