2015 WL 309512 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

CASHCALL, INC., and J. Paul Reddam, in his capacity as President and CEO of CashCall, Inc., Petitioners,
v.
Patrick MORRISEY, Attorney General, Respondent.

No. 14-894.
January 23, 2015.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

Petition for a Writ of Certiorari

Clifford M. Sloan, Thomas J. Nolan, Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Ave., NW, Washington, DC 20005, (202) 371-7000.

Thomas C. Goldstein, Counsel of Record, Tejinder Singh, Goldstein & Russell, P.C., 7475 Wisconsin Ave., Suite 850, Bethesda, MD 20814, (202) 362-0636, tg@goldsteinrussell.com.

***i** QUESTIONS PRESENTED

The Federal Deposit Insurance Act permits state-chartered banks to lend money to consumers in other states at interest rates that are lawful in the state where the bank is located. 12 U.S.C. § 1831d(a). Any contrary rate limitation in the consumer's state is expressly preempted. *Id.*

In this case, a bank chartered in South Dakota originated loans to consumers across the nation, including in West Virginia, on terms that are lawful in South Dakota. It is undisputed that the bank itself set the terms for the loans, extended credit to the consumers, and disbursed the proceeds to them.

Petitioner CashCall, Inc., which is not a bank, marketed the loans to consumers on the bank's behalf. Pursuant to its marketing agreement with the bank, CashCall also subsequently purchased many of the loans from the bank and serviced them.

The West Virginia Attorney General sued CashCall, alleging violations of the West Virginia Consumer Credit and Protection Act, a statute that exempts from regulation any loan for which federal law preempts state interest rate limitations. In holding that West Virginia's rate limitations were not preempted, the lower courts found it dispositive that CashCall, and not the bank, held the “predominant economic interest” in the loans.

The Question Presented is whether the Federal Deposit Insurance Act preempts the application of state interest rate limitations to loans that were underwritten and originated by a state-chartered bank, when a non-bank acquires a predominant economic interest in the loans.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioners CashCall, Inc. and J. Paul Reddam respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals for West Virginia in this case.

STATUTORY PROVISIONS INVOLVED

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, provides, in relevant part:
(a) Interest rates

In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

***2** (b) Interest overcharge; forfeiture; interest payment recovery

If the rate prescribed in subsection (a) of this section exceeds the rate such State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section, the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from such State bank or such insured branch of a foreign bank taking, receiving, reserving, or charging such interest.

Section 85 of the National Bank Act, 12 U.S.C. § 85, provides:

> Any association 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 at a rate of 1 per centum in ***3** excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in ***4** addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

The West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-102(38), provides:

> "Regulated consumer loan" means a consumer loan, including a loan made pursuant to a revolving loan account, in which the rate of the loan finance charge exceeds eighteen percent per year as determined according to the actuarial method, except where the loan qualifies for federal law preemption from state interest rate limitations, including federal law bank parity provisions, or where the lender is specifically permitted by state law other than article four of this chapter to make the loan at that rate without a requirement the lender hold a regulated consumer lender license.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals (Pet. App. 1a-57a) is unpublished. The state circuit court's phase-two trial opinion (Pet. App. 58a-97a) is unpublished.

JURISDICTION

The West Virginia Supreme Court of Appeals issued its judgment on May 30, 2014. Pet. App. 1a. It denied a timely request for rehearing on August 26, 2014. *Id.* 98a. On November 17, 2014, the Chief Justice extended the time to file this petition to and including December 24, 2014. *See* No. 14A512. On December 12, 2014, the Chief Justice further extended ***5** the time to file this petition to and including January 23, 2015. *See id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner CashCall, Inc. is a California-based consumer finance company. Pet. App. 2a. CashCall entered into a marketing agreement with First Bank and Trust ("FB&T"), a bank chartered in South Dakota that is supervised by the Federal Deposit Insurance Corporation. *See id.* 3a. As part of that agreement, CashCall assists FB&T in marketing loans to consumers. *Id.* 3a, 64a, 75a. If the loans are of sufficient quality to meet CashCall's standards, CashCall then purchases the loans originated by FB&T. *Id.* 3a. For loans that are purchased, FB&T keeps the origination fees, as well as any interest that accrues before CashCall purchases the loan, and CashCall assumes the right to repayment of the loan, as well as the responsibility to service the loan. *See id.* 3a n.3.

As part of its marketing program, CashCall marketed FB&T installment loans to consumers in West Virginia, under the bank's supervision. Prior to doing so, CashCall's general counsel, Dan Baren, communicated with West Virginia's Division of Banking to determine whether CashCall would need to obtain a license in order to market loans within the state. In an e-mail dated July 28, 2006, Baren asked:
As I stated on the phone, my question was whether a California company would need to obtain a license from the Commissioner to take ***6** assignments and service unsecured consumer loans that were originated by a financial institution which itself was exempt from the licensing requirement.

I would like to conclude that licensing would not be required because the loans being assigned were not 'regulated consumer loans' as that term is defined in Section 46A-1-102.

Please let me know your position on this matter. Thank you very much.

Pet. App. 42a. This inquiry referred to West Virginia Code § 46A-1-102(38), which defines the term "regulated consumer loans" and excludes from regulation "any loan" that "qualifies for a federal law preemption from state interest rate limitations."

Baren received a favorable response that same day. Kathy Lawson, the head legal counsel of the Division of Banking, assured Baren that "[w]e have further discussed the situation you describe and have come to the same conclusion you presented in your message below. Licensing is not required because the loans being assigned were not 'regulated consumer loans' as defined in 46A-1-102." A.R. 5462 (partial excerpt appears at Pet. App. 42a).

Having received assurances from the state, CashCall marketed loans for FB&T to consumers in West Virginia, and then purchased those loans that conformed to its underwriting guidelines. All told, CashCall purchased FB&T loans to 292 West Virginia residents, all for amounts of $5000 or less. Pet. App. 3a. After a substantial number of borrowers eventually ***7** defaulted on their loans, CashCall attempted to collect the debts. *Id.*

In 2007, the West Virginia Attorney General's office demanded that CashCall cease marketing loans in West Virginia and make restitution to the defaulting consumers. *Id.* at 3a-4a. The demand alleged that CashCall's activities violated the West Virginia Consumer Credit and Protection Act (WVCCPA). CashCall responded that the WVCCPA's usury provisions were preempted by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 183Id, because the installment loans were made by FB&T under a Federal Deposit Insurance Approved program. *Id.* 4a. It therefore argued that, as the Division of Banking had advised, the FB&T loans were not "regulated consumer loans."

2. The Attorney General sued CashCall in West Virginia circuit court, alleging that CashCall had issued loans without a license, that it had violated state usury laws, and that it had engaged in unlawful debt collection practices. *Id.* 5a. The Attorney General labeled CashCall's relationship with FB&T a "rent-a-bank" scheme, alleging that CashCall's marketing agreement was merely a sham to permit CashCall to avail itself of preemption rules that protect state-chartered banks. *Id.* [1]

***8** CashCall again raised its preemption defense. "Both parties agreed that if the circuit court found FB&T to be the true lender, then the State's claims that CashCall was making loans without a license and making usurious loans would be preempted by federal law." *Id.* 16a. Thus, a central issue at trial was whether federal law regards FB&T, or instead CashCall, as the lender.

The state called a single trial witness: Margot Saunders, a purported expert on lending issues. Saunders testified that regulators regard third-party lending programs with suspicion, often referring to them as "rent-a-bank" or "**rent-a-charter**" arrangements. Pet. App. 69a. She further "testified that regulators challenged such arrangements by contending that the non-bank entity was the true lender rather than the bank," and that they attempted to prove the identity of the "true lender" by focusing on the entity that bore the predominant economic risk of the loan. *Id.* 70a.

Saunders testified that CashCall, and not FB&T, bore the predominant economic risk of the consumer loans in this case because CashCall would purchase ***9** every loan that complied with its underwriting criteria for one hundred cents on the dollar, and would then bear all the risk of nonpayment. *Id.* 71a. Furthermore, CashCall had agreed to indemnify the bank, and its owner and CEO had provided a personal guarantee for CashCalPs obligations to the bank. *Id.*

CashCall's general counsel, Dan Baren, also testified. He described the genesis of CashCall's relationship with FB&T. Specifically, he explained that FB&T had approached CashCall because the bank was seeking to start consumer lending, and was also seeking to partner with an entity that could assist it in marketing its loans nationwide. Pet. App. 75a. The bank required assistance because it lacked the capacity to market the loans, and to service them after origination. *Id.* On the other side of the equation, CashCall was headquartered in California and the majority of its business was concentrated there, so it was eager to diversify. *Id.* 74a-75a. Negotiating at arms' length, CashCall and FB&T thus entered into an arrangement whereby FB&T would originate loans nationwide, and CashCall would take on the marketing and servicing responsibilities.

Baren further explained that initial underwriting decisions were all made by FB&T through a website owned by the bank on the bank's systems. *Id.* 7a. CashCall had no direct input into the underwriting process, but it was only obligated to purchase loans that were consistent with its own underwriting criteria. *Id.* Because FB&T wished to sell its loans to CashCall, it adopted consistent underwriting criteria of its own. *Id.*

***10** Baren also testified that while CashCall bore the economic risk from the loan, *e.g.*, the risk of default by the borrowers, the bank remained subject to all of the regulatory risk - including from its supervisor, the FDIC - as well as all of the reputational risk associated with the loans. *Id.* 76a-77a.

The trial court "agree[d] with the State that CashCall was the **de facto lender** and thus, is subject to West Virginia's usury and lending laws." *Id.* 63a.[2] The court held that "[b]ased upon the review of how rent-a-bank cases have been approached by other courts and regulators, the Court concludes that the predominant economic interest standard is the proper standard to determine who the true lender is in the present case." *Id.* 85a-86a. Citing cases finding that the federal banking laws did not result in complete preemption of (and therefore federal subject matter jurisdiction over) state usury claims, *id.* 86a-88a, the court concluded that the claims against CashCall were likewise not preempted. The court decided that CashCall was the true lender, that it was not an affiliate of the bank, that the purpose of the lending program was to permit CashCall to use the bank's charter to evade state usury laws, and that the program violated West Virginia law. *See id.* 90a-92a.

***11** The trial court thus granted the following relief: It enjoined CashCall from violating the WVCCPA; found that all contracts between CashCall and West Virginia consumers were void and cancelled any debts still owed to CashCall; imposed a civil penalty of $730,000 for making loans without a license; imposed a civil penalty of $730,000 for engaging in unfair and deceptive acts and for making and collecting usurious loans; and imposed a punitive damages award of $10,045,687.96 - an amount equal to quadruple the total interest that the West Virginia consumers (292 in all)had agreed to pay on their loans. *See id.* 95a-97a.[3]

3. CashCall appealed from the circuit court's orders, and the West Virginia Supreme Court of Appeals affirmed. CashCall argued that the trial court erred by applying a "predominant economic interest" test to decide that CashCall was the "**de facto lender**." Pet. App. 34a. In support, CashCall cited *Discover Bank v. Vaden*, 489 F.3d 594, 601-03 (4th Cir. 2007), *rev'd on other grounds*, 556 U.S. 49 (2009), and ***12** *Krispin v. May Department Stores Co.*, 218 F.3d 919, 923 (8th Cir. 2000), which held that the true lender is the entity that (1) sets the terms and conditions of a loan, and (2) actually extends credit to the consumer. *See* Pet. App. 34a-35a. Under that test, CashCall argued, FB&T is the lender, so West Virginia's interest rate rules are preempted and the loans are exempt state licensing and usury laws. *Id.* 34a.

The Supreme Court of Appeals rejected CashCall's argument, citing *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897 (W. Va. 1974), which held that the applicability of usury statutes should turn on the substance, and not merely the form, of transactions. Pet. App. 35a. The court thus held that the "predominant economic interest" test, which requires courts to look beyond the contracts, is the more appropriate test to determine the identity of a "true lender" in an alleged rent-a-bank case. *Id.* 35a-36a. The court attempted to distinguish *Vaden* and *Krispin* on the ground that in those cases "the non-bank entity was a corporate affiliate of the bank," while "CashCall and FB&T were completely separate entities." *Id.* 37a.

CashCall filed a timely petition for rehearing, which was denied. Pet. App. 98a.

4. This Petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to address a critically important and frequently recurring issue of federal banking law that has divided the lower courts. When it enacted Section 27 of the FDIA, Congress sought to facilitate interstate lending by state-chartered banks. It therefore expressly permitted such banks to export ***13** the interest rates permitted in their home jurisdictions to other states. Congress gave that provision teeth by expressly preempting contrary usury laws.

Plaintiffs and some regulators in states with strict usury laws dislike Congress's design and have been searching for a way to challenge it. Consequently, these plaintiffs have sought to recharacterize loan programs as belonging to third parties that provide marketing and/or servicing assistance, instead of the banks themselves. Utilizing the pejorative "rent-a-bank" label, these plaintiffs have invented legal tests that permit courts to ignore the contractual relationships at issue in these transactions, and to thwart Congress's efforts to facilitate lending by state-chartered banks.

The "predominant economic interest" test employed by the courts below is precisely such an invention. It is undisputed that FB&T sets the terms for the loans and actually extends credit to the consumers. When originated, the loans plainly fall within Section 27, and thus outside the scope of the WVCCPA. In fact, the state has not disputed that FB&T can make these very loans to West Virginia consumers without implicating the state's usury and licensing laws. Pet. App. 65a. But the lower courts held that because CashCall contracted to buy those loans so that it can service them, FB&T's crucial role in the transaction is irrelevant. That result is wrong, and the issue warrants this Court's review.

Other courts have rejected the "predominant economic interest" test in favor of a more straightforward, objective, and predictable inquiry ***14** that turns on which entity actually set the terms for a loan and then extended credit to the consumer. That is the approach taken by the Fourth and Eighth Circuits, as well as numerous federal district courts. This Court should grant certiorari to resolve the conflict, the persistence of which introduces uncertainty into the market and chills lending activity in conflict with Cognress's intent.

I. The West Virginia Supreme Court Of Appeals Erroneously Decided An Important Issue Of Federal Law.

Certiorari is warranted because the decision below incorrectly decided an important issue of federal banking law. Congress enacted Section 27 of the FDIA in 1980 as a reaction to the credit crunch of the 1970s. *See Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 826-28 (1st Cir. 1992) (summarizing legislative history). As relevant here, the statute facilitates lending by state-chartered banks, and places those banks on an equal footing with national banks. *See id.* It accomplishes those purposes by authorizing statechartered banks to export their interest rates to other states when they made loans across state lines - a power that national banks already enjoyed. *Id.* To ensure that the consumer's state does not impose its usury laws upon a regulated bank, the statute expressly preempts those laws. *See* 12 U.S.C. § 1831d(a). In lieu of state-law regulation of interest rates, federal law, including regulations by the FDIC and a separate cause of action for persons charged more than the rate permitted by Section 27, ensures fairness to borrowers. *See id.* § 1831d(b).

***15** The text of the statute makes its purpose and operation clear. It provides that "[i]n order to prevent discrimination against State-chartered insured depository institutions … such State bank … may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made … the rate allowed by the laws of the State, territory, or district where the bank is located …." 18 U.S.C. § 1831d(a). The key question is when and by whom a loan is "made."

The answer is straightforward: a loan is "made" when it is originated, and it is made by the entity that originated it, *i.e.,* the entity that approved the loan, disbursed the proceeds to the borrower, and extended the credit by communicating the approval to the borrower. That position is not only consistent with the plain meaning of the word "made" [4]; it has also long been embraced by the relevant federal agencies, which take the position that a loan is made where approval, disbursal, and extension of credit occur. *See* FDIC General Counsel's Opinion No. 11, *Interest Charges by Interstate Banks,* 63 Fed. Reg. 27,282-01, 27,285 (May 18, 1998); Office of the Comptroller of the Currency, Interpretive Letter No. 822 (Feb. 17, 1998).

***16** On the other hand, the "predominant economic interest" standard advanced by the courts below has no basis in the statutory text whatsoever. The state courts attempted to justify this standard by resort to state precedent from four decades ago holding that in order to determine whether a transaction is usurious, courts must examine its substance, not its form. *See* Pet. App. 35a, 85a (citing *Carper v. Kanawha Banking & Trust Co.,* 207 S.E.2d 897 (W. Va. 1974). But that case did not interpret Section 27, or indeed any federal statute. Instead, the issue was whether a pricing term in the credit sale of a mobile home was functionally identical to "interest" on a loan, and thus capable of being usurious under state law. *See Carper*, 207 S.E.2d at 495. It is telling that the lower courts could not find any better authority for their interpretation of the federal statute.

In any event, petitioners' interpretation of the statute does not ask courts to ignore the substance of the relevant transactions. Respondent's argument to the contrary appears to be that in order for a loan transaction to have "substance," the originator must retain the economic risk of the loan. But that is simply not true: sales of loans after origination are commonplace - indeed, they are the norm - and there is no reason that a sale for full value (like the sales in this case) has less "substance" than a sale at either a discount or a premium. In fact, the evidence in this case - which was never disputed or denied by the state - showed that both parties were able to benefit from the arrangement: FB&T was able to reach a broader customer base without taking on the added expenses of marketing and servicing the loans; and ***17** CashCall was able to diversify its loan portfolio so that its risk was not overwhelmingly concentrated in California. Moreover, the loans were not shams: the borrowers actually received the money, and efforts were made to collect on loans that were delinquent or in default. There is nothing "insubstantial" about any of that.

If anything, it is respondent's position that elevates form over substance, if the proper focus is the underlying transaction with the consumer. In this case, the state has never disputed that FB&T is permitted to make loans - at any interest rate allowed by South Dakota law - to West Virginia consumers. *See* Pet. App. 65a. Indeed, all of the loans that FB&T actually originated fall within that category of permitted loans. But respondent argues, and the lower court agreed, that because a non-bank third party acquired a predominant economic interest in the loans, the substance of the bank's transaction with the consumer is essentially irrelevant.

Petitioners' interpretation of the statute also better serves Congress's purpose in enacting Section 27, which was to facilitate lending by state-chartered banks. Because sales of loans after origination are so common in today's market, many loans are designed from the outset to satisfy servicers' underwriting criteria in order to facilitate a sale. And of course, many servicers are not banks. If the "predominant economic interest" standard holds sway, then state-chartered banks will find it very difficult to sell their loans, because those loans may instantly become usurious upon sale. If the banks know that they ***18** cannot sell the loans, then they will have no incentive to lend in the first instance, which would hinder, rather than facilitate, lending by chartered banks. Even if none of this is certain, the risk that a sold loan will be cancelled, and the purchaser will incur punitive sanctions like the ones levied against CashCall in this case, will chill purchasing activity, and therefore lending. On the other hand, if the identity of the originator is dispositive as to the identity of the lender, then banks can sell their loans, and purchasers can be confident that the purchase will not expose them to usury claims. That will facilitate lending.

This Court has not yet authoritatively interpreted Section 27. But it has made relevant statements when describing Section 85 of the National Bank Act, 12 U.S.C. § 85, which provides essentially the same protection to federally chartered banks as Section 27 does to state-chartered banks. In *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), this Court held that Section 85 permits national banks to export their interest rates to other states. The Court reasoned that Congress was aware of the market for interstate loans when it enacted the statute, and that Congress sought to protect national banks engaged in that market from regulation by neighboring states. *See* 439 U.S. at 314-15.

The Court's opinion ended with the following paragraph:

> Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair ***19** the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates. *Cf.* Cong. Globe, 38th Cong., 1st Sess., 2123 (1864)…. [T]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19 (footnote omitted).

The Court's reasoning in *Marquette* serves as a potent critique of the lower court's decision in this case. Here, the lower court essentially held that if it did not apply the "predominant economic interest" test, it would never be able to catch usurious "rent-a-bank" schemes. In other words, the court worked backward from the state's policy objective to find a test that would permit it to limit the effect of the federal statute. *See* Pet. App. 37a. But the federal banking statutes are not designed to tiptoe around state usury laws; they are designed to preempt them. As this Court more recently explained, "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 10 (2003) (quotation marks omitted). To the extent that the lower court disapproved of that result, its ***20** complaint - like the complaint of the petitioners in *Marquette* - is best addressed to Congress.

Of course, that assumes that the Court takes the state's concerns about usury at face value - which it should not. Under petitioners' test, preemption does not apply unless a state-chartered bank, insured by the FDIC and regulated under both federal and state law, originates the loans. If the bank participates in an unlawful scheme, then the appropriate regulators can sanction it. All of respondent's legitimate consumerprotection objectives can be achieved that way. But here, what respondent wishes to do is not regulate the banks, but instead to deter them from participating in lawful business arrangements by threatening the banks' partners with state law damages claims.

Finally, a test that focuses on which entity approved the loan, extended the credit, and disbursed the funds is far superior if the goal is to create a predictable and stable business environment. Banks and their partners need clear, easily administrable rules - not *ad hoc* standards that produce unpredictable results - in order to operate. The lower court's "predominant economic interest" test is vague at best. It is entirely unclear when or how an economic interest becomes "predominant," and it is therefore impossible to tell when a state court will conclude that a bank has ceased to be the "true lender" of a loan that it originated.

In fact, that concern was borne out in this very case: CashCall contacted West Virginia regulators to obtain their advice before it attempted to market loans to West Virginia consumers. In its request for ***21** information, CashCall explained that it would be taking an assignment of the loans and servicing the loans, which had been originated by a state-chartered bank. The regulators responded right away, stating that "[l]icensing is not required because the loans being assigned were not 'regulated consumer loans' as defined in 46A-1-102." Pet. App. 42a. That response confirmed CashCall's understanding of the law, and it made perfect sense. Had the regulators been true to their word, this case would never have arisen. It is only because the regulators subsequently applied the "predominant economic interest" test that CashCall found itself whipsawed by their inconsistency and unable to ensure its compliance with state law.

This issue is sufficiently important that this Court should grant certiorari to resolve it. Without clarity as to the meaning of Section 27, state-chartered banks are at a loss to determine what sorts of partnerships they can strike with third parties, and what sorts of loan products they can offer to consumers. The decision below injects unnecessary legal uncertainty into the marketplace, and thwarts Congress's intent in enacting Section 27.

II. The Decision Below Conflicts With The Precedents Of Numerous Federal Courts.

The use by the West Virginia Supreme Court of Appeals of the "predominant economic interest" test also deepens a conflict about the appropriate way to gauge whether a loan falls within the scope of federal preemption. Certiorari is warranted to address the conflict, which burdens interstate lenders with a patchwork of inconsistent rules.

***22** 1. As the court below acknowledged, it employed a different test to determine the identity of a "true lender" than the Fourth and Eighth Circuits have applied. In *Discover Bank v. Vaden,* 489 F.3d 594, 597 (4th Cir. 2007), *rev'd on other grounds* 556 U.S. 49 (2009), Discover Financial Services, Inc. (described in the *Vaden* opinion as DSF), the servicing affiliate of Discover Bank (a chartered bank), brought a state law lawsuit against a credit card customer who had refused to pay her bill. The card itself had been issued by Discover Bank. *Id.* "According to the servicing agreement between DFS and Discover Bank, DFS performs such functions as marketing and servicing Discover Bank loan products and collecting on accounts pursuant to instructions from Discover Bank." *Id.* The customer brought state law counterclaims, including usury claims. *Id.* Discover Bank sought to remove those counterclaims to federal court, where it filed a motion to compel arbitration of them. *Id.* at 598.

In deciding that the federal courts had subject matter jurisdiction, the district court, and later the court of appeals, held that the counterclaims were completely preempted by Section 27 of the FDIA. The court of appeals explained that "Vaden would have us simply accept DFS as the lender, and thus real party in interest, and deny Discover Bank's role as originator of her Cardmember account. The facts, however, show that Discover Bank was the lender here and therefore the real party in interest." 489 F.3d at 602.

***23** The Fourth Circuit found the "Cardmember agreements" to be "of particular significance." *Id.* They "conclusively demonstrate[d] that Discover Bank was the entity that extended Vaden credit and set the interest and fees of which Vaden complains." *Id.* The agreements also gave the bank the power to levy finance charges and late fees. And the agreement between Discover Bank and DFS likewise acknowledged that Discover Bank was the lender, even though DFS was responsible for mailing bills to cardmembers and bringing collection actions in court. *See id.* [5]

The Eighth Circuit employed a similar analysis in *Krispin v. May Department Stores Co.*, 218 F.3d 919 (8th Cir. 2000). In that case, a store in Missouri issued credit cards to its customers, and subsequently ***24** transferred those agreements to a federally chartered bank that it had created in Arizona. *Id.* at 921-22. The terms of credit subsequently changed to permit late fee charges in excess of those permitted by Missouri law, and customers brought class action lawsuits against the store in state court. *Id.* at 922. The store removed the actions to federal court on complete preemption grounds under the National Bank Act. The district court accepted jurisdiction and granted summary judgment to the defendants. *Id.*

The Eighth Circuit affirmed. It reasoned that "the question of complete preemption in this case turns on whether appellants' suit against the store actually amounted, at least in part, to a state law usury claim against the bank." *Id.* at 923. Even though the plaintiffs' complaints "focused exclusively on the store, the only entity with which they had ever entered into credit agreements," and even though "the store remained substantially involved in the collection process because it purchased the bank's receivables on a daily basis," the court of appeals held that the bank was the lender for purposes of federal preemption because it was merely in the role of an assignee of receivables. *Id.*

The court explained that "[t]he bank, a wholly-owned subsidiary of the store, with which it is required to maintain arms'-length transactions, was established specifically for the purpose of taking over the store's credit card operations." *Id.* The bank was therefore the real party in interest vis-à-vis those accounts. "Moreover, the store's purchase of the bank's receivables does not diminish the fact that it is now ***25** the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees." *Id.* at 924. The court thus held that it made sense "to look at the originating entity (the bank), and not the ongoing assignee (the store), in determining whether" preemption applies. *Id.*

Under the foregoing analysis, the loans in this case clearly are attributable to FB&T, and not CashCall. FB&T set the terms of the loans, and it extended the credit to consumers. That CashCall subsequently acquired an economic interest in the loans - or even that the bank designed the loans to fit CashCall's underwriting criteria - is irrelevant because "[t]he non-usurious character of a note should not change when the note changes hands." *Krispin*, 218 F.3d at 924 (quoting *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 147-49 (5th Cir. Unit B 1981)).

The lower court attempted to distinguish *Vaden* and *Krispin* by noting that in each of those cases, the bank and the non-bank entity were affiliated, while CashCall and FB&T are not. But the courts of appeals in *Vaden* and *Krispin* placed no emphasis on that fact. If anything, the lack of affiliation in this case favors CashCall because affiliated companies have far greater incentive and ability to collude in order to avoid regulation. For example, in *Krispin*, the store itself issued credit to customers - then transferred the credit to a bank that was its wholly owned subsidiary, from which it purchased all of the receivables on a daily basis. In other words, the store did not merely rent a bank; it bought one, and then used that bank to ***26** shield its credit card program from usury laws. But the Eighth Circuit had no trouble concluding that the bank, and not the store, was the true lender.

See 218 F.3d at 924. Similarly, in *Vaden*, the servicing affiliate and the bank had common ownership - thus heightening the risk that the bank was being used to shield the servicing entity from usury laws. But the Fourth Circuit found the bank to be the true lender because it extended credit and set the terms of the loans. *See* 489 F.3d at 602.

In this case, by contrast, FB&T and CashCall had an arm's-length relationship in which each assumed different responsibilities over the life of the loan: FB&T originated the loans, and CashCall later acquired and serviced them. Neither CashCall nor its owner had any power to induce FB&T to extend credit, or to specify the terms upon which it would be extended. Under *Vaden* and *Krispin*, FB&T is unquestionably the true lender.

The Fourth and Eighth Circuits are not alone in relying on the identity of the originator to determine the true lender for purposes of federal preemption. In *Sawyer v. Bill Me Later, Inc.,* 23 F. Supp. 3d 1359 (D. Utah 2014), a consumer finance company offered to finance purchases by customers buying goods on a website. *Id.* at 1360. The company would take credit information from the customers and relay the qualifying buyers to a state-chartered bank in Utah, which then extended the credit consistent with Utah law. *Id.* at 1360-61. Consumers in California, claiming that the interest rates charged on the loans were usurious under California law, brought suit against ***27** the finance company, which argued preemption. *Id.* at 1361-62.

The district court agreed with the defendant. It held that "[e]ven accepting" as true the allegation that "the structure in use … reveals that [Bill Me Later] and not the state-chartered bank is the 'true lender' and thus that the whole scheme is an obvious effort to circumvent state usury laws … the court would still be required to dismiss these claims as preempted by Section 27." *Id.* at 1367. That was so, the court reasoned, because:

> WebBank's conceded role in originating the loan subjects the program and [Bill Me Later] to regulatory scrutiny and accountability under the FDIA - including the FDIC's detailed and mandatory examination and supervision, which are part and parcel of the interest rate authority granted in Section 27 - and therefore a full panoply of loan regulation and consumer protection. Far from evading regulation, application of the FDIA results in extensive FDIC supervision of the loan program and examination for compliance with all applicable federal and state laws.

Id. at 1368. And it was that federal regulation - and not state usury law - that was the appropriate mechanism to challenge the validity of any loan by a chartered bank.

In *Hudson v. Ace Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060, at *4 (S.D. Ind. May 30, 2002) - a case applying Section 85 of the National Bank Act, 12 U.S.C. § 85, which is substantively ***28** identical to Section 27 of the FDIA except that it protects national banks as opposed to state-chartered banks - the plaintiff argued that the originator's role in servicing the loan "was so insignificant that the court should regard" the non-bank entity "as the true lender - even though [the bank] issued her loan." Because the case was before the court on a motion to dismiss, it accepted the factual premises of this argument as true. *See id.* But the court rejected these arguments, holding that while they "may provide a reasonable foundation for closer federal regulation of national banks that engage in such transactions," they do not "offer a basis for giving [the plaintiff] any relief." *Id.* The fact that a chartered bank "made the loan" was "dispositive," even though the bank then "sold a participation interest" to a non-bank entity. *Id.* at *7. And that "arrangement is lawful under § 85 even if the purpose of the arrangement was to avoid application of state usury laws." *Id.* at *4.

Under the rules applied in these cases, the result in this case would have been different.

2. On the other hand, the decision below finds some support in *BankWest, Inc. v. Baker,* 411 F.3d 1289 (11th Cir. 2005), *vacated as moot* 446 F.3d 1358 (11th Cir. 2006). There, the court held that a Georgia statute making it unlawful for an in-state non-bank entity to hold a "predominant economic interest" in payday loan revenue - defined as more than fifty percent of the revenue. *Id.* at 1298. The court held that the state statute was not preempted by Section 27. *See id.* at 1308. The Georgia Court of Appeals reached a similar result in ***29** *Georgia Cash America, Inc. v. Greene,* 734 S.E.2d 67, 72-73 (Ga. Ct. App. 2012), where it

held that even as to loans made before the statute was passed, an in-state non-bank entity could be liable under state usury laws if it was "the lender in fact."

Similarly, in *People ex rel. Herrera v. Check 'N Go of California, Inc.,* No. C 07-02789 JSW, 2007 WL 2406888, at *4 (N.D. Cal. Aug. 20, 2007), the district court held that because the plaintiffs complaint stated allegations principally against non-bank entities, Section 27 did not preempt it.

A number of courts have reached the same result as the federal district court in this case on a related but distinct question: whether Section 27 results in "complete preemption" and thus confers federal subject matter jurisdiction over cases alleging violations of state usury laws. *See, e.g., Thomas v. U.S. Bank Nat'l Ass'n ND,* 575 F.3d 794, 797 (8th Cir. 2009); *Community State Bank v. Knox,* 850 F. Supp. 2d 586, 601 (M.D.N.C. 2012); *Griner v. Synovus Bank,* 818 F. Supp. 2d 1338, 1346 (N.D. Ga. 2011); *Flowers v. EZPawn Okla., Inc.,* 307 F. Supp. 2d 1191, 1194-95 (N.D. Okla. 2004). *See also Colorado ex rel. Salazar v. ACE Cash Express, Inc.,* 188 F. Supp. 2d 1282, 1284-85 (D. Colo. 2002) (similar holding for the National Bank Act); *Goleta Nat'l Bank v. Lingerfelt,* 211 F. Supp. 2d 711, 713 n.2 (E.D.N.C. 2002) (citing previous unpublished order denying complete preemption under National Bank Act); *Brown v. ACE Cash Express, Inc.*, 01CV2674 (D. Md. Nov. 14, 2001) (unpublished); ***30** *Long v. ACE Cash Express, Inc.,* No. 3:00CV1306, 2001 WL 34106904, at *1 (M.D. Fla. June 18, 2001). [6]

3. This case is an ideal vehicle to address the split because the rules advanced by the parties in this case reflect the conflict in the lower courts. This Court can cleanly resolve the conflict by choosing one of the parties' rules - a choice that will also resolve the licensing and usury claims in this case.

This case is also an ideal vehicle because the fact pattern here is typical in this area of the law, and the facts were fully developed at trial. Here, as in dozens of other cases, a bank and a servicer entered into a mutually beneficial collaboration whereby the bank originates loans for the purpose of selling them to the servicer. The bank profits from origination fees, and the servicer profits from payments on the loans. This sort of arrangement is struck every day - and overwhelmingly, the servicer takes on the risks associated with the loans. The details may vary slightly - for example, one case may involve installment loans while another involves payday loans - but these distinctions do not alter the economic realities of these arrangements. The facts here will therefore enable the Court to resolve the legal issues.

Finally, this Court should resolve the Question Presented as soon as possible. As explained in Part I, *supra,* uncertainty in this area of the law chills beneficial business activity. In the wake of the lower ***31** courts' ruling in this case - and in light of the existing split - state-chartered banks and their potential partners cannot be sure how other courts will decide whether state usury laws are preempted when loans are marketed and/or serviced by non-bank entities. And because the potential penalties are so punitive, any uncertainty will deter participation in the market. Moreover, as the state explained in the proceedings below, any paucity of reported decisions on this question is not because the issue arises infrequently - instead, it is "because in almost every instance the payday lender or non-bank entity surrendered and settled the case." *See* State's Response to CashCall's Petition for Appeal and Brief at 25-26, *CashCall, Inc. v. Morrisey,* No. 12-1274 (W. Va). States are thus exploiting the ongoing uncertainty regarding the scope of federal preemption to extract penalties from petitioners and similarly situated businesses.

*32 CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Footnotes

1 CashCall sought to remove the action to federal court, arguing that because FB&T originated the loans, respondent's claim was completely preempted. The federal district court granted respondent's motion to remand the case, reasoning that the claim was not completely preempted because the complaint only made allegations against CashCall, a non-bank entity, and thus did not impair the

bank's ability to make loans or otherwise exercise its powers under the Federal Deposit Insurance Act. *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 786-87 (S.D.W. Va. 2009). Because it ruled that it did not have subject matter jurisdiction, the district court had no occasion to consider the separate questions of express or implied preemption.

2 The state circuit court held a two-phase bench trial. The first phase addressed the state's unfair debt collection claims (counts five through fifteen of its amended petition), which are not at issue here. The second phase addressed the state's unlawful lending and usury claims (counts two through four).

3 The phase-one trial order imposed an injunction requiring CashCall to refrain from violating the WVCCPA, and a declaratory judgment holding that CashCall's contracts with West Virginia consumers are invalid. The order further required CashCall to pay $1,292,000 in restitution to the 292 consumers for whom it held a loan. It further required CashCall to pay $1,000,000 to the state as a civil penalty. *See* Pet. App. 13a-15a.

Both orders also required CashCall to pay the state's attorney's fees and costs. In a subsequent order, the trial court assessed those to be $446,180 and $9789.94, respectively.

4 *See, e.g.*, "Make," OED Online (2014), http:// www.oed.com/view/Entry/112645?rskey=yFSYSP&result=4 (defining "make" as, inter alia, "[t]o enter into, conclude (a settlement, contract, bargain)," "[t]o create," and "[t]o draw up (a list, a document, etc.)").

5 This Court reversed *Vaden* on a different ground. *See* *Vaden v. Discover Bank*, 556 U.S. 49 (2009). Discover had brought a state court action to enforce a debt and then sought to remove the defendant's counterclaims to federal court for the purposes of pursuing arbitration. The Fourth Circuit had held that complete preemption applied because all of the counterclaims were completely preempted. *See* *id.* at 56. In reversing, this Court held that in order to determine whether a case is subject to federal question jurisdiction on the basis of complete preemption, a court cannot merely examine the counterclaims, but must examine the initial claims as well. *Id.* at 67. Because the initial claim in *Vaden* was under state law and was not amenable to federal adjudication, this Court held that complete preemption did not apply. *See* *id.* at 66. The Court did not discuss the Fourth Circuit's holding that the true lender is the entity that extends credit to the borrower and sets the terms of the loan.

6 Some of these cases involve allegations against non-bank entities; others are directed solely at banks.

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