No. 09-1161

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION ND, ET AL.,
Petitioners,

v.

DEANTHONY THOMAS, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

J. MICHAEL VAUGHAN
R. FREDERICK WALTERS
KIP D. RICHARDS
DAVID M. SKEENS
R. KEITH JOHNSTON
WALTERS BENDER
STROHBEHN & VAUGHAN
2500 City Center Square
1100 Main Street
P.O. Box 26188
Kansas City, MO 64196
(816) 421-6620

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Respondents

May 26, 2010

QUESTIONS PRESENTED

The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) permits state-chartered banks to charge interest at a prescribed rate, preempts contrary state law, and provides a federal remedy for usury. That remedy only applies, however, "if the rate prescribed [by DIDA] exceeds the rate such State bank . . . would be permitted to charge in the absence of [DIDA]." 12 U.S.C. § 1831d(b).

Below, the plaintiffs argued that DIDA does not apply to the facts of this case for two reasons: (a) the rate prescribed by DIDA did not exceed the applicable rate under Missouri law and (b) the claims in this case are not state-law usury claims because they pertain only to certain non-interest fees.

1. Did the Eighth Circuit err in holding, as a threshold matter, that DIDA "does not apply" to the "particular circumstances" of this case?

2. If it applied to the "particular circumstances" of this case, would DIDA completely preempt the plaintiffs' state-law claims?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT.....5

I. This case is an unsuitable vehicle to address complete preemption under DIDA because DIDA does not apply to the facts of this case. 5

A. Petitioners' "interest" argument was not addressed below and would not have changed the outcome in any event. 6

B. Petitioners' "interest" argument is factbound and fails on its own terms. 8

II. There is no circuit split over whether DIDA completely preempts state-law claims that fall within its scope. 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Mineta,
534 U.S. 103 (2001) 6

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003) 1, 12, 13

Brown v. NationsCredit Financial Services,
647 F. Supp. 2d 1314 (M.D. Fla. 2008) 12

Bumpers v. Community Bank of Northern Virginia,
2008 WL 203343 (W.D. Pa. 2008) 12

Cross-County Bank v. Klussman,
2004 WL 966289 (N.D. Cal. 2004) 12

Discover Bank v. Vaden,
489 F.3d 594 (4th Cir. 2007),
rev'd, 129 S. Ct. 1262 (2009) 15, 16, 17

Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,
463 U.S. 1 (1983) 1, 6

Hunter v. Beneficial National Bank USA,
947 F. Supp. 446 (M.D. Ala. 1996) 12

In re Community Bank of Northern Virginia,
418 F.3d 277 (3d Cir. 2005) 14, 15

In re Lawson Square, Inc.,
816 F.2d 1236 (8th Cir. 1987) 14

Mamot Feed Lot and Trucking v. Hobson,
539 F.3d 898 (8th Cir. 2008) 10

Partin v. Cableview, Inc.,
948 F. Supp. 1046 (S.D. Ala. 1996) 12, 14

Phipps v. FDIC,
417 F.3d 1006 (8th Cir. 2005) 9

Saxton v. Capitol One Bank,
392 F. Supp. 2d 772 (S.D. Miss. 2005) 12, 14

Smiley v. Citibank (S.D.) N.A.,
517 U.S. 735 (1996) 8, 9

Vaden v. Discover Bank,
129 S. Ct. 1262 (2009) 16

Statutes, Regulations, and Rules

California Financial Code § 18212 8

California Financial Code § 18212.1 8

8th Circuit Internal Operating Procedures 4

Federal Arbitration Act,
9 U.S.C. § 4 16

Depository Institutions Deregulation and Monetary
Control Act of 1980,
12 U.S.C. § 1831d 3, 4
12 U.S.C. § 1831d(a).....3, 4, 7
12 U.S.C. § 1831d(b) 3, 4, 5, 7

Missouri Second Mortgage Loans Act,
Mo. Rev. Stat. §§ 408.231-408.241 2
Mo. Rev. Stat. § 408.232 4
Mo. Rev. Stat. § 408.233.1(3) 10

Supreme Court Rule 10 9

12 C.F.R. § 7.4001(a) 9, 10, 11, 17

Miscellaneous

Donald R. Cassling,
The Depository Institutions Deregulation and Monetary Control Act ("DIDA") Does Not Preempt State Law When the Applicable State Law Allows a Higher Rate Than the Interest Rate Allowed by DIDA, 127 Banking L.J. 276 (2010) 14

Alan S. Kaplinsky,
Exportation Litigation: Analysis and Implications of United States Supreme Court Opinion in Smiley v. Citibank, 989 PLI/Corp. 313 (1997) 11

General Counsel's Opinion No. 10: Interest Charges under Section 27 of the Federal Deposit Insurance Act,
63 Fed. Reg. 19,258 (April 17, 1998) 9

INTRODUCTION

This case is an unsuitable vehicle to explore complete preemption under DIDA because the conduct alleged does not come within the scope of DIDA. This Court's first attempt to decide whether ERISA completely preempted state-law claims failed for the same reason. *See Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 24-25 (1983). In *Beneficial National Bank v. Anderson*, 539 U.S. 1, 11 (2003), by contrast, the plaintiffs "unquestionably and unambiguously" alleged usury violations within the scope of the National Bank Act.

Petitioners acknowledge that the "threshold question" under DIDA is whether the interest rate prescribed by DIDA is higher than the state-law rate. Pet. 25. They also acknowledge that the decision below "held that [DIDA] by its terms does not even apply to the loans at issue here" because the state rate was "well in excess of the rate allowed by DIDA." Pet. 24. The petition does not challenge the Eighth Circuit's stated basis for reaching that conclusion. Instead, petitioners claim that the decision below erred by failing to regard the specific loan fees at issue in this case as "interest." But the Eighth Circuit did not analyze the nature of the fees because doing so would not have changed the outcome. In any event, this Court typically refrains from deciding issues not passed on by the court below.

Petitioners' factbound threshold argument also fails on its own terms. The specific loan fees at issue are not "interest" under the relevant regulatory guidance. Thus, DIDA is inapplicable for another reason, in addition to the one identified by the Eighth Circuit—namely, that respondents' claims are not state-law usury claims to begin with. Accordingly, certiorari should be denied.

STATEMENT

1. In the late 1990's, some subprime lenders began to underwrite "high loan-to-value" second mortgages—loans in which the total debt consisted of 125% of the value of the borrower's home. Among these lenders was FirstPlus Bank, a now-defunct California-chartered entity that sold securitized pools of its subprime second mortgages to investors. In the course of these transactions, FirstPlus collected certain charges from borrowers that were passed on to a marketing affiliate as finders' fees.

Respondents are three Missouri homeowners who obtained second mortgage loans originated by FirstPlus. In 2004, they sued petitioners—thirty-three assignees of FirstPlus that had purchased their loans—in Missouri state court. The complaint alleges that the loans violated the Missouri Second Mortgage Loans Act (MSMLA), Mo. Rev. Stat. §§ 408.231-408.241, which "places limits on the type and amount of closing costs and fees a lender can charge on residential second mortgage loans secured by Missouri real estate." App. 3a.

Specifically, respondents allege that FirstPlus had unlawfully charged borrowers "finder's fees or broker's fees," as well as other loan fees characterized by the Eighth Circuit as "closing costs and fees [charged] on behalf of third parties." App. 4a; *see* D. Ct. Doc. No. 1-4 at ¶¶ 15(e), 18, 84 (state-court complaint). The complaint disavowed any claim of usury and acknowledged that the rate of interest charged on the loans was lawful under Missouri law. *Id.* ¶ 2 ("[P]laintiffs make no claim that the illegal charges were interest or that the [loans] were usurious under any applicable law.").

2. Petitioners removed the case to federal district

court on the ground that respondents' claims were in fact state-law usury claims and therefore completely preempted by the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. § 1831d. DIDA allows state-chartered banks to charge a prescribed federal interest rate. That prescribed rate is "a rate of not more than 1 percent per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank . . . or . . . the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater." *Id.* § 1831d(a). DIDA provides a federal remedy for usury, but that remedy only applies "[i]f the rate prescribed in subsection (a) . . . exceeds the rate such State bank . . . would be permitted to charge in the absence of [DIDA]." 12 U.S.C. § 1831d(b).

Respondents moved to remand the case to state court. They argued that DIDA only preempts state-law claims "when the state laws set a lower allowable interest rate than that allowed by federal law." App. 5a. Because Missouri allowed an equal or higher maximum interest rate than the prescribed rate under DIDA, they argued, "preemption was not triggered." *Id.* Respondents also explained that the case concerned only "illegal 'finder's fees' and other non-interest" charges and therefore did not "fall within the ambit of DIDA[,] which regulate[s] 'interest.'" D. Ct. Doc. 70 at 2 (remand motion); D. Ct. Doc. 93 at 1 (reply). The district court denied the motion to remand and granted petitioners' subsequent motion to dismiss on substantive preemption grounds. App. 15a-20a.

3. The Eighth Circuit reversed. The court did not reach the question of whether DIDA would completely preempt state-law usury claims that fall within its scope. Instead, the court held that, under the circumstances of

this case, DIDA did not apply to respondents' loans. App. 6a.

The court focused its analysis on the language of the conditional clauses found in the relevant substantive and remedial provisions of DIDA. *See* 12 U.S.C. §§ 1831d(a), (b) (providing that DIDA applies "if the rate prescribed [by DIDA] exceeds the rate [the bank] would be permitted to charge in the absence of [DIDA]"). The court explained that "complete preemption does not exist here" because "the preemptive scope of DIDA" is "limited to particular circumstances." App. 6a. Those "particular circumstances," the court explained, are circumstances in which the rate prescribed by DIDA "exceeds the rate" allowed by state law. App. 7a (quoting 12 U.S.C. § 1831d). By contrast, "when the interest rate allowed by state law exceeds the interest set forth in DIDA, the federal statute does not apply." *Id.* "In other words, the plain language of the statute ties the preemptive effect it has on state law to the condition being met." App. 9a.

"In this case," the court held, "the interest rate allowed by Missouri law for second mortgages was either as high as 20.[0]4% or unlimited at all applicable times, well in excess of the rate allowed by DIDA." App. 10a (citing Mo. Rev. Stat. § 408.232). "As a result, the federal statute does not apply. And more significantly for complete preemption purposes, the remedy set forth in the federal statute does not apply." *Id.* The Eighth Circuit remanded this case to the district court with instructions to remand the case to state court. App. 13a.

Petitioners sought rehearing and rehearing en banc. No judge called for a vote or requested a response, and the petition was denied. App. 23a; *see* CA8 I.O.P. 21.

REASONS FOR DENYING THE WRIT

I. This Case Is An Unsuitable Vehicle to Address Complete Preemption Under DIDA Because DIDA Does Not Apply to the Facts of this Case.

Petitioners ask this Court to grant certiorari to decide whether DIDA completely preempts state-law claims that fall within its scope. But this case does not present that question, and the decision below did not address it.

Rather, as the petition acknowledges, this case presents a case-specific "threshold question" concerning whether the plaintiffs' claims fall within DIDA at all. Pet. 25. That question turns on whether the interest rate prescribed by DIDA "exceeds the rate [the bank] would be permitted to charge in the absence of [DIDA]." 12 U.S.C. § 1831d(b). If the answer is no, the statute does not apply, and the question of complete preemption does not arise. The Eighth Circuit held that the answer, on the facts of this case, was no.

The Eighth Circuit held that DIDA does not apply to the loans at issue here because "the interest rate allowed by Missouri law for second mortgages was either as high as 20.[0]4% or unlimited at all applicable times, well in excess of the rate allowed by DIDA." App. 10a. The court explained that the remedy provided by DIDA "only applies in limited circumstances, and those circumstances are when the federal rate exceeds the rate allowed by state law. Because such a circumstance was not present in this case, . . . the federal remedy does not apply and is therefore not the exclusive remedy." *Id.* 10-11a.

If certiorari were granted, the inapplicability of DIDA to the facts of this case would preclude this Court

from deciding whether DIDA completely preempts state-law claims where it *does* apply. Indeed, this Court's first attempt to decide whether ERISA completely preempts state-law claims failed for the same reason. *See Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 24-25 (1983) (not reaching the question whether "any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court" because neither of the "claims in this case comes within the scope of one of ERISA's causes of action"). Because the complaint in this case does not come "within the scope" of DIDA, this case is an unsuitable vehicle to explore the complete-preemption issue.

A. Petitioners' "Interest" Argument Was Not Addressed Below and Would Not Have Changed the Outcome In Any Event.

Notably, petitioners do not challenge the Eighth Circuit's stated basis for concluding that DIDA was inapplicable—namely, that the rate prescribed by DIDA did not exceed the applicable interest rate under Missouri law. Instead, petitioners contend that the Eighth Circuit's decision was wrong on a ground not addressed in the decision below. Because "this is a court of final review and not first view," that is reason enough to deny certiorari. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (dismissing writ as improvidently granted).

Petitioners contend that the Eighth Circuit erred by failing to regard the loan fees at issue as "interest" within the meaning of DIDA. Pet. 26 n.9. The Eighth Circuit did not address that question because it had no need to do so. The rate prescribed by DIDA is "a rate of not more than 1 percent per centum in excess of the discount rate on ninety-day commercial paper in effect at

the Federal Reserve bank . . . or . . . the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater." 12 U.S.C. § 1831d(a). The statute mandates a comparison between that "prescribed" rate and the state-law rate. *Id.* (substantive provision applies if the "applicable rate prescribed in this subsection" exceeds the state-law rate); *id.* § 1831d(b) (remedy provision applies if "the rate prescribed in subsection (a)" exceeds the state-law rate). As the Eighth Circuit explained, DIDA's remedy "only applies in limited circumstances and those circumstances are when the federal rate exceeds the rate allowed by state law." App. 10-11a; *see also In re Lawson Square, Inc.*, 816 F.2d 1236, 1239-40 (8th Cir. 1987) (same).

The petition says that, if the fees were "interest," the Eighth Circuit should have "compare[d] the loan fees permitted by DIDA (*i.e.* the fees allowed by the law of California, First Plus Bank's home state) to the fees permitted by Missouri law, as well as comparing the periodic interest rates." Pet. 25. But the relevant comparison is between the applicable Missouri rate and the prescribed rate under DIDA. To the extent that such a comparison could logically be made with respect to loan fees, the fees would have to be included in the total overall interest calculation. The Missouri rate was 20.04% for the Thomas plaintiffs' initial loan and unlimited as to the rest. So long as Missouri law would permit a bank to charge a total overall interest rate (including appropriate fees) that equaled or exceeded the prescribed rate, DIDA would not apply. Thus, even if the Eighth Circuit had agreed with petitioners that the fees at issue were

"interest," that answer would not have changed the outcome below.[1]

B. Petitioners' "Interest" Argument Is Factbound and Fails On Its Own Terms.

In an effort to manufacture a conflict with one of this Court's decisions, petitioners claim that the decision below runs contrary to *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which upheld a regulation of the Office of the Comptroller of Currency (OCC), construing "interest" under the National Bank Act to include certain loan fees, including late charges. Pet. 24-27.

But as the petition acknowledges in a footnote, "not all loan fees constitute interest" under the OCC regulation upheld in *Smiley*. Pet. 26 n.9. Petitioners' argument thus turns not on the legal issue decided in *Smiley* (whether fees may constitute interest at all) but on the narrow, factbound question whether the *specific fees* challenged in plaintiffs' complaint would, under the relevant regulatory materials, constitute "interest" within

---

[1] Petitioners (at 26) conspicuously cite no authority for their claim that the applicable California rate was unlimited. An unlimited California rate, in any event, could never *exceed* an unlimited Missouri rate. And even if it were possible for this Court to engage in the first instance in the comparative analysis that petitioners propose, the analysis would be factbound, differing for the various loans at issue. The rate for the Thomases' first $6,000 loan would be 19.2% under California law. *See* Cal. Fin. Code §§ 18212, 18212.1. Missouri's 20.04% rate thus exceeded California's rate. *See* Resps. CA8 Reply 36-41. The allowable interest rate under the MSMLA was *unlimited* at the time respondents took out their other loans. App. 10a. The California rate thus could not have exceeded the maximum Missouri rate. Moreover, FirstPlus, as a California industrial loan corporation, was not authorized under California law to make the loans at issue at *any rate*. *See* Resps. CA8 Br. 32-38.

the meaning of DIDA. Petitioners' grievance, in other words, is that the decision below misapplied the law to the facts. Indeed, the petition contrasts the decision below with a "quite similar" case in which the Eighth Circuit, in petitioners' view, "correctly applied *Smiley*" to conclude that certain loan fees were "interest." Pet. 26-27 (citing *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005)). A petition for certiorari, however, is "rarely granted" where, as here, "the asserted error consists of . . . a misapplication of a properly stated rule of law." S. Ct. Rule 10.

The Federal Deposit Insurance Corporation, which administers DIDA, has generally adopted the OCC regulation upheld in *Smiley* for purposes of the Federal Deposit Insurance Act, of which DIDA is a part. *See General Counsel's Opinion No. 10: Interest Charges under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 19,258 (April 17, 1998). That OCC regulation, in turn, defines "interest" as "payment compensating a creditor or prospective creditor for an extension of credit." 12 C.F.R. § 7.4001(a). It includes not only "numerical periodic rates," but also "late fees," "overlimit fees, annual fees, cash advance fees," and other fees associated with "credit extension or availability." *Id.* It excludes "all other payments," such as "reimbursement of the lender's costs in processing the application, insuring the loan, and appraising the collateral." *Smiley*, 517 U.S. at 741. As *Smiley* explained, the OCC regulation distinguishes "between those charges that are specifically assigned to such expenses" (which are not interest) "and those that are assessed for simply making the loan, or for the borrower's default" (which are interest). *Id.*

In this case, the plaintiffs' state-court complaint challenged only two categories of non-interest fees—

specifically, "finders' fees or brokers' fees" and "certain closing costs and fees [charged] on behalf of third parties." App. 4a. The plaintiffs alleged that FirstPlus Bank, after originating their loans, "would 'transfer' a 'broker's fee' (or finder's fee)" to a marketing affiliate, as compensation for "solicit[ing] the loan business" from consumers. *See* D. Ct. Doc. No. 1-4 at ¶ 15(e) (state-court complaint). The complaint also alleged that FirstPlus Bank charged, among other things, "certain closing costs and fees on behalf of third parties" that "were in excess of costs actually charged by those third parties and then retained the difference." App. 4a. That practice violated the Missouri Second Mortgage Loans Act, which authorized only "[b]ona fide closing costs paid to third parties," which are limited to "fees or premiums for title examination, title insurance, or similar purposes," fees for "preparation of a deed, settlement statement, or other documents," "fees for notarizing deeds and other documents," "appraisal fees," and "fees for credit reports." Mo. Rev. Stat. § 408.233.1(3).

Both categories of fees—finders' fees and the third-party closing costs listed above—are excluded from the definition of "interest" under the OCC regulation on which petitioners rely. Finders' fees are expressly excluded. *See* 12 C.F.R. § 7.4001(a) ("The term 'interest' . . . does not ordinarily include . . . finders' fees."); *see Mamot Feed Lot and Trucking v. Hobson*, 539 F.3d 898, 903 (8th Cir. 2008) ("The regulation explicitly excludes from the definition of 'interest' such fees as . . . finders fees."). And although the regulation does not use the term "closing costs," the other third-party loan fees contemplated by the complaint are expressly excluded. *See* 12 C.F.R. § 7.4001(a) (excluding "appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, fees for document

preparation or notarization, or fees incurred to obtain credit reports"); Kaplinsky, *Exportation Litigation: Analysis and Implications of United States Supreme Court Opinion in Smiley v. Citibank*, 989 PLI/Corp. 313, 329 (1997) ("Because of the OCC's regulation, certain other fees, most notably appraisal fees, document preparation fees, finders' fees, notarization fees, credit report fees and fees for guaranteeing payment of any loan (collectively 'Closing Costs'), are probably not 'interest.'"). In any event, the finders' fees and third-party loan fees at issue here were not interest because they compensated a third party, and thus were not "payment compensating a creditor or prospective creditor for an extension of credit." 12 C.F.R. § 7.4001(a).

In an effort to cram the facts of this case into the relevant regulatory definition of "interest," the petition urges this Court—in the first instance—to "look beyond" the plaintiffs' complaint (Pet. 27) and view the fees at issue as "origination fees" rather than, as the Eighth Circuit characterized them, finders' fees and closing costs. *Compare* Pet. 26 n.9 (discussing "origination fees") *with* App. 4a (discussing "finders' fees" and "closing costs"); *see also* Petrs' CA8 Br. 21 ("Although [plaintiffs'] claims are facially alleged in terms of excessive 'fees' rather than a percentage-based interest rate, they actually constitute claims for excessive 'interest[.]'"). Regardless of whether "origination fees" as a general matter may constitute interest, the fees at issue here were, as described above, specifically assigned to cover particular costs or services. Furthermore, regardless of whether they are "origination fees" in a general sense, they are not "interest" because they were collected for a third party rather than as compensation for extension of credit by the lender.

Because the fees at issue are not "interest," DIDA is inapplicable for a second reason, in addition to the one identified by the decision below—namely, the plaintiffs are not bringing state-law usury claims at all. Indeed, many courts faced with claims of complete preemption under the National Bank Act and DIDA have found it unnecessary to reach the complete-preemption question because, on the facts at hand, the plaintiffs' state-law claims did not challenge "interest" charges.[2]

In *Beneficial National Bank v. Anderson*, which held that the National Bank Act completely preempts state-law usury claims, the Court faced no similar obstacles. The Court emphasized that the plaintiffs' state-court complaint expressly "sought relief for 'usury violations' and claimed that the defendants had 'charged . . . excessive interest in violation of the common law usury doctrine' and violated a state statute "'by charging excessive interest.'" 539 U.S. 1, 9 (2003) (quoting state-court com-

---

[2] *See, e.g.*, *Brown v. NationsCredit Fin. Servs.*, 647 F. Supp. 2d 1314, 1321 (M.D. Fla. 2008) (where the "fees and charges Plaintiffs are complaining about do not squarely fit into the Regulation's definition of interest, complete preemption cannot exist"); *Bumpers v. Cmty. Bank of N. Va.*, 2008 WL 203343 (W.D. Pa. 2008) (plaintiffs challenging fraudulent fees were not "asserting claims for usury," which is "defined as when a lender charges a rate of interest that is higher than legally allowed by law"); *Saxton v. Capitol One Bank*, 392 F. Supp. 2d 772, 783 (S.D. Miss. 2005) ("Plaintiff's claims are not in fact usury claims."); *Cross-County Bank v. Klussman*, 2004 WL 966289, at *5-6 (N.D. Cal. 2004) (same); *Hunter v. Beneficial Nat'l Bank USA*, 947 F. Supp. 446, 452 (M.D. Ala. 1996) ("Because, on the present record, it appears that plaintiffs' state-law claims do not fall within the coverage of [the Act], the claims cannot be completely pre-empted by the Act."); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046, 1048-49 (S.D. Ala. 1996) ("[P]laintiffs' claims are not 'usury' claims" because they are "not disputing the rate of interest charged by defendants.").

plaint). Because the complaint "unquestionably and unambiguously claim[ed] that petitioners violated usury laws," the Court was able to squarely decide the complete-preemption question under the National Bank Act. *Id.* at 11.

Here, by contrast, the state-court complaint concerns only non-interest fees under the relevant administrative interpretations, and expressly disavows any claim of usury. D. Ct. Doc. No. 1-4 ¶ 2 ("[P]laintiffs make no claim that the illegal charges were interest or that the [loans] were usurious under any applicable law."). Under the circumstances, this case is a manifestly unsuitable vehicle to address complete preemption under DIDA.

II. There Is No Circuit Split Concerning Complete Preemption Under DIDA.

The petition's principal argument for certiorari is its claim of a circuit split between the decision below and the Third and Fourth Circuits over whether DIDA completely preempts state-law claims that fall within its scope. Pet. 13-15. There is no such circuit split.

1. Petitioners' claimed split hinges on a mischaracterization of the decision below. The petition asserts that the Eighth Circuit held that DIDA categorically "does not completely preempt state-law usury claims against federally insured state banks." Pet. 13. To the contrary, as discussed above, the Eighth Circuit held only that DIDA's remedy, and hence its preemptive effect, applies in "limited circumstances"—*i.e.* when the prescribed rate "exceeds the rate allowed by state law"—and did

not apply here because "such a circumstance was not presented in this case." App. 10a-11a.[3]

In reaching that narrow holding, the Eighth Circuit followed one of its own prior precedents, *In re Lawson Square, Inc.*, 816 F.2d 1236, 1239-40 (8th Cir. 1987) (not cited in the petition), which held that DIDA does not apply where the state-law interest rate exceeds the rate set by DIDA. App. 9a-11a (discussing *Lawson Square*). *Lawson Square* did not address complete preemption.

Because the Eighth Circuit did not decide the complete-preemption question presented by the petition, the decision below cannot form any part of a circuit split on that question.[4]

2. The petition also mischaracterizes the Third Circuit's opinion in *In re Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005). Contrary to the petition's description, the Third Circuit, like the Eighth

---

[3] *See* Cassling, *The Depository Institutions Deregulation and Monetary Control Act ("DIDA") Does Not Preempt State Law When the Applicable State Law Allows a Higher Rate Than the Interest Rate Allowed by DIDA*, 127 Banking L.J. 276, 278 (2010) (recognizing limited nature of holding).

[4] The petition (at 15 n.5) also identifies a purported conflict among the district courts. But the only two decisions that the petition identifies as having rejected complete preemption under DIDA in fact held, like the Eighth Circuit, that DIDA did not apply to the facts of those cases. *See Saxton*, 392 F. Supp. 2d at 783 ("The Court finds that Plaintiff's claims are not in fact usury claims, that is claims challenging the 'rate of interest' charged by an FDIC-insured state bank within the meaning of DIDA. [T]his . . . alone is enough to take the case outside the ambit of this court's federal-question jurisdiction."); *Partin*, 948 F. Supp. at 1048-49 ("[P]laintiffs' claims are not 'usury' claims.").

Circuit below, found no complete preemption under DIDA on the facts of that case.

The Third Circuit was able to "set aside the issue" of whether the "fraudulent origination and title service fees" at issue were "interest" under DIDA because complete preemption failed for "two more substantial, and ultimately determinative, issues." *Id.* at 296. First, the court explained, DIDA "appl[ies] only to . . . state chartered banks, not to non-bank purchasers of second mortgage loans." *Id.* at 296. Because the removing defendants were not banks, the state-law claims against them "could not be preempted by . . . the DIDA." *Id.* at 297. Second, the complaint on which removal was premised did not "plead any state law usury claims" and so "[i]t follow[ed] that removal was improper." *Id.*

Moreover, the complaint as amended after removal "explicitly asserted federal claims," thus unambiguously creating federal-question jurisdiction in any event. *Id.* at 298. Because there was federal jurisdiction anyway, and because the court rejected any possibility of complete preemption on the facts, the Third Circuit's speculation about whether there would have been complete preemption under DIDA if the case *had* involved state-law usury claims against state-chartered banks, *id.* at 295, was dictum. And that dictum is particularly insignificant because it occupies less than one paragraph of a 72-page opinion, in a case in which no party briefed or argued the issue of complete preemption under DIDA.

3. The third leg of the alleged conflict is the Fourth Circuit's decision in *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *rev'd for lack of jurisdiction*, 129 S. Ct. 1262 (2009). In *Discover Bank*, as in *Community Bank*, the question of complete preemption under DIDA was not a subject of disagreement among the parties. *See*

id. at 604 n.10 (noting that "Vaden 'conceded' that [DIDA] completely preempted her state-law claims").

Aside from the lack of adversarial presentation on the issue, the Fourth Circuit's discussion of complete preemption occurred as part of a jurisdictional inquiry that this Court later concluded was improper. The Fourth Circuit was attempting to determine whether the district court had subject-matter jurisdiction over Discover Bank's petition to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 4. In making that determination, the court looked not to Discover Bank's state-law collection action, but to Betty Vaden's state-law counterclaims against Discover Bank for usury. The court concluded that federal subject-matter jurisdiction would exist because her counterclaims were completely preempted by DIDA. This Court, however, held that the Fourth Circuit's approach was erroneous. *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009). The Fourth Circuit should never have reached the complete-preemption question in the first place, the Court held, because "federal jurisdiction cannot be invoked on the basis of a defense or counterclaim." *Id.* at 1278; *see also id.* at 1277 n.7 ("Vaden did not invoke the [DIDA]. Indeed, she framed her counterclaims under state law and clearly preferred the Maryland forum.").

Attempting to create the appearance of a split, the petition quotes, out of context, the Eighth Circuit's observation that the Fourth Circuit had "interpreted the language in § 1831d differently." App. 11a. Read in context, it is clear that the Eighth Circuit's point was a narrow one—that the Fourth Circuit in *Discover Bank* had quoted the same statutory provision but omitted the conditional clause on which the decision below relied, and thus did not analyze the threshold question decided by

the Eighth Circuit. App. 11a-12a. In any event, the petition does not claim that the conditional clause would actually have made any difference on the facts of *Discover Bank*. Betty Vaden's counterclaims clearly "challenge[d] certain fees and interest rates on her Discover Card account," which she argued were in violation of Maryland statutes regulating "interest on consumer credit accounts." *Discover Bank*, 489 F.3d at 606. Her counterclaims thus fell "squarely within the FDIC's definition of 'usury' charges." *Id.* (citing 12 C.F.R. § 7.4001(a)). No party claimed that the applicable state rate there, as here, was higher than the prescribed federal rate.

* * *

In summary, the Eighth Circuit and the Third Circuit both failed to reach the complete-preemption question because they concluded that DIDA did not apply to the facts of the case—that is, the state-law claims did not come within the statute's scope. The Fourth Circuit, meanwhile, engaged in a discussion of complete preemption under DIDA that this Court later concluded was entirely unnecessary. The petition does not contend that any other circuits have decided the question.

In the thirty years since DIDA's enactment, not one federal circuit has squarely decided whether the statute completely preempts state-law claims that come with its scope under circumstances where it was actually necessary to reach that question. That fact not only undermines the petition's claim of a circuit split, but also belies the claim (Pet. 16-17) that the question is a recurring or important one. Accordingly, even if this case were a suitable vehicle to address the question, review would be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. MICHAEL VAUGHAN
R. FREDERICK WALTERS
KIP D. RICHARDS
DAVID M. SKEENS
R. KEITH JOHNSTON
WALTERS BENDER
STROHBEHN & VAUGHAN
2500 City Center Square
1100 Main Street
P.O. Box 26188
Kansas City, MO 64196
(816) 421-6620

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Respondents

May 26, 2010