No. 15-610

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, ET AL., PETITIONERS

v.

SALIHA MADDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the National Bank Act, 12 U.S.C. 1 *et seq.*, which preempts state usury laws regulating the interest a national bank may charge on a loan, continues to have preemptive effect after the national bank has sold or otherwise assigned the loan to another entity.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The National Bank Act (NBA or Act), 12 U.S.C. 1 *et seq.*, establishes a framework for the creation, regulation, and operation of national banks, meaning banks chartered by the Comptroller of the Currency rather than by a State. *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 306 (2006). The Act expressly grants certain powers to national banks. As relevant here, 12 U.S.C. 85 provides that a national bank "may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by

the laws of the State, Territory, or District where the bank is located," or a rate at one percent above the Federal Reserve discount rate, whichever is higher, "and no more." This provision allows a national bank that operates in many States to charge interest in all of those States up to the rate permitted by the bank's home State. Section 86 provides an exclusive federal cause of action for knowingly "taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85." 12 U.S.C. 86; see *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003) (holding that Section 86 completely preempts state usury law).

2. In 2005, respondent, who lived in New York, opened a credit card account with Bank of America, a national bank. Pet. App. 3a. In 2006, Bank of America's credit-card program was consolidated into FIA Card Services, N.A. (FIA), a national bank and wholly-owned subsidiary of Bank of America. *Id.* at 3a, 24a. When the loan was transferred, FIA amended the account's terms and conditions. *Id.* at 3a. For purposes of Section 85, FIA is located in Delaware, see Pet. 7; Br. in Opp. 4, and the amended agreement included a Delaware choice-of-law clause, Pet. App. 3a, 14a & n.4.

Respondent subsequently defaulted on her FIA credit-card account, owing approximately $5300. Pet. App. 3a, 25a. FIA wrote off the debt as uncollectable and sold the debt to petitioner Midland Funding, LLC. *Id.* at 3a. Petitioner Midland Credit Management, Inc., services Midland Funding's accounts. *Ibid.* Neither petitioner is a national bank. *Ibid.*

In 2010, Midland Credit Management sent respondent a letter seeking to collect payment on the credit-card debt. Pet. App. 4a. The letter stated that

a 27% interest rate applied to the debt. *Id.* at 4a, 25a. A 27% interest rate is permitted under Delaware law, but is usurious under New York law. *Id.* at 15a, 25a; see N.Y. Gen. Oblig. Law § 5-501 (McKinney 2012) (setting 6% interest rate "unless a different rate is prescribed in section fourteen-a of the banking law"); N.Y. Banking Law § 14-a(1) (McKinney 2013) (setting maximum permissible interest rate at 16%); see also N.Y. Penal Law § 190.40 (McKinney 2010) (receiving interest at rate exceeding 25% is criminal usury).

3. Respondent sued petitioners in federal district court. Respondent alleged that petitioners' attempt to charge 27% interest on the debt for the period after it was assigned by FIA violated New York's civil and criminal usury laws and the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.* Pet. App. 4a. Petitioners sought summary judgment on the ground that the NBA preempts respondent's state-law usury claim (and her FDCPA claim to the extent that it depends on the alleged state-law violation). *Id.* at 1a-2a.

The district court granted summary judgment to petitioners, holding that respondent's claims were preempted by the NBA. Pet. App. 2a.[1] The court determined that, "because FIA is a national bank entitled to exemption from state usury laws, [petitioners] are entitled to the same if they are FIA's assignees." *Id.* at 28a. To reach that conclusion, the court relied

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[1] When the district court decided the preemption question in petitioners' favor, it initially held that disputed factual issues precluded a grant of summary judgment. See Pet. App. 28a, 37a-38a, 49a-50a. The parties then entered into a stipulation regarding those facts, and the district court entered judgment for petitioners. *Id.* at 51a-55a.

on decisions such as *Phipps* v. *FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005), and *Krispin* v. *May Department Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000), Pet. App. 27a, as well as a "cardinal rule of usury" that a loan contract that is valid when it was made "can never be invalidated by any subsequent usurious transaction," *id.* at 28a (quoting *Nichols* v. *Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833)).

4. The court of appeals reversed. Pet. App. 1a-18a. The court recognized that Section 85 permits a national bank to charge interest at the rate permitted by its home State, and that Section 86 provides the exclusive cause of action for usury claims against national banks. *Id.* at 7a. The court explained that, "[t]o apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA." *Id.* at 8a. The court noted that NBA preemption may apply to entities that "exercise[] the powers of a national bank," such as subsidiaries and agents of national banks. *Id*. at 9a. The court found that principle to be inapplicable here, however, because petitioners "did not act on behalf of [Bank of America] or FIA in attempting to collect on [respondent's] debt." *Ibid.*

The court of appeals then concluded that "[n]o other mechanism appears on these facts by which applying state usury laws to the third-party debt buyers would significantly interfere with either national bank's ability to exercise its powers under the NBA." Pet. App. 9a. The court stated that application of state usury laws "would not prevent consumer debt sales by national banks to third parties" and that, to the extent that such application "might decrease the

amount a national bank could charge for its consumer debt in certain states," such an effect "would not 'significantly interfere' with the exercise of a national bank power." *Id.* at 10a-11a. The court further held that it would be an "overly broad application of the NBA" to "extend[] [its] protections" to "non-national bank entities that are not acting on behalf of a national bank." *Id.* at 11a.

Finally, the court distinguished *Krispin*, *supra*, and *Phipps*, *supra*. Pet. App. 11a-14a. The court explained that the national bank in each of those cases had an ongoing interest in the loan or an ongoing relationship with the assignee. *Ibid*. The court distinguished *Phipps* on the additional ground that the national bank in that case "was the entity that charged the interest to which the plaintiffs objected," whereas in this case respondent "objects only to the interest charged after her account was sold by FIA to [petitioners]." *Id*. at 14a.

The court of appeals remanded for consideration of whether, pursuant to the choice-of-law provision contained in respondent's amended credit-card agreement, Delaware law governs the maximum interest that petitioners may charge. Pet. App. 14a-15a. The court noted that "[t]he parties appear to agree that if Delaware law applies, the rate [petitioners] charged [respondent] was permissible." *Id*. at 15a.

5. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 19a-20a.

DISCUSSION

Petitioners contend (Pet. 11-25) that review is warranted to address whether the NBA preempts respondent's state-law usury claim. The court of appeals erred in holding that state usury laws may valid-

ly prohibit a national bank's assignee from enforcing the interest-rate term of a debt agreement that was valid under the law of the State in which the national bank is located. But there is no circuit split on the question presented; the parties did not present key aspects of the preemption analysis to the courts below; and petitioners may still prevail on remand despite the error in the court of appeals' interlocutory decision. For all of those reasons, further review is not warranted.

1. The court of appeals' decision is incorrect. Properly understood, a national bank's Section 85 authority to charge interest up to the maximum permitted by its home State encompasses the power to convey to an assignee the right to enforce the interest-rate term of the agreement. That understanding is reinforced by 12 U.S.C. 24(Seventh), which identifies the power to sell loans as an additional power of national banks. The court of appeals appeared to conclude that, so long as application of New York usury law to petitioners' collection activities would not entirely prevent national banks from selling consumer debt, state law is not preempted. See Pet. App. 10a-11a. That analysis reflects a misunderstanding of Section 85 and of this Court's precedents.

a. The NBA prescribes the interest rate that a national bank may charge its loan customers and establishes an exclusive federal cause of action for usury. In particular, Section 85 permits an "association," *i.e.*, a national bank, to "charge on any loan * * * interest at the rate allowed by the laws of the State, Territory, or District where the bank is located," or a rate one percent above the Federal Reserve discount rate, whichever is higher, "and no more." 12 U.S.C.

85.[2] Section 86 establishes an exclusive federal cause of action, and specifies the applicable penalties, for the collection of interest greater than that allowed by Section 85. See 12 U.S.C. 86 (knowingly charging interest above the rate permitted by Section 85 "shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it," and the debtor may recover from the national bank "twice the amount of the interest thus paid").

The effect of these provisions is to set a maximum interest rate that a national bank may charge (the rate allowed by its home State) and to preclude any State other than the one where the national bank is located from imposing a lower maximum interest rate. See *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-315, 318 (1978) (holding that a national bank located in Nebraska may charge its customer in Minnesota the maximum rate of interest permitted by Nebraska law). "To the extent the enumerated federal rates of interest are greater than permissible state rates, state usury laws must, of course, give way to the federal statute." *Id.* at 318 n.31; see 12 C.F.R. 7.4001(b) (stating the same understanding).

A national bank's power to charge the interest rate authorized by Section 85 includes the power to transfer a loan, including the agreed-upon interest-rate term, to an entity other than a national bank. When Congress enacted Section 85's earliest statutory antecedent, it was already established that a bank's power to

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[2] The Office of the Comptroller of the Currency has defined the term "interest" by regulation, 12 C.F.R. 7.4001(a), and this Court has deferred to that definition, see *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741-742, 744-745 (1996).

sell loans was a "necessarily implied" corollary of the power to originate loans. *Planters' Bank of Miss.* v. *Sharp*, 47 U.S. (6 How.) 301, 322 (1848) (holding that state law that barred state bank from transferring a loan violates the constitutional prohibition on state impairment of contracts, U.S. Const. Art. I, § 10, Cl. 1). As this Court has recognized, "in discounting notes and managing its property in legitimate banking business, [a bank] must be able to assign or sell those notes." *Id.* at 323; see *id.* at 321-325.

A national bank's federal right to charge interest up to the rate allowed by Section 85 would be significantly impaired if the national bank's assignee could not continue to charge that rate. Under the long-established "valid-when-made" rule, if the interest-rate term in a bank's original loan agreement was non-usurious, the loan does not become usurious upon assignment, and so the assignee may lawfully charge interest at the original rate. See *Nichols* v. *Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833) (a "cardinal rule[] in the doctrine of usury" is that "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction"); *Gaither* v. *Farmers & Mechs. Bank of Georgetown*, 26 U.S. (1 Pet.) 37, 43 (1828) ("[T]he rule cannot be doubted, that if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury."). The power explicitly conferred on national banks by Section 85—*i.e.*, the power to originate loans at the maximum interest rate allowed by the national bank's home State—therefore carries with it the power to use the loans once originated for their usual commercial purposes, which include assignment of such loans to others.

b. Respondent's state-law usury claim is preempted by Section 85 because it directly interferes with a national bank's authority to make and transfer loans at the permitted rate of interest. The credit-card debt at issue in this case was originated by FIA, a national bank that is located in Delaware.[3] FIA's contract with respondent specified a 27% rate of interest, which the parties agree was permissible under Delaware law. Pet. App. 15a. Accordingly, once respondent defaulted on the debt, FIA was entitled to charge 27% interest going forward on the accumulated balance.

Instead of continuing to attempt to collect on the debt, FIA sold the debt to petitioners. As FIA's assignees, petitioners were entitled to charge the same interest rate that FIA could have charged under the credit-card agreement and Delaware law. To the extent that New York law establishes a lower maximum interest rate, application of that limit to FIA's assignees would impair the national bank's federally recognized authority to originate and transfer loans at the rate permitted by the NBA. And, in the aggregate, the marketability (and therefore the value) of a national bank's loan portfolio could be significantly diminished if the national bank could not transfer to assignees the right to charge the same rate of interest that the national bank itself could charge.

Section 85 authorizes each national bank to charge interest up to the maximum rate allowed by the bank's home State. Congress's conferral of that federal right

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[3] Although respondent first obtained her credit-card account from Bank of America, the parties and the courts below assumed that Bank of America's consolidation of its credit-card accounts in FIA created a new account, making FIA the national bank that originated the loan at issue. See Pet. App. 3a, 5a, 36a-37a.

should be understood to incorporate the understandings that (a) sale of loans is an integral aspect of usual banking practice, and (b) a loan that was valid when made will not be rendered usurious by the transfer. To the extent that application of New York usury law would prevent FIA from fully exercising the powers conferred by Section 85, state law is preempted. See *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 28-29, 37-38 (1996) (holding that, because the NBA authorizes national banks to sell insurance in small towns, a state law preventing national banks from selling most kinds of insurance is preempted). Put another way, there is an "irreconcilable conflict" (*id.* at 31) between the NBA (specifically, 12 U.S.C. 85) and any state law that would preclude FIA's assignees from charging the full amount of interest that is permitted by the laws of FIA's home State.

c. Congress could have empowered national banks to charge certain rates of interest (as it did in Section 85), while expressly authorizing States to regulate the terms on which loans originated by national banks could be assigned to other entities. See *Barnett Bank*, 517 U.S. at 34 (citing NBA provisions that "accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law"). If Congress had enacted such a provision, it would rebut the inference that a national bank's federal right to originate loans at the maximum interest rate allowed by its home State includes the power to assign that right to others. But nothing in the NBA suggests that Congress intended to limit the national bank's power in that way.

To the contrary, in addition to specifying the rate of interest that a national bank may charge, the

NBA expressly authorizes national banks to carry on the business of banking by "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." 12 U.S.C. 24(Seventh). That power includes the power to sell loan contracts. See 12 C.F.R. 7.4008 ("A national bank may make, sell, purchase, participate in, or otherwise deal in loans * * * subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law."). Section 24(Seventh), by identifying the power to sell loans as an additional enumerated power of national banks, reinforces the longstanding understanding that a national bank's Section 85 powers include the power to transfer loans to other entities, which may continue to charge interest at the original rate.[4] Application of state usury law here would "prevent or significantly interfere with the national bank's exercise of [those] powers," *Barnett Bank*, 517 U.S. at 33, and it therefore is preempted.

d. In holding that application of New York usury law to petitioners' collection activities is not preempted here, the court of appeals erred in three principal respects. First, the court failed to recognize that a national bank's Section 85 power to charge certain interest rates carries with it the power to assign to others the right to charge the same rates. The court noted that the district court and other courts of appeals have relied on the valid-when-made principle, Pet. App. 12a n.2, 13a, but it failed to appreciate the

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[4] Congress has continued to recognize and reaffirm the preemptive effect of Section 85. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(f), 124 Stat. 2017 (codified at 12 U.S.C. 25b(f)).

significance of that principle in this case. Because the court of appeals considered only part of a national bank's Section 85 powers, it failed to understand how application of state usury law to petitioners would impair the bank's exercise of those powers.

Second, the court of appeals believed that, because FIA had assigned respondent's debt outright and retained no control over (or financial stake in) petitioners' efforts to collect that debt, application of state usury law would "limit [] only activities of" petitioners, and not of the national bank itself. Pet. App. 9a-10a (citation omitted; brackets in original); see *id.* at 2a, 11a. That analysis is misconceived. To the extent that New York law prohibits petitioners from charging the full amount of interest that FIA itself could have charged, that law prevents FIA from fully exercising its federal right to originate loans at the interest rate allowed by Delaware law, which includes the right to sell those loans to others. For preemption purposes, such state-law interest-rate restrictions on petitioners acting as FIA's assignees are no different from explicit state-law restrictions on the national bank's exercise of its assignment power.

Third, the court of appeals relied on an unduly narrow conception of conflict preemption. The court acknowledged that application of state usury law to a national bank's assignees "might decrease the amount a national bank could charge for its consumer debt in certain states." Pet. App. 11a. The court stated, however, that because "state usury laws would not *prevent* consumer debt sales by national banks to third parties," that sort of price effect "would not 'significantly interfere' with the exercise of a national bank power." *Id.* at 10-11a (emphasis added). The italicized word

suggests that, so long as the application of New York usury law would not render national-bank loans unsaleable, state law is not preempted.

That analysis reflects an unduly crabbed conception of NBA preemption, and of implied-conflict preemption generally. When federal law "explicitly grants a national bank an authorization, permission, or power," and does not "explicit[ly] state[] that the exercise of that power is subject to state law," state law is preempted to the extent that it restricts that power. *Barnett Bank*, 517 U.S. at 34. If New York had attempted to regulate the interest that FIA itself could charge New York residents, state law would clearly have been preempted by Section 85, without regard to the degree of practical harm to the national bank that New York usury law would entail. See *Marquette Nat'l Bank*, 439 U.S. at 314-315. Because the federal power conferred by Section 85 (reinforced by Section 24(Seventh)) includes the power to convey to an assignee the right to charge the maximum interest allowed by the national bank's home State, a state law that precludes the national bank from fully exercising that power is similarly preempted. Preemption in these circumstances does not require a showing that state usury law would reduce the price FIA could obtain for any particular loan or category of loans, let alone a showing that state law would "prevent consumer debt sales by national banks to third parties." Pet. App. 10a-11a.

2. Although the decision below is incorrect, there is no conflict among the circuits on the question presented here. Petitioners contend (Pet. 11-14) that the decision below conflicts with the decisions in *Phipps* v. *FDIC*, 417 F.3d 1006 (8th Cir. 2005), *Krispin* v. *May*

Department Stores Co., 218 F.3d 919 (8th Cir. 2000), and *FDIC* v. *Lattimore Land Corp.*, 656 F.2d 139 (5th Cir. 1981) (*Lattimore*). Because the questions presented in those cases were significantly different from the question presented here, those decisions do not conflict with the ruling below.

a. The disputed question in *Phipps* was whether the mortgage-loan fees charged by a national bank were "interest" within the meaning of Section 85. 417 F.3d at 1011. The plaintiffs were borrowers who had obtained second mortgage loans from Guaranty National Bank of Tallahassee (GNBT), a national bank. *Id.* at 1009. They argued that the fees charged by GNBT at origination were prohibited by Missouri law. *Ibid.* The defendants (GNBT and two entities to which GNBT had sold the loans) argued that, because the lawsuit concerned "interest" charged by a national bank, the plaintiffs' claims were preempted. *Id.* at 1010. The court of appeals agreed that most, if not all, of the fees charged by the national bank were "interest" within the meaning of Section 85, and it affirmed the district court's dismissal of the complaint. *Id.* at 1011-1014.

In this case, respondent concedes that petitioners may collect the principal and all of the interest that accumulated during the period that FIA held the debt, even though that pre-assignment interest accrued at a rate higher than petitioners themselves could have charged. See Br. in Opp. 6. She argues only that, once FIA sold the debt to petitioners, the rate at which *additional* interest could accrue was governed by state rather than federal law. *Ibid.* By contrast, *Phipps* did not present any issue concerning the rate at which post-assignment interest accrues, because

the charges at issue were imposed by the national bank itself at the time it made the loans. Although the plaintiffs in *Phipps* sued GNBT's assignees as well as GNBT itself, 417 F.3d at 1009, their claim was based on the fees charged by the national bank at origination, not on any additional interest accruing after the loans were sold, see *ibid.* ("[T]he plaintiffs strenuously argue their claims are based on unlawful *fees* charged, not unlawful *interest*."). Thus, as the court below correctly explained, "*Phipps* is distinguishable from this case" because in *Phipps* "the national bank was the entity that charged the interest to which the plaintiffs objected," whereas respondent "objects only to the interest charged after her account was sold by FIA to [petitioners]." Pet. App. 14a.

b. *Krispin* involved a challenge to late fees charged to a holder of a department store credit-card account. 218 F.3d at 921-922. The store issued the credit card, then "assigned all its credit accounts, and transferred all authority over the terms and operation of those accounts," to the May National Bank of Arizona, a wholly-owned subsidiary of the store. *Ibid.* The store "purchased the bank's receivables on a daily basis." *Id.* at 923. The plaintiffs sued the store, arguing that the late fees violated state law, *id.* at 921-922, and the court of appeals held that the NBA completely preempted their claims, *id.* at 924. The court concluded that, "for purposes of deciding the legality of the late fees charged to [plaintiffs'] credit accounts, * * * the real party in interest is the bank, not the store," because the bank "issues credit, processes and services customer accounts, and sets such terms as interest and late fees." *Ibid.*

The Eighth Circuit's complete-preemption holding in *Krispin* rested on the court's determination that the national bank in that case was the "real party in interest" with respect to the plaintiffs' credit-card account. That determination rested on the fact that, despite the bank's daily sale of its receivables to the store, the bank maintained an ongoing credit relationship with each account holder. In this case, by contrast, FIA's sale of respondent's debt to petitioners entirely terminated the credit relationship between respondent and the national bank. FIA sold respondent's debt outright; it retained no continuing role in administering her account and no continuing right to any interest that petitioners might be able to collect. See Pet. App. 13a (distinguishing *Krispin* on that basis).

c. *Lattimore* involved a loan that was originated by Hamilton Mortgage Corporation (which was not a national bank) and then assigned to Hamilton National Bank, which continued to charge interest at the rate specified in the original agreement between the mortgage corporation and the borrowers. 656 F.2d at 140-141, 146. The borrowers argued that, although the mortgage corporation was allowed to charge that rate, the national bank was not because the rate exceeded the maximum permitted by the national bank's home State. See *id.* at 146 (noting that the original interest rate would be usurious in the national bank's home State of Tennessee but not in the mortgage corporation's home State of Georgia). The court of appeals concluded that the national bank could continue to charge the original rate because "[t]he non-usurious character of a note should not change when the note changes hands." *Id.* at 148-149. Because the loan had

originally been made by an entity that was not a national bank, the court viewed state usury law, rather than Section 85, as controlling the determination whether the interest charged was lawful. See *id.* at 147-150.

The court in *Lattimore* did not address the question presented here. *Lattimore* involved a loan transferred *from* a state-regulated entity *to* a national bank, not a loan originated and subsequently assigned *by* a national bank. Although the court in *Lattimore* applied the valid-when-made rule, and the Second Circuit in this case overlooked that principle, the courts were considering different issues. To be sure, there is an appealing symmetry to the idea that, if the law that governs the originating entity continues to apply after one sort of transfer, it should likewise apply when the assignment runs in the opposite direction. See Pet. 13-14. There is, however, no legal or logical reason to conclude that the Fifth Circuit's analysis in *Lattimore* (even assuming it is correct) *must* control in the situation presented here.

3. For two additional reasons, this case would be a poor vehicle for resolution of the question presented.

a. The deficiencies in the court of appeals' preemption analysis may be attributable in part to the parties' failure to present the full range of preemption arguments below.

In the district court, petitioners argued that respondent's claims "are expressly pre-empted by federal law" because "§§ 85 and 86 [of Title 12] provide the exclusive cause of action for such claims." Pets. Mem. of Law in Support of Mot. for Summ. J. 3 (Jan. 25, 2013) (D. Ct. Doc. 32) (citation omitted). The parties' dispute centered on whether a national bank

must retain an interest in a loan it transfers in order for the transferee to validly invoke NBA preemption. Compare *id.* at 3, 7-8 (petitioners arguing that preemption applies to "both national banks and assignees of their receivables") (emphasis omitted), with Resp. Mem. of Law in Opp. to Mot. for Summ. J. 3, 16-24 (Mar. 4, 2013) (D. Ct. Doc. 42) (respondent arguing that "a non-national bank assignee [may] enjoy the benefit of the National Bank Act exemption [only] where the national bank assignor retains a cognizable, substantive interest in the debt going forward"). The parties' briefs did not distinguish between different types of preemption or address whether application of state usury law would interfere with the national bank's exercise of its powers.

In the court of appeals, the parties' arguments shifted. Respondent argued, *inter alia*, that petitioners must establish that application of state law would "significantly interfere with the national bank's exercise of its powers." Resp. C.A. Br. 14 (citations omitted); see *id.* at 12-14. Petitioners' brief argued for NBA preemption but did not specify how the preemption analysis should work and did not cite Section 85 even once. The brief stated that petitioners had "no burden whatsoever to show an interference with a national bank's exercise of powers," Pets. C.A. Br. 23, which suggests that petitioners were attempting to disavow a conflict-preemption argument. But the brief also stated that the district court's invocation of the valid-when-made rule "was not central to the [district court's] [d]ecision and does not change the analysis at all." *Id.* at 16.

As a result, the court of appeals expressed uncertainty about the precise nature of petitioners' preemp-

tion theory, see Pet. App. 7a (stating that petitioners "appear to suggest that this case involves 'conflict preemption'"), and attempted to limit its holding to the arguments presented by the parties, *id.* at 9a (stating that "no other mechanism appears on these facts" to establish that application of state usury law would significantly interfere with a national bank's exercise of its powers). The court of appeals' failure to recognize the full scope of powers granted to national banks under Sections 85 and 24(Seventh), and the court's failure to appreciate the potential significance of the valid-when-made rule, may be attributable at least in part to the lack of clarity in the briefing. Because the briefing in the court of appeals failed to address key components of the preemption analysis, this is an unattractive case for further review.

b. The decision below is interlocutory, and resolution of the question presented might not affect the outcome of this case. Petitioners argued in the court of appeals that, even if respondent's claims are not preempted by the NBA, respondent's credit-card agreement with FIA contains a choice-of-law provision that mandates the application of Delaware law. Pet. App. 1a-2a. The court of appeals did not decide that issue, but instead remanded for the district court to consider the effect of the choice-of-law clause. *Id.* at 14a-15a. Because the parties "appear to agree that if Delaware law applies, the rate [petitioners] charged [respondent] was permissible," *id.* at 15a, petitioners will likely prevail on remand if the district court accepts their reading of the credit-card agreement.

Even if the district court determines that New York law (rather than Delaware law) applies, petitioners could prevail on remand if New York usury law

itself incorporates the valid-when-made principle (assuming that petitioners have preserved such an argument). The argument that New York law incorporates this principle would be a natural corollary to petitioners' description of the valid-when-made rule as a "fundamental principle of usury law." Pet. 15; see Clearing House Ass'n L.L.C. et al. Cert. Amicus Br. 9-12 & n.3 (noting longstanding and pervasive acceptance of valid-when-made principle). And, to the extent that New York usury law treats FIA's lawful origination of the loan as a ground for allowing petitioners to charge the same interest rate that FIA could have charged, state law does not conflict with the federal scheme. More generally, the practical importance of the preemption issue presented in this case depends significantly on the extent to which individual States decline to incorporate the valid-when-made rule into their own usury laws. Petitioners have made no effort to demonstrate that state-law departures from the valid-when-made rule have been widespread. For this reason as well, the Court's review is not warranted at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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