

[Banking and Finance Law Daily Wrap Up, TOP STORY—District court dismisses 10th Amendment claim for fintech charter battle, others may proceed, \(May 3, 2019\)](#)

Banking and Finance Law Daily Wrap Up

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By [Colleen M. Svelnis, J.D.](#)

The Southern District of New York partially granted the OCC's motion to dismiss in the ongoing dispute between the OCC and the NYDFS over the OCC's decision to accept bank charter applications from nondepository fintech companies engaged in the business of banking—while denying the motion to dismiss on two other claims.

In an ongoing case filed by the Superintendent of the New York State Department of Financial Services (DFS) against the Office of the Comptroller of the Currency, the Southern District of New York has partially granted the OCC's motion to dismiss for either subject matter jurisdiction or failure to state a claim upon which relief can be granted on one count, while denying it on two other counts. The court granted the motion to dismiss on the issue of whether the OCC violated the Tenth Amendment, stating that while the DFS has standing to raise a Tenth Amendment claim, it failed to state such a claim ([Vullo v. Office of the Comptroller of the Currency](#), Docket No. 18-cv-8377).

The case involves DFS' complaint seeking declaratory and injunctive relief against the OCC in connection with the OCC's July 2018 decision (Fintech Charter Decision) to immediately begin accepting applications from, and grant special-purpose national bank charters to, financial technology (fintech) companies—including companies that do not accept deposits. Under 12 U.S.C. § 27(a), the National Bank Act (NBA) authorizes the OCC to grant a charter if it appears that the applicant is lawfully entitled to commence the "business of banking."

The DFS filed suit in the district court challenging the OCC's decision to consider such applications. DFS asserted the following three counts:

1. Count I asks the court to find that the Fintech Charter Decision was unlawful because it exceeded OCC's authority under the NBA, to set that decision aside, and to enjoin OCC from taking any further actions to implement its provisions.
2. Count II asks the court to find Section 5.20(e)(1) "null and void" because OCC exceeded its statutory authority in promulgating the regulation, to set it aside, and to enjoin OCC from taking any further actions to implement its provisions.
3. Count III asks the court to find that the Fintech Charter Decision violates the Tenth Amendment of the United States Constitution because it creates a conflict with state law that Congress did not authorize, and to "declare it null and void."

10th Amendment claim. The court found that DFS failed to state a Tenth Amendment claim. The powers delegated to the federal government by the Constitution include the power to regulate national banks, and the National Bank Act represents an exercise of this power. The court reviewed the DFS claim that OCC violated the Tenth Amendment because "federal law preempts state law only when 'Congress has clearly expressed its intent,' and here 'Congress did not authorize OCC to charter fintech companies that provide non-depository financial services.'" DFS contended that Congress did not intend to preempt state regulation of such entities. The court agreed with DFS "the operative question is not whether the federal government has the power to take the action challenged in this case, but whether Congress has, in fact, exercised that power." According to the court, to violate the Tenth Amendment, an action must "exceed the federal government's enumerated Powers, an action that violates the Tenth Amendment is one that Congress cannot choose to take."

Subject matter jurisdiction. The court found that DFS sufficiently established standing to pursue its statutory and constitutional claims against OCC, and that the claims are timely and ripe for decision. DFS argued that the district court has subject-matter jurisdiction over the action because DFS, as an agency of New York state, has standing to challenge the Fintech Charter Decision due to injury-in-fact; and that the action is ripe for adjudication and timely. The OCC countered that the court lacks subject-matter jurisdiction because DFS has not suffered an injury-in-fact.

The court found that DFS has demonstrated a "substantial risk that the harm will occur." The court noted that both the federal and state governments have the power to issue charters to banking institutions and that DFS has couched its concerns about the Fintech Charter Decision around this dual banking system. As a result of the Fintech Charter Decision, New York State's regulations for over 600 non-bank financial services firms are all at risk of becoming null and void, according to the opinion. The court stated that the "threats to New York's sovereignty are so clear" that OCC "does not even mention, let alone contest, the state's interests," instead focusing on constitutional and prudential issues.

Background. The NYDFS first sued the OCC to prevent the agency from creating fintech charters in May 2017 (see [Banking and Finance Law Daily](#), May 15, 2017). After the OCC's decision to begin accepting charter applications in July 2018 (see [Banking and Finance Law Daily](#), July 31, 2018), the NYDFS again challenged the OCC's authority (see [Banking and Finance Law Daily](#), Sept. 17, 2018).

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