No. 09-

IN THE

Supreme Court of the United States

US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
DAVID S. LESSER
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

(Additional counsel listed on inside cover)

PETER W. CARTER
PAUL R. DIESETH
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402
(612) 340-7892

THOMAS L. ALLEN
ROY W. ARNOLD
DAVID J. BIRD
REED SMITH LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222
(412) 288-3131

TODD W. RUSKAMP
SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
7th Floor
Kansas City, MO 64108
(816) 474-6550

WILLIAM E. QUIRK
MARK A. OLTHOFF
MIRIAM E.C. BAILEY
POLSINELLI SHUGHART P.C.
1700 Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
(816) 421-3355

MICHAEL G. BIGGERS
BRYAN CAVE LLP
211 North Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2145

SCOTT W. MARTIN
MICHAEL S. HARGENS
DAVID A. SCHATZ
HUSCH BLACKWELL
SANDERS LLP
4801 Main Street
Suite 1000
Kansas City, MO 64112
(816) 983-8000

QUESTIONS PRESENTED

1. In *Beneficial National Bank* v. *Anderson*, 539 U.S. 1 (2003), this Court held that state-law usury claims against federally chartered, federally insured banks are completely preempted by provisions of the National Bank Act of 1864 now codified at 12 U.S.C. §§ 85-86. The first question presented here is whether state-law usury claims against *state*-chartered, federally insured banks are likewise completely preempted by a provision of the Depository Institutions Deregulation and Monetary Control Act of 1980 now codified at 12 U.S.C. § 1831d.

2. In *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), this Court held that the term "interest" under 12 U.S.C. § 85 means not only periodic percentage interest rates but also many types of fees charged in connection with a loan (or other extension of credit). The second question presented here is whether the decision below conflicts with *Smiley* in that the court of appeals used a definition of "interest" that was limited to periodic percentage interest rates.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the case caption, the following were parties in the court of appeals: Ace Securities Corp. Home Loan Trust 1999-A; Associates First Mortgage Capital Corp.; CIT Group; Contimortgage Corp; Master Financial; Norwest Home Improvement, Inc.; PSB Lending Corp.; Challenge Realty; German American Capital Corp.; UBS Real Estate Securities, Inc.; Countrywide Home Loans, Inc.; JPMorgan Chase Bank, N.A.; Banc One Financial Services Inc.; PFF Bank & Trust; Western Interstate Bancorp.

CORPORATE DISCLOSURE STATEMENT

US Bank National Association ND and US Bank National Association are wholly owned subsidiaries of U.S. Bancorp, a publicly held corporation. U.S. Bancorp does not have a parent corporation and no publicly held company owns 10% or more of its stock.

FirstPlus Home Loan Trust 1996-2 is an express trust created under New York trust law, while FirstPlus Home Loan Owner Trusts 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, and 1998-5 are Delaware statutory trusts created under the Delaware statutory trust statute.

Wilmington Trust Company is a Delaware banking corporation that is wholly owned by Wilmington Trust Corporation. Wilmington Trust Corporation does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Goleta National Bank, now known as Community West Bank, is a California corporation. All of its stock is owned by the holding company Community West Bancshares.

Residential Funding Company, LLC, has the following parent company: GMAC-RFC Holding Company, LLC. General Motors Corporation is a publicly held corporation that owns 10% or more of the interest in Residential Funding Company, LLC, through ownership of stock in one or more companies.

Sovereign Bank is a subsidiary of Santander Holdings USA, Inc. which is a Virginia holding company formerly known as Sovereign Bancorp, Inc. Banco Santander, S.A., a publicly held corporation, is the parent of Santander Holdings USA, Inc. and owns 10% or more of its stock.

HSBC Finance Corporation, formerly known as Household Finance Corporation, is wholly owned by HSBC North America Holdings, Inc. No publicly held company directly owns 10% or more of HSBC Finance Corporation's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

REGULATIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 09-

US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

US Bank National Association ND; US Bank National Association; FirstPlus Home Loan Trust 1996-2; FirstPlus Home Loan Owner Trusts 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, and 1998-5; Wilmington Trust Company; Goleta National Bank; Residential Funding Company, LLC;

Sovereign Bank; and HSBC Financial Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 575 F.3d 794. The district court's order denying respondents' motion to remand the case to state court (App. 15a-17a) is unreported, as are its orders granting petitioners' motion to dismiss the complaint (App. 19a-20a) and denying reconsideration of the dismissal (App. 21a-22a).

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2009. A timely petition for rehearing en banc was denied on November 24, 2009. *See* App. 23a. On February 16, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 24, 2010. *See* Appl. No. 09A746. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and is unaffected by 28 U.S.C. § 1447(d) because petitioners seek review not of a remand order by a district court but of the judgment of the court of appeals, *see, e.g.*, *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 466-467 (1947) (citing *Gay* v. *Ruff*, 292 U.S. 25 (1934)).

STATUTORY PROVISIONS INVOLVED

Section 30 of the National Bank Act of 1864 (codified at 12 U.S.C. §§ 85-86) and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (codified at 12 U.S.C. § 1831d) are set forth in the Appendix (at 25a-27a).

STATEMENT

In this case, a California state bank charged fees to Missouri residents for the origination of second-mortgage loans. Although the fees were permissible under California law, the borrowers brought a putative class action in Missouri state court on the ground that the fees violated Missouri law. Had the bank been a national bank, the National Bank Act would have authorized it to charge the fees in question and permitted removal of the case to federal court. The issue here is whether the twin provision of federal law that applies to state banks, a provision Congress adopted as part of the Depository Institutions Deregulation and Monetary Control Act of 1980, similarly allowed the state bank to charge the fees and authorized removal of the lawsuit to federal court.

1. With exceptions not relevant here, federal law permits a defendant who has been sued in state court to remove the case to federal district court if the case properly could have been brought in federal court in the first place, i.e., if the district court has original jurisdiction over any of the claims. *See* 28 U.S.C. § 1441. One category of cases over which federal district courts have original jurisdiction, and that thus can be removed from state court, is "all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* § 1331.

Whether a lawsuit arises under federal law (and is therefore removable) is normally determined using the "well-pleaded complaint" rule, under which a court considers only the claims properly pleaded in the complaint. *See, e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004); *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 113 (1936). "The rule makes the plaintiff the master of

the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987).

One exception to the well-pleaded complaint rule is the doctrine of "complete preemption," which applies "when a federal statute wholly displaces [a] state-law cause of action." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). In that circumstance, federal law does not merely provide a defense to a state-law claim; rather, the claim is deemed to arise under federal law and therefore may be removed to federal court (when originally filed in state court). *See id.* "This is so because '[w]hen the federal statute completely pre-empts the state-law cause of action, a claim that comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.'" *Aetna Health*, 542 U.S. at 207-208 (alteration in original) (quoting *Anderson*, 539 U.S. at 8).[1]

Congress may expressly provide for complete preemption. *See El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 484 (1999) (explaining that 42 U.S.C. § 2201(n)(2) explicitly "transforms into a federal action 'any public liability action arising out of … a nuclear incident,'" by "provid[ing] for removal to a federal court as of right if a putative [such] action is brought in a state court" (quoting the statute)). Express legislative direction is not required, however; this Court has thus far identified three instances in which a federal law completely preempts certain state-law claims despite

[1] Complete preemption flows from an "independent corollary" to the well-pleaded complaint rule, namely that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998).

the absence of statutory language explicitly commanding that result.

First, in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court held that section 301 of the Labor Management Relations Act of 1947 (LMRA), Pub. L. No. 80-101, 61 Stat. 136, completely preempted a state-law claim to enforce a no-strike clause in a collective bargaining agreement. *See* 390 U.S. at 559-560; *see also Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983) ("The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" (quoting § 301)). *Second*, in *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), the Court held that section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, completely preempted a state-law claim charging improper processing of benefits under an ERISA plan. *See* 481 U.S. at 64-67. *Third*—and of particular relevance to this case—in *Beneficial National Bank* v. *Anderson*, the Court held that the National Bank Act of 1864 (NBA), ch. 106, 13 Stat. 99, completely preempted state-law usury claims against national banks, i.e., federally chartered, federally insured banks. *See* 539 U.S. at 9-11.[2]

---

[2] The Court has also held that state-law claims seeking ejectment based on Native American title are completely preempted. *See Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 677-678 (1974), *cited in Caterpillar*, 482 U.S. at 393 n.8. This holding was based not on a statute but on "the special historical relationship between Indian tribes and the Federal Government." *Anderson*, 539 U.S. at 8 n.4.

The provision of the NBA at issue in *Anderson* was section 30, now codified at 12 U.S.C. §§ 85-86. Section 85 "sets forth the substantive limits on the rates of interest that national banks may charge," while § 86 "sets forth the elements of a usury claim against a national bank … and prescribes the remedies available to borrowers who are charged higher rates." *Anderson*, 539 U.S. at 9. Under § 85, a national bank may charge—on a loan issued to a borrower anywhere in the country—up to the higher of two interest rates: 1) the maximum rate permitted for any lender by the law of the bank's home state (or 7 percent if no rate is provided by that law), and 2) one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the national bank's home district. *See* 12 U.S.C. § 85; *see also* 12 C.F.R. § 7.4001(b) ("A national bank located in a state may charge interest at the maximum rate permitted to any … lending institution by the law of that state."); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (national banks may "export" their home-state interest rates, applying them to loans made to out-of-state borrowers).[3]

In finding complete preemption under the NBA, this Court clarified that the "dispositive question" for complete-preemption analysis is whether Congress intended a federal cause of action to be exclusive. *Anderson*, 539 U.S. at 9; *see also id.* at 9 n.5 ("[T]he proper

[3] National banks' authority to charge the highest rate allowed for any lender by the law of their home states is commonly referred to as "most favored lender" status. *See, e.g.*, *Marquette*, 439 U.S. at 314 & n.26 (citing *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874)).

inquiry focuses on whether Congress intended the federal cause of action to be exclusive."). As to the NBA, the Court found that question answered by decisions, stretching back over a century, that had deemed the cause of action in § 86 to be exclusive. *See id.* at 10 (citing, among others, *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 32-33 (1875); *Evans* v. *National Bank of Savannah*, 251 U.S. 108, 114 (1919)).

2. In the late 1970s, interest rates soared to record levels. *See, e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 845 (1996) (plurality opinion); 28 U.S.C. § 1961 note (showing changes in the 52-week T-bill rate through the period). The high rates gave national banks a competitive advantage over their state-chartered counterparts, because "state lending institutions were constrained in the interest they could charge by state usury laws." *Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992) (citing *Gavey Props./762* v. *First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988)). "National banks did not share this inhibition because they could charge whatever interest rates were allowed under … [National] Bank Act § 85." *Greenwood Trust*, 971 F.2d at 826.

Congress sought to rectify this inequality in 1980 when it enacted the Depository Institutions Deregulation and Monetary Control Act (DIDA), Pub. L. No. 96-221, 94 Stat. 132. Section 521 of DIDA—the opening clause of which confirms Congress's intent "to prevent discrimination against State-chartered insured depository institutions … with respect to interest rates," 12 U.S.C. § 1831d(a)—amended the Federal Deposit Insurance Act so as to establish limits on the interest federally insured state banks may charge, and to provide a federal cause of action against banks that ignore those limits. *See* 94 Stat. at 164-165 (codified at 12 U.S.C.

§ 1831d). Under § 1831d(a), which explicitly preempts contrary state laws, state banks may charge up to the higher of two interest rates: 1) the maximum rate permitted for any lender by the law of the bank's home state, and 2) one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the state bank's home district. *See* 12 U.S.C. § 1831d(a); *see also "Most Favored Lender" Doctrine Applies To Insured State Banks*, FDIC Advisory Op. 81-3 (Feb. 3, 1981), *available at* http://www.fdic.gov/regulations/laws/rules/4000-730.html.[4]

As several circuits have recognized (including the Eighth Circuit), the language of § 1831d is "substantially identical" to that of 12 U.S.C. §§ 85-86, the NBA provisions underlying this Court's complete-preemption decision in *Anderson*. *Discover Bank* v. *Vaden*, 489 F.3d 594, 605 n.14 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009); *accord, e.g.*, *Mamot Feed Lot & Trucking* v. *Hobson*, 539 F.3d 898, 903 n.4 (8th Cir. 2008); *In re Community Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005); *Gavey Props.*, 845 F.2d at 521. "The parallelism was not mere happenstance. To the exact contrary, Congress made a conscious choice to incorporate the [National] Bank Act standard into DIDA." *Greenwood Trust*, 971 F.2d at 827 (citing 126 Cong. Rec. 6,907 (1980) (statement of Sen. Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Sen. Pryor)). In fact, "Congress transplanted verbatim in section 521 [of DIDA] substantive language from section 85 … with the explicit purpose of providing state-

[4] DIDA gave States the right to opt out of the preemption effected by § 1831d. *See* DIDA § 525, 94 Stat. at 167 (codified at 12 U.S.C. §§ 1730g note (repealed), 1785 note, 1831d note).

chartered banks with authority identical to that enjoyed by national banks under section 85." *12 U.S.C. § 1831d Preempts Contrary State Common Law Restrictions On Credit Card Loans*, FDIC Advisory Op. 93-27 (July 12, 1993), *available at* http://www.fdic.gov/regulations/laws/rules/4000-8160.html; *see also* 126 Cong. Rec. 6,900 (1980) (statement of Sen. Proxmire) (Under DIDA, "State chartered depository institutions are given the benefits of 12 U.S.C. § 85.").

3. Respondents are Missouri homeowners who obtained second-mortgage loans from FirstPlus Bank, a California-chartered, federally insured bank that has since gone bankrupt. App. 2a-3a. Petitioners are entities that subsequently purchased or assumed some of respondents' and/or other FirstPlus loans. App. 3a. In 2004, respondents filed a putative class action against petitioners in Missouri state court, alleging that FirstPlus charged them fees, in connection with the origination of their loans, that violated the Missouri Second Mortgage Loans Act (MSMLA), Mo. Rev. Stat. §§ 408.231-408.241. App. 3a. More specifically, respondents' state-court petition (the Missouri equivalent of a complaint) alleged (¶ 67) that the Thomas respondents were charged, among other fees, "a 10% origination fee" that Missouri law did not permit. Among other remedies, respondents sought "the return of all interest charged … on any of these Second Mortgage Loans." *Id.* at 49 (Prayer for Relief).

Petitioners removed the case to federal court on the ground that DIDA completely preempted respondents' claims and hence they arose under federal law, giving the district court original jurisdiction under 28 U.S.C. § 1331. *See* App. 4a. Petitioners "relied primarily upon th[is] … Court's decision in *Beneficial National Bank* v. *Anderson*, … alleg[ing that] the similar-

ity in language between DIDA and the NBA compelled the conclusion that DIDA, like the NBA, created the exclusive federal remedy for usury claims against federally-insured, state-chartered banks." *Id.*

Following removal, respondents filed an amended petition that reiterated the allegation regarding the origination fee paid by the Thomas respondents and further alleged (¶ 72) that respondent Rich was illegally charged "an 8.5% origination fee." Respondents also moved for a remand to state court, asserting that DIDA did not completely preempt their claims, in part because the claims were based not on the periodic interest rates they were charged but on the origination fees and certain other fees imposed in connection with the loans. App. 4a, 15a, 16a.

The district court denied respondents' motion to remand, agreeing with petitioners that DIDA "'completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge.'" App. 16a (quoting *In re Community Bank*, 418 F.3d at 295). The court specifically rejected respondents' attempt to distinguish periodic interest rates from loan fees, relying on a then-recent Eighth Circuit decision, *Phipps* v. *FDIC*, 417 F.3d 1006 (8th Cir. 2005), that had held such a distinction untenable. *See* App. 16a. The *Phipps* court, in turn, had based its holding on: 1) a regulation issued by the Comptroller of the Currency that broadly construes the term "interest" under the NBA to encompass numerous types of fees, *see* 12 C.F.R. § 7.4001(a); and 2) *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), in which this Court deferred to that broad definition, deeming it reasonable and thus entitled to deference, *see id.* at 740-745; *Phipps*, 417 F.3d at 1011-1012.

After concluding that it had jurisdiction by virtue of complete preemption, the district court granted petitioners' motion to dismiss the complaint on substantive preemption grounds. *See* App. 19a-20a. Respondents moved for reconsideration but the district court declined to reconsider, noting that since its order denying remand, a second court of appeals had concluded that DIDA completely preempts state-law usury claims against federally insured state banks. *See* App. 22a (citing *Discover Bank*, 489 F.3d 594).

4. The Eighth Circuit reversed. *See* App. 1a-13a. In its view, "the language of DIDA, unlike the NBA, does not reflect Congress' intent to provide the exclusive cause of action for a usury claim against a federally-insured state-chartered bank." App. 6a. In particular, the court observed that both the substantive and remedial provisions in § 1831d indicate that they apply only "if the applicable rate prescribed in [§ 1831d(a)] exceeds the rate [a] State bank … would be permitted to charge in the absence of" that subsection. 12 U.S.C. § 1831d(a), (b), *quoted in* App. 7a. According to the court of appeals, this language "clearly indicates the limited nature of the federal statute's preemption of state law." App. 8a. Such a "limited nature," the court reasoned, precluded the conclusion that Congress intended the cause of action in § 1831d(b) to be exclusive, i.e., precluded the conclusion that any state-law claims were completely preempted. *See* App. 10a-11a.

The court of appeals acknowledged that "other federal courts have interpreted the language in § 1831d differently." App. 11a (citing *Discover Bank*, 489 F.3d 594). The court contended, however, that these courts had failed to consider "the unabridged language of the statute." App. 12a. The court did not address how its own conclusion could be squared with Congress's in-

tent—revealed both in "the unabridged language of the statute" and in the legislative history—to put national and state banks on an equal footing "with respect to interest rates," 12 U.S.C. § 1831d(a).

The Eighth Circuit also ruled that by its terms § 1831d does not apply in this case because the maximum periodic percentage interest rate that Missouri law allowed for each of the loans at issue was either 20.04% or unlimited (depending on the timing of the particular loan), "well in excess of the rate allowed by DIDA." App. 10a (citing Mo. Rev. Stat. § 408.232(1)). The court did not explain this conclusion, and in particular never stated what "the rate allowed by DIDA" was. More importantly, although respondents had, as noted, argued that their claims were based on loan fees rather than periodic interest rates, the Eighth Circuit did not—as required by this Court's holding in *Smiley* that "interest" for these purposes includes various loan fees—compare the fees that Missouri law permitted on the loans at issue with the fees allowed under DIDA, i.e., the fees allowed by the law of California, FirstPlus Bank's home state.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision creates an acknowledged conflict in the circuits on whether section 521 of DIDA, 12 U.S.C. § 1831d, completely preempts state-law usury claims against state-chartered, federally insured banks. That question is important and recurring, and given the integrated banking system that prevails nationwide it is one on which a uniform answer is essential. Moreover, the Eighth Circuit's answer to the question is wrong. This Court's review is therefore warranted. Review is also warranted of the second question presented, because the court of appeals' ruling

that DIDA does not apply here conflicts with *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). There, this Court held—deferring to the Comptroller of the Currency's statutory interpretation—that many loan fees constitute "interest" under 12 U.S.C. § 85. *See* 517 U.S. at 740, 744-745. Yet here the Eighth Circuit ignored fees, looking only to periodic percentage interest rates in concluding that the "interest" allowed on the loans to respondents was greater under Missouri law than under DIDA.

I. THE EIGHTH CIRCUIT'S COMPLETE-PREEMPTION HOLDING IS WRONG AND CREATES A CIRCUIT CONFLICT ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

A. The Decision Below Conflicts With Decisions Of The Third And Fourth Circuits

The court of appeals held here that section 521 of DIDA, 12 U.S.C. § 1831d, does not completely preempt state-law usury claims against federally insured state banks. *See* App. 10a-11a. As the court itself recognized, "other federal courts have interpreted the language in § 1831d differently." App. 11a. Specifically, in *In re Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005), the Third Circuit held that "§ 521 of DIDA completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge," *id.* at 295 (footnote omitted). The Fourth Circuit later reached the same conclusion. *See Discover Bank* v. *Vaden*, 489 F.3d 594, 605-606 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009). And the Ninth Circuit has suggested that it too shares this view, though without actually deciding the issue. *See Cross-Country Bank* v. *Klussman*, 74 F. App'x 796, 797 (9th Cir. 2003)

("[I]t appears that the rationale of the Supreme Court's decision in *Anderson* would extend to usury claims against state chartered, federally insured banks.").[5]

In finding complete preemption under DIDA, the Third and Fourth Circuits both invoked this Court's holding that section 30 of the National Bank Act, 12 U.S.C. §§ 85-86, completely preempts state-law usury claims against national banks. *See Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 9-11 (2003), *cited in In re Community Bank*, 418 F.3d at 294-295, and *Discover Bank*, 489 F.3d at 604-605. Each circuit then noted that Congress drew the relevant language in DIDA from that section of the NBA, and each circuit thus applied the principle, repeatedly enunciated by this Court, that "[w]hen Congress borrows language from one statute and incorporates it in another statute, the language of the two acts ordinarily should be interpreted the same way." *In re Community Bank*, 418 F.3d at 295-296 (citing, among others, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992)), *quoted in Discover Bank*, 489 F.3d at 605. The Fourth Circuit also drew support for its holding from an amicus brief filed with the court by the FDIC—the agency that regulates federally insured state banks, *see* 12 U.S.C. § 1813(q)(3)—a brief that argued for complete preemption on the strength of *Anderson* after noting that "[t]he agency has 'uniformly construed Section 1831d in pari materia

---

[5] District courts have likewise divided on the issue. *Compare, e.g.*, *Forness* v. *Cross Country Bank, Inc.*, No. 05-cv-417, 2006 WL 240535, at *3 (S.D. Ill. Jan. 13, 2006), *and Hill* v. *Chemical Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992) (each finding complete preemption), *with Saxton* v. *Capital One Bank*, 392 F. Supp. 2d 772, 784 (S.D. Miss. 2005), *and Partin* v. *Cableview, Inc.*, 948 F. Supp. 1046, 1049 & n.4 (S.D. Ala. 1996) (each holding the opposite).

with Sections 85 and 86.'" *Discover Bank*, 489 F.3d at 606 (quoting Brief of Amicus Curiae Federal Deposit Insurance Corporation at the Request of the Court, at 10, *Discover Bank* (No. 06-1221), *available at* 2007 WL 551361 (hereafter FDIC Amicus Br.)).

In addition to directly conflicting with these other circuit decisions, the Eighth Circuit's interpretation of DIDA is in tension with decisions of two other circuits (and with several of its own prior cases) likewise recognizing, in other contexts, that 12 U.S.C. § 1831d should be construed identically with §§ 85-86 because it was patterned after those sections and intended to have the same meaning. *See Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992) ("The historical record clearly requires a court to read the parallel provisions of DIDA and the [National] Bank Act *in pari materia*."); *Gavey Props./762* v. *First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (identical interpretation of the two statutes "virtually compelled" "[g]iven the similarity of language"); *Mamot Feed Lot & Trucking* v. *Hobson*, 539 F.3d 898, 903 n.4 (8th Cir. 2008) ("Courts construe the parallel provisions of § 85 and § 1831d similarly, as § 1831d was modeled after § 85."); *Venture Props., Inc.* v. *First S. Bank*, 79 F.3d 90, 91 (8th Cir. 1996) (citing *Greenwood Trust* for the proposition that "12 U.S.C. § 1831d parallels 12 U.S.C. § 85 and should be interpreted the same way"). Had the court of appeals adopted the same approach here—an approach that this Court's decisions direct, *see supra* p.14; *infra* pp.17-18—it necessarily would have reached the opposite conclusion regarding complete preemption, given this Court's holding that section 30 of the NBA completely preempts state-law usury claims against national banks, *see Anderson*, 539 U.S. at 9-11.

B. The Question Presented Is Recurring And Important

This Court's resolution of the circuit conflict created by the Eighth Circuit's decision is warranted. The divisions at both the circuit and district court levels, *see supra* pp.13-14 & n.5, demonstrate that the question presented is a recurring one. And prompt resolution of that question is important—just as it was with the analogous question under the NBA, which this Court took up as soon as a circuit conflict developed, *see Anderson*, 539 U.S. at 5-6 (noting that the court of appeals decision in that case conflicted with the holding of one other circuit).

A definitive answer to the question presented is needed because the disuniformity and uncertainty created by the circuit conflict are inimical to state banks, and to the secondary markets in which state banks may sell loans after origination. As this Court has observed, "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that need[s] protection from 'possible unfriendly State legislation.'" *Anderson*, 539 U.S. at 10 (quoting *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874)); *see also Talbott* v. *Board of Comm'rs*, 139 U.S. 438, 443 (1891) (federal law evinces "an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits"); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-316 (1978) (similar). Federally insured state banks are no less a part of that integrated nationwide banking system than national banks; hence, the importance of uniformity regarding their liability is just as great. Likewise, state banks, particularly when en-

gaged in interstate lending, also need protection from "possible unfriendly State legislation." Indeed, Congress's purpose in adopting § 1831d was to ensure that state banks did not suffer a competitive disadvantage because of provisions of state law from which Congress had already shielded national banks. *See supra* pp.7-8. Finally, because many loans are between banks and borrowers located in different States, disuniformity in the law can "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984).[6]

C. The Court Of Appeals' Holding Is Wrong

The court of appeals erred in concluding that § 1831d does not completely preempt state-law usury claims against federally insured state banks. This Court has repeatedly made clear that similar language in different statutes should be given the same meaning. *See, e.g.*, *Northcross* v. *Board of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) ("The similarity of language in [two statutes] is, of course, a strong indication that the two statutes should be interpreted *pari passu*."), *cited in Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005); *see also In re Community Bank*, 418 F.3d at 296 (citing several decisions from this Court). That principle is relevant here because Con-

[6] The need for uniformity also underlay this Court's finding of complete preemption in the labor-management and ERISA contexts. *See Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 210 (1985) ("[T]he subject matter of [LMRA] § 301(a) is peculiarly one that calls for uniform law." (first alteration in original) (internal quotation marks omitted)); *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988) (similar); *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

gress consciously drew the text of § 1831d from section 30 of the National Bank Act, 12 U.S.C. §§ 85-86. *See supra* pp.8-9. And this Court held in *Anderson* that those provisions of the NBA completely preempt state-law usury claims against national banks. *See* 539 U.S. at 9-11. The parallel language in § 1831d should thus likewise be construed to completely preempt state-law usury claims.

Indeed, the argument for complete preemption is even stronger here than it was in *Anderson*, because of a second rule of statutory interpretation. That rule states that Congress's inclusion of pre-existing language in a statute is presumed to incorporate any settled judicial construction of that language. *See, e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006)); *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998). Thus, whereas the canon just discussed directs courts to construe two statutes in parallel but does not indicate what the proper construction is, this canon directs courts to embrace a specific construction—namely the one that Congress, at least implicitly, has endorsed. And by the time of DIDA's passage in 1980, it had been settled for decades that the language in section 30 of the NBA (12 U.S.C. §§ 85-86) reveals a congressional intent to create an exclusive cause of action for usury claims against national banks. *See Anderson*, 539 U.S. at 10 (citing, among others, *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 32-33 (1875); *Evans* v. *National Bank of Savannah*, 251 U.S. 108, 114 (1919)). Congress's application of essentially the same language to state banks in § 1831d compels the conclusion that it intended the cause of action in that section to be exclu-

sive as well. That congressional intent is "dispositive" as to complete preemption. *Anderson*, 539 U.S. at 9.

The Eighth Circuit reached the opposite conclusion on the ground that both the substantive and remedial provisions in § 1831d include the phrase "if the applicable rate prescribed in [§ 1831d(a)] exceeds the rate [a] State bank … would be permitted to charge in the absence of" that subsection. 12 U.S.C. § 1831d(a), (b); *see* App. 7a-9a. In the court's view, this phrase indicates Congress's desire to limit the reach of the cause of action in § 1831d(b), thus precluding a finding of complete preemption. *See* App. 10a-11a. That reasoning is flawed; the "niggling variation[]" between the two statutes identified by the court of appeals, *Greenwood Trust*, 971 F.2d at 827 n.7, does not justify its disregard of their overall "striking" similarity, *id.* at 826 n.7.

The relevant portions of both DIDA and the NBA serve the same purpose: to shield federally insured state and national banks, respectively, from the limits imposed by state usury laws. Each statute, moreover, accomplishes that goal in the same way: by giving banks the authority to charge a federally prescribed rate, namely (in both statutes) the higher of "the rate allowed by the laws of the State … where the bank is located" and "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. 12 U.S.C. §§ 85, 1831d(a). And each statute creates a federal cause of action, with the same limitations period and the same prescribed damages, against banks that exceed that federally authorized maximum. *See id.* §§ 86, 1831d(b). The "if" clause on which the Eighth Circuit focused is insignificant: It merely recognizes that if the DIDA rate is no higher than what state law authorizes, the protection

the statute grants is unnecessary, as the bank can simply charge the state rates. *See Gavey Props.*, 845 F.2d at 522 (rejecting an argument like the Eighth Circuit's on the ground that the "conditional clause … can be seen as simply providing a more exacting formulation than § 85 of Congress's intent to aid federally insured financial institutions").[7]

There is additional evidence, moreover, that Congress, unlike the Eighth Circuit, sees no substantive difference between the language in §§ 85-86 and the language in § 1831d. DIDA included two other provisions virtually identical to section 521 (i.e., § 1831d), the first of which applied to federally insured savings and loan associations (section 522) and the second of which applied to insured credit unions (section 523). Like section 521, both of these other sections included the "if" clauses on which the Eighth Circuit placed dispositive weight here. *See* DIDA § 522, 94 Stat. at 165 (codified until 1989 at 12 U.S.C. § 1730g); *id.* § 523, 94 Stat. at 166 (codified at 12 U.S.C. § 1785(g)). In 1989, Congress repealed the statutory section containing the savings and loan provision, and re-enacted that provision elsewhere. *See* Financial Institutions Reform, Recovery, and Enforcement Act § 407, Pub. L. No. 101-73, 103 Stat. 183, 363 (repealing § 1730g); *id.* § 301, 103 Stat. at 277, 282 (re-enacting the language). The re-enacted section omits the "if" clause from the substantive provision, instead using the phrasing in the NBA, i.e., in 12 U.S.C. § 85. *See* 12 U.S.C. § 1463(g)(1). The language

[7] *Gavey Properties* involved section 522 of DIDA, which, as discussed immediately below, applied to federally insured savings and loan associations but used the same language as section 521. *See* 94 Stat. at 165 (codified until 1989 as 12 U.S.C. § 1730g).

of the re-enacted remedial provision is also closer to its NBA counterpart than the original version. Yet the legislative history of FIRREA states explicitly that the re-enactment was not intended to effect a substantive change. *See* H.R. Rep. No. 101-54, at 343 (1989) ("The effect of this section is to preserve the current preemption of state usury laws."). Congress thus evidently does not view the inclusion or omission of the "if" clause on which the Eighth Circuit focused as altering the extent to which state usury laws are preempted.

Further confirming the infirmity of the Eighth Circuit's interpretation is the fact that that interpretation fails to give effect to Congress's manifest purpose in adopting DIDA. *See Discover Bank*, 489 F.3d at 604 (construing DIDA in light of "the purpose underlying [its] enactment"). *See generally*, *e.g.*, *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (statutory interpretation includes "considering the purpose and context of the statute"). As the statutory text states—in language the Eighth Circuit never discussed—Congress passed section 521 "to prevent discrimination against State-chartered insured depository institutions … with respect to interest rates." 12 U.S.C. § 1831d(a). Congress's explicit objective, in other words, was to provide federally insured state banks with the same privileges and protections, in terms of interest rates and usury laws, enjoyed by national banks. *See* FDIC Amicus Br. 10 ("Congress patterned Section 1831d after Sections 85 and 86, used similar language in both statutes, provided comparable remedies, and expressed its intent to provide state banks parity with national banks."). The legislative history confirms this intent. *See supra* pp.8-9; *cf. Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 65-66 (1987) (relying on the legislative history of ERISA section 502 in holding that that sec-

tion completely preempts state-law claims). In fact, the conference report accompanying DIDA directly contradicts the Eighth Circuit's view that DIDA's preemptive effect is more limited than the NBA's, stating that "[s]tate usury ceilings on all loans made by Federally insured depository institutions … will be permanently preempted." H.R. Conf. Rep. No. 96-842, at 78 (1980) *reprinted in* 1980 U.S.C.C.A.N. 298, 308. Recognizing that the cause of action for usury is necessarily federal, and therefore removable, is a critical part of the protection that Congress sought to provide, just as it was with national banks and the NBA. The Eighth Circuit's decision here wrongly denies that protection to federally insured state banks.[8]

Finally, even if the Eighth Circuit's reading of the statutory language were correct, the court's conclusion that DIDA does not completely preempt any state-law claims would not follow. The court's interpretation was that "the remedy set forth in § 1831d(b) only applies in limited circumstances." App. 10a. But that does not warrant a holding that the remedy is not exclusive in those "limited circumstances," i.e., when it *does* apply. As this Court has repeatedly explained, complete preemption means that putative state-law claims are actually federal claims if they fall within the scope of an exclusive federal cause of action—whatever that scope may be. *See Anderson*, 539 U.S. at 8 ("When the federal statute completely pre-empts the state-law cause

[8] The court of appeals also saw great significance in the fact that § 1831d(a) states that it preempts state law "for the purposes of this section." *See* App. 7a-8a. It is unclear, however, how this language substantively distinguishes DIDA from the NBA, and specifically what additional "purposes" the Eighth Circuit thought could be served by the complete preemption effected by the NBA.

of action, a claim which comes within the scope of that cause of action … is in reality based on federal law."); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24 (1983) (similar). The Eighth Circuit's view that the scope of § 1831d(b) is narrower than petitioners contend (and other courts have found) simply does not lead to, or in any way support, the conclusion that even claims falling within that narrower scope avoid being completely preempted. What Congress intended a federal cause of action's scope to be, and whether it intended that cause of action to be exclusive, are two distinct inquiries.

The court of appeals' flawed analysis appears to have been driven by the assumption that complete preemption could be found only if Congress intended § 1831d to preclude all state-law usury claims. But that assumption is unwarranted (although, as explained, the language and history of DIDA establish that Congress did so intend). Again, the question is simply whether Congress intended a cause of action to be exclusive of state-law claims falling within its scope. Indeed, if the Eighth Circuit's reasoning were sound, then this Court should not have (unanimously) found complete preemption in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), because section 301 of the LMRA does not completely preempt *all* state-law claims between unions and employers, but only "claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394 (1987) (quoting *International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 859 n.3 (1987)); *see also Caterpillar*, 482 U.S. at 396 n.10 (similar); *Livadas* v. *Bradshaw*, 512 U.S. 107, 122 n.16 (1994). Likewise, under the Eighth Circuit's analysis

this Court's unanimous decision in *Metropolitan Life Insurance* was wrong, because ERISA does not "pre-empt entirely every state cause of action relating to [ERISA] plans," *Franchise Tax Bd.*, 463 U.S. at 25, but only those that fall "within the scope of § 502(a)," *Metropolitan Life Ins.*, 481 U.S. at 64.

In sum, because the decision below is wrong and creates a circuit conflict on an important and recurring issue of federal law, this Court's review is warranted.

II. THE EIGHTH CIRCUIT'S HOLDING THAT DIDA DOES NOT APPLY TO THE LOANS AT ISSUE HERE RESTS ON A DEFINITION OF "INTEREST" THAT CONFLICTS WITH THIS COURT'S DECISION IN *SMILEY*

The court of appeals committed a second, closely related error in this case. It held that section 521 of DIDA by its terms does not even 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 (emphasis omitted) (citing Mo. Rev. Stat. § 408.232(1)). That statement—which was the entirety of this part of the Eighth Circuit's analysis—addresses only periodic percentage interest rates. Under § 1831d, however, the term "interest" encompasses many types of fees, not simply periodic rates. The Comptroller of the Currency has interpreted "interest" under 12 U.S.C. § 85 to mean "any payment compensating a creditor or prospective creditor for an extension of credit," even if the payment is a flat fee or otherwise not calculated as a function of time. 12 C.F.R. § 7.4001(a). In *Smiley* v. *Citibank (S.D.), N.A.*, this Court rejected a challenge to that interpretation, deeming it reasonable and hence entitled to judicial deference. *See* 517 U.S. at 741-742 ("[I]t

seems to us quite possible and rational to distinguish, as the regulation does, between those charges that are specifically assigned to [certain] expenses and those that are assessed for simply making the loan." (emphasis omitted)). And the FDIC has since adopted the same interpretation of "interest" in § 1831d. *See General Counsel's Op. No. 10: Interest Charges Under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 19,258, 19,259 (Apr. 17, 1998).

Because the threshold question under § 1831d is whether the "interest" allowed by DIDA—namely the higher of the applicable 90-day discount rate and the interest allowed by the law of the originating bank's home state—is in any instance higher than what would be allowed absent DIDA, *Smiley* required the Eighth Circuit to compare the loan fees permitted by DIDA (i.e., the fees allowed by the law of California, FirstPlus Bank's home state) to the fees permitted by Missouri law, as well as comparing the periodic interest rates. Indeed, a comparison of fees was particularly appropriate here because respondents, as discussed, stressed in their briefing below that their claims against petitioners were based solely on such fees, particularly origination fees. *See* Resps.' C.A. Br. 6 ("Plaintiffs' MSMLA claims are *not* based on allegations that the interest rates they were charged exceeded the rate permitted under [Mo. Rev. Stat.] section 408.232.1 …. Instead, Plaintiffs' claims are based entirely on allegations that they were charged unauthorized and excessive loan fees …."); *see also supra* pp.9-10 (describing respondents' allegations). In failing to compare the permissible fees, the Eighth Circuit departed from *Smiley*.

The fees comparison mandated by *Smiley* makes clear that DIDA does govern here. As the Eighth Circuit itself noted, *see* App. 3a n.1, Missouri law places

several limits on the fees, including origination fees, that can be charged in connection with second mortgages, *see* Mo. Rev. Stat. § 408.233(1); *Adkison* v. *First Plus Bank*, 143 S.W.3d 29, 30 (Mo. Ct. App. 2004) (per curiam); *see also* App. 3a n.1 ("The limits on closing costs and fees provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher [periodic] interest rate on second mortgage loans."). By contrast, California law, applicable under DIDA because the originator of the loans to respondents was a California-chartered bank, *see* App. 2a, imposes no such limits. Hence, DIDA applies here because the fees—and thus the "interest" as that term is used in DIDA—that could be charged to respondents under California law exceeds the fees (i.e., "interest") that could be charged under Missouri law.[9]

The Eighth Circuit itself reached a comparable conclusion in *Phipps* v. *FDIC*, 417 F.3d 1006 (8th Cir. 2005), in which the court correctly applied *Smiley* to a case that arose under the NBA but was otherwise quite similar to this action. In *Phipps*, as here, the plaintiffs sought to avoid complete preemption of their MSMLA

---

[9] Although not all loan fees constitute interest under *Smiley*, the origination fees on which respondents' claims are partly based do so: An interpretive letter from the Office of the Comptroller of the Currency (OCC) states that a fee to open a home-equity line of credit constitutes interest because it is not "'specifically assigned'" to cover the cost of an activity or service. *Whether Certain Fees Levied By A Bank In Connection With Home Equity Loans Constitute Interest Under 12 U.S.C. 85 And 12 C.F.R. 7.40001(a)*, OCC Interpretive Letter No. 803 (Oct. 7, 1997), *available at* 1998 WL 320183, at *2-3 (quoting *Smiley*, 517 U.S. at 741-742). The same is true of loan-origination fees—a direct analogue to a line-of-credit opening fee—as the Eighth Circuit itself has previously recognized, *see Phipps* v. *FDIC*, 417 F.3d 1006, 1012 (8th Cir. 2005) (origination fees are "[c]learly" interest).

usury claims by "strenuously argu[ing] their claims are based on unlawful *fees* charged, not unlawful *interest*." *Id.* at 1009. Noting that it was "required to look beyond the plaintiffs' artful attempts to characterize their claims to avoid federal jurisdiction," *id.* at 1011, and citing its own precedent as well as cases from several other circuits that had conducted a similar analysis, *see id.* at 1012, the court of appeals deemed the fees at issue to be "interest" under *Smiley* and therefore held the plaintiffs' claims completely preempted under *Anderson*, *see id.* at 1011-1012.

In short, the decision below conflicts with this Court's decision in *Smiley*. Moreover, petitioners alerted the court of appeals about this conflict in requesting rehearing, yet the court declined the request. Under these circumstances—and particularly given the close link between the Eighth Circuit's departure from *Smiley* and its ruling on the complete-preemption issue—this Court's review of the second question presented is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
DAVID S. LESSER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

PETER W. CARTER
PAUL R. DIESETH
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402
(612) 340-7892

THOMAS L. ALLEN
ROY W. ARNOLD
DAVID J. BIRD
REED SMITH LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222
(412) 288-3131

TODD W. RUSKAMP
SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
7th Floor
Kansas City, MO 64108
(816) 474-6550

WILLIAM E. QUIRK
MARK A. OLTHOFF
MIRIAM E.C. BAILEY
POLSINELLI SHUGHART P.C.
1700 Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
(816) 421-3355

MICHAEL G. BIGGERS
BRYAN CAVE LLP
211 North Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2145

SCOTT W. MARTIN
MICHAEL S. HARGENS
DAVID A. SCHATZ
HUSCH BLACKWELL
SANDERS LLP
4801 Main Street
Suite 1000
Kansas City, MO 64112
(816) 983-8000

MARCH 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3302

DEANTHONY THOMAS; SUSAN JELINKE-THOMAS;
STEVEN M. RICH,
Appellants,

v.

US BANK NATIONAL ASSOCIATION ND; ACE SECURITIES CORP. HOME LOAN TRUST 1999-A ASSET BACKED NOTES, SERIES 1999-AA; U.S. BANK N.A.; WILMINGTON TRUST COMPANY; FIRSTPLUS HOME LOAN OWNER TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUST 1996-3; FIRSTPLUS HOME LOAN OWNER TRUST 1996-4; FIRSTPLUS HOME LOAN OWNER TRUST 1997-1; FIRSTPLUS HOME LOAN OWNER TRUST 1997-2; FIRSTPLUS HOME LOAN OWNER TRUST 1997-3; FIRSTPLUS HOME LOAN OWNER TRUST 1997-4; FIRSTPLUS HOME LOAN OWNER TRUST 1998-1; FIRSTPLUS HOME LOAN OWNER TRUST 1998-2; FIRSTPLUS HOME LOAN OWNER TRUST 1998-3; FIRSTPLUS HOME LOAN OWNER TRUST 1998-4; FIRSTPLUS HOME LOAN OWNER TRUST 1998-5; THE ASSOCIATES; CIT GROUP; CONTIMORTGAGE CORPORATION; GOLETA NATIONAL BANK; MASTER FINANCIAL; NORWEST HOME IMPROVEMENT, INC.; PSB LENDING; RESIDENTIAL FUNDING CORPORATION; HOUSEHOLD FINANCE CORPORATION; CHALLENGE REALTY; GERMAN AMERICAN CAPITAL CORPORATION; SOVEREIGN BANK; PAIN WEBBER REAL ESTATE SECURITIES INC.; UBS REAL ESTATE SECURITIES, INC.; COUNTRYWIDE

HOME LOANS, INC.; BANC ONE FINANCIAL SERVICES INC.; FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF PFF BANK; WESTERN INTERSTATE BANCORP,
Appellees,

Appeal from the United States Court District Court
for the Western District of Missouri
Argued: April 13, 2009
Decided: August 7, 2009

[575 F.3d 794]

* * *

[795]

Before: MURPHY, HANSEN, and BYE, Circuit Judges.

[796]

BYE, Circuit Judge.

Deanthony Thomas, Susan Jelinke-Thomas, and Steven M. Rich (collectively Thomas) brought claims in Missouri state court against a number of banks and lending institutions (collectively the lenders) alleging violations of the Missouri Second Mortgage Loans Act (MSMLA), Mo. Rev. Stat. §§ 408.231-.241, arising out of loans originated by FirstPlus Bank (a California lending institution which is now defunct) and subsequently purchased by the lenders. The lenders removed the case to federal court arguing the state law claims were completely preempted by the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. § 1831d. Agreeing with the lenders, the district court denied Thomas's motion to remand to state court

and then dismissed the claims. Thomas now appeals. We reverse with instructions to remand this case to state court.

I

Thomas and the other appellants are Missouri homeowners who obtained "high loan-to-value" second mortgages (reflecting a total debt of 125% of the appraised value) on their homes from FirstPlus Bank. FirstPlus Bank was a federally insured, state-chartered bank when the loans were made. FirstPlus Bank became defunct, and the loans were purchased or assumed by other banks as assignees, including some national banks.

In June 2004, Thomas brought suit in Missouri state court on behalf of himself and others similarly situated against thirty-three assignee banks of FirstPlus alleging the loans they had received violated the MSMLA, 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.[1]

Specifically, Thomas alleged the subject loans violated Missouri law because: 1) the borrowers were

[1] Missouri law allows lenders to charge a higher interest rate for second mortgage loans than the general usury rate applicable to most loans. *Compare* Mo. Rev. Stat. § 408.030.1 (generally allowing a rate of 10% or the market rate, whichever is higher) *with* Mo. Rev. Stat. § 408.232.1 (prior to 1998, setting a maximum rate of 20.04% on second mortgage loans, and setting ***no*** limit on second mortgage interest rates after 1998). The limits on closing costs and fees provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher interest rate on second mortgage loans.

charged nonrefundable finder's fees or broker's fees which were not allowed by or in excess of the fees allowed by the MSMLA; and 2) FirstPlus charged certain closing costs and fees on behalf of third parties which were in excess of the costs actually charged by those third parties and then retained the difference. Thomas sought to recover the interest paid on the allegedly unlawful second mortgage loans and an order barring the collection of additional interest. Notably, none of the subject loans violated Missouri law with respect to the maximum interest rate chargeable on a second mortgage loan, which exceeded the rate allowed by federal law pursuant to DIDA.

In August 2004, the defendant banks removed the case to federal district court. The banks alleged removal was proper because FirstPlus, the originator of the loans, was a federally-insured, state-chartered bank and DIDA (which applies to federally-insured, state-chartered banks) completely preempted the state law claims brought under the MSMLA. The banks relied primarily upon the Supreme Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), which held that the National Bank Act (NBA), 12 U.S.C. §§ 85-86, completely preempted state law usury **[797]** claims against national banks. *Id.* at 10-11. The banks alleged the similarity in language between DIDA and the NBA compelled the conclusion that DIDA, like the NBA, created the exclusive federal remedy for usury claims against federally-insured, state-chartered banks.

Thomas filed a motion to remand the case to state court. He argued the language of DIDA differed in material respects from the language in the NBA, and DIDA only preempted state usury laws in limited circumstances, that is, when the state laws set a lower al-

lowable interest rate than that allowed by federal law. Because Missouri law allowed a higher allowable interest rate than the rate set forth in DIDA, preemption was not triggered. The district court disagreed and denied the motion to remand, concluding DIDA provided the exclusive remedy for usury claims against federally-insured, state-chartered banks. Thereafter the banks brought a motion to dismiss the case, which the district court granted.

Thomas filed a timely appeal. On appeal, he renews his argument that DIDA differs in material respect from the language of the NBA, and preemption does not apply in circumstances where state law allows a higher interest rate than the interest rate set forth in DIDA. The banks renew their claim as to the statutory language in DIDA being the same as the NBA, and federal law completely preempts the state law claims brought here. The national bank defendants alternatively argue that the NBA should apply whether they are the originator of a loan or purchase a loan as an assignee, and therefore completely preempts the claims brought against them even if DIDA does not. Finally, some of the assignee banks argue the named plaintiffs lacked standing to sue them because none of the named plaintiffs (as opposed to unnamed class member plaintiffs) have loans that have been assigned to them.

II

The district court's denial of the motion to remand the case to state court is reviewed de novo, *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1004 (8th Cir. 2006), as is the district court's dismissal of the case, *Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 824-25 (8th Cir. 2004).

A

The general rule is when a claim filed in state court alleges only state law claims, the existence of a federal defense, e.g., preemption, is not enough to support the removal of the case to federal court. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). An exception to this rule is when the preemptive force of a federal statute completely displaces state law and it is clear Congress meant the federal statute to be the exclusive cause of action for the type of claim asserted. *Beneficial Nat'l Bank*, 539 U.S. at 8. Complete preemption, as opposed to ordinary or conflict preemption, is rare, however, and only applies if the "federal statutes at issue provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Id.*

Complete preemption does not exist here because the language of DIDA, unlike the NBA, does not reflect Congress' intent to provide the exclusive cause of action for a usury claim against a federally-insured state-chartered bank. To the contrary, a close examination of the statutory language indicates Congress very clearly intended the preemptive scope of DIDA to be limited to particular circumstances.

Two provisions of DIDA are at issue—the subsection discussing the circum-[798]stances under which a federally-insured state-chartered bank may charge the interest rate allowed by federal law notwithstanding state law to the contrary, 12 U.S.C. § 1831d(a) (the substantive provision), and the subsection setting forth a consumer's remedy when a bank charges interest in excess of that allowed by DIDA, 12 U.S.C. § 1831d(b) (the remedy provision). The substantive provision is set forth as follows:

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

12 U.S.C. § 1831d(a).

The plain language of the statute clearly indicates the interest rate allowed by federal law only comes into play "***if*** the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection." *Id.* (emphasis added). In other words, when the interest rate allowed by state law exceeds the interest rate set forth in DIDA, the federal statute does not apply. The limited nature of the preemptive effect the federal statute has on state law is emphasized by the qualifying phrase added to the

statute's preemption language: "notwithstanding any State constitution or statute which is hereby preempted ***for the purposes of this section***." *Id.* (emphasis added). In other words, conflicting state constitutions or statutes are not preempted for every and all purposes, but only for purposes of "this section."

The remedy provision is set forth as follows:

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

12 U.S.C. § 1831d(b).

This remedy provision, as does the substantive provision, clearly indicates the **[799]** limited nature of the federal statute's preemption of state law, by stating the federal remedy only applies "***[i]f*** the rate prescribed in subsection (a) of this section exceeds the rate such

State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section." *Id.* The limited scope of preemption is emphasized by the subsection's phrase stating "and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section" which follows the conditional circumstances under which the statute applies, i.e., ***if*** the federal rate exceeds the rate allowed by state law. In other words, the plain language of the statute ties the preemptive effect it has on state law to the condition being met. By stating "and such state fixed rate is thereby preempted," the statute plainly indicates the state rate is only preempted "if" exceeded by the rate prescribed in the federal statute.

A similar statute was interpreted by this court in *Firstsouth, F.A. v. Lawson Square, Inc. (In re Lawson Square, Inc.)*, 816 F.2d 1236 (8th Cir. 1987), involving section 1730g(a) of DIDA, which applies to federally insured savings and loan associations rather than federally insured, state-chartered banks. The language of the two statutes is, however, identical. The holding in *Lawson Square* makes clear that when the federal preemption language does not "fit," state law applies. *See id.* at 1239.

In *Lawson Square*, the interest rate allowed by Arkansas law exceeded the applicable interest rate set forth in DIDA. The rate allowed by federal law under DIDA fluctuated between 9.72% and 10.22% at all applicable times, while the rate otherwise allowed by Arkansas state law fluctuated between 13.5% and 14%. *Id.* at 1238. Because the rate allowed by DIDA did ***not*** exceed the rate allowed by state law, the court correctly reasoned the federal statute did not apply:

> [W]e note immediately that the very first clause of Section [1730g(a)] reads as follows: "[i]f the applicable rate prescribed in this section exceeds the rate an insured institution … would be permitted to charge in the absence of this section …". The "applicable rate" referred to is the federal discount rate plus one per cent.; the rate that would be permitted in the absence of this section is the Arkansas Constitution's present limit of federal discount rate plus five per cent. Attempting to substitute these terms for the words which represent them produces a false statement, for in fact the "applicable rate" does not exceed the "permitted rate." That being the case, we need go no further in Section [1730g(a)]; *we know that it does not apply in this instance.*

Id. 1239-40 (emphasis added).

In this case, the interest rate allowed by Missouri law for second mortgages was either as high as 20.4% or *unlimited* at all applicable times, well in excess of the rate allowed by DIDA. *See* Mo. Rev. Stat. § 408.232.1 (setting a maximum rate of 20.04% on second mortgage loans prior to 1998, and setting ***no*** limit on second mortgage interest rates after 1998). 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. Complete preemption only applies when it is clear Congress meant for the federal statute to "provide[] the *exclusive* cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8 (emphasis added). By its plain and unambiguous language, the remedy set forth in § 1831d(b) only applies in limited circumstances, and those circumstances are when the federal rate exceeds the rate al-

lowed by state law. [800] Because such a circumstance was not present in this case, just as it was not present in *Lawson Square*, the federal remedy does not apply and therefore is not the exclusive remedy. Accordingly the district court erred when it denied Thomas's motion to remand this case to state court.

We note other federal courts have interpreted the language in § 1831d differently. In *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *rev'd on other grounds* 129 S.Ct. 1262 (March 9, 2009) (2009 WL578636), the Fourth Circuit held DIDA, like the NBA, completely preempts state usury claims against federally-insured, state-chartered banks. *Id.* at 605. In so holding, the Fourth Circuit quoted the relevant provisions of § 1831d(a) in the following manner:

> In order to prevent discrimination against State-chartered insured depository institutions … with respect to interest rates … such State bank[s] … may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest … at the rate allowed by the laws of the State … where the bank is located.

Id. at 604.

Comparing this redacted version of the statute with the full version of the statute does reveal the language eliminated by the Fourth Circuit's second set of ellipsis (emphasized below) is critical to the substantive meaning of the statute:

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

12 U.S.C. § 1831d(a).

We will not alter the statutory language in such manner to support a conclusion as to DIDA completely preempting state law while providing the exclusive federal remedy for state usury claims against federally-insured, state-chartered banks. Rather, the unabridged language of the statute, which is both the starting and ending point of our analysis, *see Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914, 918 (8th Cir. 2008) (indicating that when "the plain language of the statute controls … we need not con-

sider the parties' varying interpretations of legislative history"), clearly establishes the limited effect DIDA has on such claims.

B

Alternatively, the national banks argue the claims against them are completely preempted under sections 85 and 86 of the NBA. We disagree. The national banks did not originate the loans at issue, but rather are assignee banks who subsequently purchased the loans. As assign-[801]ees, they are subject to all the claims which could have been brought against the originator of the loan. *See* 15 U.S.C. § 1641(d) ("Any person who purchases or is otherwise assigned a [tainted] mortgage … shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the [original lender]."). To hold otherwise would allow an originating bank to cleanse an otherwise illegal loan merely by assigning it to a national bank.

Finally, some of the defendant banks (non-holder banks) argue they are not purchasers or assignees of any FirstPlus Bank second mortgage loans subject to the MSMLA, and therefore the plaintiffs lack standing to bring the claims against them. We decline to address this issue, preferring it be raised in the first instance upon remand to state court.

III

The judgment of the district court is reversed and the case is remanded to the district court with instructions to reinstate the claims and remand the case to state court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 04-cv-6098-HFS

DEANTHONY THOMAS, *et al.*,
Plaintiffs,

v.

U.S. BANK N.A. N.D., *et al.*,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs contend their mortgage loans were tainted by practices by the lender that violate a Missouri statute in connection with various overcharges and fees. Defendants, assignees of the loan obligations of plaintiffs, removed the case to this court on the theory that federal law preempts certain claims of usurious practices by lenders. The lender in this case was FirstPlus Bank (FPB), a California lending institution, now in bankruptcy, which was subject to California laws governing interest.

The defendant assignees contend they are protected by federal law (Sections 85 and 86 of the National Banking Act—the NBA—12 U.S.C. §§ 85-86) which allegedly preempts use of Missouri law in these circumstances. An alternative theory of protection would be that FPB, by reason of federal deposit insurance, was also protected by preemption, under the De-

pository Institutions Deregulation and Monetary Control Act—DIDA—12 U.S.C. § 1831d. Plaintiffs challenge these theories and seek remand.

As an initial matter, I disagree with defendants regarding preemption by the NBA. They were not originators of the loans, but simply assignees. I have so ruled in similar circumstances, and granted a remand. Defendants are soundly invoking DIDA, however, because FPB was the originator of the loans, and the section cited above "completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 295 (3rd Cir. 2005).[1]

In this case and in what appears to be a companion case plaintiffs' counsel has argued that there is no preemption because there is no challenge here to the interest charged by FPB. The Eighth Circuit has, however, recently determined that at least some of the claims should be characterized as complaining about excessive interest, broadly construed. *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005). That ruling has finality, in that the mandate was issued earlier this month.

When there are some claims of excessive interest, the whole case is removable, 417 F.3d at 1011. I do not find briefing by plaintiffs attempting to distinguish the adverse ruling of the district judge in *Phipps*, and to assert that if excessive interest was claimed there that

---

[1] Whether defendants have standing to assert FPB's preemption rights is not questioned by plaintiffs, and I assume there is standing. Another issue not before me is the possibility that FPB violated California law, which is not the thrust of this litigation.

is not the situation here. Under the circumstances the motion to remand (doc. 69) must be denied. SO ORDERED.[2]

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

September 30, 2005
Kansas City, Missouri

[2] I will deal with a renewed motion to dismiss on the briefing heretofore filed, but it must be noted that the *Phipps* case creates a dilemma for plaintiffs in saying that to the extent they may be challenging charges that are *not* interest they are not entitled to complain under the Missouri statute, and "have failed to state a claim under Missouri law for which relief may be granted." 417 F.3d at 1014.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 04-cv-6098-HFS

DEANTHONY THOMAS, *et al.*,
Plaintiffs,

v.

U.S. BANK N.A. N.D., *et al.*,
Defendants.

ORDER

Through one of the oddities of computerized record-keeping, a collection of complex motions in this litigation, dating back some three years, now emerges as unruled motions. They should have appeared periodically in computer reports, and, when six months old, have been listed overdue. They have now been called to my attention. One might wonder why plaintiffs' counsel did not make inquiry.

Further examination suggests the case has been abandoned, because Eighth Circuit law now establishes that the claims cannot proceed as alleged State law violations, and the basic issues have been preempted by

federal law.[1] See my short memorandum on this subject two years ago. Doc. 126.

Various issues are presented: Personal jurisdictional challenges (Docs. 52 and 61), lack of standing (Doc. 54), the Missouri statute of limitations (Doc. 63), a constitutional bar to retroactive legislation (Doc. 59) and, what seems most controlling, exemption or preemption (Doc. 57). Because preemption has been ruled in a comparable case, *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), it seems to justify removal and now dismissal. Plaintiffs cannot proceed on a theory of violation of Missouri statutes.

Rather than get bogged down in other issues that are moot questions by reason of preemption and *Phipps*, I grant the motion to dismiss on preemption grounds (Doc. 57) and deny all other motions (Docs. 52, 54, 59, 61 and 63) as moot.[2] SO ORDERED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

September 26, 2007
Kansas City, Missouri

---

[1] To the extent the charges are *not* characterized as interest, and thus preempted, the *Phipps* case, infra, holds there is no violation of Missouri law. 417 F.3d at 1014.

[2] This includes defendants' request for fees, because this litigation is legally frivolous, at least after *Phipps*. If I am now moving too precipitously, because of an impending reporting date, a timely motion for reconsideration or for relief from an adverse judgment would be considered.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 04-cv-6098-HFS

DEANTHONY THOMAS, *et al.*,
Plaintiffs,

v.

U.S. BANK N.A. N.D., *et al.*,
Defendants.

ORDER

Pending is a motion to reconsider (Doc. 133) and a notice of joinder in defendants' opposition to the motion to reconsider (Doc. 136). The joinder notice is treated by the computer as a motion. To the extent leave of court is appropriate, Doc. 136 is hereby GRANTED.

Central to the reconsideration claim is the contention that the court has erroneously derived a complete preemption rule for federally insured state banks from a rule applicable only to national banks. It is contended that *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), is based on differently worded legislation relating to national banks. Plaintiffs rely on a "plain meaning" reading of the statute here involved, 12 U.S.C. § 1831d(a) and (b), and a district court decision from Mississippi. *DuBose v. Merchants and Farmers Bank*, 2006 WL 568714 (S.D. Miss. 2006). *See also Saxton v. Capitol One Bank*, 392 F. Supp. 2d 772 (S.D. Miss. 2005).

Plaintiffs acknowledge that they must overcome a contrary ruling by Judge Alsop in *Hill v. Chemical Bank*, 799 F. Supp. 951 (D. Minn. 1992). They contend only that it was inadequately reasoned; that is, not reading the words of the statute as they and the Mississippi judge do. They fail to acknowledge and discuss a Fourth Circuit case favorably citing *Hill* and reaching the same result. *Discover Bank v. Vaden*, 489 F.3d 594 (2007), *cert. granted*, 128 S. Ct. 1651 (2008). *Discover Bank* was cited in the brief in opposition but plaintiffs do not deal with it in the reply.*

Hill and *Discover Bank* are well reasoned and supported and consistent with my earlier preemption ruling. I believe they are sound and that the novel and weakly supported theory of plaintiffs does not justify changing my dispositive ruling. To the extent it is plausible it may be dealt with on appeal.

The motion to reconsider (Doc. 133) is therefore DENIED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

September 23, 2008
Kansas City, Missouri

* The Third Circuit has also considered the language in question and finds complete preemption. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 295 (2005).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3302

DEANTHONY THOMAS *et al.*,
Appellants,

v.

US BANK NATIONAL ASSOCIATION ND, *et al.*,
Appellees,

Mortgage Bankers Association, *et al.*,
Amici on behalf of Appellee

Appeal from U.S. District Court for the
Western District of Missouri—St. Joseph
(5:04-cv-06098-HFS)
Filed: November 24, 2009

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken, Judge Wollman, Judge Gruender, and Judge Benton took no part in the consideration or decision of this matter.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX F

STATUTORY PROVISIONS

12 U.S.C. § 85—Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the county, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase,

discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sightdrafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 86—Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. § 1831d—State-chartered insured depository institutions and insured branches of foreign banks

(a) Interest rates. In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch

of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) Interest overcharge; forfeiture; interest payment recovery.

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