No. 15-610

IN THE

Supreme Court of the United States

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

Petitioners,

v.

SALIHA MADDEN

Respondent.

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

BRIEF IN OPPOSITION

Daniel A. Schlanger
Counsel of Record
Kakalec & Schlanger, LLP
32 Broadway, Suite 601
New York, NY 10004
(212) 500-6114 x101
dschlanger@kakalec-schlanger.com

Counsel for respondent

QUESTION PRESENTED

Whether the National Bank Act permits a debt collector—which is neither a national bank nor affiliated with a national bank—to charge interest that is criminally usurious under New York law on defaulted consumer debt that the debt collector purchased from a national bank.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF IN OPPOSITION

The National Bank Act (NBA) permits national banks to charge borrowers interest at the rate permitted by the laws of the state where the bank is located, preempting contrary state usury law where the borrower resides. Petitioners are not national banks; they are debt collectors who buy defaulted debt from banks for pennies on the dollar and collect it for their own benefit. Yet they assert that they may charge usurious interest and assert NBA preemption on the same terms as national banks.

Neither this Court nor any circuit court has ever extended NBA preemption to debt collectors, or to *any* third-party entity that was not acting on behalf of a national bank. The Second Circuit applied settled preemption principles to the facts of this case and correctly rejected petitioners' defense.

Petitioners have failed to show that this Court should review that narrow, factbound decision. In fact, the argument against certiorari is compelling: the case involves idiosyncratic facts that do not give rise to a split or set a precedent about other types of debt; it involves a legal standard that no longer governs; it arrives in an interlocutory posture and may become moot; and it presents waiver problems because petitioners expressly disavowed an entire theory of preemption below. For these and other reasons stated more fully herein, certiorari should be denied.

STATEMENT OF THE CASE

1. In 1864, Congress enacted the NBA to facilitate the operation of a national banking system. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*,

439 U.S. 299, 314-15 (1978). The NBA governs the business activities of national banks, *i.e.*, "associations organized to carry on the business of banking under any Act of Congress." 12 U.S.C. § 37. The Office of the Comptroller of Currency (OCC), which administers the NBA, "oversees the operations of national banks and their interactions with customers." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007).

Section 85 of the NBA "sets forth the substantive limits on the rates of interest that national banks may charge." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). It provides that a national bank "may take, receive, reserve, and charge . . . interest at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. § 85. Although § 85 does not contain any preemptive language, this Court has held that the NBA completely preempts state-law usury claims against national banks charging rates allowable under § 85. *See Marquette*, 439 U.S. at 318. Instead, § 86, which prohibits banks from charging more interest than permitted by § 85, provides the "exclusive cause of action for usury claims against national banks." *Anderson*, 539 U.S. at 9, 11.

After the collapse of subprime lending threatened to derail the global economy, Congress became concerned that federal regulators had not only failed to prevent risky lending, but also preempted efforts by state regulators to do the same. *See* S. Rep. No. 111-176, 16-17 (2009). In the Dodd-Frank Wall Street and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress imposed three new limits on NBA preemption.

First, Congress codified the preemption standard applicable to "state consumer financial laws," which include but are not limited to usury laws. *See* 12 U.S.C. § 25b(a)(2). Such laws are "preempted[] only if" their application discriminates against national banks, or if:

> in accordance with the legal standard for preemption in . . . *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.

Id. § 25b(b)(1). *Barnett Bank* held that courts adjudicating NBA preemption claims "must ask whether or not the Federal and State Statutes are in irreconcilable conflict," either because they impose conflicting duties, or because the state prohibition would stand as an obstacle to Congress's purposes. 517 U.S. at 31 (quotation marks omitted).

Second, Congress required the OCC to make any further preemption determinations on a "case-by-case basis"—as opposed to blanket rulings. 12 U.S.C. § 25b(b)(1)(B). The OCC can preempt the application of individual state consumer financial laws if "substantial evidence, made on the record . . . supports the specific finding" that state law would prevent or significantly interfere with a national bank's exercise of its powers. *Id.* § 25b(c). The OCC may also preempt "the law of any other State with substantively equivalent terms" to a law that it deems preempted, *id.* § 25b(b)(3)(A), but it must "first consult with the Bureau of Consumer Financial Protection" (CFPB), *id.* § 25b(b)(3)(B). These preemption determinations receive only limited judicial deference, *see id*. § 25b(b)(5), and must be reviewed every five years, *id*. § 25b(d).

Third, Congress restricted non-bank entities' ability to claim preemption by providing that state consumer financial laws will apply to banks' subsidiaries, affiliates, and agents "to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law." *Id*. § 25b(e). It also provided that none of the federal laws at issue in this case "shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank)." *Id*. § 25b(h)(2).

Dodd-Frank was enacted on July 21, 2010. The new preemption provisions took effect no later than July 21, 2011. *See* OCC Office of Thrift Supervision Integration, Dodd-Frank Act Implementation 8 (July 14, 2011), http://tinyurl.com/Dodd-Frank-Act-Implementation.

2. In 2005, respondent Saliha Madden, a resident of New York, opened a credit card account with Bank of America (BoA), a national bank. Pet. App. 3a. Madden's account was governed by the terms and conditions detailed in her cardholder agreement with BoA. *See id.* In 2006, BoA's credit card program was consolidated into FIA Card Services, N.A. (FIA), another national bank incorporated in Delaware. *See id.* 3a, 7a.

Madden later became unable to pay her balance of approximately $5000. *Id*. 3a. In 2008, FIA deemed

Madden's debt uncollectible and charged it off.[1] *See id.* FIA then sold Madden's defaulted debt to petitioners Midland Funding, LLC and Midland Credit Management, Inc. (collectively, "Midland"). *See id.*

Unlike BoA and FIA, Midland is not a national bank. Midland is a third-party debt collector that purchases defaulted debt for pennies on the dollar,[2] and collects the debt for its own benefit. The OCC "has made clear that third-party debt buyers are distinct from agents or subsidiaries of a national bank" and has "issued guidance regarding how national banks should manage the risk associated with selling consumer debt to third parties" for the precise reason that "national banks do not exercise control over third-party debt buyers." Pet. App. 9a (citing OCC Bulletin 2014-37, Risk Management Guidance (Aug. 4, 2014)). Midland is regulated instead by the CFPB and state law.[3]

---

[1] Open-end loans, such as credit card accounts, must generally be charged off—*i.e.*, taken off a bank's balance sheet—180 days after payments are due. *See* OCC Bulletin 2000-20, Uniform Retail Credit Classification and Account Management Policy (June 20, 2000).

[2] *See, e.g.*, Encore Capital Group, Inc., Annual Report (Form 10-K) 36 (Feb. 13, 2013) (Midland's parent company and its subsidiaries purchased charged-off credit card portfolios for an average purchase price of 3.0% of face value in 2012 and 3.3% of face value in 2011 and 2010).

[3] In September 2015, the CFPB obtained a consent order and judgment against Midland and its parent company, Encore Capital Group, to resolve claims alleging a litany of abusive debt collection practices. *See* Consent Order, No. 2015-CFPB-0022.

Once FIA sold Madden's defaulted debt to Midland, no national bank retained any further interest in Madden's account. Pet. App. 3a. In an affidavit submitted below, a Midland employee explained that "as a result of the sale of [Madden's] account, [Midland] obtained complete authority to settle, adjust, compromise and satisfy same, and . . . FIA Card Services, N.A. has no further interest in the account for any purpose." C.A. JA 43-44 ¶ 5.

Upon purchasing Madden's debt, Midland could have attempted to collect the face value of the entire balance—principal and interest—that had accrued while the national banks held the debt. New York law also permitted Midland to continue charging 25% interest on that balance going forward. But Midland wanted more. In November 2010, Midland issued Madden a letter announcing that it had taken assignment of the debt and demanding 27% interest going forward—an amount that is criminal to collect in New York. Pet. App. 4a; N.Y. Penal Law § 190.40.

Despite its demand for usurious interest, Midland's business model does not depend on actually collecting interest in excess of 25%. According to Midland, it collected such interest on fewer than 1% of the 50,000 accounts in New York for

---

Encore must pay up to $42 million in consumer refunds, pay a $10 million penalty to the CFPB's Civil Penalty Fund, stop collection on over $125 million worth of debt, and stop reselling debts to other debt collectors. *See* CFPB, Press Release, *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts* (Sept. 9, 2015), http://tinyurl.com/CFPB-Takes-Action.

which it sent a dunning letter similar to the one sent to Madden, earning a grand total of $20,837 spread across these accounts over a three-and-a-half year period. C.A. JA-41. In fact, Midland often does not collect any interest at all; instead, it typically collects only a small percentage of the face value of the loans it acquires.[4]

On November 10, 2011, Madden filed a class action complaint against Midland in the U.S. District Court for the Southern District of New York. Pet. App. 4a. Madden alleged that Midland had charged usurious interest in violation of New York law, and that Midland's debt collection practices had violated the Fair Debt Collection Practices Act. Pet. App. 4a. Madden sought all relief available under these laws, including voiding the principal of her loan, which is an unusual remedy available only in New York and a handful of other states. N.Y. Gen. Oblig. Law § 5-511; 47 C.J.S. Interest & Usury § 270.

After paper discovery, but prior to depositions and the close of discovery (which remains open), Madden moved for class certification, which Midland opposed on various grounds. Pet. App. 22a. For example, it argued that in light of the small amount of usurious interest it actually collected, "a relatively insignificant number of potential class members" suffered actual damages. D. Ct. Dkt. #40, at 10.

---

[4] *See, e.g.*, Encore Capital Group, Inc., Annual Report (Form 10-K) F-17 (Feb. 13, 2013) (reporting that in 2012 Encore acquired charged-off consumer receivable portfolios with a face value of $11.4 billion, estimating that it would collect $842.8 million of that, or approximately 7.4%).

Midland cross-moved for summary judgment, arguing that Delaware law applies and permits Midland to charge 27% interest. Midland also argued that § 85 of the NBA preempts Madden's state-law claims. Pet. App. 25a-26a. Notably, Midland did not argue that applying New York usury law to it would significantly interfere with a national bank's exercise of its powers, nor did it cite to the *Barnett Bank* conflict preemption standard. Consequently, Midland did not build any record regarding significant interference.

The district court agreed with Midland that the NBA preempts Madden's claims, but denied Midland's motion for summary judgment because of factual disputes about Madden's individual account. Pet. App. 31a-38a. Because its preemption decision disposed of the common issues in the case, however, the district court denied class certification. *Id*. 38a, 44a. It did not reach Midland's other arguments for summary judgment or against certification.

To facilitate an appeal, Madden stipulated the individual issues away, and the district court "so ordered" the stipulation and entered judgment for Midland. *Id*. 51a-55a.

Madden appealed, arguing that § 85 does not apply where a national bank sells debt to non-bank debt buyers outright. Appellant Br. 14-19. Madden also emphasized that there was no conflict preemption because applying state usury laws to Midland did not significantly interfere with the exercise of national banks' powers. *Id.* 21-25. Midland responded that it had "no burden whatsoever to show an interference with a national bank's exercise of powers," and proclaimed that the significant interference analysis had no "relevance whatsoever to the question presented in this appeal." Appellee Br. 23-24.

The Second Circuit reversed. Pet. App. 2a. Applying pre-Dodd-Frank NBA preemption principles, the court held that Midland was not entitled to preemption because neither Midland entity is "a national bank nor a subsidiary or agent of a national bank, or is otherwise acting on behalf of a national bank, and because application of the state law on which Madden's claims rely would not significantly interfere with any national bank's ability to exercise its powers under the NBA." *Id.* The court remanded to the district court the question of whether Delaware law applies and, if so, whether it precludes Madden's claims. Pet. App. 15a.

After Midland lost in the court of appeals, it sought to reinvent its case: it hired new counsel and filed a petition for rehearing, raising for the first time the significant interference argument that it had expressly disavowed earlier. *See* Pet. Reh'g 9-11. The Second Circuit denied rehearing and issued its mandate.

Today, outcome-determinative motions are pending in the district court. Madden has filed a renewed motion for class certification that Midland has opposed on various grounds. Midland also filed a renewed motion for summary judgment, reiterating its argument that Delaware law governs.[5]

---

[5] The district court has requested that the parties docket their papers only after the motion is fully briefed. Thus,

REASONS TO DENY THE WRIT

I. There Is No Circuit Split.

The Second Circuit's refusal to extend NBA preemption to a debt collector attempting to charge usurious interest on defaulted credit card debt does not conflict with the decisions of the Eighth Circuit, the Fifth Circuit, or any other circuit. Indeed, no circuit has ever extended NBA preemption to third-party debt collectors.[6] Moreover, Midland ignores that Dodd-Frank modified NBA preemption in 2010, thus rendering any arguable split stale and unworthy of review.

A. The Circuits Apply The Same Standard To Determine Preemption Under The National Bank Act.

1. As the Second Circuit noted, *Krispin v. May Department Stores Co.*, 218 F.3d 919 (8th Cir. 2000), "does not support finding preemption here" because in *Krispin* a national bank was "'the real party in interest.'" Pet. App. 13a (quoting *Krispin*, 218 F.3d at 924). In *Krispin*, May Department Stores issued credit cards to its customers. The store subsequently

---

although these motions and the opening briefs supporting them have been finalized and served, they do not yet appear on the docket.

[6] Midland cites only a single district court case holding that a third-party debt purchaser may assert an NBA preemption defense against a usury claim. *See* Pet. 13 (citing *Munoz v. Pipestone Fin., LLC*, 513 F. Supp. 2d 1076, 1079 (D. Minn. 2007)). As the Second Circuit explained, *Munoz* "misapplied Eighth Circuit precedent." Pet. App. 14a n.3.

assigned its credit-card accounts and transferred all authority over them to its wholly owned subsidiary, May National Bank of Arizona. 218 F.3d at 921-22. The store ceased administering the card accounts and instead merely purchased the receivables from the bank. *Id.* at 923.

Borrowers who had been charged late fees by the bank sued the store, arguing that the fees violated state usury laws. *Id.* at 922. The defendants argued that § 85 applied because "[the store's] purchase of the bank's receivables [did] not alter the fact that [the] accounts [were] now controlled by the bank." *Id.* at 923.

The Eighth Circuit agreed, emphasizing that the applicability of § 85 "turns on whether [the] suit against the store actually amounted, at least in part, to a state law usury claim against the bank," *id*., and analyzing the issue as follows:

> [T]he store's purchase of the bank's receivables does not diminish the fact that it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees. Thus, although we recognize that the NBA governs only national banks, in these circumstances we agree with the district court that it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies. Accordingly, for purposes of deciding the legality of the late fees charged to appellants' credit accounts, we find that the real party in interest is the bank, not the store.

Id. at 923-24 (citations omitted).

The Second Circuit's decision is consistent with this holding. Unlike in *Krispin*, where a national bank continued to own, service, and impose fees on the accounts in question, "neither BoA nor FIA has retained an interest in Madden's account." Pet. App. 13a. And unlike in *Krispin*, Madden did not challenge any fees or interest imposed by a national bank; she only challenged the interest charged *by Midland* after it acquired her debt. *Id.* 14a.

Two other points about *Krispin* are important. First, the store and the bank in *Krispin* were closely affiliated: the bank was a subsidiary of the store. 218 F.3d at 923. Thus, it made sense to inquire whether the bank was the real party in interest when the plaintiffs sued the store. Here, by contrast, Midland and FIA have no such relationship, and there is no plausible argument that FIA is the real party in interest. *Cf. West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 788 (S.D.W.Va. 2009) (contrasting the relationship between bank and store in *Krispin* with that of a debt-buyer and a state-chartered bank). Second, *Krispin* did not involve defaulted debt. Instead, the bank was issuing new credit to the customers on an ongoing basis. 218 F.3d at 923. Here, FIA no longer issues credit to Madden.

The Second Circuit also correctly distinguished *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005). Pet. App. 13a-14a. In *Phipps*, a national bank issued second mortgage loans to its customers and charged them various fees up front. 417 F.3d at 1009. After charging these fees, the bank sold the loans to a non-bank third party. *Id.* The plaintiffs sued, alleging that the bank's fees violated state usury laws. *Id.* The court focused on whether the fees at issue constituted interest under § 85 and held that they did. *Id.* at 1011-13. The court had no opportunity to consider whether fees charged by the non-bank entity were also subject to preemption—because there were no such fees in that case. Unlike the plaintiffs in *Phipps*, Madden didn't challenge any action by a national bank; she "object[ed] only to the interest charged *after* her account was sold by FIA to the defendants." Pet. App. 14a (emphasis added).

2. There is also no conflict between the decision below and the Fifth Circuit's decision in *FDIC v. Lattimore Land Corp.*, 656 F.2d 139 (5th Cir. 1981), which had precisely the opposite facts of this case, and in any event did not base its holding on NBA preemption. *Lattimore* involved a note assigned in part to a bank from a non-bank entity. *Id.* at 147. The interest charged was not usurious in Georgia, where the note was made and where the borrower resided—but it exceeded the maximum allowable interest in Tennessee, where the bank was located. *Id.* Instead of deciding the question under the NBA, the court applied "normal choice of law rules" to determine that Georgia usury laws applied. *Id.* at 149-50. *Lattimore* thus says nothing about whether § 85 extends to non-bank entities that purchase debt from national banks. And of course, Midland is free to argue (and is in fact arguing) that "normal choice of law rules" support its position in the ongoing proceedings in the district court.

3. Midland does not even attempt to gin up a circuit conflict over the application of *Barnett Bank*'s conflict preemption standard, because none exists. *See* Pet. 11-14. The closest Midland comes is to cite—

in a footnote—a First Circuit case about fees and expiration dates on gift cards sold at shopping malls. *Id.* 14 n.5 (citing *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 534 (1st Cir. 2007), *cert. denied*, 552 U.S. 1185 (2008)).

This case does not remotely resemble *Ayotte*. And contrary to Midland's allegation, Second Circuit precedent agrees with *Ayotte*. Indeed, the Second Circuit considered substantially similar state laws, applied to substantially similar gift cards, in *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191-92 (2d Cir. 2007).

In *Ayotte* and *Blumenthal*, the First and Second Circuits held that SPGGC, a non-bank shopping mall operator that sold gift cards issued by national banks, could assert a preemption defense. *Ayotte*, 488 F.3d at 534; *Blumenthal*, 505 F.3d at 191-92. Both circuits applied the same rules of conflict preemption and reached the same result: that state laws prohibiting expiration dates on gift cards would effectively prevent Visa-member national banks from issuing those cards and receiving interchange fees for operating the cards, and thus significantly interfere with the national banks' powers. *See Ayotte*, 488 F.3d at 534; *Blumenthal*, 505 F.3d at 191-92.[7] That is the opposite of a circuit split.

---

[7] Agreeing with the position taken by the OCC, the Second Circuit held that SPGGC could not assert preemption with respect to certain fees that were imposed solely by SPGGC, and not by the bank. *Blumenthal*, 505 F.3d at 191.

B. The Dodd-Frank Act Renders Any Arguable Split Stale.

In light of Dodd-Frank's recent contraction of NBA preemption, Midland's expansive question presented should percolate. Dodd-Frank narrowed the scope of NBA preemption by eliminating preemption for subsidiaries, affiliates, and agents of national banks. *See* 12 U.S.C. § 25b(h)(2). Midland does not cite any case addressing this significant legislative development (or even mention that Congress acted), and at least some of the cases cited by Midland (*e.g.*, *Ayotte*) may no longer be good law.

More broadly, Congress's purpose in denying preemption even to wholly-owned subsidiaries of national banks was to restrict preemption to the banks themselves. Midland cannot credibly suggest that any circuit would now extend preemption to a third-party debt collector on the facts of this case. This Court should allow the courts of appeals to at least consider the effect of Dodd-Frank before taking up the issue.

II. The Second Circuit's Decision Is Neither Broad Nor Controversial Enough To Warrant Review.

Certiorari should be denied because the Second Circuit's decision is neither broad nor controversial enough to warrant the immediate, interlocutory review Midland seeks. The Second Circuit applied a narrow rule: where a national bank sells a loan to an unaffiliated non-bank entity, the purchaser must comply with state regulation unless doing so would "significantly interfere with any national bank's ability to exercise its powers under the NBA." Pet.

App. 2a. Here, the Second Circuit found, based on the evidence that Midland presented (or actually, failed to present), that applying New York usury law to charged-off credit card debt sold by national banks to third-party debt collectors would not significantly interfere with banks' powers. *See id.*

That ruling does not threaten the debt markets because under the Second Circuit's decision, cases involving other types of sales or loans—or even similar cases in which the defendant substantiates its claim of interference—might come out differently.

1. Midland contends that "the practical implications of the Second Circuit's decision in this case are difficult to overstate," Pet. 21, but Midland and its amici systematically overstate them. To inflate the significance of the decision below, Midland and its amici rely principally on a hodge-podge of unvetted Internet posts speculating about possible consequences of the decision below. *See* Pet. 21-23; Clearing House Ass'n Br. 22-24; Structured Fin. Br. 9-10. Midland's resort to such conjecture only highlights the dearth of any reliable evidence that the Second Circuit's decision is having an impact on banks.

In any event, to the extent Internet commentary is worth heeding, a chorus of investors and legal commentators rejects Midland's hyperbole. *See, e.g.*, Michael C. Tomkies & Susan M. Seaman, *Stop The Madden Madness*, Law360 (Nov. 25, 2015), http://tinyurl.com/tomkiesmadden ("Fairly read, the opinion of the . . . Second Circuit merely clarifies a relatively narrow point of law[.]"); Howard S. Altarescu & Robert Loeb, *Case Update: Madden v. Midland Funding*, Orrick, Herrington & Sutcliffe

LLP (Nov. 6, 2015), http://tinyurl.com/altarescumadden ("[I]t is worth noting that *Madden* dealt with distressed, indeed defaulted, debt . . . . It is possible that an argument could be successfully mounted that *Madden*'s reasoning should not extend to the sale of fully performing debt."); Richard Kelly, *Are Usury Laws Making a Comeback? Examining Madden v. Midland Funding*, NewOak Capital LLC (June 2015), http://tinyurl.com/newoakmadden ("[T]he Madden decision will have a limited effect on the secondary market for consumer debt. If the securitization market remains relatively broad and deep, there should also be no material impact on the availability of consumer credit."); Adam Levitin, *Madden v. Marine Midland Funding*, Credit Slips (July 2, 2015), http://tinyurl.com/levitinmadden ("[A]mici argue that compliance with usury laws will gum up secondary markets. That's hogwash.").

2. Midland urges immediate review on the ground that the Second Circuit is uniquely important in finance cases. Pet. 24. Venue in this case, however, turned on where Madden received Midland's unlawful demands—not on where the creditors were located. People everywhere have credit cards, so these issues can arise anywhere, and other circuits do not defer to the Second Circuit's NBA decisions. It is therefore telling that no circuit court has ever even adjudicated a case similar to this one. If the issue was as important as Midland claims, we would expect more cases by now.

3. Midland insists that if the decision below is not reversed, the secondary market for debt will falter because third parties will refuse to buy usurious loans from banks. Pet. 21-23. That is wrong

because it is not the purchase of the debt that violates New York's usury laws; it is the attempt to continue collecting usurious interest going forward.[8] Thus, Midland and other debt buyers in New York can continue to purchase loans, collect the full balances on those loans as of the date of assignment, and collect up to 25% interest on balances accruing post-assignment. New York law only prohibits Midland from attempting to charge the last 2% of post-assignment interest going forward.

In the context of defaulted debt specifically, Midland cannot show why this 2% matters. Midland purchases defaulted debt for pennies on the dollar. *See, e.g.*, Encore Capital Group, Inc., Annual Report (Form 10-K) F-20 (Feb. 26, 2015) (explaining that in 2014, Midland's parent company purchased $13.8 billion in debt for $1.3 billion). In the vast majority of cases, Midland collects far less than the face value of the debt because borrowers who have defaulted cannot afford to pay even that much (which is why they defaulted, and why the debt is so cheap). *See id*. And by Midland's own admission, it almost never collects interest above 25%—it did so in less than 1% of the 50,000 accounts it pursued in New York. C.A. JA 41; D.Ct. Dkt. #40, at 10 (arguing that "a

---

[8] In each state in the Second Circuit, debt collectors can avoid liability by not attempting to collect usurious interest on the loans they purchase. Indeed, that is the general rule nationwide. *See* F.T. Chen, *Usury: Liability for the Statutory Penalty of Persons Other Than the Offending Lender in a Usurious Loan Transaction*, 4 A.L.R.3d 650, § 7 (1965).

relatively insignificant number of class members" actually paid usurious interest to Midland).

Midland could forego those usurious collections with essentially no impact to its bottom line, and no effect on the price it would pay to national banks to buy debt. In 2008, the year that FIA charged off Madden's loan, Midland and its affiliates bought debt at 3.5% of face value. *See* Encore Capital Group, Inc., Annual Report (Form 10-K) F-16 (Feb. 11, 2009). From that baseline, if Midland obeyed the law and recovered the face value plus 25% interest, it would make a staggering 3471% return on investment.

In short, Midland's insistence that the decision below will render debt valueless in the secondary market cannot be squared with the facts of this case, or even basic arithmetic. A different result may obtain for performing (*i.e.*, non-defaulted) debt, where margins may be tighter. But that only underscores why the decision below does not affect the market as a whole: it does not necessarily even reach buyers of performing debt.

4. The decision below also imposes no limits on national banks' ability to sell loans, and leaves every existing protection for banks intact. For example, many jurisdictions permit banks to include contractual features, like savings clauses, that prevent usury liability by lowering the interest rate to the legal limit in the event the contractual rate is usurious. *See, e.g.*, *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708, 714 (Tex. App. 1998); *In re Dominguez*, 995 F.2d 883, 886 (9th Cir. 1993) (applying California law). National banks can also avoid state usury liability via NBA preemption if they retain a legally cognizable interest in the debt, rather than assigning

it or selling it outright. *See Krispin*, 218 F.3d at 923-24.

Banks can also ask the OCC to make a case-specific preemption determination. Dodd-Frank gave the OCC the power to determine that a "[s]tate consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers" and to thereby deem that law preempted. 12 U.S.C. § 25b(b)(1)(B). Here, the OCC made no such determination and did not even file an amicus brief supporting Midland below. The regulator's silence is telling, as the OCC has not hesitated to urge preemption in other Second Circuit cases. *See* OCC Amicus Brs. in *SPGGC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (No. 05-4711-CV), 2007 WL 7419441; *Wachovia Bank v. Burke*, 414 F.3d 305 (2d Cir. 2005) (No. 04-3770-cv), 2004 WL 3758346; *Fleet Bank v. Burke*, 160 F.3d 883 (2d Cir. 1998) (No. 98-9324), 1998 WL 34084189.

5. Midland and its amici raise the specter that, in addition to hindering the sale of loans, the decision below will prevent securitization. Pet. 23; Structured Fin. Br.7-9; Am. Bankers Ass'n Br. 10; Clearing House Ass'n Br. 7, 18. This argument elides the myriad distinctions between the defaulted credit card debt at issue in this case and the various types of consumer loans that banks securitize—which include student loans, auto loans, performing credit card debt, personal loans, and home mortgages.

These other loans have features that are not at issue here. Loans included in student and auto loan-backed securities typically have interest below state usury limits, meaning "the risk that the . . . decision [below] could apply to these types of loans is relatively low." *See* Moody's Investors Serv., *Appeals Court Ruling Adds to Legal Uncertainty for ABS Backed by Bank-Originated Marketplace Lending Loans* 2 (July 17, 2015). Asset-backed securities for performing credit card debt are distinct because the originating bank typically retains the accounts and securitizes only the underlying receivables.[9] *See id.* Indeed, new rules promulgated under Dodd-Frank require national banks to retain a substantial interest in most forms of consumer debt they securitize, including credit card debt. *See* Credit Risk Retention, 79 Fed. Reg. 77,602-01 (Dec. 24, 2014). Because the banks retain such an interest, courts following the decision below would apply NBA preemption to such transactions. *See* Pet. App. 13a; Moody's, *supra*.[10]

---

[9] Put differently, the bank retains the credit card accounts and continues to set the account terms. The bank creates a special trust which purchases all future receivables on these accounts—*i.e.*, customers' credit card payments—from the bank as they come in, packages the receivables into asset-backed securities, and sells the securities to investors. FDIC, *Credit Card Securitization Manual*, http://tinyurl.com/FDIC-Securization-Manual (last updated May 24, 2007).

[10] Even if the originating banks do not retain an interest in the securities, two safeguards allow banks to absorb "usury risk" without significantly affecting rates or liquidity. First, securities are typically overcollateralized, meaning the assets backing a security are worth more than the principal amount of securities issued. Second, securities are sold with an "excess spread," meaning the interest paid by the consumer to the issuer exceeds the interest paid by the issuer to the security-holder. These cushions protect the value of security pools even if some of the underlying loans are voided. Sabrina A. Neff, *Options for Debt Buyers Waiting for the Final Word in* Madden,

Amici argue the decision below is "working mischief on the national credit and securitization markets," Structured Fin. Br. 8; *accord* Clearing House Ass'n Br. 23-24, but offer scant support for their claims. Instead, amici rely almost exclusively on out-of-context statements drawn from Internet commentary about "marketplace lending,"[11] which is a new and narrow segment of the lending industry that has nothing to do with this case. Wholly distinct from traditional financial institutions, marketplace lenders operate virtually unregulated Internet platforms that enable private investors to lend to private borrowers, often at usurious rates. *See* Peter Manbeck & Marc Franson, *The Regulation of Marketplace Lending*, Chapman and Cutler LLP, 1-3, 26 (April 2015), http://tinyurl.com/ManbeckMarketplace.

Extrapolating from marketplace lending to securitization more broadly is misleading, particularly since marketplace lending comprises less than one-tenth of one percent of the global lending market. *See* Edward Robinson, *As Money Pours Into Peer-to-Peer Lending, Some See Bubble Brewing*, Bloomberg (May 14, 2015),

---

ABA Consumer Fin. Servs. Comm. Newsletter (Dec. 2015), http://tinyurl.com/ABA-newsletter-Madden; Kelly, *supra*; Moody's Investors Serv., Madden *Ruling Would Have Limited Effect on Rated Securitizations For Now* (Sept. 11, 2015), http://tinyurl.com/Moodys-Limited-Effect-Madden.

[11] Fourteen of the fifteen sources amici cite to show that the Second Circuit's decision will disrupt the lending industry focus on marketplace lending. *See* Am. Bankers Ass'n Br. 4; Clearing House Ass'n Br. 23-24; Structured Fin. Br. 3, 8-9.

http://tinyurl.com/Bloomberg-Madden. And even if trends in marketplace lending were revealing, experts and operators alike have disclaimed any effect from the Second Circuit's decision in this case. *See* Jayson Derrick, *Are Changes Coming to the P2P Lending Model?*, Benzinga (Sept. 29, 2015), http://tinyurl.com/DerrickP2P (leading marketplace lender explaining that "its operations ha[ve] seen 'essentially no impact' following the *Madden* ruling," and that "it is 'having no trouble' funding loans in New York, Connecticut and Vermont"); Christopher Gillock, *Court Rulings, Negative Press and Regulatory Rumblings Cast a Pall Over Marketplace Lending*, LinkedIn Pulse (Sept. 14, 2015), http://tinyurl.com/GillockMarketplace ("[L]egal and equity analysts think much of the concern is overwrought and that these lenders will not be forced to change their business models anytime soon.").

Thus, the decision below will not have a substantial impact on secondary markets going forward—and certainly will not impede national banks' ability to issue credit. Of course, none of that helps Midland in this case: it has already broken the law, and it wants to escape liability. But Midland's liability is not important enough to warrant this Court's review.

III. This Case Is A Poor Vehicle To Decide The Question Presented.

As the foregoing discussion illustrates, this case is not what Midland says it is. In a strained effort to absolve itself of state law liability, Midland invokes the interests of a broad range of market participants and financial products. But this case simply does not implicate those distinct entities and scenarios. Moreover, Midland has waived key points, and its ever-changing litigation strategy has muddled the nature of its claims and frustrated the development of a record on the points it now asks the Court to address. These practical deficiencies underscore the limited value of this case as a vehicle for addressing the question presented.

1. As an initial matter, Congress changed the law of NBA preemption in Dodd-Frank. Congress codified the *Barnett Bank* preemption standard, 12 U.S.C. § 25b(b)(1)(B), and restricted third parties' ability to assert preemption defenses, *id*. § 25b(b)(2), (e), (h)(2), as well as the OCC's ability to make preemption determinations, *id*. § 25b(b)(1)(B), (b)(3), (d), (g). In this case, the Second Circuit applied the pre-Dodd-Frank standard, relying on *Barnett Bank* and its progeny without discussing Congress's efforts to limit third parties' ability to assert preemption. But all parts of Dodd-Frank will apply to future loans. It would make little sense for this Court to adjudicate whether NBA preemption extends to third parties in a case governed by yesterday's law.

2. The loans in this case were not performing or securitized, and so this case does not present an appropriate vehicle to examine the effects of applying state usury laws to such loans. Given the size of the securities market, a more appropriate vehicle will inevitably present itself if this issue is truly important.

3. This case is in an interlocutory posture. The Second Circuit's mandate issued on August 21, 2015 and has not been stayed. Summary judgment and class certification litigation is ongoing in the district

court. The pending motions raise issues that are independent of preemption, and are potentially outcome determinative: summary judgment could end the case; and if class certification is denied, the case may settle or be dismissed voluntarily. If Madden prevails on both motions, class settlement is possible. Consequently, this case may end before this Court decides the question presented.

4. Midland has failed to preserve key contentions for review. Midland waived its significant interference argument below by failing to present it to the district court, and by denying to the Second Circuit that it had any "burden whatsoever to show an interference with a national bank's exercise of powers" and dismissing conflict preemption as a "red-herring." Appellee Br. 23. "In fact," Midland insisted, significant interference did not have "any relevance whatsoever to the question presented," *id.* at 24, *i.e.*, to "[w]hether the NBA applies to assignees of credit agreements where the originating entity was a National Bank," *id*. at 6. Thus, Midland did not just forfeit its significant interference argument, it "knowingly and intelligently relinquished" it. *Wood v. Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012).

It was only after Midland lost in the court of appeals that significant interference transformed from a "red-herring" with no "relevance whatsoever," Appellee Br. 23-24, to an "additional (and distinct) source of preemption," Pet. 17. Consequently, the record is barely developed as to how, if at all, applying state usury laws to third-party debt collectors might interfere with a national bank's powers. This Court should decline to consider these fact-intensive questions for the first time. *See*

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view.").

Midland has been similarly inconsistent in advancing its argument that the NBA incorporates the principle that loans that are valid when made cannot later be treated as usurious. After Midland failed to make the argument, the district court *sua sponte* raised the "valid-when-made" doctrine and *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103 (1833), in its ruling on Midland's motion for summary judgment. Pet. App. 28a. When Madden challenged the applicability of *Nichols* on appeal, Midland conceded that *Nichols* "was not central to the [district court's] Decision and does not change the analysis at all." Appellee Br. 16. Accordingly, the Second Circuit addressed neither *Nichols* nor the valid-when-made doctrine.

After Midland lost, "valid-when-made" mutated from a concept that did "not change the analysis at all," *id.*, to a "fundamental principle of usury law" and a "background principle" against which Congress enacted the NBA, Pet. Reh'g 7-8; Pet. 15. The issue remains underdeveloped: the petition cites no case holding that the NBA incorporated this common law principle. Because Midland's "litigation posture with respect to the question[] presented" has been far from "consistent," *City of Canton v. Harris*, 489 U.S. 378, 384-85 (1989), this Court should decline to consider that question here, and wait first to see whether courts of appeals accept Midland's revisionist history of the NBA.

5. Finally, Midland's petition poses a broad, categorical question: whether the NBA "continues to

have preemptive effect after the national bank has sold or otherwise assigned the loan to another entity." Pet. i. The question encompasses all loans, all asset transfers, and all possible purchasers and assignees. Midland has cast such a wide net because the facts of this case—which are limited to defaulted debt and third-party debt collectors—are among the worst possible for a defendant, and so Midland can only win if the Court adopts a sweeping preemption rule. That makes the case a bad vehicle to consider NBA preemption generally: if the Court grants certiorari, it will either reject Midland's claim without setting a precedent that facilitates the resolution of other cases, or it will adopt a broad preemption rule with far-reaching and unintended consequences.

For example, the OCC has long been concerned with "rent-a-bank" schemes, whereby "a national bank essentially rents out its charter to a third-party vendor who originates loans in the bank's name and then relinquishes responsibility for how these loans are made." OCC, News Release, *OCC Concludes Case Against First National Bank in Brookings Involving Payday Lending, Unsafe Merchant Processing, and Deceptive Marketing of Credit Cards* (Jan. 21, 2003), http://tinyurl.com/OCC-News-Release.[12] Adopting the categorical rule Midland seeks will likely spur new variations of these schemes: this case already closely

---

[12] The OCC is "particularly concerned where an underlying purpose of the relationship [between third-party vendor and bank] is to afford the vendor an escape from state and local laws that would otherwise apply to it." News Release, *supra*.

"recalls past arrangements in which national banks formed close relationships with payday lenders, allowing payday lenders to benefit from the umbrella of federal preemption." Bloomberg BNA, *Banking Daily: Loans in Flux as Appeals Court Rebuffs Midland Funding* (Aug. 24, 2015).

Congress itself disapproved of sweeping preemption inquiries. Dodd-Frank requires that any further "significant interference" determinations by the Comptroller of the Currency be made only on a "case-by-case basis," 12 U.S.C. § 25b(b)(1)(B), *i.e.*, a determination limited to "the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms," *id.* § 25b(3)(A). If the Comptroller seeks to preempt the laws of more than one state at a time by deeming the provisions of various state laws equivalent, he must first consult with the CFPB. *Id.* § 25b(3)(B). And any preemption determination must be based on "substantial evidence" that "supports the specific finding" of "preemption." *Id.* § 25b(c). Although the statute refers to the Comptroller rather than the courts, it communicates Congress's intent that the law in this area develop deliberately on the basis of clear evidence—and not through tectonic shifts brought about in cases lacking any meaningful record.

IV. The Second Circuit's Decision Is Correct.

Certiorari should also be denied because the decision below is correct—and Midland's position, which effectively treats NBA preemption as a commodity that national banks can sell to third parties, is clearly wrong. "Federal preemption is an affirmative defense upon which the defendants bear the burden of proof." *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005). Midland has failed to show that it is entitled to NBA preemption.

1. Midland's resort to § 85 of the NBA to shield its collection of usurious interest finds no support in the statutory text or purpose.

Section 85 does not expressly preempt any state law. Instead, it provides that a national bank "may take, receive, reserve, and charge . . . interest at the rate allowed . . . where the bank is located." 12 U.S.C. § 85. The statute does not authorize anybody other than a national bank to do anything, and does not authorize national banks to treat preemption as an asset that they can sell with their loans.

Indeed, although this Court has interpreted § 85 on multiple occasions, it has never suggested that the statute protects third parties. To the contrary, it has always stressed the singular nature of national banks themselves. *See, e.g.*, *Anderson*, 539 U.S. at 10-11 (holding that §§ 85 and 86 completely preempt usury claims against national banks themselves in light of "the special nature of federally chartered banks"); *Marquette*, 439 U.S. at 314, 318-19 (holding that § 85 permits national banks to export their interest rates because such banks are "national favorites"). In Dodd-Frank, Congress reaffirmed that § 85 relates only to "the charging of interest by a national bank." 12 U.S.C. § 25b(f).

2. Unable to cite any authority directly supporting its claim to preemption under § 85,

Midland and its amici contend that "valid-when-made" principles, incorporated in § 85 through osmosis, require finding that the "interest rate set by an originating bank cannot be invalidated by a subsequent assignment of the loan." Pet. 15-16. This argument misunderstands the NBA, the "valid-when-made" principle, and the Second Circuit's decision.

First and foremost, "valid-when-made" is a principle of usury law that the states are free to incorporate or reject in their respective usury statutes. It has nothing to do with NBA preemption. Thus, § 85 says nothing about assignees, and Midland does not cite a single case in its "valid-when-made" discussion that even involves the NBA. *See* Pet. 16.[13]

The lack of on-point citation makes sense, since Midland and amici's conception of "valid-when-made" was not the law when the NBA was enacted. In the seminal valid-when-made case, *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103 (1833), the Court made clear that selling a promissory note at a discount cannot convert the difference between the face value of the note and its sale price into usurious interest. As applied here, *Nichols* means that Midland can collect

---

[13] The cases cited by amici either do not address the NBA, *see Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285 (7th Cir. 2005); *Strike v. Trans-W. Disc. Corp.*, 155 Cal. Rptr. 132 (Cal. Ct. App. 1979), do not turn on the NBA, *see FDIC v. Lattimore Land Corp.*, 656 F.2d 139 (5th Cir. 1981), or do not implicate the valid-when-made doctrine, *see Mono v. DH Capital Mgmt. Inc.*, No. 2013-CA-001800, 2014 WL 6845592 (Ky. Ct. App. Dec. 5, 2014). *See* Clearing House Ass'n Br. 11; Structured Fin. Br. 13.

the entire balance that had accrued on Madden's debt at the time of assignment, even though this would allow Midland to collect a 2757% return on investment[14]—more than a hundred times the 25% interest that New York permits lenders to charge. But *Nichols* does not hold that Midland may charge more than 25% on Madden's balance post-assignment, much less that NBA preemption (which did not exist when *Nichols* was decided) travels with the loan.

To the contrary, a Supreme Court case decided shortly after the NBA was enacted undercuts Midland's attempts to link NBA preemption to "valid-when-made" principles. In *National Bank v. Johnson*, 104 U.S. 271 (1881), the Court recognized that under New York law, it is not a "usurious transaction" for individuals to purchase valid promissory notes at a discount, even if that discount means the purchasers receive more than the maximum rate of interest allowed under the state's usury laws (then 7%). *Id.* at 274-75. However, because § 85 (as originally enacted) limited national banks to charging "on any loan or discount made, . . . interest at the rate allowed by the laws of the State . . . where the bank is located, and no more," *id.* at 271, the Court held that a national bank located in New York was so limited as well, such that when it received 12% on a discount, it was liable for a usury penalty under the NBA, *id.* at 277-78. Thus, even though the transaction was valid

[14] This figure assumes that Midland paid 3.5% of face value for Madden's debt (the average price Midland paid for debt that year) and then collected 100% of the face value.

under New York law, it was not valid under § 85. Put differently, the NBA affirmatively *precluded* national banks from asserting the type of "valid-when-made" argument recognized by *Nichols*.

Given the clear disconnect between "valid-when-made" and the NBA, the Second Circuit unsurprisingly refused to muddy its discussion of the federal statute with references to a state-law usury defense. Perhaps in a future case, a loan assignee might be able to argue that the "valid-when-made" doctrine shields it from liability under state law—to the extent the assignee actually makes and preserves this argument. Here, however, this defense both fails on the merits, and was waived when Midland disavowed its applicability in the briefing below.

3. Midland also fails to meet its burden of proving that it is entitled to preemption under a significant interference analysis.

In *Barnett Bank*, this Court explained that states are not deprived of "the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *See* 517 U.S. at 33-34. Applying ordinary conflict preemption principles, the Court thus held that a state law prohibiting national banks from selling insurance was preempted by a federal statute expressly permitting banks to sell insurance. *Id*. at 33. Dodd-Frank codified the *Barnett Bank* standard, and clarified that third parties—including affiliates, subsidiaries, and agents of national banks—cannot assert preemption on the same terms as the banks themselves. 12 U.S.C. § 25b(b)(1)(B), (b)(2), (e), (h)(2).

Here, the Second Circuit applied the pre-Dodd-Frank understanding of *Barnett Bank*, explaining that "[t]o apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA." Pet. App. 8a. Reviewing Midland's arguments and the record in this case, the court of appeals held that "[n]o other mechanism appears on these facts by which applying state usury laws to the third-party debt buyers would significantly interfere with [a] national bank's ability to exercise its powers under the NBA." Pet. App. 9a.

That result was correct. Indeed, the Second Circuit's articulation of the preemption standard—which left room for Midland to show significant interference—may have been unduly generous to Midland in light of Congress's subsequent decision to deny preemption to subsidiaries, affiliates, and agents. While Dodd-Frank does not apply to the loans in this case (which were made before the statute's effective date), that does not matter because Midland is not a subsidiary, affiliate, or agent of a bank. The question is not whether Dodd-Frank directly prevents Midland from asserting preemption in this case, but instead what Congress's decision to deny preemption to *affiliated* third parties says about whether *independent* third parties like Midland ever had access to such a defense. Clearly, they did not.

Midland argues (at 18) that the "proper focus" is "on the *effect* of a state regulation on the national bank," and not on "the identity of the party that is the direct object of the regulation," but never discusses (or even acknowledges) Dodd-Frank, which focused expressly on the identity of the regulated party in denying subsidiaries, affiliates, and agents the benefit of preemption. Moreover, Midland cites no Supreme Court case holding that regulation of an independent third party would, or even could, significantly interfere with a national bank's exercise of its powers. The closest Midland comes is to cite *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), for the proposition that states cannot bypass preemption by regulating counterparties. *See* Pet. 18-19. But *Rowe* involved a far broader preemption standard than *Barnett Bank*. *See Rowe*, 552 U.S. at 370-71 (determining that "[s]tate enforcement actions *having a connection with, or reference to*," carrier "rates, routes, or services are pre-empted") (emphasis in original) (quotation marks omitted). Emphasizing congressional intent to deregulate the carrier industry, this Court held preempted state law that imposed limitations on carriers' abilities to contract with shippers. *See id*. at 371-72. Application of New York's usury law to Midland does not impose an analogous obligation on national banks because New York usury law does not regulate the transaction between the banks and Midland; it regulates only Midland's conduct after the transaction is concluded. Thus, both the law and the facts at issue in *Rowe* are distinguishable from this case.

Even assuming *arguendo* that the identity of the regulated entity is irrelevant and the inquiry focuses solely on the effect that applying state law has on national banks' exercise of their powers, Midland's claim fails. Midland presented no evidence that subjecting it to state regulation in this case would impede a national bank from issuing credit cards or selling debt on the secondary market.

Instead, all Midland has offered is speculation that applying usury laws to a debt collector's interest rate decisions *might* make the debt collector less willing to purchase defaulted debt for the same price it has paid in the past, and thus reduce bank profits on the sale of charged-off debt by some unquantified amount. But Midland has not introduced a scintilla of evidence that bank profits will suffer *at all*. Indeed, the record establishes that the collection of usurious interest is not even important to *Midland's* profits, let alone the banks. C.A. J.A. 41. In light of this record, and Midland's business model more generally, Midland's late-breaking contentions regarding significant interference are unsupported and implausible, in addition to being waived.

CONCLUSION

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

Respectfully submitted,

Daniel A. Schlanger
Counsel of Record
Kakalec & Schlanger, LLP
32 Broadway, Suite 601
(212) 500-6114 x101
dschlanger@kakalec-schlanger.com

Counsel for respondent