No. 15-610

Supreme Court of the United States

MIDLAND FUNDING, LLC, AND MIDLAND CREDIT MANAGEMENT, INC.,

Petitioner,

v.

SALIHA MADDEN,

Respondent.

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

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 3,400 member organizations and their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA regularly files briefs as an amicus curiae in cases of interest to its membership.

[1]No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

The counsel of record received timely notice under Rule 37.2(a) of ACA International's intent to file this brief. All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms that employ thousands of workers. These members include the very smallest of businesses, which operate within a limited geographic range of a single state; and the very largest of multinational corporations, which operate in every state and outside the United States. About three-quarters of ACA's company members have fewer than 25 employees. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

ACA's members also help governments in recovering unpaid obligations — a function that is increasingly important as many governments face record budget deficits.

The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt. ACA is the trade association for the credit-and-collection industry, and its members make that secondary market possible because they acquire and service the hard-to-collect debts issued and sold by national banks that this case is about.

Summary of Argument

Congress enacted the National Bank Act in its current incarnation in June 1864. The Act's section 30 is today codified at 12 U.S.C. § 85, substantially unchanged. This Court interpreted that section less than a decade after its original enactment, in *Tiffany v. National Bank of Missouri*, where a bankruptcy trustee sought statutory penalties from a national bank that had charged the debtor a rate of interest (9 percent) greater than the amount allowed for banks organized under Missouri law (8 percent), but less than the amount allowed to other lenders (10 percent). The *Tiffany* Court held that the national bank was entitled to the more favorable rate because "[t]he act of Congress is an enabling statute, not a restraining one." The National Bank Act was intended to protect a national bank from any competitive disadvantage against state banks in its home state: it allowed "National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate." The Court explained that national banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government," so the National Bank Act "could not have been intended . . . to expose [national banks] to the hazards of unfriendly legislation by the States, or to ruinous competition with State banks."

The National Bank Act is intended to foster a robust national credit market, to which a healthy system of national banks is a means. It is essential to a robust national credit market that the valid-when-made rule must apply to the loans that generate that market, and those loans cannot lose their protected character simply because they pass from one market participant to another. A loan issued by a national bank, whatever else it may become, will always be a loan issued by a national bank.

The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt. The credit-and-collection industry keeps bad debt from being a total loss for the original creditor. Without debt buyers, the bank would simply charge off the loan, which would be a total loss — and would drive up the interest that the bank must charge in order to recoup that loss. But with a secondary market in hard-to-collect debt, the bank can sell the charged-off loan to a debt buyer — at a discount, to be sure, but half a loaf is better than none. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which maximizes recovery from that debt and thereby keeps interest rates down.

The Second Circuit's decision will hamper the flow of credit, and disadvantage both national banks and their customers. National banks benefit directly from the secondary market in debt collection, which lets a national bank sell hard-to-collect debt to debt buyers who are willing to assume the burden and risk of collecting on that debt, and whose resources are better aligned with the collection of such debt and whose experience lets them collect on that debt more efficiently. A third party experienced in debt collection may be a good option for the consumer as well. A consumer benefits when he or she can work out a new, more manageable payment arrangement if he or she is willing to repay the loan but facing some difficulty with paying on schedule.

The Second Circuit's decision will make debt originated by national banks less attractive to third-party buyers. When a national bank sells a hard-to-collect loan, that loan is more marketable if the most-favored-lender status comes with the package and the buyer can acquire the loan with the same terms as the bank had. But if the National Bank Act's protection evaporates when the loan leaves the national bank's hands, and resets the loan's character and terms, then the loan becomes less marketable — the debt buyer is less willing to buy, and the bank will be able to sell only at a less favorable price. The Second Circuit's decision will therefore chill the market for loans being sold by national banks, and will disadvantage national banks in managing their hard-to-collect debt.

Argument

I. The National Bank Act is "an enabling statute, not a restraining one," whose purpose is to foster a robust national credit market.

Congress enacted the National Bank Act in its current incarnation in June 1864. The Act's section 30 provided that

> Every association organized under this act may take, receive, reserve, and charge on any loans . . . interest at the rate allowed by the laws of the State or Territory where the bank is located and no more, except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding 7 percentum. . . .[2]

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[2] National Banking Act § 30, 13 Stat. 99 (1864), *quoted in Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 410 (1873).

That provision was later codified as Revised Statutes § 5197,[3] and is today codified at 12 U.S.C. § 85, substantially unchanged (except for the addition of an alternative maximum rate):

> 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

[3] *See Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549, 555 (1900).

> 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 . . . .[4]

This Court interpreted that section less than a decade after its original enactment, in *Tiffany v. National Bank of Missouri*,[5] where a bankruptcy trustee sought statutory penalties from a national bank that had charged the debtor a rate of interest (9 percent) greater than the amount allowed for banks organized under Missouri law (8 percent), but less than the amount allowed to other lenders (10 percent). The *Tiffany* Court held that national bank was entitled to the more favorable rate because "[t]he act of Congress is an enabling statute, not a restraining one."[6] The National Bank Act was intended to protect a national bank from any competitive disadvantage against state banks in its home state: it allowed "National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate."[7] The Court explained that national banks "were

[4] 12 U.S.C. § 85 (rate of interest on loans, discounts and purchases).

[5] *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409 (1873).

[6] *Id.*, 85 U.S. at 411.

[7] *Id.* at 413.

established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government," so the National Bank Act "could not have been intended . . . to expose [national banks] to the hazards of unfriendly legislation by the States, or to ruinous competition with State banks."[8]

The National Bank Act is intended to foster a robust national credit market, to which a healthy system of national banks is a means. It is essential to a robust national credit market that the valid-when-made rule[9] must apply to the loans that generate that market, and those loans cannot lose their protected character simply because they pass from one market participant to another. A loan issued by a national bank, whatever else it may become, will always be a loan issued by a national bank.

II. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt.

As part of the process of attempting to recover outstanding payments, debt collectors and debt buyers are an extension of every community's businesses. Debt collectors and debt buyers work

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[8] *Id.* at 413.

[9] *See* Pet. at 15–16.

with these businesses, large and small, to obtain payment for the goods and services already received by consumers. Their efforts have resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Recovering rightfully owed consumer debt helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls. And without effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

In 2013, Ernst &Young conducted a study to measure the various impacts of third-party debt collection on the national and state economies.[10] The study found that, in calendar 2013:

- Third-party debt collectors received approximately 1 billion consumer

[10]Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies in 2013*, July 2014, *available at* http://www.acainternational.org/files.aspx?p=/images/21594/theimpactofthird-partydebtcollectiononthenationalandstateeconomies2014.pdf (accessed Dec. 9, 2015). The study included both debt sold to a debt buyer, which acquired the issuer's interest in the debt; and debt assigned to a third-party debt collector, who acted as the issuer's (or the issuer's successor's) agent but did not acquire the issuer's interest in the debt.

accounts from creditor clients, with a face value of $756 billion.[11]

- Third-party debt collectors recovered $55.2 billion from consumers on behalf of creditor and government clients.[12]
- The third-party collection of consumer debt returned an average savings of $389 per household by keeping the cost of goods and services lower.[13]
- Third-party debt collectors helped recover rightfully-owed consumer debt totaling $44.9 billion — including $5.4 billion in New York, the state with the highest total debt collected,[14] and one of the three states to which the Second Circuit's decision applies directly.

The credit-and-collection industry keeps bad debt from being a total loss for the original creditor. A bank loans out money with the expectation of being repaid according to the loan's terms, and its resources and operations are geared toward that expectation. But sometimes the expectation is disappointed and, in those cases, a debt buyer is a more attractive option for a bank than continued

[11] *Id.* at 5.

[12] *Id.* at 3.

[13] *Id.*

[14] *Id.*

collection activity by the bank itself. Without debt buyers, the bank would simply charge off the loan, which would be a total loss — and would drive up the interest that the bank must charge in order to recoup that loss. But with a secondary market in hard-to-collect debt, the bank can sell the charged-off loan to a debt buyer — at a discount, to be sure, but half a loaf is better than none. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which maximizes recovery from that debt and thereby keeps interest rates down.

III. The Second Circuit's decision will hamper the flow of credit, and disadvantage both national banks and their customers.

National banks benefit directly from the secondary market in debt collection. That secondary market lets a national bank sell hard-to-collect debt to debt buyers who are willing to assume the burden and risk of collecting on that debt, and whose resources are better aligned with the collection of such debt and whose experience lets them collect on that debt more efficiently.

A third party experienced in debt collection may be a good option for the consumer as well. A consumer benefits when he or she can work out a new, more manageable payment arrangement if he or she is willing to repay the loan but facing some difficulty with paying on schedule. And a debt collector is likelier to be willing to work out such an arrangement with the consumer for the simple reason that a third party experienced in debt collection will be likelier to connect with a consumer whom the bank is having difficulty in reaching. According to one experienced debt collector, "[b]ased on my experience, on average debt collectors are able to work out repayment of a debt with one out of every four consumers they speak with."[15]

The Second Circuit's decision will make debt originated by national banks less attractive to third-party buyers. When a national bank issues a loan, it benefits from the most-favored-lender rule that this Court articulated *Tiffany v. National Bank of Missouri*: that the National Bank Act protects a national bank from any competitive disadvantage against state banks in its home state.[16] When a national bank sells a hard-to-collect loan, that loan is more marketable if the most-favored-lender status comes with the package and the buyer can acquire the loan with the same terms as the bank had. But if the National Bank Act's protection evaporates when the loan leaves the national bank's hands, and if the sale resets the

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[15] Nick Jarman, "What a Debt Collector's Day Is Really Like," credit.com, Oct. 14, 2014, *available at* http://blog.credit.com/2014/10/what-a-debt-collectors-day-is-really-like-98660/ (accessed Dec. 9, 2015).

[16] *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 411–13 (1873).

loan's character and terms, then the loan becomes less marketable — the debt buyer is less willing to buy, and the bank will be able to sell only at a less favorable price. The Second Circuit's decision will therefore chill the market for loans being sold by national banks, and will disadvantage national banks in managing their hard-to-collect debt.

Conclusion

This Court should grant the petition for a writ of certiorari.

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