No. 15-1618

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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JEREMY POWELL and TINA POWELL,

*Plaintiffs-Appellees*,

v.

THE HUNTINGTON NATIONAL BANK,

*Defendant-Appellant*.

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On Appeal from the United States District Court
for the Southern District of West Virginia
Hon. Thomas E. Johnston, District Judge

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September 21, 2015

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 4th Cir. R. 26.1, plaintiffs-appellees Jeremy and Tina Powell state that they have no parent corporations and there is no corporation that owns 10% or more of their stock. Plaintiffs-appellees know of no publicly held corporation that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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# INTRODUCTION

This case concerns the preemptive scope of the National Bank Act's provisions on usury, 12 U.S.C. §§ 85 & 86. These provisions allow national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located," *id*. § 85, and create an exclusive federal cause of action for claims that a national bank engaged in a "usurious transaction" by "charging a rate of interest greater than is allowed." *Id*. § 86. Together, the provisions completely preempt "state-law claim[s] of usury against a national bank." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003).

Defendant-Appellant Huntington Bank argues that, because of these provisions, "if a charge is 'interest' and is 'allowed by the laws of the State . . . where the bank is located,'" then national banks may "impose that charge nationwide" and all state-law claims concerning that charge are preempted. Huntington Br. 17. Huntington's interpretation of the provisions is overly broad. Sections 85 and 86 do not authorize national banks to export all of their home state's laws concerning interest, nor do they preempt all state-law claims challenging the imposition of interest as illegal. They expressly apply only to the home state's interest rate, 12 U.S.C. § 85, and to claims that a national bank engaged in a "usurious transaction" in which it "charg[ed] a rate of interest greater than is allowed." *Id*. § 86. Under sections 85 and 86, if a state-law claim challenges

the "rate of interest" imposed as too high—that is, if it alleges that the rate is usurious—it is preempted; if it does not challenge the rate of interest, the Act's usury provisions do not apply.

Here, as the district court explained, the plaintiffs "do not assert claims that challenge as usurious the rate of interest . . . charged by defendants." JA 8. The plaintiffs allege that Huntington Bank assessed late fees that were not due, not that the late fees were excessive. As both the Fifth and Ninth Circuits have recognized, "there is a difference between alleging that certain customers are being charged too much, and alleging that they should have never been charged for the service in the first place." *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1038 (9th Cir. 2014) (quoting *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 89 (5th Cir. 2013)). Because the plaintiffs' "claims do not challenge the rate of interest charged by Defendant, but rather challenge Defendant's practice of charging an otherwise non-usurious late fee when no late fee should be charged in the first place," JA 11, the claims do not implicate and are not preempted by sections 85 and 86.

## STATEMENT OF THE ISSUE

Whether Jeremy and Tina Powell's state-law claims are preempted by the National Bank Act (NBA), 12 U.S.C. §§ 85 and 86.

## STATEMENT OF THE CASE AND FACTS

### A. Complete Preemption Under Sections 85 and 86 of the National Bank Act

Sections 85 and 86 of the NBA govern the rates at which national banks may charge interest, establishing when such rates are usurious. Section 85 "sets forth the substantive limits on the rates of interest that national banks may charge." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). It provides that banks may charge "interest at the rate allowed by the laws of the State . . . where the bank is located, or at a rate of 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," with an exception not relevant here. 12 U.S.C. § 85. "When no rate is fixed by the laws of the State," the bank may 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." *Id.*

Section 86 "sets forth the elements of a usury claim against a national bank, provides for a 2-year statute limitations for such a claim, and prescribes the remedies available to borrowers who are charged higher rates and the procedures governing such a claim." *Beneficial*, 539 U.S. at 9. It provides that "charging a rate of interest greater than is allowed by section 85 . . . when knowingly done,

shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it." 12 U.S.C. § 86. The person by whom the greater interest has been paid "may recover back, in an action in the nature of an action of debt, twice the amount of the interest" paid as long as "such action is commenced within two years from the time the usurious transaction occurred." *Id.*

Together, "these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive." *Beneficial*, 539 U.S. at 11. Because they "provide the exclusive cause of action for such claims," there is "no such thing as a state-law claim of usury against a national bank." *Id.* Rather, even where a "complaint makes no mention of federal law," if it claims that defendants "violated usury laws"—that is, if it claims that interest rates are illegally high—it "arises under federal law" and can be removed to federal court. *Id.* This situation, in which a "federal statute wholly displaces the state-law cause of action" such that the claims arise under federal law, even "if pleaded in terms of state law," is known as "complete preemption." *Id.* at 8. Thus, sections 85 and 86 completely preempt "actions against national banks for usury." *Id.* at 10.

Because of federalism concerns, there is a "presumption . . . against finding complete preemption." *Lotz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005).

**B. The Illegal Late Fees and Complaint**

Jeremy and Tina Powell are homeowners who reside in Barboursville, West Virginia. JA 41. In 2011, the Powells received a home mortgage loan from Huntington National Bank, a nationally-chartered bank in Ohio. The Powells' note required monthly payments of principal and interest in the amount of $762.78. JA 46. In addition, it provided that, "[i]f Lender has not received the full monthly payment . . . by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of [four percent] of the overdue amount of each payment, but not more than $15.00." JA 47.

On October 8, 2012, the Powells made a full payment of their October installment. Nonetheless, Huntington charged them a $15 late fee on their home mortgage loan. JA 42. On November 5, 2012, the Powells made another full payment of their monthly installment. Once again, they were charged a late fee. JA 42.

Huntington's assessment of the October and November late fees violated the West Virginia Consumer Credit Protection Act (WVCCPA), which protects West Virginia "consumers from unfair, illegal, and deceptive acts or practices." *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 513 (2011). The WVCCPA provides that

> [n]o delinquency charge may be collected on an installment which is paid in full within ten days after its scheduled or deferred

> installment due date, even though an earlier maturing installment or a delinquency or deferral charge on an earlier installment may not have been paid in full. For purposes of this subsection, payments shall be applied first to current installments, then to delinquent installments and then to delinquency and other charges.

W. Va. Code § 46A-3-112(3). The Act also provides that late fees "may be collected only once on an installment however long it remains in default." *Id.* § 46A-3-112(2).

Huntington claims that it charged the Powells late fees in October and November because they had not timely made their September payment. However, section 46A-3-112 prohibits charging late fees in months in which a borrower has made a full, on-time payment, regardless of whether a prior installment was not timely paid: Either the late fee was charged because the current payment was impermissibly applied to the prior installment in violation of section 46A-3-112(3), or the late fee was assessed a second time on the prior installment in violation of section 46A-3-112(2).

Huntington can comply with West Virginia's law prohibiting the imposition of late fees in months in which borrowers have made fully, timely payments. Discovery in this case has shown that Huntington's loan servicing software already has the capability to apply different servicing instructions and has been adapted to do so in different states. Doc. 74, Ex. B (filed as attachment to Doc. 72, Plaintiffs' Motion to File Exhibit Under Seal).

On October 15, 2013, the Powells brought this lawsuit in West Virginia state court on behalf of themselves and other West Virginia citizens who were charged late fees by Huntington National Bank for months in which they made full and timely principal and interest payments. JA 41-45. The complaint did not contend that the amount of the late fee charged, $15, was too high. Rather, it alleged that imposing the late fee at all was illegal. Specifically, the complaint alleged that Huntington violated W. Va. Code § 46A-3-112 by charging late fees when no late fee was owed. It also alleged a derivative misrepresentation claim under W. Va. Code § 46A-2-127, based on Huntington's assessment of late fees that were not due.

### C. The District Court's Decision

Huntington removed the case to federal court and then moved for judgment on the pleadings on the ground that the claims were "barred by complete preemption under the National Bank Act, 12 U.S.C. §§ 85 and 86." Doc. 6, at 1 (Huntington motion); *see also*, *e.g.*, Doc. 7, at 1 (memorandum of law, arguing that the Powells' claims fail because they "are completely preempted by Sections 85 and 86 of the National Bank Act").

The district court denied Huntington's motion. The court began by explaining that the NBA "authorizes a national bank 'to charge interest at the rate allowed by the laws of the state in which the bank is located,'" and that the

Supreme Court held in *Beneficial* that the NBA provides the exclusive cause of action for "actions against national banks for usury.'" JA 6 (quoting 12 U.S.C. § 85). Based on these sources, the district court recognized that in "determining whether the NBA pre-empts Plaintiffs' claims, the Court must examine the character of the claims." *Id.* "If they assert usury claims," it explained, "such claims would be pre-empted by §§ 85 and 86 of the NBA[.]" *Id.* On the other hand, if they do "not assert usury claims but purely state consumer protection claims that do not challenge the rate of interest charged," the claims are not completely preempted. *Id.*

The court then analyzed the claims at issue in this case, concluding "that they do not assert claims that challenge as usurious the rate of interest (that is, the *amount* of the $15 late fees) charged by Defendant." *Id.* at 8. The court found a number of reasons to reach this determination: It pointed out that "the word 'usury' appears nowhere on the face of the complaint." *Id.* It noted that the Powells do not "ground their claims in West Virginia's usury statute, West Virginia Code § 47-6-6." *Id.* And it found it "clear that Plaintiffs' claims do not assert that the $15 late fee is excessive." *Id.* If the Powells had asserted that the late fee was excessive, the court explained, their complaint "would assert a theory of usury." *Id.* Because their claims do "not challenge the rate of interest charged

by Defendant," however, the court determined that "Plaintiffs' claims are not usury claims and are not pre-empted by §§ 85 and 86 of the NBA." *Id*. at 8-9.

Because the ground on which Huntington had moved for judgment on the pleadings—complete preemption—had also been one of its theories for removal, and because the district court had determined that complete preemption did not apply, the court then considered whether it had jurisdiction over the case based on other grounds. The court concluded that it had jurisdiction under the Class Action Fairness Act, 13 U.S.C. § 1332(d).

Huntington moved to certify the district court's order for interlocutory review. On May 1, 2014, the district court granted the motion, and on June 8, 2015, this Court granted Huntington's petition for permission to appeal.

## SUMMARY OF ARGUMENT

The district court correctly held that sections 85 and 86 of the NBA do not preempt the Powells' claims. Those provisions govern the interest rates that national banks may charge, provide an exclusive remedy against national banks that charge a higher interest rate, and preempt state-law claims that challenge national banks' interest rates as excessive. As both the Fifth and Ninth Circuit have recognized, these provisions preempt claims that a customer "has been charged too much," not claims that an interest charge was illegally assessed. *See Hawaii ex rel. Louie*, 761 F.3d at 1038; *Hood*, 737 F.3d at 89. Because the

Powells do not challenge the late fees at issue as excessive, but as illegal under the circumstances, sections 85 and 86 do not apply to their claims. Stated differently, because the Powells do not claim that Huntington charged interest at a usurious rate, their claims are not preempted by provisions that preempt "state-law claim[s] of usury against a national bank." *Beneficial*, 539 U.S. at 11.

The cases cited by Huntington do not undermine the district court's conclusion that, because the Powells' claims do not challenge interest rates, they are not preempted by sections 85 and 86. *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), and *Beneficial*, 539 U.S. 1, in particular, *confirm* that sections 85 and 86 apply to interest rates and state-law claims of usury against national banks. And Huntington's argument that Section 85 preempts the Powells' claims because they rest on a state law concerning the order in which payments are applied is unavailing. Even if such laws incidentally affect the amount of interest that will eventually be owed, they are not laws about interest rates, as necessary for section 85 to apply. Claims based on West Virginia's law about the application of payments do not challenge the interest rate as excessive and are not preempted.

Moreover, the Powells' claims are not otherwise preempted by the NBA. To begin with, Huntington moved for judgment on the pleadings solely on the theory that the Powells' claims were preempted by sections 85 and 86, and that theory

was the only one addressed in the district court's order. Accordingly, other preemption theories are waived and not properly before this Court. Moreover, Huntington's alternative theory fails on its merits because the state laws underlying the Powells' claims neither prevent nor interfere with Huntington's ability to engage in the business of banking. Huntington can continue to make home loans while also complying with West Virginia's laws prohibiting the imposition of late fees in months in which borrowers have made full principal and interest payments. Indeed, Huntington's loan servicing software already has the capability to handle state specific servicing instructions and has been adapted to do so in different states.

## ARGUMENT

### I. Sections 85 and 86 of the National Bank Act Do Not Preempt the Powells' Claims.

Sections 85 and 86 of the NBA preempt claims challenging the "rate of interest" charged by the bank—that is, state law usury claims. *See* USURY, Black's Law Dictionary (10th ed. 2014) (defining "usury," in relevant part, as "the charging of an illegal rate of interest as a condition to lending money"); *Hood*, 737 F.3d at 89 ("Usury claims involve allegations that the lender is charging too much in interest."). Because the Powells' claims do not challenge the rate of interest charged by Huntington, they are not preempted by sections 85 and 86.

**A. Sections 85 and 86 Preempt Only Claims Challenging Interest Rates.**

Sections 85 and 86 are clear about what they cover: national bank interest rates and claims that banks charged higher rates than allowed. Section 85 establishes the interest rates national banks may charge, allowing national banks to charge "interest at the rate" allowed by the laws of the bank's home state. 12 U.S.C. § 85. Section 86 then creates a federal cause of action against national banks that "charg[e] a rate of interest greater than is allowed by section 85." *Id.* § 86. This cause of action is exclusive in the area it covers: claims that a "greater rate of interest" than that allowed by section 85 has been charged. *Id.* Because section 85 allows national banks to charge their home state interest rates, and section 86 creates an exclusive right of action for claims that the bank charged a higher rate than allowed by section 85, these sections preempt claims that challenge as excessive the rate of interest charged. In other words, they preempt "state-law claim[s] of usury." *Beneficial*, 539 U.S. at 11.

Huntington's preemption argument relies on a misreading of Section 85. According to Huntington, Section 85 allows national banks to "export" *all* of their "home state's laws governing the permissibility of interest charges into other states." Huntington Br. 3. Section 85, however, is specifically limited in coverage. By its plain language, it allows national banks to export only certain laws regarding interest: those regarding *interest rates*. Correspondingly, section 86

creates a cause of action only against banks that charge interest rates greater than those allowed. Thus, although Huntington acts as though it is unquestionable that national banks can export all of their home state's laws about interest, consistently following statements that the imposition of interest charges was allowed by a bank's home state with the phrase "and therefore [by] section 85," *see* Huntington Br. 1, 9, 10, 13, 20, 24, 25, 27, 34, 35, 37, 45, sections 85 and 86 concern only national bank interest rates. And because they only concern interest rates, they only preempt state laws challenging those rates—state-law usury claims—not all state laws concerning interest.[1]

The Supreme Court has long recognized that sections 85 and 86 are concerned with national banks' interest rates and with the charging of excessive interest rates—that is, usury. *See Beneficial*, 539 U.S. at 9 (noting the "longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action for usury against national banks"). For example, in *Farmers' and Mechanics' National Bank v. Dearing*, 91 U.S. 29, 32 (1875), the Supreme Court equated violations of an earlier version of the provisions with committing "the offense of usury." In *Brown v. Marion National*

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[1] In its attempt to make it seem uncontroverted that section 85 allows the exportation of all laws about interest, Huntington repeatedly claims, including in the second line of its brief, that *the Powells* "do not dispute that 12 U.S.C. § 85 gives Huntington the right to assess" the fees at issue in this case. *Id*. at 1. That claim is contradicted by the complaint in this case, which challenges those fees as illegal because they were not owed.

*Bank*, 169 U.S. 416, 418 (1898), the Court described charging a rate greater than allowed by an earlier version of section 85 as charging a "usurious interest." In *Evans v. National Bank of Savannah*, 251 U.S. 108, 111 (1919), the Court described the penalties currently codified in section 86 as "penalties prescribed for taking usury," and explained that "the National Bank Act adopts usury laws of the states only in so far as they severally fix the rate of interest." *See also id*. at 111 ("[Federal law] completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate."). And in *National Bank v. Johnson*, 104 U.S. 271, 277 (1881), the Court explained that an earlier version of Section 85 authorized national banks to charge interest rates that natural persons could legally charge, but that "[t]he sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest."

The recognition that Sections 85 and 86 concern interest rates—and claims that national banks have committed usury by charging greater rates than they are allowed—continues in modern NBA cases. The question in *Marquette*, 439 U.S. 299, for example, was whether section 85 "authorizes a national bank based in one State to charge its out-of-state credit-card customers *an interest rate* on unpaid balances allowed by its home State, when that *rate* is greater than that permitted by the State of the bank's nonresident customers." *Id*. at 301 (emphasis added). The

Court answered yes, establishing that national banks can export their home state's interest rates to other states.

Huntington cites *Marquette* for the proposition that banks can export *all* of "their home state's laws regarding the permissibility of interest charges into other states." Huntington Br. 8-9. *Marquette*'s analysis and holding, however, concern only the "'exportation' of interest rates," 439 U.S. at 318, not the exportation of other home state laws concerning interest. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 737 (1996) (explaining that *Marquette* held that section 85 "authorizes a national bank to charge out-of-state credit-card customers *an interest rate* allowed by the bank's home State" (emphasis added)). And although Huntington is correct that *Marquette* acknowledged that Section 85 might preempt some laws in a borrower's home state, it vastly overgeneralizes in claiming that the case "acknowledged that Section 85 preempts laws in a borrower's home state that would otherwise block a bank from charging interest permitted by the laws of the bank's home state." Huntington Br. 23. *Marquette* specifically identified which state laws would be threatened by its holding: "state *usury* laws." 439 U.S. at 318-19 (emphasis added); *see also id*. at 319 n.31 ("To the extent the enumerated federal rates of interest are greater than permissible state rates, state usury laws must . . . give way to the federal statute.").

The Supreme Court's decision in *Beneficial*, 539 U.S. 1, which held that the preemption provided under sections 85 and 86 is "complete preemption," confirms that sections 85 and 86 concern national banks' interest rates and claims that banks committed usury by exceeding those rates. *Beneficial* explained that section 85 "sets forth the substantive limits *on the rates of interest* that national banks may charge." *Id*. at 9 (emphasis added). Section 86, it continued, "sets forth the elements of a *usury claim* against a national bank." *Id*. (emphasis added). Further underscoring that the only state laws that might be preempted by the provision are usury laws, the Court explained that "[o]nly if Congress intended § 86 to provide the exclusive cause of action for usury claims against national banks would the statute" completely preempt state-law claims. *Id*. The Supreme Court held that the "National Bank Act provide[s] the exclusive cause of action for usury claims against national banks." *Id*. "Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank." *Id*. at 11.

Huntington claims that *Beneficial* helps confirm that the NBA "preempts *any* law in a borrower's home state that prohibits national banks from imposing interest charges permitted by the bank's home state." Huntington Br. 9 (emphasis added). As the Fifth Circuit has explained, however, "*Beneficial National* did not hold that the NBA preempts all state regulation of national banks. Instead, the

holding was limited to state law usury claims." *Hood*, 737 F.3d at 90; *accord Vaden v. Discover Bank*, 556 U.S. 49, 56 n.4 (2009) (describing *Beneficial* as "holding that the National Bank Act, 12 U.S.C. §§ 85, 86, completely preempts state-law usury claims against national banks").

In sum, sections 85 and 86 concern only national bank interest rates and claims that banks committed usury by charging higher rates than allowed. They establish allowable interest rates, provide a cause of action for usury when a national bank charges more than the allowable rate, and preempt state-law usury claims. They have no applicability to claims that do not challenge the interest rates charged by a national bank.

**B. The Powells' Claims Do Not Challenge Interest Rates.**

The Powells' claims do not challenge the rate of interest charged by Huntington. Although they challenge the imposition of a late fee, and although late fees are considered interest, *see* 12 C.F.R. 7.4001(a), the Powells do not claim that the $15 late fee charged was "greater than is allowed." 12 U.S.C. § 86; *see W. Va. ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 992 (S.D. W. Va. 2012) ("[E]ven if [fees] are 'interest' under the NBA, the Complaint must also allege that the 'interest' is excessive—usurious—to invoke complete preemption."). Indeed, their complaint recognized that the loan note allowed late fees, when appropriate, to be assessed at the $15 rate. JA 42. Instead, the Powells

allege that Huntington charged late fees that should not have been charged at all. As the district court explained: “[I]t is clear that Plaintiffs’ claims do not assert that the $15 late fee is excessive.” JA 8.

> Rather, Plaintiff’s theory is that Defendant’s practice of assessing a late fee in a month where Plaintiffs made a timely payment . . . violated West Virginia Code §§ 46A-3-112 and 46A-2-127. Because this theory does not challenge the rate of interest charged by Defendant, Plaintiffs’ claims are not usury claims and are not pre-empted by §§ 85 and 86 of the NBA.

JA 8-9.

In other words, as the Fifth Circuit held recently in an analogous case, “there is a difference between alleging that certain customers are being charged too much, and alleging that they should have never been charged for the service in the first place.” *Hood*, 737 F.3d at 93. Where consumers “make[] only the latter claim,” their claims are not preempted. *Id*. at 93.

*Hood* involved claims by the State of Mississippi that credit card companies violated the state consumer protection act by charging customers for “payment protection plans” that they did not want or need. The credit-card companies contended that the claims were preempted by sections 85 and 86, arguing that “the fees associated with the Payment Protection Plans were ‘interest,’ and that by challenging Defendants’ practices in charging these fees, the State was implicitly alleging usury claims.” *Id*. at 90. The Fifth Circuit rejected that argument. The court explained that, even if the fees were interest, the claims would not be

preempted because the State did not "allege[] that Defendants charged an improper rate for the Payment Protect Plans, and thus d[id] not allege that Defendants charged too much in interest." *Id*. at 92.

> The State never alleges that Defendants charge an interest rate greater than allowed by § 85. In fact, the State never makes any assertions about Defendants' rate of interest. Nowhere in the State's complaints is there any calculation of the total rate of interest that Defendants charge, or any description of the legal rate of interest. While not dispositive, we find it telling that the complaints omit these vital elements of a usury claim, and do not reference or cite the portions of Mississippi law that address usury. Instead, the State complains of Defendants' unfair and deceptive practices. Indeed, the gravamen of the State's complaints is that the customers do not actually understand that they have agreed to purchase these services and are charged without their consent, not that they are being charged too much.

*Id*. The Fifth Circuit recognized that "[n]either § 85 nor § 86 provides a cause of action for these kinds of consumer protection claims," which contended that the fees "should have never been charged," not that they were charged at excessive rates, and held that the claims were not preempted. *Id*. at 92-93.

Here, as in *Hood*, the plaintiffs do not make any claims about the rate of interest. As in *Hood*, they have not calculated the total rate of interest, described the legal rate of interest, or referenced or cited W.Va. Code § 47-6-6—the state-law cause of action for usury. They are not alleging that Huntington "should never be allowed to charge [late fees], or that the [late] fees are themselves excessive." *Id*. at 93. Instead, just as Mississippi argued that, under the circumstances in *Hood*,

the consumers should not have been charged for the payment plans, the Powells argue that, under the circumstances here, they should not have been charged the late fees. Sections 85 and 86 do not address these types of claims, and, accordingly, do not preempt them.

The Ninth Circuit has similarly recognized the distinction between claims challenging the legality of an interest charge and claims challenging the rate of interest. *See Hawaii ex rel. Louie*, 761 F.3d at 1038. In *Hawaii ex rel. Louie*, the Hawaii attorney general filed complaints against credit-card providers, alleging that they illegally marketed and enrolled customers in add-on services, including payment protection plans. The defendants contended that the claims were preempted by sections 85 and 86. The court of appeals rejected the argument, explaining that the question in determining whether sections 85 and 86 preempted claims was whether the claims "challenged the 'rate of interest'" and concluding that, "[e]ven assuming that protection plan fees are interest, the complaints [at issue] did not allege that the card providers charged excessive interest rates." *Id*. at 1036. "The unfair and deceptive practice claims," the court explained, "targeted alleged marketing misrepresentations. The unjust enrichment claims arose from the purported failure to obtain consent before enrolling consumers in debt protection products. Regardless of the rates charged, the banks had independent state law obligations to obtain consent from and not to deceive consumers. These claims are

not preempted by the National Bank Act." *Id*. at 1037-38. Likewise, here, separate from the question of late fee rates, Huntington had an independent state law obligation not to charge late fees in months when the Powells made full, on-time payments of those months' installments. Accordingly, these claims, as well, are not preempted by the NBA.

The Fifth Circuit, Ninth Circuit, and court below are not alone in recognizing that when state-law claims challenge the legality of an interest charge, without challenging the interest rate, they do not implicate sections 85 and 86 and are not preempted. *See*, *e.g.*, *W. Va. ex rel. McGraw v. Capital One Bank USA N.A.*, 2010 WL 2901801, at *3 (S.D. W. Va. July 22, 2010) (holding that claim was not preempted where it was "clearly not challenging the amount of interest or fees, but rather the imposition of over-the-limit fees in certain, specifically defined, circumstances"); *Saxton v. Capital One Bank*, 392 F. Supp. 2d 772, 783 (S.D. Miss. 2005) (determining that claims did not challenge the "rate of interest" where plaintiffs did "not contest the rate of interest defendant assessed but the fact that it was charged at all"); *McGraw v. JPMorgan Chase*, 842 F. Supp. 2d at 993; *Cross-Country Bank v. Klussman*, 2004 WL 966289, at *5-6 (N.D. Cal. Apr. 30, 2004); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046, 1048-49 (S.D. Ala. 1996); *Hunter v.*

*Beneficial Nat'l Bank USA*, 947 F. Supp. 446, 451-2 (M.D. Ala. 1996).[2] As the district court explained below, its "view on this matter is not a novel interpretation." JA 11.

Indeed, in *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1018-22 (S.D. Iowa 2009), the Southern District of Iowa, like the court below, held that sections 85 and 86 did not preempt claims based on the charging of illegal late fees. The court noted that "a plaintiff cannot bring a state law claim against a national bank for charging excessive rates of interest," *id.* at 1021, but that nothing in the statute, regulations, "or Supreme Court precedent indicate that § 86 preempts state law suits asserting claims beyond the scope of a traditional usury claim." *Id.* The court determined that the claims before it—which alleged that the bank used a software platform programmed to "'stack' late fees by misapplying incoming payments after a missed payment," *id.* at 1012-13—alleged that "Wells Fargo charged fees when they should not, a wholly different claim from a claim that Wells Fargo applied an illegal interest rate." *Id.* at 1021. Because the plaintiffs' claims were "not alleging that the rate of interest charged by Wells Fargo exceeded

[2] Some of these cases involve the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d, which is also referred to as the Depository Institutions Deregulation and Monetary Control Act (DIDA). Section 1831d regulates state-chartered banks and has been interpreted to have the same preemptive effect as the NBA. *See McGraw v. JPMorgan Chase*, 842 F. Supp. 2d at 994.

the interest rate established by statutory law," the court held that the claims were not subject to preemption by sections 85 and 86. *Id.*

Huntington attempts to distinguish the cases recognizing the distinction between cases that allege it was illegal to impose an interest fee and cases that challenge interest rates on the basis that those cases involved bank charges "imposed in violation of the parties' agreements or as a result of fraud or misrepresentations." Huntington Br. 36. That distinction is without a difference. In all of the cases cited, as in this case, the plaintiffs alleged that imposition of the fees was illegal under state law. And in all of the cases, the courts determined, as the district court did here, that the state-law claims were not preempted under sections 85 and 86 because they did not contest the rates of interest charged, but rather whether imposition of the charge was legal. Huntington provides no reason why state-law claims that allege a charge is illegal—but do not challenge the rate of interest—would be preempted when the charge violates the state consumer protection law, but would not be preempted when the charge is illegal because it violates state laws concerning fraud or misrepresentation. Sections 85 and 86 do not distinguish between state-law claims concerning fraud and misrepresentation and other types of state-law claims. Rather, the line they draw is between state-law claims that challenge the "rate of interest" and state law claims that do not. 12 U.S.C. § 86.

Huntington also attempts to distinguish all of the cases recognizing the distinction between claims challenging rates of interest and claims challenging the legality of imposing an interest charge by contending that, in those cases, "there were no arguments that the banks' home state laws permitted such charges to be imposed in such circumstances." Huntington Br. 37. But in all of those cases, as here, the banks' home state laws were irrelevant. The law of the bank's home state only comes into play when the claims at issue concern the rate of interest. In such instances, section 86 provides the exclusive cause of action for challenges to the rate, and the rates are only illegal if they violate the home state's laws. *See* 12 U.S.C. §§ 85 & 86. If the state-law claims do not challenge the rate of interest, however, but rather challenge the legality of imposing the fee at all—as in the cases above, and as in this case—then whether or not the bank's home state law would allow the fee is irrelevant. In such cases, the claims alleged are not preempted, and the only question is whether the fees are legal under the state laws invoked in the complaint.

Unable meaningfully to distinguish the cases recognizing the distinction between challenging the imposition of a fee and challenging the rate of interest, Huntington insists that plaintiffs' claims "*do* challenge" the rate of interest because they keep banks from charging "the *entire* amount of interest permitted by *the bank*'s home state." Huntington Br. 34. As an example, Huntington states that

Ohio law would have allowed it to charge the Powells $563.53 in interest in October 2012, $548.53 of which was periodic interest and $15 of which was a late fee. Huntington asserts that because the Powells challenge the legality of the $15 late fee under West Virginia law, the Powells are arguing that "West Virginia law permits that national bank to only charge $548.53 in interest that month." Huntington Br. 35.

Huntington's argument misunderstands the Powells' claims. The Powells do not argue that West Virginia set a maximum allowable interest of $548.53. Indeed, they have taken no position on the maximum amount of interest the bank could charge under West Virginia law. They have not argued that $563.53 is an excessive amount of interest, either on its own or in proportion to their principal. And they have not disputed that, if Huntington's home state's law allowed the bank to charge interest at a rate that resulted in $563.53 in interest, that rate would be illegal. Instead, their claim is that, regardless of whether the total amount or rate of interest was legal, it was illegal to charge late fees under the factual circumstances in which Huntington charged them.

Moreover, the same argument could have been made in *Hood*, *Hawaii ex rel. Louie*, and the other cases recognizing a distinction between claims that challenge assessment of fees and claims that challenge interest rates as illegal. These cases

determined, however, that even if the challenged fees were part of interest, the challenges were not preempted.

Just because a state-law claim, if successful, would cause less interest to be charged does not mean it is a challenge to the rate or amount of interest. *See McGraw v. JPMorgan Chase*, 842 F. Supp. 2d at 993 ("[E]very allegation that an interest charge is improper need not be an allegation that it is usurious."); *cf. Hawaii ex rel. Louie*, 761 F.3d at 1037 (explaining that fact that credit card providers may need to disgorge financial gain from fees did not turn the claims into usury claims). Because the claims do not concern the rate of the interest charged, they are not preempted.[3]

Huntington similarly ignores the importance of looking at the nature of the underlying claims in accusing the district court of distinguishing "'between pre-empted and non-pre-empted claims based on the particular label affixed to them.'" Huntington Br. 34 (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004)). The district court did not base its decision on whether the Powells' claims

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[3] Huntington's second example fails for similar reasons. Huntington claims that because West Virginia law only allows a single late fee to be charged for any individual missed payment, the Powells are seeking to "cap the total amount of interest borrowers may be charged when they have fallen behind" at $15, even though "it may be lawful under the bank's home state law . . . to charge $45 in interest if borrowers remain behind . . . for three months." Huntington Br. 35. But the Powells' claim is not that $45 was too much to charge in late fees, but that it was illegal for it to impose late fees that were not due.

are *labeled* usury claims, but on whether they, in fact, *are*, usury claims—that is, whether they challenge the interest rate. *See* JA 6, 8 (explaining that the court "must examine the character of the claims" to determine whether they are usury claims and concluding, upon undertaking such an examination, that the Powells "do not assert claims that challenge as usurious the rate of interest"). When a federal statute preempts claims that a national bank "charg[ed] a rate of interest greater than is allowed," 12 U.S.C. § 86, it cannot seriously be argued that the district court impermissibly "allow[s] parties to evade the pre-emptive scope of federal law," Huntington Br. 34 (quoting *Davila*, 542 U.S. at 214), when it examines whether the state-law claims in fact allege that the national bank charged such a greater rate of interest.

Finally, Huntington argues that distinguishing between claims that challenge whether a fee can be imposed at all and claims that challenge the rate of interest thwarts "the purposes of Section 85." Huntington Br. 33. Congress's concerns in enacting sections 85 and 86, as established by their plain language, however, were with establishing permissible interest rates for national banks and creating a penalty for national banks that charged usurious interest. These goals are not undermined by state laws that make certain types of fees illegal. As the Fifth Circuit has explained, the NBA "is not meant to be a blanket ban on any state law that might impact a national bank." *Hood*, 737 F.3d at 90.

Although Huntington claims that "Congress intended that Section 86 provide the 'exclusive cause of action'" for "state consumer protection law challenges to the propriety of certain interest charges," Huntington Br. 36 (quoting *Beneficial*, 539 U.S. at 10-11), "the best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). The text of sections 85 and 86 specifically refers to the interest "rate allowed," 12 U.S.C. § 85, and the charging of "a rate of interest greater than is allowed." *Id.* § 86. Because the Powells' claims challenge the imposition of illegal late fees, not the rate of interest charged by Huntington, they are not preempted by Sections 85 and 86.

### C. The Authorities Cited by Huntington Do Not Undermine the District Court's Determination that the Powells' Claims Are Not Preempted.

The authorities cited by Huntington do not undermine the conclusions that, in accordance with their texts, sections 85 and 86 preempt only those state-law claims that challenge interest rates, and that claims challenging the imposition of fees as illegal are not preempted because they do not challenge an interest rate.

First, Huntington claims that a "trio" of Supreme Court decisions "confirms that the National Bank Act preempts any law in a borrower's home state that prohibits national banks from imposing interest charges permitted by the bank's home state uniformly across the nation." Huntington Br. 9. None of the three cases Huntington cites—*Marquette*, *Beneficial*, and *Smiley*—stands for that proposition. As discussed above, *Marquette* held only that a national bank can charge its out-of-

state customers the "*interest rate* . . . allowed by its home State, when that rate is greater than that permitted by the State of the bank's nonresident customers." 439 U.S. at 301 (emphasis added). Likewise, *Beneficial* held that sections 85 and 86 provide the exclusive cause of action for "usury claims against national banks," 539 U.S. at 9—not that all claims concerning the legality of interest fees are preempted.[4]

In *Smiley*, the Court held that the term "interest" in section 85 includes late fees. 517 U.S. 735. Huntington cites *Smiley* for the proposition that "'there is no doubt that § 85 pre-empts state laws' limiting a bank's right to assess late fees and other interest charges." Huntington Br. 23 (quoting 517 U.S. at 744). The clause quoted by Huntington, however, merely affirms that section 85 preempts *some* state laws—a conclusion that is not in dispute in this case. *See Smiley*, 517 U.S. at 744 (supporting the statement that section 85 has preemptive power by quoting *Marquette*'s discussion of the preemption of "state *usury* laws" (quoting *Marquette*, 517 U.S. at 744) (emphasis added)). *Smiley* does *not* state that section 85 preempts *all* state laws concerning "a bank's right to assess late fees and other

[4] Throughout its brief, Huntington uses the word "charges" instead of "rates"—sometimes through alterations in quotes, sometimes through selective quotations, and sometimes through paraphrasing. *See*, *e.g.*, Huntington Br. 24 (quoting *Beneficial* with alteration); Huntington Br. 15 (quoting section 85, beginning after the word "rate"). Huntington's use of "charges" instead of "rates" when discussing section 85 does not change the statute's text: Section 85 applies only to laws concerning "rates of interest," and sections 85 and 86 preempt only state-law claims that national banks have charged an excessive interest rate.

interest charges." Huntington Br. 23. *See* JA 10 ("Nor does Smiley stand for a rule that § 85 pre-empts state law claims that do not challenge a late fee as excessive or usurious.").

*Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *rev'd on jurisdictional grounds*, 556 U.S. 49 (2009), also does not support the conclusion that sections 85 and 86 preempt the Powells' claims. The question in *Discover Bank* was whether the federal courts had jurisdiction over a petition to arbitrate counterclaims brought by a borrower against a servicing affiliate of a state bank. The Court had previously held that jurisdiction over the petition to arbitrate would depend on jurisdiction over the underlying dispute, so the question was whether the federal courts had jurisdiction over the counterclaims—specifically, whether the claims were completely preempted by the Federal Deposit Insurance Act (FDIA). To answer this question, the Court addressed two subordinate questions: first, "whether [the bank] was the real party in interest with respect to [the borrower's] counterclaims," and, second, whether "the FDIA 'completely preempts' state law usury claims against a state- chartered, federally insured bank that is the real party in interest of a state court dispute." 489 F.3d at 601, 604. The Court answered both questions in the affirmative, basing its conclusion that "Congress intended complete preemption of state-court usury claims under the FDIA," in large part on the "virtual identity of the preemption language in the FDIA" and NBA, which

"completely preempts state-court usury claims against national banks." *Id*. at 604, 606.

In a short paragraph towards the end of its decision, the Court stated that the borrower's claims challenging "certain fees and interest rates" fell within the completely preempted category, because the charges were within the definition of interest in 12 C.F.R. § 7.4001(a). 489 F.3d at 607. Huntington argues that because some of the borrower's claims involved the assessment of late fees, the same conclusion applies to the Powells' claims. *Discover Bank*, however, specifically recognized that "not all of [the borrower's] claims fall into the state-court usury claim category." *Id*. at 607 n.16. "While those non-usury claims arguably fall outside the preemptive scope of the FDIA," the Court continued, "complete preemption of any one of [the borrower's] counterclaims should suffice to provide a federal forum under the complete preemption doctrine." *Id*. (citing *Saxton*, 392 F. Supp. 2d at 783). Thus, the only thing the Court considered necessary to its holding was that *at least one* of the borrower's claims—which included a claim about interest rates—was preempted. The Court did not go through the borrower's claims individually to determine which ones were preempted, and did not consider whether there was a difference between claims that challenge interest rates as excessive and claims that challenge the circumstances in which a fee is imposed.

Thus, the decision's reference to preemption of claims regarding "fees and interest" is not instructive. *Id.* at 606.

*Krispin v. May Department Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000), and *In re Late Fee & Over-Limit Fee Litigation*, 741 F.3d 1022, 1025 (9th Cir. 2014), which Huntington cites to demonstrate that courts have held that sections 85 and 86 preempt claims concerning late fees, are both off-point. *Krispin* concerned claims that a bank charged "late fees [that] exceeded the amount permitted"; it did not consider whether claims that did not challenge the rate of fees as excessive were preempted. 218 F.3d at 922. And *In re Late Fee & Over-Limit Fee Litigation*, involved claims brought under 12 U.S.C. § 86, challenging fees as unconstitutionally excessive; it did not speak to preemption of state-law claims.

Finally, Huntington cites a handful of Office of the Comptroller of the Currency (OCC) interpretive letters from the 1990s that address whether late fees or other fees are "interest"—a question answered with regard to late fees by *Smiley*—and whether an interstate national bank may charge home state interest rates on its loans. *See* Huntington Br. 16-17, 27. In answering these questions, the interpretive letters use broad language indicating that, if a charge is interest, it can be charged in other states according to the law of the bank's home state. However, none of these letters consider the difference between claims that challenge interest rates and claims that challenge the legality of imposing a fee at all. Because these

letters do not analyze or explain why section 85 would allow national banks to export all of their state's laws concerning interest, when the statute only provides that national banks may charge "interest at the rate allowed by the laws of the State . . . where the bank is located," the letters are not persuasive on this point.

In the end, Huntington cannot escape the plain meaning of the language used in sections 85 and 86. These provisions set forth permissible interest rates for national banks, 12 U.S.C. § 85, create an exclusive cause of action for claims that national banks charged "a rate of interest greater than is allowed," *id*. § 86, and preempt "state-law usury claims against national banks." *Vaden*, 556 U.S. at 56 n.4. They have no applicability to the claims at issue here, which do not challenge the interest rates charged by Huntington.

**D. Section 85 Does Not Preempt Laws Governing the Order in which Loan Payments Are Applied.**

In a separate section of its brief, Huntington contends that, in addition to preempting state laws concerning the permissibility of imposing interest charges, section 85 preempts state laws requiring payments to be applied first to current installments. Huntington Br. 42.[5] This argument falters at the same place as

[5] Huntington places this argument in a section of its brief that criticizes the district court for focusing on complete preemption. Huntington thus may be arguing that, even if section 86 does not create a federal cause of action for these claims and they are thus not completely preempted, they are preempted under section 85 alone. Sections 85 and 86, however, are coextensive. Section 85 establishes a legal rate, and section 86 creates an exclusive remedy for violations of that rate.

Huntington's other arguments about section 85: the language of the statute. By its plain text, section 85 applies to interest rates. 12 U.S.C. § 85. Contrary to Huntington's contention, it does not allow a national bank to "export the *entire* law of its home state relating to interest charges." Huntington Br. 42.

Huntington insists that laws about the order of applying payments *are* laws about interest rates, because they influence "both the balance of the account—which determines the amount, if any, of any interest in the form of numeric periodical interest that should be charged—and the date when the payment is made," which affects whether a late fee should be charged. Huntington Br. 43-44. To begin with, however, the West Virginia law at issue does *not* affect the balance of the account for the purpose of charging numeric periodical interest. Huntington Br. 43. The law provides that "*[f]or purposes of this subsection*, payments shall be applied first to current installments, then to delinquent installments and then to delinquency and other charges." W. Va. Code § 46A-3-112(3) (emphasis added). The relevant subsection concerns only late fees, stating that "[n]o delinquency charge may be collected on an installment which is paid in full within ten days after its scheduled or deferred installment due date, even though an earlier maturing installment or a delinquency or deferral charge on an earlier installment may not have been paid in full." *Id.* The West Virginia law thus does not affect

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Thus, there are no violations of section 85 for which there is not a remedy under section 86.

how the bank applies the payment for purposes of paying principal and interest, the loan balance, or the amount of numerical periodic interest due.

Moreover, not every law that has an effect on the amount of the loan balance or the amount of interest that will ultimately be owed is a law about interest rates. Section 85 applies to laws "establish[ing] . . . the interest rate itself," not to those that have just an "indirect effect on interest rates because they may affect the ultimate return on loan proceeds." OCC Interpretive Letter, 1993 WL 501557, at *4 (Feb. 26, 1993).

*Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900), and *First National Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1976), are not to the contrary. In *Daggs*, 177 U.S. at 555, the Supreme Court held that the NBA incorporated state law allowing parties to agree on any interest rate. And in *Nowlin*, 509 F.2d at 876, the Eighth Circuit held that section 85 incorporated state laws prohibiting banks "from adding-on or discounting interest to increase the yield on installment notes above the 10%" interest rate set by state law.

12 C.F.R. § 7.4001(b) is likewise irrelevant. That section states that "[a] national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state," and provides that "[i]f state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of

state law relating to that class of loans that are material to the determination of the permitted interest." *Id.* As an example, the section states that "a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies." 12 C.F.R. § 7.4001(b). Thus, laws "material to the determination of the interest rate" in that section are laws that play a role in establishing what interest rate applies. *See* OCC Interpretive Letter, 1986 WL 235921 (Nov. 18, 1985) ("This Office has defined 'provisions of State law . . . material to the determination of the interest rate' as those state laws that either 1) set forth the characteristics of a category of loans, or 2) establish the manner in which the numerical rate of interest is determined."). The consumer's outstanding balance or when the consumer makes a payment may affect which laws "material to the determination of the interest rate" apply. *See* 12 C.F.R. § 7.4001(b); OCC Interpretive Letter, 1993 WL 501557, at *3 n.3 (Feb. 26, 1993) (citing OCC Interpretive Letter, 1981 WL 57784, which explained that, when state law only allowed a certain rate to be charged on loans of up to $3,000, national banks could only charge that rate on loans of up to $3,000). However, laws that affect the loan balance or when the consumer makes a payment are not *themselves* "material to the determination of the interest rate."[6]

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[6] Indeed, the OCC has found various laws that might affect the loan balance to be

Huntington notes that Ohio considers certain provisions, including those "relating to the method of determining the balance upon which interest or finance charges are applied" to be "material to the determination of the interest rate." Huntington Br. 45 (quoting Ohio Rev. Code § 1109.20(B)(2)). However, laws about order of applying payments for late fee purposes do not set the method for determining the portion of the balance to which the interest rate applies. *Cf. Am. Timber & Trading Co. v. First Nat'l Bank of Oregon*, 690 F.2d 781, 787-88 (9th Cir. 1982) (determining that the relevant balance was the amount of funds available to borrowers). Likewise, laws about the order in which payments will be applied are not laws about "time periods within which fees and charges may be avoided." Huntington Br. 45 (quoting Ohio Rev. Code § 1109.20(B)(2)).

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immaterial to the determination of the rate. *See* OCC Interpretive Letter, 1993 WL 501557, at *1 (Feb. 26, 1993) ("The OCC does not consider appraisal fees to be material to the determination of the interest rate for home equity borrowing."); OCC Interpretive Letter, 1992 WL 125221, at *3 (Feb. 18, 1992) (determining that state laws "relating to the aggregate dollar amount of . . . long-term, fixed rate loans, the maximum permissible maturity of certain loans and a requirement that such loans be amortized at a rate sufficient to ensure repayment within specified maturity limits, and restrictions regarding loan-to-value ratios, insurance, and escrow relating to second-lien mortgage loans" were not "material to the determination of the interest rate"); OCC Interpretive Letter, 1981 WL 57784, at *3 (Jan. 12, 1981) (determining that certain disclosure requirements whose purpose was "to ensure that consumers do not accept certain possible liabilities without being fully aware of such acceptance" were not material to the determination of the interest rate).

In short, because laws governing the order in which payments on a loan will be applied are not laws about interest rates, they are not preempted by Sections 85 and 86.

## II. The NBA Does Not Otherwise Preempt the Powells' Claims.

Huntington argues that complete preemption under sections 85 and 86 is only the "starting point" in determining whether the Powells' claims are preempted under the NBA, and that the district court also should have examined whether the state law "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers." Huntington Br. 52, 53 (quoting *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)). But preemption under sections 85 and 86 was the *only* ground on which Huntington moved for judgment on the pleadings in the district court and was the only issue considered by the district court below. It is thus the only issue properly before this Court. *See Williams v. Prof'l Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002); 28 U.S.C. § 1292(b). Moreover, Huntington's alternative preemption argument fails on its merits: Just as the Powells' claims are not preempted under Sections 85 and 86, they do not "prevent or significantly interfere" with Huntington's exercise of its powers.

### A. Huntington's Alternative Preemption Theory Is Not Properly Before the Court.

Huntington moved for judgment on the pleadings in the district court on only one ground: that the Powells' "claims are barred by complete preemption

under the National Bank Act, 12 U.S.C. §§ 85 and 86 and Plaintiffs have not alleged a violation of the NBA or any violation of a state law authorized to apply through the NBA that can sustain a claim in this case." Doc. 6, at 1 (motion for judgment on the pleadings); *see also* JA 61 (Huntington memorandum in support of its motion to certify stating that "[i]n the 12(c) Motion, Huntington Bank argued that Plaintiffs' claims are preempted because" they are a "challenge to the amount of the 'interest' charged"). According to Huntington, the Powells' claim is "legally a claim for a usury violation," and therefore "completely preempted by the NBA." Doc. 7, at 2. Not until its reply memorandum in support of its motion for judgment on the pleadings did Huntington raise the argument, "in the alternative," that the Powells' claims "are preempted because they significantly interfere with Huntington Bank's powers under the NBA." Doc. 19, at 13. Even then, Huntington's primary "interference" argument was that controlling Huntington's ability to assess late fees would interfere with its "exercise of its powers under § 85 . . . to assess late fees in accordance with Ohio law." Doc. 19, at 13. Huntington never argued that West Virginia law interfered with its "power" to determine how payments should be applied.

Here, Huntington contends that the district court erred in not considering whether West Virginia laws "prevents or significantly interferes" with its power "to determine the order in which payments are posted to borrower accounts."

Huntington Br. 53. However, arguments that are not made at all, or made only in a reply memorandum, "are deemed waived." *Moseley v. Branker*, 550 F.3d 312, 325 n.7 (4th Cir. 2008).

Moreover, in keeping with the "ordinary rule in federal courts . . . that an argument raised for the first time in a reply brief or memorandum will not be considered," *Clawson v. FedEx Ground Package Sys., Inc.*, 451 F. Supp. 2d 731, 734 (D. Md. 2006) (citing *United States v. Williams*, 445 F.3d 724, 736 n. 6 (4th Cir. 2006)), the district court did not address Huntington's "significantly interferes" argument. Instead it discussed the ground on which Huntington had moved for judgment: complete preemption under sections 85 and 86. *See* Huntington Br. 14. In considering interlocutory appeals under 28 U.S.C. § 1292(b), the "court of appeals may not reach beyond the certified order." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Although the Court's "jurisdiction is not confined to the precise question certified by the lower court . . ., that jurisdiction *is* confined to the particular order appealed from." *United States v. Stanley*, 483 U.S. 669, 677 (1987). Here, where the only ground on which Huntington moved for preemption was preemption under sections 85 and 86, and the only preemption question the district court addressed in the order below was whether the Powells' claims are preempted under sections 85 and 86, alternative arguments are not properly before the Court. *See In re M & L Bus.*

*Mach. Co., Inc.*, 75 F.3d 586, 589 n.4 (10th Cir. 1996) (explaining that the court was "limited to consideration of the order from which [the] appeal [was] taken," and declining to consider alternative arguments not addressed by district court).

**B. The Powells' Claims Do Not Prevent or Significantly Interfere with Huntington's Ability To Engage in the Business of Banking.**

Even if Huntington's alternative theory were before the Court, the Powells' claims would not be preempted. States have authority to "regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33; *see also Dodd–Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 1044, 124 Stat. 1376, 2015 (July 21, 2010) (codified at 12 U.S.C. § 25b(b)(1)(B)) (a non-discriminatory state consumer financial law is preempted only if it "prevents or significantly interferes with the exercise by the national bank of its powers"). Here, the West Virginia state law provisions at issue do not prevent or significantly interfere with the relevant power at issue here—Huntington's power to make real estate loans, *see* 12 U.S.C. § 371—or with any incidental power "necessary to carry on the business of banking," *see id*. § 24(Seventh). Huntington can continue to make loans in the same fashion in which it has been doing so, regardless of whether it is required to apply payments to current installments first for late fee purposes and regardless of whether it is forbidden from charging late fees in months in which the borrower has paid its installment in full.

Huntington asserts that without the ability to decide on its own how to apply payments, it will not be able to "offer mortgages" because it will not be able to "determine the balance on each loan." Huntington Br. 48. Huntington does not explain why this assertion would be true. And this Court has had "little sympathy" for the argument that having to understand different state's laws is, in and of itself, a significant burden on lending activities. *Decohen v. Capital One, N.A.*, 703 F.3d 216, 226 (4th Cir. 2012).[7] National banks are required to, and do, comply with state-specific laws on a regular basis. *See id.* ("Examining state laws for usury limits, notice requirements, and contract provisions is exactly what national banks already do."). Moreover, Huntington's loan servicing software already has the capability to handle state specific servicing instructions. *See* Doc. 74, Ex. B (filed as attachment to Doc. 72, Plaintiffs' Motion to File Exhibit Under Seal.)

Huntington also claims that because federal law is the source of national banks' powers, anything a bank is allowed to do is one of its powers, and the relevant power is its "power to determine the order in which transactions are posted." Huntington Br. 48; *see id.* n.1 ("[I]f federal law does *not* grant national banks power to determine posting order, they cannot exercise that power at all.").

[7] In this respect, this Court differs from the California Court of Appeal, which stated in *Akopyan v. Wells Fargo Home Mortgage, Inc.*, 155 Cal. Rptr. 3d 245, 272 (Cal. Ct. App. 2013), that "requir[ing] [a bank] to operate under diverse payment application schemes for loans it services in [different] states" was "inconsistent with the purpose of the NBA."

Huntington's argument proves too much. Under Huntington's reasoning, any state law that prevented a bank from doing anything it was otherwise allowed to do would be preempted. The Supreme Court has explained however, that national banks "are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (citations omitted). Likewise, it has stated that "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers," *id*. at 12—a statement that would make little sense if a bank's engaging in an activity were itself a "power." And this Court's case law demonstrates that the NBA does not preempt all state laws that apply to banks, even where the state law prohibits a bank from doing something that federal law does not forbid. *See Decohen*, 703 F.3d at 224-25 (determining that state-law claims against a national bank based on a state law requiring a "debt cancellation agreement to cancel all of the 'remaining' debt" was not preempted); *see also Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315, 323 (4th Cir. 2012) ("[T]he NBA and OCC regulations do not 'occupy the field.'"); 12 U.S.C. § 25b(b)(4). Moreover, the Court's case law demonstrates that state laws do not interfere with a bank's ability to do business any time they regulate in an area related to one of a bank's powers. *See Epps*, 675 F.3d at 324-25

(finding it "uncontroversial . . . that the power to collect on secured collateral in the event of default is related to the extension of credit" but rejecting the idea that all state debt collection laws "burden the exercise of a national bank's lending power").

In support of its argument that the relevant power is the power to determine the order of applying payments, Huntington cites *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012), and *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009). The courts in those cases, however, found that the state-law claims conflicted with specific powers expressly granted to the bank. Huntington identifies no similar express power here. Moreover, courts disagree on the correctness of *Gutierrez*'s analysis. *See King v. Carolina First Bank*, 26 F. Supp. 3d 510, 517 (D.S.C. 2014) (rejecting argument that claims challenging manner of posting debits was preempted as a matter of law because the "claims as alleged only incidentally affect [the bank's] deposit-taking powers and [the bank] has not established that refraining from the challenged wrongful conduct would prevent or significantly interfere with its ability to engage in the business of banking").[8]

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[8] Huntington also cites *Bishop v. Ocwen Servicing, LLC*, 2010 WL 4115463 (S.D. W. Va. Oct. 19, 2010), but *Bishop* involved preemption under the Home Owners Loan Act (HOLA), not the NBA. This difference is meaningful. *See, e.g.*, *Smith v. BAC Home Loans Servicing, LP*, 769 F. Supp. 2d 1033, 1043-44 (S.D. W. Va. 2011) (discussing differences). Unlike the NBA and its regulations, which "do not

Congress codified *Barnett Bank*'s "prevents or significantly impairs" standard as part of the *Dodd–Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203, § 1044, 124 Stat. 1376, 2015 (July 21, 2010) (Dodd-Frank) (codified at 12 U.S.C. § 25b(b)(1)(B)). The history of the Act makes clear that the standard is a meaningful one that is not met whenever a bank is prohibited from engaging in an activity it finds convenient. In codifying the standard, Congress intended to "undo[] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. 111-176, at 175 (2010); *see also* H.R. Conf. Rep. 111-517, 2010 U.S.C.C.A.N. 722, 731 (2010) (The law "revises the standard the OCC will use to preempt state consumer protection laws"). The OCC's broader interpretation stated that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. § 34.4 (2010). Thus, "prevents or significantly impairs" is a more stringent standard than "obstruct, impair, or condition," which itself would require more than mere inconvenience.

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'occupy the field,'" *Epps*, 675 F.3d at 323, HOLA's implementing regulation invoked field preemption. 12 C.F.R. § 560.2(a) ("[The Office of Thrift Services] hereby occupies the entire field of lending regulation for federal savings associations."). In 2010, Congress amended HOLA to bring HOLA preemption in line with NBA preemption, *see* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1046, 124 Stat. 1376, 2017 (July 21, 2010), but that provision's effective date post-dated *Bishop*. *Id*. § 1048. Thus, *Bishop*'s preemption discussion is inapposite.

In addition to codifying a stringent standard for determining when state consumer financial laws are preempted, Dodd-Frank makes clear that the inquiry into whether a law prevents or significantly interferes with a bank's exercise of its powers is a searching one. The law provides that courts and the OCC may make such determinations only on a "case-by-case basis." 12 U.S.C. § 25b(b)(1)(B). Further, the law clarifies that OCC determinations concerning preemption are not binding: "A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes . . . shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." *Id.* § 25b(b)(5)(A). Finally, Dodd-Frank establishes that "[n]o regulation or order of the Comptroller of the Currency" prescribed under the section setting forth the prevents or significantly impairs standard, "shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme

Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996)." 12 U.S.C. § 25b(c).

Here, there is no evidence that application of the relevant West Virginia law will significantly impair the bank's "ability to engage in 'the business of banking.'" *Decohen*, 703 F.3d at 222. Regardless of the outcome of this case, Huntington will be able to make mortgage loans and engage in banking without significant interference. Accordingly, if Huntington's alternative preemption theory were properly before this Court, it should be rejected.

## CONCLUSION

This Court should affirm the district court's decision denying Huntington's motion for judgment on the pleadings.

## REQUEST FOR ORAL ARGUMENT

The Powells respectfully request oral argument because this case presents important issues concerning the scope of preemption under the NBA.

Respectfully Submitted,

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September 21, 2015

## RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word 2010), the brief contains 11,941 words.

/s/ Adina H. Rosenbaum
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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, September 21, 2015, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

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