

No. 14-894

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**In the Supreme Court of the United States**

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CASHCALL, INC. AND J. PAUL REDDAM, IN HIS  
CAPACITY AS PRESIDENT AND CEO OF CASHCALL, INC.,  
*Petitioners,*

v.

PATRICK MORRISEY,  
ATTORNEY GENERAL OF WEST VIRGINIA,  
*Respondent.*

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On Petition For A Writ Of Certiorari  
To The Supreme Court Of Appeals  
Of West Virginia

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Under Section 27 of the Federal Deposit Insurance Act, “a State bank . . . may, *notwithstanding any State constitution or statute which is hereby preempted for purposes of this section*, take, reserve, receive, and charge on any loan . . . interest . . . at the rate allowed by the laws of the State . . . where the bank is located.” 12 U.S.C. § 1831d(a) (emphasis added). Put another way, a state-chartered bank may “take, reserve, receive, and charge” interest on any loan at the rate allowed in its home State even if that rate would violate the usury laws of another State. The statute does not apply, however, if a *non-bank* entity is “tak[ing], reserv[ing], receiv[ing], and charg[ing]” the interest on the loan.

The question presented is whether Section 27 protects a loan from a State’s usury laws if a non-bank entity bears the “predominant economic interest” in the loan.

## TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW .....	1
INTRODUCTION.....	2
STATEMENT .....	3
REASONS FOR DENYING THE PETITION.....	13
I. There Is No Split Of Authority Over Whether And When Section 27 Preempts A State’s Usury Laws .....	13
II. The Decision Of The West Virginia Supreme Court Of Appeals Is Consistent With The Text And Purpose Of Section 27 .....	23
III. This Case Lacks Exceptional Importance And Is A Poor Vehicle For Review .....	30
CONCLUSION .....	37
APPENDIX.....	1a
State and Territory Statutory Provisions Concerning Regulation of State-Chartered Banks.....	1a
State Statutory Provisions Establishing Interest Rate Limitations .....	5a

## TABLE OF AUTHORITIES

### Cases

<i>Abramski v. United States</i> , 134 S. Ct. 2259 (2014).....	25–26
<i>BankWest, Inc. v. Baker</i> , 411 F.3d 1289 (11th Cir. 2005).....	24–26
<i>Discover Bank v. Vaden</i> , 489 F.3d 594 (4th Cir. 2007).....	17, 21–22, 27
<i>Flowers v. EZPawn Okla., Inc.</i> , 307 F. Supp. 2d 1191 (N.D. Okla. 2004) .....	22
<i>Fluke v. CashCall, Inc.</i> , 792 F. Supp. 2d 782 (E.D. Pa. 2011) .....	35
<i>Georgia Cash America, Inc. v. Greene</i> , 734 S.E.2d 67 (Ga. Ct. App. 2012).....	29
<i>Goleta Nat’l Bank v. Lingerfelt</i> , 211 F. Supp. 2d 711 (E.D. N.C. 2002) .....	22
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008).....	32
<i>Inetianbor v. CashCall, Inc.</i> , 768 F.3d 1346 (11th Cir. 2014).....	36
<i>Jackson v. Payday Fin., LLC</i> , 764 F.3d 765 (7th Cir. 2014).....	35
<i>Kight v. CashCall, Inc.</i> , 200 Cal. App. 4th 1377, 133 Cal. Rptr. 3d 450 (2011).....	35–36
<i>Krispin v. May Dep’t Stores Co.</i> , 218 F.3d 919 (8th Cir. 2000).....	17–18, 22–23
<i>Mississippi ex rel. Hood v. AU Optronics Corp.</i> , 134 S. Ct. 736 (2014).....	17

<i>Moses v. CashCall, Inc.</i> , No. 14-1195, 2015 WL 1137242 (4th Cir. Mar. 16, 2015) .....	36
<i>O'Donovan v. CashCall, Inc.</i> , 278 F.R.D. 479 (N.D. Cal. 2011) .....	35
<i>Otis v. Marketing Three, LLC</i> , 987 N.E.2d 545 (Ind. Ct. App. 2013) .....	36
<i>Spitzer v. County Bank of Rehoboth Beach</i> , 45 A.D.3d 1136 (N.Y. App. Div. 2007) .....	29
<i>State ex rel. Swanson v. CashCall, Inc.</i> , Nos. A13-2086, A14-0028, 2014 WL 4056028 (Ct. App. Minn. Aug. 18, 2014) .....	34–35
<i>State v. McKinley</i> , 234 W. Va. 143, 764 S.E.2d 303 (2014) .....	31
<i>West Virginia v. CashCall, Inc.</i> , 605 F. Supp. 2d 781 (S.D. W. Va. 2009) .....	<i>passim</i>
<i>West Virginia v. CashCall, Inc.</i> , No. 2008C1964, 2012 WL 11875223 (W. Va. Cir. Ct. Sept. 10, 2012) .....	12
<i>Whitman v. Raley's Inc.</i> , 886 F.2d 1177 (9th Cir. 1989) .....	16
 <u>Statutes</u>	
12 U.S.C. § 1820 .....	5
12 U.S.C. § 1831a .....	4, 27
12 U.S.C. § 1831d .....	3–4, 14, 24, 26
Mass. Gen. Laws ch. 167, § 37 .....	6
S.D. Codified Laws §§ 51a-1-1 to 51a-5-32 & §§ 51a-7-1 to 51a-15-45 .....	5
W. Va. Code § 46A-1-101 <i>et seq.</i> .....	7

W. Va. Code § 46A-6-104.....	6–7, 11
W. Va. Code § 46A-7-115.....	7, 11
W. Va. Code § 47-6-6 .....	6–7, 11
W. Va. Code § 47A-1-1 <i>et seq.</i> .....	7

### Regulations

12 C.F.R. § 208.64 .....	5
12 C.F.R. §§ 324.1-324.405.....	4
OCC, Preemption Determination, 66 Fed. Reg. 28,593 (May 23, 2001) .....	30

### Other Authorities

Howell E. Jackson, <i>Multisectoral Financial Services Industry: An Exploratory Essay</i> , 77 Wash. U.L.Q. 319 (1999).....	5
Robert H. Jackson, <i>Advocacy Before the Supreme Court</i> , 25 Temp. L.Q. 115 (1951) .....	37
Elizabeth R. Schiltz, <i>The Amazing, Elastic, Ever- Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation</i> , 88 Minn. L. Rev. 518 (2004) .....	28

**OPINIONS BELOW**

The West Virginia Supreme Court of Appeals' decision affirming the Circuit Court for Kanawha County is informally reported at 2014 WL 2404300 and reprinted in Petitioners' appendix at 1a.

The Circuit Court for Kanawha County's phase-two trial opinion is informally reported at 2012 WL 11875220 and reprinted in Petitioners' appendix at 58a.

The Circuit Court for Kanawha County's phase-one trial opinion is informally reported at 2012 WL 11875223 and is not reprinted in Petitioners' appendix.

The opinion of the Southern District of West Virginia remanding this case to the Circuit Court for Kanawha County is reported at 605 F. Supp. 2d 781.

## INTRODUCTION

In this case, the West Virginia Supreme Court of Appeals correctly decided—in a decision that is controlling only in the State of West Virginia—that state usury laws apply to a non-bank entity holding the predominant economic interest in a loan, even if the non-bank attempted to avoid state usury laws by associating with a state-chartered bank. Under Section 27 of the Federal Deposit Insurance Act (FDIA), a state-chartered bank can charge and collect interest on loans at a rate legal in its home State, regardless of whether those rates are usurious in the State where they are being charged. But Section 27, by its plain terms, does not apply where it is a non-bank entity that seeks to collect usurious interest. That limitation is at the heart of this case, where both a bank and non-bank entity were involved with a loan. To determine which entity is the one truly seeking the interest—*i.e.*, the “true lender”—the state supreme court reasonably concluded that courts should look into which party bears the “predominant economic interest” in the loan.

Petitioners claim that the decision of the West Virginia Supreme Court of Appeals is critically important, as it purportedly conflicts with the decisions of several federal courts of appeals and thwarts Congress’s intent. They are wrong.

There is no split of authority. Petitioners—a private non-bank lender named CashCall and its sole stockholder, President, and CEO, J. Paul Reddam (collectively, “CashCall”)—identify only two federal

appellate decisions that allegedly conflict with the state supreme court decision below. Both of those decisions, however, address a jurisdictional question that is entirely distinct from the merits question addressed in the decision up for review.

Nor is it true that the West Virginia Supreme Court of Appeals has thwarted congressional design. To the contrary, the state supreme court's decision vindicates Congress's intent. It protects already heavily-regulated state-chartered banks from the maze and burden of fifty state usury laws, while at the same time seeks to prevent the abuse of that privilege by *non-bank* lenders who lack the banks' federal and state oversight and unique role in our nation's economy.

CashCall has tried its hardest to portray this case as an exceptional and calculated attack on an important federal law. But the reality is quite different. This is little more than a Hail Mary pass by a private non-bank lender that has a recognized history of attempting to circumvent state usury laws and that is now staring down a multi-million dollar judgment. The petition should be denied.

### **STATEMENT**

1. Section 27 of the Federal Deposit Insurance Act allows state-chartered banks to lend money to consumers nationwide at interest rates lawful in the bank's home state or at rates set by federal law. Pub. L. 96-221, Title V, § 521, 94 Stat. 164 (Mar. 31, 1980), codified at 12 U.S.C. § 1831d(a). Enacted in response to the 1970s credit crunch, this statute

encourages money-lending across state lines by lifting from state-chartered banks the burden of unraveling and observing the maze of fifty state usury laws. *Ibid.* Under the statute, each bank need only follow the rules set by federal and home-state regulators—a hefty burden in itself. *Id.* §§ 1831d(a), 1831a(j)(3) (“No provision of this subsection shall be construed as affecting the applicability of . . . Federal law to State banks.”).

Federal law provides rigorous banking regulations and inspections for state-chartered banks. For example, federal regulations govern banks’ practices, reserves, consumer protections, and recordkeeping.<sup>1</sup> And a bank’s federal regulator, either the Federal Deposit Insurance Corporation (FDIC) or the Federal Reserve (if the bank is a member of the Federal Reserve) must annually conduct “a full-scope, on-site examination” of each state-chartered bank, with additional examinations

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<sup>1</sup> *See, e.g.*, 12 C.F.R. §§ 324.1–324.405 (establishing capital standards for FDIC-supervised banks); *id.* §§ 332.1 to 332.18 (regulating privacy of consumer financial information for FDIC supervised banks); *id.* §§ 337.1 to 337.12 (prohibiting unsafe and unsound banking practices for FDIC-supervised banks); *id.* §§ 344.1 to 344.10 (requiring recordkeeping for securities transactions for FDIC-supervised banks); *id.* § 208.4 (mandating capital adequacy for Federal Reserve-supervised banks); *id.* § 208.81 to 208.86 (providing for consumer protection in sales of insurance by Federal Reserve-supervised banks); *id.* §§ 208.30 to 208.37 (regulating securities and securities related activities for Federal Reserve-supervised banks); *id.* §§ 208.50 to 208.51 (setting real estate lending and appraisal standards for Federal Reserve-supervised banks).

as necessary. 12 U.S.C. § 1820(b) & (d); 12 C.F.R. § 208.64.

Like federal regulators, state agencies closely regulate state-chartered banks within their respective jurisdictions for legal compliance and financial performance. Resp. App. 1a–4a (State and Territory Statutory Regulations of State-Chartered Banks). Relevant here, South Dakota requires its state-chartered banks to observe a litany of regulations, pertaining to everything from organization to capital structure to recordkeeping. S.D. Codified Laws §§ 51a-1-1 to 51a-5-32 & §§ 51a-7-1 to 51a-15-45. Although South Dakota does not impose a cap on interest rates for loans, nearly all States set generally applicable maximum interest rates as part of their regulatory schemes. Resp. App. 5a–11a (State Statutory Interest Rate Limitations).

This confluence of federal and state supervision reflects the importance of banks’ financial solidity and public trust. As one commentator has explained, “[t]he premise underlying” federal and state banking laws “is that an entity should not be allowed to engage in the business of banking unless the entity complies with the regulatory safeguards designed to restrain the risks associated with depository institutions.” Howell E. Jackson, *Regulation in a Multisectoral Financial Services Industry: An Exploratory Essay*, 77 Wash. U. L.Q. 319, 368 (1999).

Non-bank financial entities, such as hedge funds, insurers, mortgage companies, private education lenders, and payday lenders, lack the same federal

and state regulation. These entities are not protected or regulated under the Federal Deposit Insurance Act, lack federal depository insurance, and are not permitted to provide full banking services. *E.g.*, Mass. Gen. Laws ch. 167, § 37 (prohibiting unauthorized banking). Many non-bank creditors therefore lend money without the same institutional controls as banks.

2. CashCall, a non-bank private lender, makes unsecured installment loans by phone and online for “customers with a range of credit scores.” See CashCall, Inc., *Get Money Fast!*, <https://www.CashCall.com/rates> (offering loans between 35.52% and 204.94% interest plus fees). Attracting borrowers through radio, television, and internet ads, CashCall offers an online form in which a consumer proves he or she is over 18 years old and gets a loan the same day. CashCall, Inc., *How It Works*, <https://www.CashCall.com/howitworks>. As CashCall promises, “The steps are that simple and painless, 1-2-Money!” *Ibid.*

Between August 2006 and March 2007, hundreds of West Virginia consumers borrowed money from what they thought was CashCall at interest rates far above the State’s 18% cap. Pet. App. 3a; W. Va. Code §§ 46A-6-104, 47-6-6. The loans were issued at 96% interest for \$2,525, 89% interest for \$1,000, and 59% interest for \$5,000. The 292 loans totaled \$882,150 in principal and \$2,511,421.99 in interest agreed to be paid. Pet. App. 64a–65a.

After the loans were made, CashCall aggressively attempted to collect as many interest payments as possible: in its own words, the company would do “whatever it takes to get [its] money.” *Id.* at 3a, 7a. CashCall launched frequent surprise debits of customers’ checking accounts, tacked on extra unannounced fees, interrupted consumers at home and work, told employers and co-workers about customers’ debts, threatened customers, and initiated untenable arbitrations. *Ibid.* CashCall, for instance, contacted most of its 292 West Virginia customers by phone hundreds of times each, for a total of 84,371 calls. *Ibid.* CashCall’s efforts netted it \$1,201,366.12 in payments from West Virginia consumers, *id.* at 64a–65a, but ultimately almost three-quarters of CashCall’s West Virginia customers defaulted, *id.* at 3a.

**3. a.** Concerned about CashCall’s interest rates and debt collection methods, the West Virginia Attorney General sued CashCall in state court under the state Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 *et seq.* Pet. App. 3a–4a. This state law places boundaries on debt collection techniques; requires lenders to observe the 18% interest cap set by the state lending and credit rate board under West Virginia Code Sections 46A-6-104 and 47-6-6; and mandates that lenders obtain a business registration certificate under West Virginia Code Sections 46A-7-115 and 46A-6-104. Pet. App. 5a–6a; *see* W. Va. Code §§ 46A-6-104; 47A-1-1 *et seq.* Despite denying any wrongdoing, CashCall soon stopped loaning money to West Virginia consumers. Pet. App. 3a–4a.

In response, CashCall asserted that Section 27 of the Federal Deposit Insurance Act preempts West Virginia's interest rate and licensing requirements. *Id.* at 4a. CashCall alleged that Section 27 forestalls West Virginia's usury and licensing laws because CashCall funnels its loan disbursements through First Bank & Trust ("FB&T"), a South Dakota state-chartered bank paid to be CashCall's conduit. *Id.* at 37a, 62a–63a. If Section 27 applies, FB&T can charge any interest rate on a loan because its home State has no maximum rate. *Id.* at 4a.

Under CashCall and FB&T's "rent-a-bank" arrangement, FB&T formally made the loans at the outset but CashCall ultimately owned the loans and did basically everything else. *Id.* at 17a, 79a. After FB&T approached CashCall, CashCall set up the infrastructure for the loan program. CashCall developed all lending materials, including a comprehensive accounting and loan tracking system. *Id.* at 75a, 80a–81a. CashCall then paid the bank a starting incentive between \$50,000 and \$100,000, plus paid the bank for any actual services rendered, like having FB&T's lawyers look at CashCall's marketing materials. *Id.* at 80a–81a. CashCall also paid the bank a continuing lump sum for assuming the reputational risk of being a conduit for CashCall's loans. *Id.* at 73a, 77a–78a. Under their contract, CashCall would pay FB&T \$30,000 per month for the first three months; \$60,000 per month for the next three months; \$125,000 per month for the next three months; and \$200,000 per month for the next six months. *Id.* at 81a–82a.

CashCall also handled the marketing and loan initiation aspects of the program at its own expense. *Id.* at 70a, 80a. When a consumer applied for a loan, CashCall collected the application and verified the applicant's identity. *Id.* at 70a–71a. CashCall set the criteria to issue a loan. Neither CashCall nor FB&T solicited or issued loans in West Virginia that did not meet the guidelines CashCall first imposed. *Id.* at 70a. FB&T viewed applications through CashCall's software but did not set interest rates or decide the applicant's credit-worthiness for a loan. *Id.* at 70a, 72a, 76a–77a.<sup>2</sup> CashCall also gave consumers any loan rejections. *Id.* at 70a.

FB&T merely acted as a conduit for the loans. CashCall fronted FB&T money for the loans through a continuing deposit of no less than \$1.5 million or the sum of the loans made in the highest yielding two days in the previous thirty days. *Id.* at 71a, 82a–83a. With CashCall's money in hand, FB&T gave loans to the loan recipient using CashCall's software and accounting system. *Id.* at 77a. No more than three days after FB&T disbursed CashCall's loan funds, "CashCall was required to purchase and did in fact purchase all of the loans." *Id.* at 79a–80a. The purchase price for each loan was "the outstanding balance due, including all principal, interest,

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<sup>2</sup> Contrary to CashCall's assertion, Pet. 13, it is disputed whether CashCall effectively set the terms of the loans. The trial court never made a factual finding on this point, and its findings and opinion suggest the opposite. Pet. App. 59a–62a.

origination fees, and other charges or sums owed by the borrower.” *Id.* at 77a, 80a. In addition, FB&T was reimbursed for any operational costs in excess of 15% of FB&T’s net revenue, thus guaranteeing FB&T a profit. *Id.* at 82a. Finally, CashCall serviced each loan, collecting payments and keeping all interest paid. For its own financial reporting purposes, CashCall treated each loan as if CashCall alone was the lender. *Id.* at 84a.

CashCall bore all risks associated with the loans. FB&T sold the loans to CashCall without recourse, which meant that FB&T was not on the hook if the consumer failed to pay. *Id.* at 71a, 80a, 83a. CashCall also indemnified FB&T for any losses from their relationship, including losses from CashCall’s mistakes or borrowers’ claims. *Id.* at 17a–18a, 71a, 83a–84a. J. Paul Reddam, CashCall’s sole owner and stockholder, also personally guaranteed CashCall’s financial obligations to FB&T, including the loans FB&T would make to consumers. *Id.* at 79a–80a. If a borrower defaulted during the three-day window FB&T owned the loan, CashCall would have to pay FB&T its money back. *Id.* at 79a–80a, 83a. CashCall also maintained multi-million dollar insurance coverage for its relationships with FB&T and borrowers. *Id.* at 80a. Finally, CashCall and the Bank remained separate entities, *id.* at 62a–63a, so FB&T could walk away at any time.

**b.** CashCall removed this action to federal court, but the district court rejected CashCall’s assertion that the Federal Deposit Insurance Act completely preempted the Attorney General’s claims and

remanded this case to state court. *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 783 (S.D. W. Va. 2009). The district court concluded that the FDIA was not sufficiently implicated because the target of the suit was not a state-chartered bank but CashCall, a non-bank entity. Cashcall is the real party in interest, the court found, because the Attorney General is seeking relief specifically from CashCall and not the bank. CashCall was left to assert ordinary preemption in state court as a defense to the state usury law claims.

c. On remand and after trial, the state trial court rejected CashCall's assertion of ordinary preemption under Section 27 as a defense on the merits to the state usury law claims. The trial court concluded that it had to determine whether CashCall or the bank—FB&T—was the entity actually seeking interest on the loans, *i.e.*, the true lender for purposes of Section 27. Pet. App. 85a. Based on CashCall and FB&T's contracts and relationship, the trial court found that "CashCall is the de facto lender of the subject loans, as it clearly bore the economic risk of the loans." *Id.* at 79a. As such, Section 27 did not protect the loans from West Virginia's usury and licensing laws. *Id.* at 94a. The trial court then entered judgment against CashCall for charging more than 18% interest, contrary to rates set by the state lending board under W. Va. Code § 47-6-6; for not obtaining a business registration certificate, in violation of W. Va. Code § 46A-7-115; and for engaging in "repeated and willful" "unfair or deceptive acts or practices," under W. Va. Code § 46A-6-104. *Id.* at 94a. As relief, the court declared

CashCall's loans void, canceled all outstanding debts, mandated restitution, and awarded civil penalties and attorney's fees. *Id.* at 95a–97a.

CashCall also lost at trial on the Attorney General's debt collection claims. In a separate opinion, the trial court held that virtually undisputed evidence showed that CashCall had violated eleven different debt collection laws. *West Virginia v. CashCall, Inc.*, No. 2008C1964, 2012 WL 11875223, at \*22 (W. Va. Cir. Ct. Sept. 10, 2012). The court ordered further restitution, civil penalties, and attorney's fees. *Ibid.* It also found these violations to be an independent basis to cancel "any debts still allegedly owed." *Ibid.*

Altogether, the state trial court ordered CashCall to pay more than \$13.8 million in restitution and penalties, plus \$446,180 in fees and costs. Pet. App. 2a.

d. On direct appeal to the West Virginia Supreme Court of Appeals, CashCall raised fourteen assignments of error but lost every argument. *Id.* at 1a–57a. As pertinent here, the five justices of West Virginia's highest court agreed that federal law did not preempt the State's usury and licensing laws because CashCall was "the true lender" seeking interest on the loans. *Id.* at 37a–38a. To make that determination, the state supreme court looked to substance over form and sought to discover which of the two parties bears the "predominant economic interest" of the loans. It rejected CashCall's effort to focus "only [on] the superficial appearance of

CashCall's business model" because that "would always find that a rent-a-bank was the true lender of loans." *Id.* at 34a, 37a.

e. On January 23, 2015, CashCall filed its petition with this Court.

### **REASONS FOR DENYING THE PETITION**

This Court's involvement is unnecessary for three reasons. *First*, no split of authority exists between the decision of the West Virginia Supreme Court of Appeals and any other appellate court about the need to conduct a totality-of-the-circumstances analysis to determine whether a state-chartered bank is truly the entity seeking interest on a loan for purposes of Section 27 preemption. *Second*, the decision below is correct because it is consistent with the text and purpose of Section 27. *Third*, the state supreme court's fact-bound decision lacks exceptional importance and is a poor vehicle for this Court to examine Section 27 for the first time.

#### **I. There Is No Split Of Authority Over Whether And When Section 27 Preempts A State's Usury Laws.**

The West Virginia Supreme Court of Appeals held that Section 27 does not preempt West Virginia's usury laws because, under the factual circumstances, FB&T was not "the true lender of the loans made to the West Virginia consumers." Pet. App. 34a. By its terms, Section 27 permits a "State bank" to "take, receive, reserve, and charge on any loan" interest at "the rate allowed by the laws of the

State where . . . the *bank* is located.” 12 U.S.C. § 1831d (emphases added). It expressly preempts the application of any contrary laws of another State to the loans. There was and is no dispute that only FB&T is a “bank” within the meaning of the statute, and that CashCall is not. The question faced by the state supreme court and the trial court, therefore, was whether FB&T as the only state-chartered bank involved was “tak[ing], receiv[ing], reserv[ing], and charg[ing]” interest on the loans at issue. Or as the state courts put it: whether the bank was acting as the “true lender” of the loans for purposes of the statute. If so, Section 27 would preempt the application of West Virginia’s usury laws to the loans, and CashCall could not be liable for claims under those laws. But if CashCall as a *non-bank* entity was acting instead as the “true lender” seeking interest for purposes of the statute, Section 27 would not preempt state usury law, and CashCall could be subject to liability. The state supreme court agreed with the trial court, which concluded after reviewing the totality of the circumstances that CashCall was acting as the true lender because CashCall “had the predominant economic interest in [the] loans made by the bank.” Pet. App. 37a.

As explained by the trial court, numerous factors supported the conclusion that Cashcall—and not FB&T—was the true lender seeking interest for purposes of federal preemption. Those factors include: “FB&T placed the entire monetary burden and risk of the loan program on CashCall, and not on FB&T”; “CashCall paid FB&T more for each loan than the amount actually financed by FB&T”;

“CashCall agreed to such terms on the belief that its business scheme would successfully evade state usury laws and it could reap the benefits of the excessive interest rates charged on each loan”; “CashCall had to procure the personal guarantee of its sole owner and stockholder, J. Paul Reddam, to personally guarantee all of CashCall’s financial obligations to the [FB&T], including the amounts of the loans prior to ‘purchase’ by CashCall”; “CashCall had to indemnify [FB&T] against all losses arising out of the Agreement, including claims asserted by borrowers”; “CashCall was under a contractual obligation to purchase the loans originated and funded by [FB&T] only if CashCall’s underwriting guidelines were followed when approving the loan”; and for “financial reporting purposes, CashCall treated such loans as if they were funded by CashCall.” *Id.* at 17a–18a; *see supra* pp. 10–11.

CashCall now argues that the state supreme court’s decision to apply a totality-of-the-circumstances “predominant economic interest” analysis conflicts with the approach taken by two federal courts of appeals. Specifically, CashCall contends that the Fourth and Eighth Circuits have adopted a test that singularly “rel[ies] on the identity of the originator to determine the true lender for purposes of federal preemption.” Pet. 26. But as the West Virginia Supreme Court of Appeals found, the cases cited by CashCall are “easily distinguishable.” Pet. App. 37a.

For at least two reasons, the appeals court cases cited by CashCall do not create a split of authority.

*First*, those cases addressed an entirely different legal question. Both cases concerned a determination of the “real party in interest” for purposes of removal to federal court, and not the question of the “true lender” for purposes of federal preemption under Section 27. *Second*, to the extent the legal question in those cases is similar to the one at issue here, the analysis in those cases was likewise based on the totality of the circumstances.

A. Foremost, there is no division of authority with the Fourth and Eighth Circuits because the cases cited by CashCall addressed a distinct legal question. While both cases involved suits brought ostensibly against non-bank entities for violations of state usury law, as is true here, the issue in those cases was the propriety of removal to federal court. The Fourth and Eighth Circuits sought to discover whether the complaints, though pleaded solely in terms of state law, raised state claims that Congress had completely preempted and thus gave rise to federal subject-matter jurisdiction. Here, in contrast, the state supreme court was confronted with state law claims on the merits and had to determine whether Section 27 set aside state usury law as a matter of ordinary preemption. As the Ninth Circuit has explained, “[t]he jurisdictional issue of whether ‘complete preemption’ exists is very different from the substantive inquiry of whether a ‘preemption defense’ may be established.” *Whitman v. Raley’s Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989).

1. Complete preemption, an exception to the well-pleaded complaint rule, permits removal of state-law

claims to federal court if Congress has “completely” and not merely “ordinarily” preempted the claims against the party. *Discover Bank v. Vaden*, 489 F.3d 594, 599 (4th Cir. 2007), *rev’d and remanded on other grounds*, 556 U.S. 49 (2009). To decide if a case raises claims that have been completely preempted, and to prevent parties from engaging in artful pleading to create or destroy jurisdiction, courts must look beyond the complaint to determine the real claims and parties in interest. *Id.* at 600–01. This jurisdictional inquiry identifies whether a federal law is actually implicated. *Ibid.* If no federal law is involved, there cannot possibly be complete preemption. *See also Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 745 (2014) (in cases removed to federal court on the basis of diversity jurisdiction, courts must ascertain the identity and citizenship of the “real parties in interest” rather than accept at face value the alleged identities and citizenship).

In the cases identified by CashCall, the Fourth and Eighth Circuits applied the “real party in interest” analysis to determine whether the Federal Deposit Insurance Act (concerning state-chartered banks) or the National Banking Act (concerning national banks) was actually implicated. Because those federal laws apply only to banks, the question in both cases was whether the state usury law claims were “really directed” at a bank rather than the non-bank entity named in the complaint. *Vaden*, 489 F.3d at 601; *see also Krispin v. May Dep’t Stores Co.*, 218 F.3d 919, 923 (8th Cir. 2000) (“complete preemption in this case turns on whether the

appellants' suit against the [non-bank] store actually amounted, at least in part, to a state law usury claim against the bank"). If what the plaintiff "really" and "actually" wanted was to impose liability on the bank, the bank would be considered the "real party in interest," and federal law would be implicated for purposes of federal jurisdiction and complete preemption. If not, the case would be remanded to state court to proceed against the named non-bank entity, which could then raise ordinary preemption under federal law as a defense to the state usury law claims. In both *Vaden* and *Krispin*, the courts of appeals found that a bank was the intended target of the claims and therefore the "real party in interest."

This is the same jurisdictional analysis applied by the federal district court that remanded this case after CashCall's attempt to remove this matter from the state trial court. To decide whether federal law was implicated for purposes of complete preemption, the district court "found it necessary to determine whether the claims were actually directed against a federally or state-chartered bank." *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 785 (S.D. W. Va. 2009). Reviewing the complaint, the court concluded that CashCall, not the bank, is the "targeted entity." *Id.* at 788. The Attorney General, the court stressed, "is seeking relief from the harmful conduct of a *specific entity*—CashCall." *Ibid.* "The totality of the Complaint shows that the State's suit is directed against a single, specific entity violating a host of state laws including the usury law—that entity is CashCall, not the Bank." *Id.* at 787. As such, no federal law was implicated for purposes of complete

preemption, and the case was remanded to state court.

Of course, as the district court recognized, CashCall could on remand still raise ordinary preemption in state court as a defense to the state usury law claims. That defense would require the state court to determine whether CashCall or the bank was the “real lender” for purposes of Section 27. *Ibid.* But that inquiry, the district court emphasized, would be distinct from and could reach a different result than the “real party in interest” analysis for purposes of complete preemption. While the bank was not the “real party in interest” because it was not the actual target of the Attorney General’s lawsuit, it could still “turn out to be” the “real lender” under Section 27 if the bank was the entity seeking the interest on the loans. *Ibid.* In that circumstance, the bank’s status as the “real lender” would require preemption of West Virginia’s usury laws, and CashCall—the “real party in interest”—would be free from any liability in state court under state usury law.

2. The issue in this case is the merits question left open by the district court—whether the bank or CashCall is the “real lender” for purposes of ordinary preemption under Section 27. The West Virginia Supreme Court of Appeals sought to determine “whether CashCall or FB&T was the true lender of the loans made to the West Virginia consumers,” and concluded that the proper method for resolving that question was to find by a fact-intensive inquiry which party “has the predominant economic interest

in [the] loans.” Pet. App. 34a. What the state supreme court did not do is ask whether the bank or CashCall was the actual target of the lawsuit or the “real party in interest.”

3. CashCall is trying to manufacture a split of authority by conflating the jurisdictional question about the “real party in interest” with the merits question about the “real lender.” But they are different. And there thus cannot possibly be any conflict between the Fourth and Eighth Circuits, which addressed the former question, and the West Virginia Supreme Court of Appeals, which addressed the latter. If CashCall wanted to raise an issue regarding the Fourth and Eighth Circuit decisions in *Vaden* and *Krispin*, it should have challenged the district court’s remand order that addressed the same jurisdictional issue, but it has not done so. In the context of this case and the limited question presented, the Fourth and Eighth Circuit decisions are simply inapposite.

B. But even if this Court were to conclude that the legal question confronted by the Fourth and Eighth Circuits is similar or identical to the question here, there is still no clear split in appellate authority. Contrary to CashCall’s assertion, neither the Fourth nor Eighth Circuit looked solely to whether the bank or non-bank entity “actually sets the terms for a loan and then extended credit to the consumer.” Pet. 14. Instead, like the state supreme court and trial court below, both the Fourth and Eighth Circuits conducted fact-intensive inquiries that relied on many different factors.

In *Vaden*, the Fourth Circuit “look[ed] carefully at the facts to determine the real party in interest.” A credit card user—Betty Vaden—had asserted state-law counterclaims against Discover Financial Services (“DFS”), a non-bank entity. The Fourth Circuit concluded that Vaden’s real purpose was to obtain relief against her “lender,” and accordingly scrutinized the facts to determine whether DFS or Discover Bank, a bank, was in fact the lender. The court found “several pieces of evidence” “instructive”: the bank was the lender on the cardmember agreement, issued the card, set guidelines for evaluating card applications, decided interest and fees, levied periodic finance charges and late fees, indemnified its servicing affiliate, and listed itself on its internal financial documents as the card issuer and account owner. *Id.* at 597, 602–03. In addition, DFS had never identified itself as the lender and instead had acted under bank instructions when it marketed the card, sent bills for the bank’s card accounts, and collected overdue accounts. *Ibid.* All of these factors, the Fourth Circuit held, showed that the bank was the party from whom Vaden really desired relief.

The Fourth Circuit specifically “emphasize[d] the heavily fact-dependent nature of [its] analysis” and suggested that rent-a-bank cases, like this one, might come out differently. *Id.* at 597 n.9. The court discussed two cases, in particular, where district courts had found non-bank entities to be the “real lender[s].” *Id.* (citing *Goleta Nat’l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 718–19 (E.D.N.C. 2002), and

*Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1196 (N.D. Okla. 2004)). In one case, as here, a “non-bank payday lender” had “‘leased’ an association with the [bank] in order to avoid state usury laws.” *Ibid.* These rent-a-bank cases, the Fourth Circuit explained, were “distinguishable from the facts” in *Vaden. Ibid.*

The Eighth Circuit’s analysis in *Krispin* was similarly based on the totality of the circumstances. There, holders of a department store’s credit card brought suit against the store, alleging violation of state usury laws. Looking closely at the facts, the Eighth Circuit considered whether the consumers’ “suit against the store actually amounted, at least in part, to a state law usury claim against [a national] bank” that had been established as a wholly-owned subsidiary of the store “specifically for the purpose of taking over the store’s credit card operations.” *Krispin*, 218 F.3d at 923. The Eighth Circuit found that “the real party in interest is the bank, not the store,” for several reasons: the bank “issues credit” as “the originator” of each credit account, has total authority over the terms and operation of each credit account during the life of the credit card, “processes and services customer accounts,” and decides when to charge late fees and how much. *Id.* at 921–24. In addition, even though the credit agreements were initially with the department store, the store had left new accounts to the bank, assigned old accounts to the bank, “transferred all authority over the terms and operation of [old] accounts[] to the bank,” and told old customers at the time that, “[e]ffective

immediately, credit is being extended by the May National Bank of Arizona” (the bank). *Ibid.*

It can hardly be said with any confidence that, if confronted with the facts and circumstances of this case, the Fourth or Eighth Circuit would reach a different result than that of the West Virginia Supreme Court of Appeals. Sup. Ct. R. 10(a). *Vaden* and *Krispin* involved heavily fact-dependent analyses of cases that were quite different from the one at bar. As the federal district court explained in remanding this matter to the West Virginia state courts, “there was no question in *Vaden* and *Krispin* that the state-banks controlled the allegedly usurious charges.” *CashCall*, 605 F. Supp. 2d at 787. Moreover, “the state-banks and agents in *Vaden* and *Krispin* were related either through an indemnity agreement or through their corporate structure,” whereas “CashCall and the Bank are completely separate entities.” *Ibid.* Even accepting the fiction that the Fourth and Eighth Circuits addressed in *Vaden* and *Krispin* the same legal question at issue here, it is far from clear that those courts would disagree with the state supreme court’s decision in this case.

## **II. The Decision Of The West Virginia Supreme Court Of Appeals Is Consistent With The Text And Purpose Of Section 27.**

Beyond the absence of a split of appellate authority, certiorari is not warranted because the court below did not err. Contrary to Cashcall’s assertion, the state supreme court’s decision is fully consistent with the text and purpose of Section 27.

A. 1. The text of Section 27 unambiguously permits what might otherwise be considered usurious interest rates on a loan *only* where the interest is sought by a state-chartered *bank*. It provides that “State-chartered insured depository institutions” may “take, receive, reserve, and charge on any loan . . . interest at a rate . . . allowed by the laws of the State, territory, or district where the bank is located”—“notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section.” 12 U.S.C. § 1831d(a). A “[s]tate-chartered insured depository institution” is any bank, banking association, trust company, savings bank, industrial bank, or other banking institution the deposits of which are insured by the FDIC. *Id.* § 1813.

It follows from this plain language that Section 27 does *not* apply where a *non-bank* entity seeks usurious interest rates on a loan. As the Eleventh Circuit has observed, “The language of § 27(a) refers only to state-chartered banks, and does not address non-bank businesses . . . at all.” *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1304 (11th Cir. 2005), *vacated as moot*, 446 F.3d 1358 (11th Cir. 2006). Nothing in the law prohibits a State from regulating the efforts of a non-bank entity to circumvent the State’s usury laws.

Accordingly, where a bank and a non-bank entity are both involved with a facially usurious loan, the question that the text presents is whether it is the bank or non-bank entity that seeks the usurious

rates. If it is the bank, the language of Section 27 plainly shields the loan from state usury laws. But if it is the non-bank entity, the statute's language is equally plain in allowing state regulation to stand.

The statutory text thus requires precisely what the West Virginia Supreme Court of Appeals did: adopt the "predominant economic interest" test to determine whether it is the bank legitimately seeking what might otherwise be considered usurious rates, or the non-bank entity improperly seeking to collect usurious interest in circumvention of state law. As the state supreme court explained, the inquiry necessitates examining the substance, and not merely the form, of the relationship between the bank and non-bank entity to determine the "true lender." Pet. App. 37a. And the "predominant economic interest" test accomplishes that end because it looks behind the "superficial appearance" of the business arrangement to discover which entity—bank or non-bank—is actually seeking the facially usurious rates. *Ibid.* In contrast, a form-focused test like that proposed by CashCall—singularly dependent on the identity of the entity originating the loan—is not designed to uncover the party that is truly seeking the interest.

This reading of the text follows not only from the plain language but also from "this [C]ourt's standard practice, evident in many legal spheres and presumably known to Congress, of ignoring artifice when identifying the parties to a transaction." *Abramski v. United States*, 134 S. Ct. 2259, 2270 (2014). Under this rule of statutory interpretation, a law should be read to address "the substance of a

transaction, [not] only empty formalities.” *Id.* at 2267. This Court has repeatedly “emphasized” that “[u]sing a straw [should] not enable evasion of the . . . law.” *Id.* at 2270.

2. CashCall offers a different reading of the text that, in its view, supports its test. Specifically, CashCall notes that the statute provides that a “State bank . . . may . . . 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, territory or district where the bank is located.” 12 U.S.C. § 1831d(a) (emphasis added). The “key question,” CashCall contends, is “when and by whom a loan is ‘made.’” Pet. 15. According to CashCall, the term “made” indicates that the statute applies so long as a state-chartered bank originated the loan.

CashCall makes too much of one word. To begin, the word “made” is part of the phrase “discount made” and has nothing to do with the word “loan.” *See BankWest*, 411 F.3d at 1296 (explaining that Section 27 “covers ‘any loan’ of [an] out-of-state bank”); *id.* at 1304 (quoting the word “loan” and omitting the word “made”). But even if the statute could plausibly be read to include the phrase “any loan . . . made,” as CashCall contends, the word “made” does not bear the weight that CashCall places upon it. To support CashCall’s reading, the word “made” would need to be followed by the phrase “by a State-chartered bank.” As it stands, however, the most that the word “made” conveys is that the statute applies to loans that have been

consummated. Nothing in the statute suggests that it applies to loans that have been consummated *by a state-chartered bank*. To the contrary, Section 27 says only that it preempts state laws when a state-chartered bank is “tak[ing], receiv[ing], reserv[ing], and charg[ing]” interest on any loan, whomever made the loan in the first place.

B. The “predominant economic interest” test is also consistent with the statute’s purpose, which is to protect state-chartered banks and not non-bank financial entities. Section 27 is part of a larger scheme of regulation directed at state-chartered banks. *See, e.g.*, 12 U.S.C. § 1831a(a) (specifying the permissible activities of state-chartered banks); *id.* § 1820(d); *id.* § 1820(b)(2), (4)(A) (permitting examinations of state-chartered banks and their affiliates as the Board of Directors deems necessary); *id.* § 1813(r) (charging state regulators with overseeing state-chartered banks); *id.* § 1820(h)(1)(A) (permitting state regulators to examine and supervise state-chartered banks); *see supra* note 1 (collecting further regulations). Within this scheme, Congress enacted Section 27 specifically to “provide[] parity, or competitive equality, between national banks and State chartered depository institutions.” *Vaden*, 489 F.3d at 604 (quoting 126 Cong. Rec. 6,900 (1980)). It put state-chartered banks on the same footing as national banks, which were already allowed to lend money across state lines without complying with each State’s usury laws. *Ibid.*

This law recognizes that state-chartered banks, occupying a unique niche in our nation’s financial

marketplace, can and should be trusted to lend money at rates legal in their home State without having to comply with the usury laws of all States. As one commentator has explained, allowing banks to export home-state interest rates under Section 27 “is but one manifestation of the conviction that banks are somehow special, that the role that they play in our economy merits some special legal privileges.” Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 Minn. L. Rev. 518, 599 (2004). After all, “the extraordinary preemptive force of the Exportation Doctrine requires a powerful justification,” which is why “[n]onbanks using the Exportation Doctrine, either through nonbank bank subsidiaries or through charter-renting arrangements, are not justified in relying on the banking law principles that rationalize the broad expansions of the Exportation Doctrine with respect to depository institutions.” *Id.* at 600.

As a rigorous means of ensuring that Section 27 preemption only applies where a state-chartered bank is the true lender, the “predominant economic interest” test furthers this statutory purpose. Unlike the test advanced by CashCall, the state supreme court’s test would not “always find that the rent-a-bank was the true lender of loans such as those at issue in this case.” Pet. App. 37a. Rather, it makes certain that non-bank financial entities, which are not subject to the same regulations as state-chartered banks and do not occupy the same special role in the nation’s economy, do not take advantage of Section 27 to circumvent state usury laws.

C. Tellingly, several state appellate courts have adopted the same “predominant economic interest” test when confronted, as here, with the question of ordinary preemption under Section 27. For example, in *Georgia Cash America, Inc. v. Greene*, 734 S.E.2d 67 (Ga. Ct. App. 2012), a non-bank entity argued that certain out-of-state banks were the “true lenders” of payday loans that violated Georgia law. The Court of Appeals of Georgia held that the “predominant economic interest” test should be used to determine whether the non-bank entity “sought to obtain an amount greater than lawful interest . . . and was therefore the true lender” for purposes of federal preemption. *Id.* at 72, 75. Similarly, in *Spitzer v. County Bank of Rehoboth Beach*, 45 A.D.3d 1136 (N.Y.App.Div.2007), a payday lender was accused of attempting to use a Delaware bank to circumvent New York’s usury laws. The New York appellate court held that there must be “an examination of the totality of the circumstances . . . to determine who is the ‘true lender,’ with the key factor being ‘who had the predominant economic interest’ in the transactions.” *Id.* at 1138.

Federal regulators have likewise taken actions consistent with the state supreme court’s decision below. In a Preemption Determination concerning the National Bank Act—which similarly preempts state usury laws for loans by national banks—the Office of the Comptroller of the Currency (“OCC”) expressly adopted the “predominant economic interest” test. It excluded from the general rule of preemption under the National Bank Act

“situation[s] where a loan product has been developed by a non-bank vendor that seeks to use a national bank as a delivery vehicle, and where the vendor, rather than the bank, has the *preponderant economic interest* in the loan.” Preemption Determination, 66 Fed. Reg. 28,593, 28,595 n.6 (May 23, 2001) (emphasis added). Moreover, as the federal agencies that regulate state- and federally chartered banks, the FDIC and the OCC have “issued directives and t[aken] other actions intended to terminate the practice” at issue here, including “enforcement action against CashCall’s former partner[s], First Bank of Delaware, and CompuCredit.” Pet. App. 89a.

### **III. This Case Lacks Exceptional Importance And Is A Poor Vehicle For Review.**

Even if this Court were to determine that a split of appellate authority exists or that the West Virginia Supreme Court of Appeals erred, the petition should be denied because this case does not raise an exceptionally important issue and is otherwise a poor vehicle for this Court’s first case interpreting Section 27.

**A.** While CashCall contends that the state supreme court’s decision is “critically important” and will “chill lending activity in conflict with Congress’s intent,” that is far from true. Pet. 12, 14. The state supreme court’s decision merely affirms one fact-bound application of the “predominant economic

interest” test to a particular set of facts in an opinion that controls<sup>3</sup> only one State. Among other pertinent facts, the conclusion of the state courts below turned on CashCall’s status as an independent contractor, its duty to indemnify the bank, its obligation to purchase loans that met its underwriting requirements, and its retention of all payments of interest and principal. See Pet. 30; Pet. App. 17a–18a. As CashCall concedes, there is no dispute that the decision below does not affect a state-chartered bank’s ability to make loans in West Virginia without regard to the State’s usury laws. Nor does anything in the decision below suggest that the West Virginia Supreme Court of Appeals would necessarily disapprove of an arrangement between a state-chartered bank and a non-bank entity that differs from the one that existed between CashCall and FB&T. CashCall contends that the case-by-case nature of the “predominant economic interest” test will ultimately give banks “no incentive to lend” in West Virginia, but it offers no proof that lending from out-of-state banks has dried up in places like Georgia, where the “predominant economic interest” test has been codified in law.

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<sup>3</sup> The decision below is unpublished. Thus, while it “may be cited as legal authority” and is “legal precedent,” its “value as precedent is necessarily more limited” because “where a conflict exists between a published opinion and a memorandum decision, the published opinion controls.” Syl. Pt. 4 & 5, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014).

At bottom, CashCall’s exaggerated concerns stem from a fundamentally flawed understanding of Congress’s intent. As this Court has often explained, “the text of the relevant statute provides the best evidence of congressional intent.” *Greenlaw v. United States*, 554 U.S. 237, 258 (2008). Here, the text makes clear that Congress intended to protect state-chartered banks from out-of-state usury laws *if it is the state-chartered bank that is “tak[ing], receiv[ing], reserve[ing], and charg[ing]” interest on the loans*. But Congress did not intend to give non-bank entities a means to circumvent state usury laws. Under that proper understanding of congressional intent, the decision below does not “conflict” with Congress’s intent but advances it. Pet. 12. To the extent that the decision does chill some lending activity in West Virginia by non-bank entities, that is not a legal crisis but rather consistent with Congress’s design.

This case is hardly—as CashCall dramatically claims—the Machiavellian culmination of a long “search[]” by West Virginia regulators to find “a way to challenge” a federal statute that they “dislike.” *Id.* at 13. The Attorney General’s position in this case, which is consistent with that of the federal regulators, *vindicates* Congress’s intent to protect state-chartered banks and not non-bank entities. In addition, this case is not a one-off test case focused exclusively on the meaning of Section 27. The usury claims at issue in this petition are just a fraction of a case so large it took 57 months to reach final judgment in the trial court and was litigated in two phases—the first addressing the State’s eleven debt

collection claims and the second addressing the State's three usury and registration claims. Moreover, as described more fully below, this case is only one of many against CashCall throughout the country for a number of different consumer protection violations.

**B.** For a number of reasons, this case is also a poor vehicle for this Court's first opinion interpreting Section 27.

1. To begin, this case is a poor vehicle for this Court to weigh the merits and consequences of different rules for determining whether a non-bank entity is attempting to take improper advantage of Section 27, because CashCall would likely satisfy every possible test. As evidenced by the numerous administrative and judicial proceedings against CashCall for its lending practices, CashCall appears to have a pattern of attempting to circumvent state usury laws. In late 2013, the federal Consumer Financial Protection Bureau also filed suit against CashCall for violating the usury and licensing laws of sixteen States.<sup>4</sup> Seventeen States have filed suit under state law against CashCall for violations of state usury, licensing, and debt collection laws. *See*

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<sup>4</sup> Complaint & Amended Complaint, No. 1:13-cv-13167, Doc. 1 & 27 (D. Mass. Dec. 16, 2013 & Mar. 21, 2014) (claiming that CashCall violated usury and licensing laws in Alabama, Arkansas, Arizona, Colorado, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, and Ohio).

*CashCall, Inc.*, BBB Business Review, <http://www.bbb.org/sdoc/business-reviews/loans/cash-call-inc-in-orange-ca-13192029/>, accessed Mar. 17, 2015 (listing all government actions and, on a scale of A+ to F, rating CashCall an F). The allegations include interest rates of up to 1800%.<sup>5</sup> And many

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<sup>5</sup> *E.g.*, *Minn. AG sues Calif. lending firm over rate 'ruse,'* AP State News (July 12, 2013) (“alleg[ing] the loans come with annual percentage rates of up to 342 percent and high origination fees”); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Sues Western Sky Financial And CashCall For Illegal Loans Over Internet (Aug. 12, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-sues-western-sky-financial-and-cashcall-illegal-loans-over-internet> (accusing CashCall of violating New York usury and licensed lender laws by charging interest rates from 89% to 355%); Press Release, Colorado Attorney General, Attorney General Files Lawsuit Against Predatory Online Loan Servicers (Dec. 16, 2013), available at [http://www.coloradoattorneygeneral.gov/press/news/2013/12/16/attorney\\_general\\_files\\_lawsuit\\_against\\_predatory\\_online\\_loan\\_servicers](http://www.coloradoattorneygeneral.gov/press/news/2013/12/16/attorney_general_files_lawsuit_against_predatory_online_loan_servicers) (alleging CashCall serviced and collected predatory loans charging annual percentage rates between 90% and 350%); Press Release, Attorney General of Arkansas (Oct. 1, 2013), <http://arkansasag.gov/news-and-consumer-alerts/details/mcdaniel-files-suit-against-online-payday-lending-operation> (alleging that “defendants offer payday loans with interest rates as high as 342%”); Amended Complaint, *Georgia v. Western Sky Financial*, No. 2013-CV-234310, Amended Complaint (Superior Court of Fulton County, Ga. Aug. 5, 2013) (alleging that CashCall’s agreement with Western Sky Financial contained a clause stating that any dispute would be arbitrated by the Cheyenne River Sioux Tribal Nation in order to obtain tribal sovereign immunity); *State ex rel. Swanson v. CashCall, Inc.*, Nos. A13-2086, A14-0028, 2014 WL 4056028 (Ct. App. Minn. Aug. 18, 2014) (upholding temporary injunction based on claim of using a company to claim tribal immunity with respect to

private consumer lawsuits have been filed, as well, accusing CashCall of practices ranging from deceptive advertising to high interest to fraud.<sup>6</sup> One

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making usurious loans to Minnesota consumers); Press Release, Maryland Dep't of Labor, Licensing, & Regulation, Maryland Comm'r of Financial Regulation Announces \$2Million Settlement with Western Sky Financial, CashCall, Inc. and Others (June 23, 2014), available at <https://www.dllr.state.md.us/whatsnews/frwesternsky2014.shtml> (reporting that CashCall agreed to a \$2 million settlement agreement for charging 1,800% annual interest); Marni Usheroff, *Anaheim lender CashCall settles Connecticut loan violations*, Orange County Register, 2014 WLNR 9827587 (Apr. 11, 2014) (reporting that CashCall settled a case after it “offered unsecured, short-term consumer loans of up to \$15,000 with annual interest rates ranging from 89 percent to 355 percent”); Matthew Patane, *Online Lender CashCall Must Pay \$1.5 Million to Iowans*, Des Moines Register (Oct. 6, 2014), <http://goo.gl/vVkmQ8> (reporting that CashCall lost its Iowa lending license for charging interest above 169% and violating state lending laws).

<sup>6</sup> *E.g.*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 769 (7th Cir. 2014) (denying arbitration of claims of “alleged violations of Illinois civil and criminal statutes” for loans on which CashCall was the assignee, when the loans “pay approximately 139% in interest each year [so] that a \$2,525 loan will cost approximately \$8,392”); *O'Donovan v. CashCall, Inc.*, 278 F.R.D. 479 (N.D. Cal. 2011) (class action alleging violations of the federal Electronic Fund Transfer Act, Federal Reserve Regulation E, California’s Consumer Legal Remedies Act, California’s Rosenthal Fair Debt Collection Practices Act, and other California-law claims for unlawful, unfair, and fraudulent business practices); *Fluke v. CashCall, Inc.*, 792 F. Supp. 2d 782, 786 (E.D. Pa. 2011) (noting that CashCall arbitrated a claim over the unconscionability of “an interest rate of 99.16%”); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1395, 133 Cal. Rptr. 3d 450, 462 (2011) (remanding private action for trial on

unique twist in some cases is CashCall’s so-called “rent-a-tribe” arrangements—as opposed to its “rent-a-bank” schemes—in which CashCall seeks to use an Indian tribe’s sovereign immunity and right to arbitration to preclude judicial oversight of its high-interest loans. In the course of these cases, CashCall’s lending practices have been described by federal judges as “egregious” and “odious.”<sup>7</sup> Given CashCall’s apparent proclivities, this case is simply unlikely to permit this Court to craft a meaningful rule to guide lower courts in mine-run cases.

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whether CashCall illegally recorded borrowers’ confidential conversations); *Otis v. Marketing Three, LLC*, 987 N.E.2d 545 (Ind. Ct. App. 2013) (alleging that CashCall served as the marketing agent for \$2,600 loans with a 99.23% APR); Peggy Lowe, *CashCall must halt loan shark tactics; Fast-money lender must stop its deceptive TV, radio, online advertisements.*, Orange County Register, 2009 WLNR 16678478 (Aug. 26, 2009) (reporting a state court judgment against CashCall for \$1 million in civil penalties).

<sup>7</sup> *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1356 (11th Cir. 2014) (Restani, J., concurring) (refusing to compel arbitration of defamation, usury, and Fair Credit Reporting Act claims because arbitration “would be an insufficient antidote to the egregious actions of defendant CashCall”), petition for certiorari filed, No. 14-775 (U.S. Dec. 31, 2014); *Moses v. CashCall, Inc.*, No. 14-1195, 2015 WL 1137242, at \*28 (4th Cir. Mar. 16, 2015) (Davis, J., dissenting in part) (“I do not hesitate to observe the odiousness of CashCall’s apparent practice of using tribal arbitration agreements to prey on financially distressed customers.”).

2. The number of issues raised in the state supreme court also makes this petition a poor vehicle. Because CashCall confronted the state supreme court with *fourteen* different assignments of error on appeal, the supreme court could not and did not give this issue extensive consideration. While “[t]he mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error,” “receptiveness declines as the number of assigned errors increases.” Robert H. Jackson, *Advocacy Before the Supreme Court*, 25 Temp. L.Q. 115, 119 (1951). Here, the opinion spends but five paragraphs of a fifty-seven page order on the specific question now before this Court. This Court can and should await a petition seeking review of an opinion that provides a more comprehensive analysis.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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**APPENDIX****State and Territory Statutory Provisions Concerning  
Regulation of State-Chartered Banks**

Alabama	Ala. Code tit. 5
Alaska	Alaska Stat. tit.6
Arizona	Ariz. Rev. Stat. tit. 6
Arkansas	Ark. Code Ann. tit. 23, subtit. 2
California	Calif. Fin. Code
Colorado	Colo. Rev. Stat. tit. 11
Connecticut	Conn. Gen. Stat. tit. 36a
Delaware	Del. Code. Ann. tit. 5
District of Columbia	D.C. Code tit. 26
Florida	Fla. Stat. tit. XXXVIII
Georgia	Ga. Code. Ann. tit. 7
Hawaii	Haw. Rev. Stat. tit. 22
Idaho	Idaho Code Ann. tit. 26
Illinois	Ill. Comp. Stat. ch. 205
Indiana	Ind. Code tit. 28

Iowa	Iowa Code tit. XIII, subtit. 2
Kansas	Kansas Stat. Ann. § 9-17
Kentucky	Ky. Rev. Stat. Ann. tit. XXV
Louisiana	La. Rev. Stat. Ann. tit. 6
Maine	Me. Rev. Stat. tit. 9-B
Maryland	Md. Code Ann. Fin. Inst.
Massachusetts	Mass. Gen. Laws Pt. I. tit. XXII. ch. 167A, 168, 170- 72
Michigan	Mich. Comp. Laws Ch. 487
Minnesota	Minn. Stat. ch. 46-59
Mississippi	Miss. Code Ann. tit. 81
Missouri	Mo. Rev. Stat. tit. XXIV
Montana	Mont. Code Ann. tit. 32
Nebraska	Neb. Rev. Stat. Ch. 8
Nevada	Nev. Rev. Stat. tit. 55
New Hampshire	N. H. Rev. Stat. Ann. tit. XXXV
New Jersey	N.J. Stat. Ann. tit. 17

New Mexico	N.M. Stat. Ann. ch. 58
New York	N.Y. Banking Law
North Carolina	N.C. Gen. Stat. ch. 53-55
North Dakota	N.D. Cent. Code tit. 6
Ohio	Ohio Rev. Code Ann. tit. XI
Oklahoma	Okla. Stat. tit. 6; Or. Rev. Stat. tit. 53
Pennsylvania	7 Pa. Cons. Stat.
Rhode Island	R.I. Gen. Laws Tit. 19
South Carolina	S.C. Code Ann. tit. 34
South Dakota	S.D. Codified Laws tit. 51a
Tennessee	Tenn. Code Ann. tit. 45
Texas	Tex. Fin. Code Ann.
Utah	Utah Code Ann. tit. 7
Vermont	Vt. Stat. Ann. tit. 8
Virginia	Va. Code Ann. tit. 6.2
Washington	Wash. Rev. Code tit. 30
West Virginia	W. Va. Code ch. 31A
Wisconsin	Wis. Stat. Ch. 214-225

Wyoming	Wyo. Stat. Ann. tit. 13
Guam	11 Guam Code Ann., Div. 1, Div. 4, Ch. 106
Puerto Rico	P.R. Laws Ann. tit. 7
Virgin Islands	V. I. Code Ann. tit. 9

**State Statutory Provisions Establishing Interest  
Rate Limitations**

Alabama	Ala. Code §§ 8-8-1, 8-8-12, 8-8-10, 8-8-5, 8-8-6, 11-54- 97, 11-58-15, 8-8- 7, 24-1- 32, 16-3-28, 22-21-6
Alaska	Alaska Stat. §§ 45.45.010, 45.45.030, § 45.45.010
Arizona	Ariz. Rev. Stat. §§ 44-1201, 44-1202, 44-1203, 44-1204, 44-1201
Arkansas	Ark. Const. Art. XIX § 13
California	Cal. Const. XV § 1, Civ. Code §§ 1916-1, 1916-2, 1916-3, Const. Art. XV § 1, Ins. § 1100.1, Corp. § 25211.5, 25116, Fin. §§ 31410, 1504, 1716, 3707, 7675
Colorado	Colo. Rev. Stat. §§ 5-12- 101, 5-12-103, 5-2-201, 18- 15-104, 5-12-102[4], 11-41- 115, 5-13-101, 5-13-102, 5- 13-103
Connecticut	Conn. Gen. Stat. §§ 37-4, 36a-57, 337-1, 37-9, 21-44

Delaware	Del. Code Ann. Tit. 6 § 2301, 2304[b], 2301
District of Columbia	D.C. Code §§ 28-3302, 28-3301, 28-3303, 28-3304, 28-3302; 26 U.S.C. § 6621
Florida	Fla. Stat. §§ 687.04, 687.071, 516.031, 520.01, <i>et seq.</i>
Georgia	Ga. Code Ann. §§ 7-4-2, 7-4-10, 7-4-18, 7-4-12, 7-3-14
Hawaii	Haw. Rev. Stat. §§ 478-2, 478-5, 478-6, 478-3
Idaho	Idaho Code Ann. §§ 28-22-104, 6-807, 28-22-104
Illinois	815 Ill. Comp. Stat. §§ 205/4, 205/6, 735 Ill. Comp. Stat. 5/2-1303, 735 Ill. Comp. Stat. 5/12-109, 205 Ill. Comp. Stat. 670/1, 815 Ill. Comp. Stat. 205/4, 815 Ill. Comp. Stat. 205/4a, 205 Ill. Comp. Stat. 670/15, 205 Ill. Comp. Stat. 510/2, 20 Ill. Comp. Stat. 3605/5 to 3605/12, 205 Ill. Comp. Stat. 305/46; Ind. Code §§ 24-4.5-3-201, 24-4.5-3-508, 24-4.5-5-301, 24-4.5-5-202,

	24-4.6-1-101, 34-54-8-5, 24-4.5-3-501
Iowa	Iowa Code §§ 535.2(3), 535.2(1), 535.5, 535.2, 535.3, 668.13, 535.2(2)
Kansas	Kans. Stat. Ann. §§ 16-201, 16-207, 16-207, 16-204, 16-205, 16-207
Kentucky	Ky. Rev. Stat. Ann. §§ 360.010, 360.020, 360.040, 360.010(2), 290.465, 288.530
Louisiana	La. Rev. Stat. Ann. §§ 9:3500, 9:3501, 13:4202, 13:5112, 9:3504, 9:3509, 9:3504
Maine	Me. Rev. Stat. tit. 9-B, § 432, tit. 14, § 1602-B, tit. 14 § 1602-C, tit. 30-A § 3963, tit. 11 § 9-1201, tit. 9-A § 2-201
Maryland	Md. Const. Art. III § 57, Com. Law § 12-103, § 12-114, Cts. & Jud. Proc. § 11-106, 107, 301, Com. Law §§ 12-103, 12-506, 12-609, 12-610
Massachusetts	Mass. Gen. Laws ch. 107, § 3, ch. 271, § 49, ch. 231, §

	6B, ch. 231 § 6C, ch. 231 § 6F, ch. 140 § 96, ch. 140 § 114B, ch. 175, § 142
Michigan	Mich. Comp. Laws §§ 438.31, 438.32, 600.6013, 493.1, 490.14
Minnesota	Minn. Stat. §§ 334.01, 47.20, 334.03, § 334.02, § 48.196, § 549.09, 48.195, 52.14, § 47.204, § 334.011, § 334.01, § 334.012
Mississippi	Miss. Code Ann. §§ 75-17- 1[1],75-17-1[2], 75-67-119, 75-17-7, 75-17-1, 75-17-23, 75-17-1 [3]
Missouri	Mo. Rev. Stat. § 408.020, 408.030, 408.050, 408.060, 408.030, 408.040, 408.035
Montana	Mont. Code Ann. §§ 31-1- 106, 31-1-107, 31-1-108, 25-9-205l, 31-1-112
Nebraska	Neb. Rev. Stat. §§ 45- 101.03, 45-105, 45-110, 45- 110, 45-103, 45-101.04
Nevada	Nev. Stat. §§ 99.040, 99.050, 17.130, 677.730, 336:1, 195-F:15, 374-C:14

New Hampshire	N.H. Rev. Stat. Ann. §§ 399-A:3, 398-A:2, 358-K:1
New Jersey	N.J. Stat. Ann. §§ 31:1-1, 2C:21-19, 31:1-3, 2C:21-19, 31:1-1
New Mexico	N.M. Stat. Ann. §§ 56-8-3, 56-8-13, 56-8-4, 56-8-9, 56- 8-21, 56-12-13
New York	N.Y. Gen. Oblig. Law §§ 5- 501(1), 5-511(1), 5-513, 5- 511(1), 5-525, N.Y. C.P.L.R. 5003, 5004
North Carolina	N.C. Stat. §§ 24-1, 24-2, 24-5, 24-1.1A, 24-1.4, 24-9, 24-1.2A
North Dakota	N.D. Cent. Code §§ 47-14- 05, 47-14-09, 47-14-10, 47- 14-11, 28-20-34, 47-14-09
Ohio	Ohio Rev. Code Ann. §§ 1343.01, 1343.04, 1343.02, 1343.03
Oklahoma	Okla. Stat. tit. 15 § 266, Const. Art. XIV § 3, 15 § 272, tit. 12 § 727, tit. 59 § 1510, tit. 14A § 3-201
Oregon	Ore. Rev. Stat. §§ 82.010, 82.025

Pennsylvania	41 Pa. Stat. §§ 201, 202, 301, 302, 501, 42 Pa. Stat § 8101
Rhode Island	R.I. Gen. Laws §§ 6-26-1, 6-26-2, 6-26-3, 6-26-4, 9-21- 10, 19-26-18, 6-26-2, 6-27-4
South Carolina	S.C. Code Ann. §§ 34-31- 20, 37-1-101 <i>et seq.</i>
South Dakota	S.D. Codified Laws §§ 54-3- 4, 54-3-16, 54-3-5.1, 54-11- 5, 54-3-13
Tennessee	Tenn. Code Ann. §§ 47-14- 103, 47-14-117, 47-14-112, 47-14-121, 45-2-1106, 47- 14-104, 45-3-705, 47-14- 104
Texas	Tex. Fin. Code Ann. §§ 305.001 to 305.003, 305.005, 305.008
Utah	Utah Code Ann. §§ 15-1-1, 76-6-520, 15-1-4, 11-6-4
Vermont	Vt. Stat. Ann. tit. 9 §§ 41a, 50, 2405, tit. 12, § 2903, tit. 24, § 1761
Virginia	Va. Code Ann. §§ 6.1- 330.53, 6.1-330.57, 6.1- 330.54, 6.1-330.64, 6.1-

	330.66, 6.1-330.48, 6.1-330.71, 6.1-330.77
Washington	Wash. Rev. Code §§ 19.52.010(1), 19.52.030(1), 4.56.110, 19.52.110, 19.52.100, 19.52.130, 19.52.120, 19.52.160
West Virginia	W. Va. Code §§ 47-6-5, 47- 6-5(b), 47-6-6, 46A-5-103, 46A-5-104, 56-6-31, 46A-3- 111, 33-13-8, 46A-3-101, 47-6-11, 47A-1-1, <i>et seq.</i>
Wisconsin	Wis. Stat. §§ 138.04, 138.06(2), 815.05(8), 138.041, 138.052(7), 138.05(5), 218.0142
Wyoming	Wyo. Stat. Ann. §§ 40-14- 106, 1-16-102(a), 1-6- 102(c), 40-14-121