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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, and BRIAN P. BROOKS, in his official capacity as Acting Comptroller of the Currency, Defendants.	ECF Case CASE NO.: 4:20-cv-05200-JSW **BRIEF OF *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** Hearing Date: March 19, 2021 Hearing Time: 9:00 a.m. Judge: Hon. Jeffrey S. White Courtroom: Courtroom 5, 2nd Floor

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I. SUMMARY OF ARGUMENT

Diverse regulatory frameworks, information processing capabilities and access to capital mean that U.S. financial institutions differ greatly in their ability to originate, fund, and service loans. A bank's local market deposits are usually a low cost, but limited, source of funding loans. Additional funding sources are more costly, and along with capital requirements and other regulations, can make lending unprofitable. Therefore, a bank's pool of local loanable funds will not necessarily always match the loan demand generated by the supply of local investable projects. Some markets will have an oversupply of good borrowers that cannot be funded by banks, while other markets will have an excess of funds due to the lack of good borrowers. The ability to transfer loans between institutions improves efficiency and production in both types of markets, by allowing funds to flow across space. Local institutions can exploit local information to make good origination decisions, whereas other institutions having excess local funds are able to hold more good loans than they would otherwise be able to make to (their) local borrowers.

State usury laws limit the interest rate that can be charged on certain types of loans, typically consumer or small business loans, by significantly penalizing lenders who violate the limit. The OCC's Rule seeks to clarify the prior practice that a loan's interest rate is subject to the usury law of the state where the loan originator is located, not the state of the loan buyer. If, instead, the usury law of the loan buyer's state applied to the loan, the market for loan sales would be significantly disrupted: an institution in one state could legally make the loan but institutions in other states may not purchase it with the same pricing. Consequently, the integrated secondary market for loan sales would be reduced and fragmented across groups of states with similar usury laws. Therefore, to preserve a well-functioning market for loan sales, the OCC's Rule should be maintained.

Economists have found that a well-functioning secondary market for loans has three benefits and these benefits would be mitigated if loan sales are restricted. First, loan sales expand the supply of credit by giving originating banks the opportunity to finance loans less expensively. The expansion of the banking system's aggregate lending capacity and the allocation of capital to the most productive projects regardless of location have important macroeconomic implications, such as greater economic growth.

Second, loan sales reduce the risk of lending amongst banks by allowing greater diversification of lending portfolios. By buying loans from around the country, banks can reduce their exposure to the geography-specific risk in their immediate area. Banking system risk can also be reduced by sharing it with non-bank buyers of loans.

Third, the expansion of lending and lowering of risk made possible by loan sales should lead to more financial inclusion and broader access to credit. Studies have shown that loan sales reduce the interest rates that borrowers pay on their loans and increase the likelihood that borrowers will receive a loan. These advantages should, in theory, be especially important for small and risky borrowers, who are often excluded from receiving loans when credit is constrained. Such financial inclusion has been highlighted as important for economic growth and a more equal distribution of wealth and income. Moreover, many innovative new ("fintech") lenders rely on loan sales as a means of leveraging their origination capabilities, which can carry particular benefits for less wealthy or higher-risk borrowers. Encouraging loan sales will allow innovative new lenders to originate loans on a larger scale. Limits on the viability of the loan sales market would therefore have adverse effects on the underserved by limiting their ability to receive lower cost loans as well as receive funds through innovative financial inclusion intermediaries.

The benefits of loan sales are clearly indicated by the fact that loan sales constitute a central component of the banking business. And while some loan sales would remain legal regardless of the court's ruling, the activity and depth of the secondary loan market in would be limited if the court required that sold loans conform to the usury laws of the purchaser's state. The academic literature on the relative benefits and costs of maintaining usury rates provides a useful context for the decision. Usury rates attempt to restrict any potential market power that banks can use to disadvantage borrowers. However, usury ceilings also could differentially curtail loans to riskier and lower-quality borrowers, thus pushing them towards less-regulated types of borrowing. Empirical research quite broadly supports the notion that the latter effect dominates: that riskier-looking borrowers (who are often minorities or others with limited financial access) are hurt when usury ceilings are binding and benefited when they are loosened or eliminated. Interpreting the National Bank Act in a way that, contrary to the statutory scheme and the OCC's interpretation, allows usury laws from states not connected to the original loan transaction to frustrate loan sales, therefore, is likely to reduce the economic advantages of the secondary loan market in ways that adversely affect income and wealth distribution within the economy.

II. INTEREST OF *AMICI CURIAE*

The undersigned academics frequently write on matters of public policy and have no financial interest in the outcome of this litigation.

A. Rashad Abdel-Khalik is a Professor of Accountancy and V.K. Zimmerman Professor of International Accounting at the University of Illinois's Gies College of Business. He has published research focusing on risk and accounting in financial reporting.

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III. ARGUMENT

A ROBUST SECONDARY MARKET WHERE BANKS CAN BUY AND SELL LOANS EXPANDS THE SUPPLY OF CREDIT, SUPPORTS ECONOMIC GROWTH, REDUCES THE RISK OF LENDING, PRODUCES BETTER RESULTS FOR CONSUMERS AND SMALL BUSINESSES, AND PROMOTES MORE INCLUSIVE ACCESS TO CREDIT

The *amici* respectfully submit this brief in support of the OCC's *Opposition to Plaintiffs' Motion For Summary Judgment and Defendant's Cross Motion-Motion for Summary Judgment.* The undersigned support the OCC's Rule[1] and urge the Court to grant the OCC's motion for summary judgment. As set forth below, the existence of a robust secondary market where banks and non-banks can buy and sell loans is important for a number of reasons. First, it expands the supply of available credit and supports strong economic growth. Second, ready access to secondary markets reduces the risk of lending, promoting a safer banking system. Third, the OCC's Rule will especially benefit consumers and small businesses by fostering more inclusive access to credit.

Economists have found that, in the banking context, there are large economic advantages when the regulatory structure permits the functions of loan origination and holding to be separated. Throughout most of banking history, loans typically were originated and then held by the same entity, but in recent decades the U.S. market for loan sales has developed, through which banks can sell the loans that they originate and buy loans originated by other banks. Banks have played a key role in that process owing to their ability to operate as loan originators and sellers throughout the country. A crucial aspect of the banking system's role is the ability to originate and sell loans across state lines. Loan sales would not be viable if the sale was not possible, or if the terms of the loan (i.e., its interest rate) were subject to change upon sale, depending on the interest rate limits enacted on lending by state authorities in the state of the purchasing bank. This brief highlights the economic advantages of an active market in loan

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[1] *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,530–36 (June 2, 2020) (to be codified at 12 C.F.R. §§ 7.40001(e) and 160.110(d)) ("OCC Rule").

sales, which would be limited if loan sales to banks in some states were effectively prohibited by requiring that sold loans conform to the usury laws of the purchaser's state.

The practice of selling loans has increased dramatically in recent decades in part because the Supreme Court's *Marquette* decision[2] of 1978 permitted national banks to be subject to the usury limits in their own state rather than in the states where they originate each loan. In addition, advances in information technology have allowed better and more data-driven credit evaluation of loans. However, the separation of the origination and holding of loans is not new in the United States. Its particular usefulness grows out of the nation's fragmented and diverse financial sector. The U.S. has maintained a significantly high number of financial institutions ranging from the few large depository banks that operate branch networks nationally to the many small local banks that operate in individual communities and non-depository financial institutions, such as mutual funds and investment funds. The heterogeneity and geographical fragmentation of institutions leads to clear comparative advantages in different stages of the production process for loans, which includes originating, funding, and servicing.

The differing comparative advantages can stem from various distinctions among financial institutions, including their legal powers (e.g., having the ability to branch), their information advantages (e.g., local information and information collected through relationship banking), or the extent that their equity capital may limit their on-balance-sheet capacity to own loans. To put it another way, the banks that are in the best position to originate loans are not always the best to fund or service them after origination. For instance, small community banks might be able to identify reliable borrowers and originate loans to them but may lack the funding capacity to hold the loans in their own portfolios. Similarly, investment funds or mutual funds might have ample capital to diversify their investment portfolio with loans but may lack the ability to originate them.

[2] *Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 299, 99 S. Ct. 540, 541, 58 L. Ed. 2d 534 (1978).

Studies of loan sellers and buyers provide evidence that both differences in these comparative advantages and the benefits of portfolio diversification motivate participation in the secondary loan market.[3] Banks with profitable lending opportunities but limited or costly forms of financing that constrain their lending capacity (e.g., high costs of uninsured debt and deposits, which in turn may reflect a scarcity of equity capital) are most often the sellers in the market, whereas banks with strong capital positions tend to be buyers of loans. Similarly, those banks with opportunities for diversified originations (e.g., those for whom extensive branching is permissible) are less likely to participate in the loan sales market.

These studies demonstrate that a well-functioning secondary market for loans benefits both loan sellers and buyers as it facilitates the efficient allocation of functions to firms according to comparative advantage, and further increases the social benefits that arise from returns to specialization in those functions. Other research has expanded upon these contributions by identifying in more detail the various advantages to a vibrant market for loan purchases and sales. To summarize this literature, a well-functioning secondary loan market has been shown to have three broad but inter-related economic advantages. First, loan sales increase aggregate credit supply, which in turn promotes higher GDP growth. Second, loan sales improve the stability of the banking system by allowing diversification of investments. Third, loans sales should lead to better outcomes for borrowers along two lines: (1) the increased competition and diversification that come with loan sales leads to lower interest rates and (2) the rise in loan supply and the decrease in interest rates is likely to produce greater financial inclusion. In the remainder of this brief, we summarize the supporting evidence for each of these advantages.

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[3] *See* Christine A. Pavel & David Phillis, Why Commercial Banks Sell Loans: An Empirical Analysis, 152 Federal Reserve Bank of Chicago Proceedings (1987); Allen N. Berger & Gregory F. Udell, "Securitization, Risk, and the Liquidity Problem in Banking", in Michael Klausner & Lawrence White, eds.: Structural Change in Banking (1993); Joseph G. Haubrich & James B. Thomson, Loan Sales, Implicit Contracts, and Bank Structure, 7(2) Review of Quantitative and Financial Accounting 137 (1996); Rebecca S. Demsetz, Bank Loan Sales: A New Look at the Motivations for Secondary Market Activity, 23(2) Journal of Financial Research 197 (2000).

1. <u>Increase the Availability of Credit and Support Economic Growth</u>.

Legal restrictions constrain the ability of originating banks to hold loans on their balance sheets (e.g., minimum cash asset reserve ratio requirements and minimum equity capital ratio requirements). Banks typically target minimum ratios of cash-to-assets and equity capital-to-assets that exceed those minimum regulatory requirements, given the economic desirability of maintaining buffers in excess of these required minimum ratios to ensure continuing compliance in the eventuality of potential losses. Having to maintain these minimum ratios often means that smaller banks have more potential investment opportunities than they are able to fund.[4]

Loan sales give originating banks the opportunity to finance loans less expensively through the sale of the loan than by funding the loan internally on their balance sheets via traditional deposits and equity issues.[5] In essence, the funds received via loan sales help relieve capital constraints. Conversely, the secondary loan market allows a financial intermediary with adequate capital to acquire profitable projects originated by a bank whose own capital is insufficient to support the additional risk. Hence, loan sales use the capital of lenders in other locations to support lending in locations where lenders' capital is scarce. This increases the total volume of lending that can occur in the aggregate.[6]

The expansion of the banking system's aggregate lending capacity has important macroeconomic implications. Studies of both historical and modern periods have found a strong

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[4] *See* Mark Gertler & Ben Bernanke, <u>Banking and Macroeconomic Equilibrium</u>, In New Approaches to Monetary Economics (1987); Katherine A. Samolyk, <u>Banking Conditions and Regional Economic Performance Evidence of a Regional Credit Channel</u>, 34(2) Journal of Monetary Economics 259 (1994).

[5] *See* George G. Pennacchi, <u>Loan Sales and the Cost of Bank Capital</u>, 43(2) Journal of Finance 375 (1988); Charles T. Carlstrom & Katherine A. Samolyk, <u>Loan Sales as a Response to Market-Based Capital Constraints</u>, 19(3-4) Journal of Banking & Finance 627 (1995).

[6] *See* A. Sinan Cebenoyan & Philip E. Strahan, <u>Risk Management, Capital Structure and Lending at Banks</u>, 28(1) Journal of Banking & Finance 19 (2004); Steven Drucker & Manju Puri, <u>On Loan Sales, Loan Contracting, and Lending Relationships</u>, 22(7) Review of Financial Studies 2835 (2009).

positive connection between bank lending activity and economic growth.[7]

2. <u>Enhance Financial Stability</u>.

An additional social gain from loan sales is the reduction in financial system risk that they engender. Loan sales allow banks to better diversify their investment portfolios and thus reduce their overall risk of failure. While community or regional banks are well-equipped to judge the quality of loan applicants in their neighborhoods, they generally do not possess the ability to select and originate loans of borrowers outside of their locations. The secondary loan market allows these banks to obtain loans from more distant areas, reducing their exposure to geography-specific risk. For instance, banks active in the loan sales market improve their ability to manage credit risk, operating with greater leverage as a result of lowering the necessary capital and liquidity buffers.[8] As a result of loan sales, banks throughout the country have an enhanced ability to increase loans originated while diversifying their portfolio and lowering overall risk.

3. <u>Better Results for Consumers and Small Businesses, More Inclusive Access to Credit</u>.

Because an active national market for loan sales expands the supply of credit and reduces the risk of lending, it tends to increase the likelihood that borrowers – especially risky borrowers – will receive a loan, and tends to reduce the interest rates that borrowers – especially risky

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[7] *See* Robert G. King & Ross Levine, <u>Finance and Growth: Schumpeter Might be Right</u>, 108(3) Quarterly Journal of Economics 717 (1993); Jith Jayaratne & Philip E. Strahan, <u>The Finance-Growth Nexus: Evidence from Bank Branch Deregulation</u>, 111(3) Quarterly Journal of Economics 639 (1996); Matthew Jaremski, <u>National Banking's Role in U.S. Industrialization, 1850-1900</u>, 74(1) Journal of Economic History 109 (2014); Scott Fulford, <u>How Important are Banks for Economic Development? National Banks in the United States, 1870-1900</u>, 97(5) Review of Economics and Statistics 921 (2015); Raghuram Rajan & Rodney Ramcharan, <u>Local Financial Capacity and Asset Values: Evidence from Bank Failures</u>, 120(2) Journal of Financial Economics 229 (2016); Erik P. Gilje, Elena Loutskina & Philip E. Strahan, <u>Exporting Liquidity: Branch Banking and Financial Integration</u>, 71(3) Journal of Finance 1159 (2016); J. David Brown & John S. Earle, <u>Finance and Growth at the Firm Level: Evidence from SBA loans</u>, 72(3) Journal of Finance 1039 (2017).

[8] Cebenoyan, *supra*.

borrowers – pay on their loans. This occurs as a result of an active secondary loan market for two reasons. First, a bank's ability to sell the loan reduces the risk and liquidity premia it charges borrowers to compensate for its own funding cost. Second, the expansion of loan supply means that the market for originating loans is more contested by other lenders, which pushes originating banks to compete more aggressively for borrowers.

Empirical evidence directly links loan sales to an improvement in borrowers' loan terms. Many respondents of the Federal Reserve System's Lending Practices Survey indicated that they offered more attractive interest rates to borrowers in exchange for permission to sell their loans.[9] Furthermore, scholars have found that loan sales lead to lower interest rates on average, that borrowers with loans trading in the secondary market are able to subsequently borrow at lower interest rates, and that loan sales permit the selling bank to maintain valuable relationships, which are profitable to the bank and ease borrowers' future abilities to obtain credit.[10]

The cost advantages of a loan sales market that reflect greater supply, greater diversification and greater competition, should, in theory, be especially important for the riskiest borrowers. That implies that the gains to borrowers from loan sales should also produce greater financial inclusion. Poor and small-dollar borrowers are often a marginal class of borrowers in formal financial systems, and instead they often must seek out higher interest loans through credit cards or predatory lenders. These less regulated forms of lending typically expose borrowers to worse loan terms and fewer consumer protections than bank loans.

If the loan sales market were absent, underserved groups likely would suffer disproportionately from the reduction in the aggregate supply of credit and the increase in the

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[9] Gary B. Gorton & Joseph G. Haubrich, The Loan Sales Market, 2 Research in Financial Services 85 (1990).

[10] A. Burak Güner, Loan Sales and the Cost of Corporate Borrowing, 19(2) Review of Financial Studies 687 (2006); Mark J. Kamstra, Gordon S. Roberts, & Pei Shao, Does the Secondary Loan Market Reduce Borrowing Costs?, 18(3) Review of Finance 1139 (2014); João AC Santos & Peter Nigro, Is the Secondary Loan Market Valuable to Borrowers?, 49(4) Quarterly Review of Economics and Finance 1410 (2009); Drucker, *supra*.

cost of credit. Furthermore, major improvements in financial inclusion have been made possible by new lending technologies that help to improve access to credit by underserved communities in the United States.[11] Many innovative new lenders rely on loan sales as a means of leveraging their origination capabilities for a broader market. Many innovative startups have begun to utilize new technologies that focus on loan origination to reach a broader portion of the population. With limited financing so far, loan sales have been crucial to these firms' operation, and the OCC has begun to grant national charters to these financial technology firms in order to allow them to originate loans on a larger scale. Limits on the viability of the loan sales market would therefore have additional adverse effects on the underserved by limiting the ability of innovative intermediaries to expand their lending businesses.

Studies of financial inclusion have highlighted its importance for growth and the distribution of wealth and incomes. Greater financial inclusion can help achieve inclusive growth and economic development, as well as lower inequality.[12] Moreover, the shifting of payments and transactions from credit cards and predatory lenders into the formal financial sector provides greater protection for consumers in terms of regulation and oversight of lenders.

Despite all the aforementioned advantages of an active loan sales market, which the

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[11] *See* Panagiotis Avramidis, Nikolaos Mylonopoulos, & George Pennacchi, The Role of Marketplace Lending in Credit Markets: Evidence from Bank Mergers, forthcoming Management Science (2021).

[12] *See* Leora Klapper, Mayada El-Zoghbi, & Jake Hess, Achieving the Sustainable Development Goals: The Role of Financial Inclusion (2016), *available at* http://www. ccgap. org.; Robert Cull, Tilman Ehrbeck, & Nina Holle, Financial Inclusion and Development: Recent Impact Evidence, World Bank Working Paper No. 88169 (2014), *available at* https://documents.worldbank.org/en/publication/documents-reports/documentdetail/269601468153288448/financial-inclusion-and-development-recent-impact-evidence; Asli Demirguc-Kunt, Leora Klapper, & Dorothe Singer, Financial Inclusion and Inclusive Growth: A Review of Recent Empirical Evidence, World Bank Policy Research Working Paper 8040 (2017), *available at* https://openknowledge.worldbank.org/handle/10986/26479; Miriam Bruhn & Inessa Love, The Real Impact of Improved Access to Finance: Evidence from Mexico, 69(3) Journal of Finance 1347 (2014); Robin Burgess & Rohini Pande, Do Rural Banks Matter? Evidence from the Indian Social Banking Experiment, 95(3) American Economic Review 780 (2005).

OCC's regulation would protect and perpetuate, one of the fundamental questions that is raised in this litigation is to assess the utility of allowing the usury laws of states not connected to the original loan transaction to upset the interest rate setting mechanism that is contained in the National Bank Act, given that loan sales likely increase the ability of local borrowers to borrow from out-of-state bank loan originators at interest rates above the state usury ceiling. The academic literature also sheds light on this potential concern. Examining the wide-variety of usury laws and rates through time, the empirical studies analyzing the consequences of usury laws cast doubt on the proposition that more binding usury laws actually improve financial market outcomes for borrowers.

Whether usury laws are desirable as a matter of economic theory is not clear. Usury laws will tend to reduce the supply of credit to high-risk borrowers if lenders are unwilling to lend to them at lower interest rates. In theory, however, usury restrictions have the potential to be beneficial in markets with high borrower moral hazard and can be seen as a primitive means of social insurance to guard agains future periods of high interest rates.[13] In practice, empirical evidence so far indicates that usury laws lead banks to supply less credit.[14] Studies have further suggested that when credit-rationing occurs it often results in financial exclusion of the underserved. An empirical study of the effects of the Card Act of 2009[15], for instance, found that

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[13] Giuseppe Coco & David De Meza, In Defense of Usury Laws, 41(8) Journal of Money, Credit and Banking 1691 (2009); Edward L. Glaeser & Jose Scheinkman, Neither a Borrower Nor a Lender Be: an Economic Analysis of Interest Restrictions and Usury Laws, 41(1) Journal of Law and Economics 1 (1998).

[14] *See* Rudolph C. Blitz & Millard F. Long, The Economics of Usury Regulation, 73(6) Journal of Political Economy 608 (1965); James R. Ostas, Effects of Usury Ceilings in the Mortgage Market, 31(3) Journal of Finance 821 (1976); Steven M. Crafton, An Empirical Test of the Effect of Usury Laws, 23(1) Journal of Law and Economics 135 (1980); Daniel J. Villegas, The Impact of Usury Ceilings on Consumer Credit, 56(1) Southern Economic Journal 126 (1989); Oren Rigbi, The Effects of Usury Laws: Evidence from the Online Loan Market, 95(4) Review of Economics and Statistics 1238 (2013).

[15] *Credit Card Accountability Responsibility and Disclosure Act of 2009*, Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

states with more binding (lower) usury ceilings saw less migration to consumer installment credit when the Act reduced credit card lending to risky borrowers.[16] The literature on usury laws confirms the view that they are associated with worse terms for high-risk borrowers and have sometimes been enacted to harm underserved communities.[17] Historical usury rate restrictions increased average and minimum loan size and worsened credit access for those with less social capital.[18] And even when usury rates did not reduce the amount of borrowing in an economy, they might cause high-risk individuals to shift from bank lending to less restrictive retail lending such as credit cards.[19] These studies examine the history of usury laws and find that they were used by politically powerful low-risk (incumbent) borrowers as a way to limit competition from high-risk borrowers. In summary, it is not clear that usury laws, on balance, are beneficial to borrowers. For these reasons, it appears that the benefits of usury rates, if any, are small and concentrated on particularly well-connected borrowers when compared with the general gains of an integrated loan market discussed above.

III. CONCLUSION

The *amici* respectfully submit this brief in support of the OCC's *Opposition to Plaintiffs' Motion For Summary Judgment and Defendant's Cross Motion-Motion for Summary Judgment.*

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[16] Gregory Elliehausen & Simona M. Hannon, The Credit Card Act and Consumer Finance Company Lending, 34 Journal of Financial Intermediation 109 (2018).

[17] *See* Efraim Benmelech & Tobias J. Moskowitz, The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century, 65(3) Journal of Finance 1029 (2010); Thomas A. Durkin, Gregory Elliehausen, Michael E. Staten, & Todd J. Zywicki, Consumer Credit and the American Economy (2014).

[18] Peter Temin & Hans-Joachim Voth, Interest Rate Restrictions in a Natural Experiment: Loan Allocation and the Change in the Usury Laws in 1714, 118(528) Economic Journal (2008): 743-758.

[19] Richard L. Peterson, Usury Laws and Consumer Credit: a Note, 38(4) Journal of Finance 1299 (1983).

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