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.)

MOTION FOR LEAVE TO LATE FILE THE AMICUS CURIAE BRIEF OF PROFESSOR ADAM J. LEVITIN IN SUPPORT OF NEITHER PARTY

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Professor Adam J. Levitin, *pro se*, respectfully requests leave to submit the attached, conditionally filed, *amicus curiae* brief in support of neither party. The brief is late filed, and as detailed below, only one party, the Appellee, has consented to its filing. As grounds for leave, Professor Levitin states the following:

INTRODUCTION

The single most critical consumer credit regulation issue in the courts today is the vitality of a so-called "valid-when-made" doctrine that purports to allow the assignability of federal preemption. The typical application 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. 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[1] through "rent-a-bank" lending schemes, in which

[1] 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.

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,[2] 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.).[3]

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. In particular, 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 argument in *Bank Amici*'s brief is founded on a

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[2] *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.

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

historical claim about commercial law that has significant implications for consumer credit regulation if accepted as true.[4] Specifically, *Bank Amici* argue that the district court should be reversed because of the so-called "valid-when-made" doctrine. Amici Br. at 10-12. In this case, *Bank Amici* argue that the doctrine purports to hold that "where a contract was 'valid when made,' 'no subsequent event'—including its transfer or assignment—may invalidate its terms." 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. Amici Br. at 11.

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

[4] 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.

decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). 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 the option 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, much less to the question of whether federal preemption of state law travels with a note when the note is assigned to an entity that does not itself enjoy the protections of preemption.

In this amicus brief, Professor Levitin draws on his expertise in consumer

credit regulation to highlight to the Court the far-reaching implications of wading into the "valid-when-made" issue, which has not been robustly briefed for the Court and which is not necessary to resolve the case in favor of either party. In the event that the Court disagrees and believes it necessary to address the "valid-when-made" doctrine, Professor Levitin also draws on his expertise in the history of negotiable instruments and usury regulation to address the spurious pedigree of the valid-when-made doctrine, which is a recent invention, rather than a fundamental part of American banking and negotiable instrument law.

INTEREST OF AMICUS CURIAE

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 believes that his expertise regarding the history of usury regulation in the United States will be helpful to the Court, particularly in light of the claims of *Bank Amici* that the "valid-when-made" doctrine is a longstanding, fundamental rule of US commercial law that was incorporated in the Home Owners Loan Act. He also believes that his expertise in consumer finance generally will be helpful to the Court in understanding the broader implications of ruling on the "valid-when-made" doctrine, which generally arises in the context of assignments from banks to non-banks, rather than from one type of bank to another.

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

DESIRABILITY OF AMICUS CURIAE BRIEF

As explained above, a ruling on the "valid-when-made" issue argument in this case has potentially significant implications for states' ability to regulate consumer

lending by non-banks through their usury laws. Given the importance of the alleged historicity of the "valid-when-made" doctrine for its applicability through supposed incorporation in the Home Owners Loan Act of 1933, an informed understanding of the doctrine's claimed caselaw roots is critical for the Court's evaluation. This is where Professor Levitin seeks to assist the Court.

The 18th century English and early 19th century American commercial law cases on which the "valid-when-made" doctrine claims to rest are extraordinarily difficult for modern readers to parse. These cases involve a set of financial instruments, transactions, doctrinal problems, procedural stances, and even terminology that have largely disappeared from commerce. Further obfuscating the meaning of these cases is the style of judicial writing. These are cases that only a commercial law professor with antiquarian inclinations could love.

Professor Levitin believes that his familiarity with these cases, with historical negotiable instrument law, and as well as with the larger (and now obscure) doctrinal context of usury law in the 19th century would assist the court in evaluating the claims about the historicity of the "valid-when-made" doctrine and whether it is in fact part of the background to the Home Owners Loan Act of 1933.

Moreover, Professor Levitin's expertise in consumer finance regulation could be valuable to the Court in terms of pointing out the implications of opining on

"valid-when-made" in the context of an escrow case regarding the assignment of loans from one type of federally-regulated financial institution (a federal savings association) to another (a national bank). The real focus on the "valid-when-made" doctrine has been about undermining the application of state usury laws for non-banks through the assignment of loans from federally-regulated banks to state-regulated non-banks that then seek to shelter in the banks' federal preemption of state regulation. An opinion on "valid-when-made" in the escrow context for loans that stay within the federal regulatory ambit even when transferred could have unintended implications for litigation regarding the application of "valid-when-made" in a substantially different context.

POSITION OF THE PARTIES

Professor Levitin has obtained the consent of the Plaintiffs-Appellees to the filing of an amicus brief. Defendant-Appellant has not consented to the late filing of an amicus brief.

TIMELINESS OF THE AMICUS BRIEF

Professor Levitin recognizes that he is seeking to file the amicus brief after the ordinary deadline provided by Federal Rule of Appellate Procedure 29(a)(6).

That deadline was October 14, 2019. Rule 29(a)(6) provides the court with discretion to grant leave for later filing.

Professor Levitin requests leave for a late-filing of the amicus brief on the grounds that he was not aware that the valid-when-made issue had been raised in the litigation until October 15, 2019, as the district court's opinion never referred to the doctrine. Upon learning of the case, Professor Levitin promptly prepared the conditionally filed brief and submitted this motion.

Given the importance of the vitality of the "valid-when-made" doctrine to consumer credit regulatory policy, Professor Levitin believes that the assistance of an academic amicus in support of neither party, even in a late-filed brief, is important to ensure consideration of by the Court of the historicity of the "valid-when-made" doctrine and to alert the Court to the significant public policy debate regarding "valid-when-made" that is not apparent from the extant briefing in this case.

WHEREFORE, Professor Levitin respectfully requests leave to file the brief submitted with this motion.

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 MOTION FOR LEAVE TO FILE 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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