In the

Supreme Court of the United States

MINNESOTA,

and

MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioners,

v.

FIRST OF OMAHA SERVICE CORPORATION, et al.

No. 77-1258

No. 77-1265

Washington, D.C.
October 31, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

MINNESOTA, Petitioner, v. FIRST OF OMAHA SERVICE CORPORATION ET AL.; and MARQUETTE NATIONAL BANK OF MINNEAPOLIS, Petitioner, v. FIRST OF OMAHA SERVICE CORPORATION ET AL.	:	No. 77-1258 No. 77-1265

Washington, D.C.
Tuesday, October 31, 1978

The above-entitled matter came on for argument at 1:51 o'clock p.m.

BEFORE:

WILLIAM E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

2 APPEARANCES:

RICHARD B. ALLYN, Solicitor General, State of Minnesota, St. Paul, Minnesota 55155; on behalf of the petitioner.

JOHN TROYER, Levitt, Palmer, Bowen, Bearmon & Rotman, 500 Roanoke Building, Minneapolis, Minn. 55402; on behalf of respondent in opposition.

ROBERT H. BORK,

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Nos. 77-1258 and 77-1265, Minnesota v. First of Omaha Service Corporation, et al, and Marquette National Bank of Minneapolis v. First of Omaha Service Corporation, et al.

ORAL ARGUMENT OF RICHARD B. ALLYN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ALLYN: Mr. Chief Justice, and may it please the Court in council:

I do speak on behalf of the interests of the State of Minnesota in this case. This is an appeal from the Minnesota Supreme Court.

And the dispute is over whether a Nebraska national bank has to abide by the Minnesota usury laws when it charges interest to Minnesota residents for a bank credit card program conducted in Minnesota; or whether, as it claims, it can import the Nebraska usury law into Minnesota in order to charge six percent more interest than the other banks that are doing business in Minnesota, including other national banks.

Now, Bankamericard and Master Charge credit card programs have been marketed in Minnesota, as indeed, throughout the country, for many years. It's a fair statement to say that thousands of Minnesotans rely on these cards daily to purchase goods and services, indeed, to get cash advances.

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A few years ago Minnesota passed a specific statute to govern these kinds of transactions. It's known as the open end loan arrangement law -- we call it the Bank Credit Card Act. But essentially it says this:

That a state or national bank or a savings bank can issue credit to a consumer, permit them to pay it back in a flexible way, permit them to use the money in a flexible way; and indeed, the card holder himself decides when he's going to obtain the credit and when he's going to pay it off.

In Minnesota the statute says the annual interest that may be charged is 12 percent. In addition there are some compounding limitations.

Finally, there is a $15 fee permitted,up to $15 permitted for the privilege of using the card.

It's important to note that without exception the national banks and the state bank of Minnesota which have issued and use these cards have abided by the Minnesota law from its inception in 1976.

Late in 1975, the First National Bank of Omaha, Nebraska, came to Minnesota, registered a wholly owned subsidiary, which is managed by one of its vice presidents, with our secretary of state, and appointed a person suitable to receive process in Minnesota, and embarked upon a systematic solicitation of Minnesota residents, using the telephone and the mails.

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In addition, merchants and banks willing to handle these transactions were enlisted.

Now the problem is that the First National Bank of Omaha, Nebraska, wants to charge 18 percent on the unpaid balance. In addition, they have some compounding techniques, if you'd call them that, which exceed those which are permitted by our state statute.

This issue in this case, then, is whether or not they can do that, or whether they have to abide by our statute. And let me just say by way of introduction that it seems without dispute that a state's right to protect its citizens from usury has been a tradition in American since its founding.

We've had a law in Minnesota on usury since territorial days. And this tradition was in the mind of Congress, we argue, in 1864 when it passed the National Banking Act, which is what you're examining here.

And that tradition was codified in this respect: A number of people wanted to adopt a uniform national interest rate, but it was rejected. It was felt that each state should be entitled to regulate its interest, each state to protect its own citizens.

On the other hand, they wanted to make clear that their own creation, the national banks, or new creation, the revised national banks, I should say, would not be unfairly treated by these state laws.

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So they provided that in charging interest national banks would be governed by the laws of the state where they're located.

There's no question that Congress intended for the states to continue to set the interest rate, and that the national banks would be bound by it.

And just one quick quote -- I won't try to belabor it. But the Congressman from California said: "What is the consistency or propriety of having two rates of interest established by law in the same community? What is the benefit of having two systems of usury in the same state?"

Of course, they rejected that notion of two systems.

All right, what is now codified as section 85, which is in issue here, simply says a national bank can charge for a loan what they can charge for a loan is that rate allowed by the laws in the state where it's located.

First of Omaha claims, our main office is in Omaha, Nebraska; we can charge the Nebraska rate and go anywhere in the country and charge that rate because we're located in Nebraska.

Now, we urge that Congress never intended to let this provision be used to export interest rates into other states. We believe that Congress intended to preserve to each state the right to regulate interest rates.

Now, there's no question that the language on its

w 7 face raises the possibility they assert here; we don't deny that. But we urge you to consider Congress' purpose and intent when they adopted section 85. And we've supplied in our briefs statements similar to the one I've read which indicates what that intent is.

It seems clear to us that at the time that Congress adopted section 85, it only contemplated banks being in one place. Banks didn't travel the paths of interstate commerce the way they do today.

If a person, even from another state, wanted a loan, they showed up at the bank and posted their security or note, and bundles of notes were handled across the counter, and away they went.

Now a couple of courts -- the decisions which are cited in our brief -- have agreed that at section 85, is silent when a bank goes somewhere else than the state where it's located, and that as a result, when they go elsewhere, they're governed by whatever laws are in force in that state.

I think there's an alternative argument which is just as sound, and which I would urge here today as well. And that is that "located" can mean more than just where the home office is, where that building is.

If you'll look at the intention of Congress, and you apply it to the transaction here, it seems to me that there is no question that when a bank comes into Minnesota, does a

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substantial solicitation, profits by this commerce in our state, maintains a corporation license to do business in Minnesota, or a foreign corporation.

QUESTION: With respect to that, counsel, would Minnesota's purposes be served if the court had simply enjoined the subsidiary in Minnesota from carrying on this kind of conduct?

MR. ALLYN: We're not sure what the national bank would have done. It seems that it may well have. And the reason for that is that the subsidiary was the one, according to the stipulated record, which made agreements with the local banks which would handle the paper coming from the merchants.

And secondly, the subsidiary was the one that was going to collect the delinquent accounts, and as a matter of fact, keep the interest.

QUESTION: But the Supreme Court of Minnesota felt not even a subsidiary could be enjoined?

MR. ALLYN: The Supreme Court of Minnesota -- that's correct, your Honor. They felt that because of a prior interpretation in the Eighth Circuit, that they were bound by it.

But Mr. Justice Rehnquist, if you read our court's opinion, you'll find it's one of the most reluctant conclusions --

QUESTION: They weren't happy, obviously.

MR. ALLYN: Okay. And the reason they weren't

happy is because of the anomalous result. And that is that one state could anywhere -- a bank from one state could go anywhere in the country and beat out the competition there because they're bringing a different interest rate with them.

QUESTION: I would have thought that you would get more business if you charged lower rates.

MR. ALLYN: Okay, the problem that comes up here, Mr. Chief Justice, is, they advertise their card --

QUESTION: -- in terms of competition. Perhaps it's just the use of that word that --

MR. ALLYN: Well, it made a difference here, and here's how it happened.

They claimed that their card was free. No other card in Minnesota could claim that. And the reason they could claim their card was free was that they weren't charging this privilege fee. And the reason they could do that is because they were charging a higher amount of interest.

So no one else could make this wonderful claim that their card was free. And pity the consumer walking down the street. All these banks had signs up that said, BankAmericard. Many banks sell it. It's not an exclusive license.

And let's face it, one of the intents behind usury law, one of the ideas is, that the public can't protect itself wholly. It doesn't shop as wisely as it might.

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So we're saying -- the legislature is saying, as an exercise of our police power, we've got to look out for the citizens to a limited extent. And that limited extent is setting an outside limit on how much interest can be charged.

So I agree that shopping around is certainly part and parcel of our economy, but some protections apparently have been added.

The important thing that we wanted to emphasize to you today, at least speaking for the state of Minnesota, is, that we feel very strongly that if section 85 is interpreted in the way they want, it's going to displace our own ability to protect our citizen from usury.

And I think there are some analogous cases, although they're not based on section 85. But those cases -- the Alden's cases; there are three of them now out of the circuits, all of them holding that a mail order company in Chicago which ships things off to, say, a state like in Pennsylvania, must not charge more interest than the law in Pennsylvania, that it's not an undue burden on interstate commerce, and it's not an interference with their ability to make a profit in that state.

QUESTION: Well, those are really minimum contact cases, aren't they? Here you have a subsidiary that actually took out papers in Minnesota.

MR. ALLYNA: That's true, your Honor. I frankly

kw 11

think our case is a little stronger.

But one of the points I wanted to make to you today is that they're looking for approval of a radical departure from the custom in the trade today. To our knowledge there are only two national banks that are going elsewhere and claiming that they can take their higher rate with them.

And that leads me to one of two last points I want to make before giving way to other counsel, and that is, there's been a request made in one of the amicuses that you make a prospective ruling here.

Personally, the state does no object to that because we're just seeking an injunction. But I'd like to point out that our evidence shows that, first of all, there aren't that many other banks that are doing it. Almost every state in the country today has a bank credit card statute which sets an interest rate in that state.

Secondly, First Omaha came into Minnesota and kept doing what they did in the face of our new statute, without ever challenging it, without ever bringing on a declaratory judgment, without ever even asking the Commissioner of Banking for an opinion.

So it isn't as if they weren't on notice that there might be a problem. But they decided to do commerce in our state and take profit from our state without abiding by our law.

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One last point then --

QUESTION: General Allyn, why do you think the Minnesota court was so deferential to the Eighth Circuit? That hasn't been historically true, and I wondered why they were persuaded here by it.

MR. ALLYN: Your Honor, I think the Justices' opinion felt that because of the procedural way the case actually came up to the Minnesota court with the First National Bank itself -- of Omaha -- not being there, that -- they felt that in effect their decision was going to affect that bank; there's no question about that.

QUESTION: And all the parties were Eighth Circuit people, were they not?

MR. ALLYN: Yes, your HOnor. Yes, your Honor.

That they shouldn't try and implement a different rule of law than what they felt was the superior court's law.

QUESTION: Didn't they feel that -- the Eighth Circuit felt and didn't this court feel it was bound by Tiffany in a way? The Tiffany case?

MR. ALLYN: Actually, no -- well, they mentioned Tiffany. I think what they felt they were bound by --

QUESTION: Well, you would suggest we overrule Tiffany.

MR. ALLYN: I don't suggest you overrule Tiffany, your Honor. I suggest that what they want you to do is

expand Tiffany way beyond what the Supreme Court in 1874 decided. What they -- what I think the Minnesota court felt bound by was the Fisher case in the Eighth Circuit. And --

QUESTION: What did the -- didn't the Fisher -- wasn't the Fisher case, didn't it purport to follow Tiffany?

MR. ALLYN: Your Honor, it was in dictu. Actually, they started right out by saying section 85 is clear; they're located in Nebraska. It's a Nebraska transaction there in Iowa.

But there's no question they discussed Tiffany and said, if the most favored lender factor, and it had to be used here because Iowa had a higher rate, you know, they could charge the higher rate in Iowa.

I don't deny you that Tiffany is a very important part of the case, and co-counsel is going to talk about the most favored lender doctrine. But you don't have to overrule it here.

The most favored lender doctrine was meant to protect banks from discrimination against state banks in their same location. We don't have a discriminatory statute in Minnesota. All banks and lenders in the bank credit card business, indeed, any kind of credit card business, can charge the same interest rate in Minnesota: 12 percent. If it's a Diner's -- or a local department store; if it's an installment loan from the bank; they're all 12 percent.

So the point I wanted to make to you, Your Honor, is that -- while some people don't like Tiffany,we don't want you to feel you have to overturn it to get to where we want to go today.

QUESTION: Except there's talk about a different rate of interest for small loan companies.

MR. ALLYN: Okay. Mr. Stewart -- Justice Stewart, if I may address that real quickly.

QUESTION: Minnesota still has its small loan act, does it not?

MR. ALLYN: It does, Your Honor.

QUESTION: Which allows 36 percent in the aggregate or something in that neighborhood?

MR. ALLYN: 33 for a loan up to $300; 18 percent for $300 to $600; and 15 percent up to $1,200 was theoutside limit.

The important thing to note here is that it's a closed end transaction. It doesn't permit any compounding. And it has other limitations that they don't even begin to comply with here.

Now, they use that argument, Mr. Justice Stewart, to say that they can go through and grab off that interest rate there and use it on these credit card transactions. While, darn it all, the small loan act was designed to make credit available to people who couldn't frankly get credit cards.

QUESTION: Well, under Tiffany, what if in the home state of a bank, the state has a special -- a general rule, the interest rate at 18 percent, and then they set a special rate for state banks, 12 percent.

Well, now, under Tiffany, the national bank isn't bound by that, is it?

MR. ALLYN: Under Tiffany, they could charge the higher percent.

QUESTION: 18.

MR. ALLYN: And we're not contesting that. We just don't have that situation here. Thank you very much.

QUESTION: Very well.

QUESTION: Was the small loan company act issue raised in the Minnesota court?

MR. ALLYN: It has been alluded to, yes.

QUESTION: You concede that it was?

MR. ALLYN: Yes --

QUESTION: In this case?

MR. ALLYN: Yes, they have at least been briefing, said, if nothing else, gee, we can use the most favored lender doctrine here in Minnesota by applying this 18 percent which we found over here in the small loan act.

QUESTION: Did the Minnesota court pass on it?

MR. ALLYN: I don't believe the Minnesota court decided that it had to. As a matter of fact, I'm sure it didn't.

16 MR. CHIEF JUSTICE BURGER: Mr. Troyer.

ORAL ARGUMENT OF JOHN TROYER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. TROYER: Mr. Chief Justice, and may it please the Court:

The -- I would like to respond to a couple of the questions that were asked here.

In terms of the competitive disadvantage which the Marquette National Bank finds itself, it charges a 12 percent rate and a $15 membership fee -- or did, until it sold its program.

The Omaha bank comes in here with an 18 percent rate. What is the competitive disadvantage to The Marquette Bank, as distinguished from the disadvantage to the Minnesota consumer?

The disadvantage to the Marquette Bank is, number one, obviously, it cannot charge an 18 percent rate; it cannot get the profit yield of an 18 percent rate.

But more precisely, a bank which can charge a higher rate of interest has tremendous flexibility and advantage in terms of advertising, in terms of soliciting the consumer; if it is entitled to a greater yield, it can afford to spend the time, money and effort in order to attract the consumers in the state of Minnesota, and to draw them off of, for instance, Marquette's program.

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Forthermore, the Omaha bank has a competitive advantage at the 18 percent rate level because the Omaha bank in Omaha is entitled to charge its finance charge of 1-1/2 percent per month on the previous balance of a customer's account, whereas in Minnesota, the rule provided by our statute is, it must charge that rate on the average daily balance of the customer's account.

Now, by charging a finance charge of, say, 1 percent on the average balance of the account as distinguished from the previous balance, the yield is greater using the previous balance method.

So that's just another example of how the Omaha bank and its subsidiary are privileged.

Secondly, we are not, as Mr. Allyn suggested, urging that you overrule Tiffany. Tiffany can be limited to its facts. Tiffany was a situation involving a Missouri bank. It was an intrastate transaction.

The Missouri law provided for a 10 percent rate of interest to the general lenders in the state. State banks were limited to 8 percent. We had a Missouri bank which charged 9 percent interest. And the debtors sue.

QUESTION: Don't you think the Eighth Circuit understood it to stand for something a little more broad than that?

MR. TROYER: I don't believe -- certainly the Eighth

w 18 Circuit extended Tiffany beyond -- well, what I think ought to happen here.

It seems to me that you cannot apply, or should not apply, Tiffany in an interstate transaction. That section 85 does not, or should not, permit that. The very language of section 85 does not permit that.

If you look at the clauses and try to construe them together, the first clause which permits a bank located in Nebraska, for instance, to charge the highest rate of interest to general lenders in the state of Nebraska.

If you look at that first clause --

QUESTION: Do you think the section would prevent Minnesota from passing a statute that would require Iowa banks to charge a higher rate of interest than Minnesota banks? Or a lower rate than Minnesota banks?

MR. TROYER: Would you give me that again, please? I didn't follow it.

QUESTION: Well, the section -- you say the section just doesn't apply at all to an interstate transaction, is that it?

MR. TROYER: Well, my -- Marquette's position is that section 85 is totally silent on the issue of what rates of interest -- wait a minute, on the rates of interest which may be charged in interstate loan transactions.

It is perfectly clear in the intrastate setting,

kw 19 but not in the interstate.

QUESTION: So it doesn't apply at all to an interstate transaction?

MR. TROYER: That's correct, your HOnor.

QUESTION: So that as far as that section is concerned, Minnesota could require an Iowa bank to charge a higher rate or a lower rate than --

MR. TROYER: Oh, no, Minnesota couldn't require an Iowa bank in Iowa, obviously --

QUESTION: No, I mean in Minnesota.

MR. TROYER: When that Iowa bank comes into Minnesota, when it solicits Minnesota residents, when it --

QUESTION: Well, I know, but could it require the bank to charge a higher rate, or a lower rate, or either one, than a Minnesota bank, when it's doing business in Minnesota?

MR. TROYER: All it could require under the most favored lender doctrine in Tiffany is that --

QUESTION: What about the section? You say it doesn't apply at all to protect the Minnesota banks?

MR. TROYER: That's correct.

QUESTION: And so that so far as that section is concerned, Minnesota could require the Iowa bank doing business in Minnesota to charge either a higher rate or a lower rate than Minnesota banks?

MR. TROYER: The Iowa bank, when it comes into

w 20 Minnesota, has privileges of Minnesota national banks; so that Minnesota, if it passes a law permitting Minnesota banks to charge 12 percent or 18 percent, certainly the Iowa bank could take advantage of it.

QUESTION: By virtue of what section?

MR. TROYER: By virtue of section 85.

QUESTION: So it does apply to an interstate transaction?

MR. TROYER: No, it applies to intrastate transactions?

QUESTION: Mr. Troyer, I've missed something.

Why does it just go after them for usury?

MR. TROYER: Well, the Marquette National Bank is given special standing under the Minnesota statute as sort of a private attorney general to enforce the Minnesota statute.

The Marquette Bank, in and of itself, has no standing to assert a claim of usury here against the Omaha bank or the Omaha subsidiary. That cause of action belongs to consumers, or belongs to the state of Minnesota acting on behalf of consumers in that state.

QUESTION: Well, normally, every other state I know when somebody charges usurious interest, they manage to get indicted?

MR. TROYER: Well, we would have loved -- Marquette would have loved -- to be able to bring a cause of action against that Omaha bank for usury, but we simply didn't think

w 21 we had standing.

QUESTION: I didn't say the bank brought it. The individual people -- why don't you tell them that they get all their money back plus, they're very glad to join in a suit, aren't they?

MR. TROYER: The state of Minnesota, as a matter of fact, in its intervention -- intervening complaint has asserted a cause of action against the Omaha subsidiary for that purpose, and is asking if the Minnesota Supreme Court is reversed here, is asking to recover -- or for an adjustment in their interest rate charged to consumers.

So that's a part of the state of Minnesota's cause of action.

QUESTION: Because I have a great problem with a cause of action that says that when people charge extra high prices, it interferes with competition, and the free market place, and all of those other type phrases.

MR. TROYER: In response to that, your Honor, all I can say is that Marquette bank has been disadvantaged; there has been a drawing off of customers of the Marquette National Bank. And the statute was passed both for the benefit of state banks in Minnesota and national banks located in Minnesota, and for Minnesota consumers.

And we are -- we have standing under that statute, and have asserted our claim here. Because we have been injured.

We are injured when a Nebraska bank comes in here and offers its card free to Minnesota residents in order to take -- it can afford to offer the card free when you have, when its permitted to charge an 18 percent rate.

If it had to operate at a 12 percent rate, it wouldn't be offering that card.

QUESTION: Well, suppose gasoline companies start to selling gas for $3 a gallan; would the other companies object?

MR. TROYER: I --

QUESTION: If it were limited to money?

MR. TROYER: I assume not.

QUESTION: Well, I understood your friend, your colleague, to say that the come-on was that the Omaha bank could advertise no membership fee initially, and that would get the customers into the house. And then afterwards they would find they were paying 18 percent instead of 12.

MR. TROYER: That's correct, your Honor.

QUESTION: That's how he explained my confusion about competitive advantage, at least to me.

MR. TROYER: Back to my point, if you look at the -- the Seventh Circuit here has taken the position it's the plain language of the statute. It talks in the first clause of 12 U.S.C. 85 -- that's on page 23 of my -- of our brief -- it talks about the fact that the words are, any loan. And

that means any loan made in the state of Nebraska; any loan made in the state of Minnesota.

We don't believe that you can read the statute that way.

Given the second clause of 12 U.S.C. 85, that interpretation won't wash. The interpretation here that a Nebraska bank can charge the highest rate of interest provided in either state.

The clauses taken as a whole are clearly referring to any loans made in the state where the national bank is located. You've got to construe both clauses together.

If the words, any loan, in the first clause referred to loans made across state lines, then the second clause, refers to the rate of interest permitted state banks located in the foreign state, rather than state banks located in the home state.

It's clear that the second clause refers to the rate of interest permitted state banks located in the home state, and the home state only.

The construction given here by the Seventh Circuit and by the state of Minnesota in section 85 conflicts with the doctrine of competitive equality which has been -- ever since Tiffany -- has been part and parcel of section 85.

The purpose of Congress in adopting section 85 was to maintain and secure competitive equality between

national banks and state banks in the interest rates they could charge.

If you look at the Senate debates, in the Congressional Globe, which we cite in our briefs, it's clear that there is not any debate by the Senators as to this point, as to what interest rate could be charged by a national bank crossing state lines.

Certainly, they would have debated that point, because you had a state bank lobby on one hand in 1864, and you had a national bank lobby on the other hand. And they were very concerned, each separate party, about protecting their interests.

And if there was any thought at that time of adopting section 85 that a national bank of Nebraska was going to be able to come into the state of Minnesota and charge Nebraska rates, the Senators would have raised it, and we could see that in the debates.

You don't see that in the debates. Adoption of the Seventh Circuit decision, adoption of the Minnesota position -- the Minnesota Supreme Court's position -- means destruction here of the doctrine of competitive equality between state and national banks in interest rates.

As Mr. Allyn pointed out, there is a very delicate balance between national banks and state banks in terms of competition between them. If you're going to allow a

kw 25 Nebraska bank to come in here to the state of Minnesota and by offering the card free draw off, and in effect, to ruin Marquette's bank card program, what's to stop it from going to some other state and doing the same thing?

No local, national, or state bank will be safe from the predatory practices, then, of out of state national banks located in the state permitting the higher interest rate.

Again, I emphasize that Marquette and the state of Minnesota take the position that section 85 of the National Bank Act is simply silent on the issue of what interest rates may be charged by a national bank when it crosses state lines and transacts business in a foreign state.

QUESTION: Well, this was more than just a national bank crossing state lines, though. It actually incorporated a subsidiary in Minnesota.

MR. TROYER: That's correct, for purposes of conducting business in Minnesota. We take the position that section 85 is silent; that ordinary conflicts -- or conflicts of law rules apply here.

For instance, in the first clause of section 85, when you read the words, the laws -- any national banking association may charge on any loan or discount made at interest allowed by the laws of the state.

That means the state's conflicts of law rules as well.

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Take for instance a state lender in Nebraska who chooses to come into the state of Minnesota. Based on Nebraska's conflict of laws rule, that state bank in Nebraska would, presumably, given the strong public policy statements in the Minnesota statute, have to comply with the Minnesota Credit Card Act.

QUESTION: What if someone from Worthington, Minnesota, went down to Omaha and borrowed from the First National. Would the First National be entitled to charge him a Nebraska rate?

MR. TROYER: If that consumer goes to Omaha, Nebraska, and our act specifically provides for that, in subdivision eight, I believe it was, when that Minnesota consumer goes to Nebraska and obtains a loan from -- or obtains a card from a Nebraska bank, shows up at the premises of the Omaha bank, certainly in that situation.

But that's not what happened here. The Omaha bank was in Minnesota, through its operating subsidiary, systematically and continuously soliciting Minnesota residents for the purposes of enrolling them in that Nebraska bank's program.

QUESTION: Mr. Troyer, the amicus brief filed here by the Conference of State Bank Supervisors makes, alternatively at least, a different argument as you know; well, it makes three.

First of all, it asks the Court to overrule Tiffany. And then it says that even if Tiffany is not overruled, there

are at least two alternative grounds on which your position can be -- should be -- vindicated.

First, assuming that a bank can be only located in one place, and here the bank is located in Nebraska, that 85 is simply inapplicable to business it does anywhere else except where it is located. And that's, as I understand it, been your argument.

But secondly, it says, particularly in light now of Citizens and Southern National Bank v. Bougas, that a bank can be located in more than one place and that this bank was, is located in Nebraska, and when it moved into your state of Minnesota, it's also located there. And therefore, by the very terms of 85, for its Minnesota business, it is governed by your law, since Minnesota is where it's located for the purpose of that business.

You haven't mentioned that argument. Do you disavow it?

MR. TROYER: We don't disagree with that position, and that is really the position of the state of Minnesota, that for intrastate --

QUESTION: I didn't hear you make it.

MR. TROYER: -- that for intrastate -- intrastate loan transactions, a national bank is located in Nebraska.

QUESTION: The argument is only really made in the -- so far as I've heard today -- in the brief of this -- in this

28 amicus brief to which I referred.

I haven't heard it been made orally.

MR. TROYER: Well, let me make it orally.

QUESTION: Well, you don't have to. I've just stated it.

But do you disavow that argument?

MR. TROYER: No, no. I can accept that argument as an alternative ground for holding in favor of Marquette and the state of Minnesota.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Troyer.

Thank you.

Mr. Moore.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BORK: Mr. Chief Justice, and may it please the Court:

The only substantive question in this case is actually whether section 85 of the National Bank Act applies to interstate loan transactions.

I think the answer to that as a legal matter is quite clear: It absolutely and clearly applies, I think beyond any doubt.

But so much of this discussion today has been essentially legislative, cast somewhat as legal argument. But

it's really legislative, asking this Court to change the reading that section 85 has had for over one hundred years, in order to protect Minnesota's public policy, that I think I ought to spend a moment characterizing this case, before going directly into the understanding section 85.

And that is this: Nebraska is not exporting interest rates. I think it is more accurate to say that Minnesota is exporting its law, to a Nebraska bank.

A Minnesota resident who wants a line of credit from a Nebraska bank, we are told by Nebraska -- by Minnesota, I'm sorry -- may drive or fly to Omaha, get the Omaha credit card, and bring it back and use it in Minnesota or any other state in the union; but he may not engage in that same transaction by mail.

And that's all that this case comes down to, because what happens here is, a Minnesota resident is told, made aware by a service corporation which extends no credit to anybody, that those credit cards are available in Omaha.

QUESTION: Do you suggest--telling us that all of these transactions are made in this way, Mr. Moore?

MR. BORK: Mr. Chief Justice, I am saying that anybody who wants a First National Bank of Omaha credit card sends an application to Omaha, Nebraska. The application is passed upon in Omaha, Nebraska. The credit is extended in Omaha, Nebraska. And the debt is repaid in Omaha, Nebraska.

And what we're being told today is, that that would be all right if the Minneapolis resident drove to Omaha and got his credit card, but not if he sent a letter or an application asking for his credit card.

QUESTION: What do you think the act of extending credit is in the credit card thing? It's when -- if the customer goes to a restaurant and uses his credit card, and signs the slip; it's when the bank pays the --

MR. BORK: When the bank pays the restaurant, Mr. Justice White.

QUESTION: And that happens in Omaha, you say?

MR. BORK: Oh, yes, that happens in Omaha. Now it's conceivable that if a Minneapolis resident went to New York and used his credit card in a hotel in New York, New York might say, ah ha, its public policy should govern that transaction; and then we would have a three-way fight.

QUESTION: Well, why can't Minnesota say if an Omaha bank wants to have one of its customers use his credit card in Minnesota, that Minnesota can control the terms of that?

MR. BORK: You mean a different kind of a statute?

QUESTION: Yes.

MR. BORK: That could happen, and I suppose if every state in the union said that every use of a credit card in our state to purchase something is governed by our usury laws,

I think the credit card business would cease to exist.

Because everytime somebody crossed the country, the credit card companies would have to compute interest for every different state and see where every transaction was --

QUESTION: Well, what has Minnesota said that's different from that?

MR. BORK: Well, Minnesota says that if our customers -- if you ask our customers to write to you to get a credit card approved in Omaha, you have to comply with Minnesota interest rates even though the entire making of the loan, the entire extension of the credit, everything about that transaction, is centered in Omaha; and even though -- and I should stress this -- that credit card will be used --

QUESTION: Anywhere.

MR. BORK: -- anywhere in the country, in many nations abroad.

QUESTION: If the business is so heavily centered in Omaha, why did they incorporate a subsidiary in Minnesota?

MR. BORK: To make phone calls, to make it known that if you send an application to the First National Bank in Omaha, we will consider it and perhaps send you a credit card.

QUESTION: Do you think --do you think the Minnesota court could have enjoined that?

MR. BORK: I do not think so, Mr. Justice Rehnquist.

w 32 Because that would be to apply Minnesota law through its subsidiary to a Nebraska banking transaction.

Now it could enjoin if it was a deceptive practice or something of that sort. We're not talking about that. We're talking about, send a letter to us in Nebraska, and we'll consider extending you credit.

That is exactly the same kind of transaction --

QUESTION: Well, it could be that if some resident of Minnesota insists on paying more than the going rate of interest and prefers to pay 18 percent instead of the going rate, then the only way to do it is either to mail it Iowa or go to this office in --

MR. BORK: Well, Mr. Justice Marshall, I should say that the Omaha plan has a lot of advantages that the Minnealpolis plan does not.

If you are a prompt payer, if you engage in a transaction, go to a restaurant on September 15, get billed on October 1, pay before October 25, you will pay no interest rate to the Omaha National Bank, but the other --

QUESTION: Provided it's mailed on time?

MR. BORK: Yes. But the other plan, Mr. Justice Marshall, charges you a $10 or a $15 charge, whether or not you are a prompt payer.

So that it is to the advantage of prompt payers to use the Omaha card.

QUESTION: What I'm talking about is the 18 percent interest, when given to your office in Minneapolis -- right?

MR. BORK: I beg your pardon?

QUESTION: You -- can you pay your bill in your office in Minneapolis?

MR. BORK: No, the bill is mailed -- the payment of the bill is mailed to Omaha. There is no -- the service corporation which is the party here does not extend credit and does not --

QUESTION: And you can't pay it?

MR. BORK: No, you must mail your check or your money order to Omaha.

QUESTION: That's the way you get around the usury law.

QUESTION: Does the Nebraska bank advertise in Minnesota?

MR. BORK: It does indeed, Mr. Chief Justice.

QUESTION: Radio, television?

MR. BORK: No, well, it's been mostly by mail or telephone in making applications available in that sense.

Now I should say one word about this enormous competitive disadvantage which the Marquette National Bank thinks it lives under.

And that competitive disadvantage turns out to be, really entirely, that the Omaha bank, through its agent,

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can advertise a free credit card.

The Marquette bank could have advertised equally a 33 percent lower interest rate. This entire case, this entire attempt, to change the structure of the national banking system, turns out to be a fight over alternative advertising techniques.

I really think Marquette bank would have done better to take their case to an advertising agency instead of a law firm.

But that's what it comes down to. And I would like if I may to return to the law of the case, which has in the presentation been somewhat slighted, I think.

And I think it is clear that section 85 of the National Bank Act applies to interstate transactions; and for over 100 years the banking industry has assumed that, and has had every reason to think so because of this Court's decision in the Tiffany case and because of the --

QUESTION: Do you say that Tiffany is a holding to that effect?

MR. BORK: No, sir; I do not, Mr. Justice Rehnquist. But if you take a look at Tiffany and then at the clear language of section 85, which appears on page 14 of respondent's brief, the blue brief, the statute provides in pertinent part, the national bank -- freely translating it until I get to the right word, pertinent word -- the national

kw 35

bank may take interest charged on any loan or discount made, and that includes every loan or discount made by a national bank. So that the plain text meaning of section 85 is that if a loan or a discount is made by a national bank, section 85 covers it.

Now I would think that it would take a rather strong, a rather compelling showing, in the light of the Tiffany case over 100 years ago, and a consistent line of cases following Tiffany; in the light of the clear wording of section 85; and in the light of the understood practice of the financial industry in this area -- and I want to stress that, because the financial industry has built up around the settled expectation that 85 applies.

And we are now talking about an industry affected by this case --

QUESTION: Incidentally, Mr. Bork, section 30 dealt with in Tiffany, read almost exactly in hyperbata didn't it?

MR. BORK: Yes, it did, Mr. Justice Brennan. The predecessor section.

QUESTION: Yes.

QUESTION: Well, that's okay if one proceeds on the assumption -- I mean your argument follows, if one proceeds on the assumption that the bank is located in Nebraska and only in Nebraska.

But what if the bank is located in Minnesota?

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MR. BORK: Well, of course, at the time the 1864 act was written, branch banking was absolutely prohibited. So that one would have to --

QUESTION: So that a bank could have a single location?

MR. BORK: Single location.

QUESTION: But is that now true?

MR. BORK: I think it is still true. We may not branch within a state.

QUESTION: Yes, but how about the Bougas case.

MR. BORK: About the Bougas case. Citizens & Southern against Bougas said, I think, entirely on reasoning thatI think applies to this case, that there is no particular reason to confine the word, located, so that a bank cannot be sued at its branches.

Because all of the policy reasons against -- for requiring the word, located, to mean -- sue the bank --

QUESTION: In one, single place.

MR. BORK: -- have now changed so that those same reasons permit suit at the branch banks.

In this case, those policy reasons, as I hope to show, press in overwhelmingly in the opposite direction. And the reason I say that is that a really enormously complex -- and I should say, enormously, highly regulated, at state and federal levels -- industry is involved here, built around --

kw 37 in part, built around the principle that section 85 applies to this.

And you now have an industry which has -- governed by this case alone -- which annually does hundreds of billions, perhaps trillions of dollars, in credit transactions. This is not a credit card case. This is a case that applies to all interstate loans, because section 85 is not a credit card statute.

And if section 85 has no application to interstate transactions, it has no application to any interstate transactions.

For example, interstate mortgage money, which is a very big industry, would suddenly be thrown into chaos by a decision that the state -- where the bank is located no longer governs the interst rate.

Interstate auto loans, which are very common, have been governed by section 85.

This is not a credit card case. This is an interstate lending case.

QUESTION: You're saying then that the banks have construed section 85 this way for so long, we should construe it that way.

MR. BORK: Well, I think given-- Mr. Justice Rehnquist, I think given the Tiffany case --

QUESTION: And yet that's not Tiffany. You agree

kw 38 it's not a --

MR. BORK: No, I was about to make a --

QUESTION: By all means --

MR. BORK: I was about, Mr. Justice Rehnquist, to suggest that there was some reason for the banks to have felt this way. Given the Tiffany case, given the plain language, any laon made by a national bank, which is in section 85; and then given the practice which has grown up and which was unchallenged until recently.

The form books in which these loans are made, the available form books, all specify, the law of the state of the bank as the law providing the interest rate.

It's just been understood in this industry.

QUESTION: Well, do you really think form books should be an important part of our decisional apparatus?

MR. BORK: No, Mr. Justice Rehnquist, I was just suggesting that the form books are merely a reflection of an understanding that this industry has been built upon.

And if I had no other argument, even if it were unreasonable for the banking industry to have construed section 85 the way they did, I would stand here before you and argue that that unreasonable construction, having gone on so long, ought to be adhered to, because you havenot the information before you to know what new statute to legislate through interpretation of section 85.

And indeed you have not the options under section 85 to legislate wisely in this field.

For example, the kind of legislative problems we're being given here by the state of Minnesota and the Marquette National Bank for consideration, perhaps the best national rule -- I don't know; perhaps the best national rule -- would be a single credit card rate for all credit cards, legislated federally.

That might be the way to handle this. That is not an option that is avaialable to this Court under any conceivable reading of section 85.

QUESTION: Well, Mr. Bork, would you agree that when Minnesota or any other state places a statutory limit on interest rates, and declares that certain penalties for anything beyond that is usury, that what the state is doing is expressing an important social policy to protects its citizens?

In general, would you agree that that's the purpose?

MR. BORK: I certainly do agree to that, Mr. Chief Justice.

QUESTION: But you say that doesn't stop them from gambling by mail, if they have a mail gambling apparatus in Las Vegas. I don't know if you can gamble by mail, but --

MR. BORK: I doubt that you can gamble by mail, but once it is -- what is being said here is that a Minneapolis

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resident may not write to an out of state bank for a line of credit which he intends to use all over the country because Minnesota follows him, Minnesota brands the resident, so that Minnesota law goes everywhere he goes.

QUESTION: Well, Minnesota maybe would put it in a little different light. They might say, Minnesota is going to try to shelter and protect its native citizens.

MR. BORK: Well, I think that's so. But I don't think Minnesota can shelter and protect them when they leave the state, in effect, to do their transactions, and when a federal law reads directly upon that transaction.

QUESTION: Of course, they aren't leaving the state really, are they?

QUESTION: They're leaving the state when they have a branch, a Nebraska branch, in Minnesota?

MR. BORK: Nebraska has no branch -- this is a service corporation. It does no banking business whatsoever.

QUESTION: I was using branch not in a technical banking sense, but they have an arm in Minnesota.

MR. BORK: They have people in Minnesota who make Minnesotans aware that they may write, may send an application, to Nebraska for a credit card.

That's what they do. It is a -- I am sure that throughout our history, bankers have made known to possible borrowers in other states that credit was available in

kw 41 Wall Street or in Philadelphia or in Boston.

Those were financial centers back in the colonies, and it was made known that that credit was available, and by mail or by travel, borrowers came for that purpose. And we had interstate lending that far back. And this case is no different.

QUESTION: Mr. Bork, the complaint in the case, which is referred to at page A3 of the Supreme Court of Minnesota's opinion, paragraph 3 says, defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of these merchants and banks in the system.

Now doesn't that sound like a little more than just urging you to write your favorite bank in Omaha.

MR. BORK: Mr. Justice Rehnquist, they do elicit people to sign up. But no credit transaction takes place in Minnesota. Every aspect of that, the application, the approval, the extension of the credit and the payment, all takes place in Nebraska where the bank is located.

QUESTION: Well, what are the -- what are the agreements which the service corporation enters into which are referred to in paragraph 3 of the complaint?

MR. BORK: Oh, that a bank will -- when these sales drafts come in, that it will send them through the ordinary

bank channels to Omaha.

QUESTION: These are agreements between the merchants and the bank?

MR. BORK: Well, usually the bank is not a party; it's just the service corporation.

QUESTION: No, but a lot of merchants won't go for certain credit cards, and a lot will. And so the bank is interested in having the retail establishments agree to use their cards.

MR. BORK: Yes, and the service corporation will make an agreement with the restaurant or with other banks.

QUESTION: That's the agreement, I think, that --

MR. BORK: Yes. But it extends no credit. It makes no loans. It does nothing that would come under section 85 or indeed under the Minnesota statute.

What is happening here is that --

QUESTION: Doesn't that include an agreement as to how much of a override the bank's going to take?

MR. BORK: Yes.

QUESTION: Is that 5 percent or 7 percent or something?

MR. BORK: Oh, no, no, the override -- you mean the discount from the merchants?

QUESTION: Yes.

MR. BORK: I think that runs between 1-1/2 percent and 4 now.

dkw 43] QUESTION: Well, all right, but that agreement will include that figure?

MR. BORK: Probably so.

QUESTION: So that is -- what do you call that?

MR. BORK: I don't --

QUESTION: Is that a fee? Is that a fee?

MR. BORK: Well, I haven't characterized, but I don't think it's an extension of a loan which we have to worry about whether it falls under section 85 or not. What we're talking about here is the interest rate charged --

QUESTION: Well, you're going to pay the merchant -- what you're doing is you're paying the merchant until you can collect from your customers.

MR. BORK: That's right.

QUESTION: And the merchant's going to have to pay your something for the use of the bank's money?

MR. BORK: Yes. But the merchant gets a discount. But what we're talking about --

QUESTION: Pays the discount.

MR. BORK: -- what we're talking about here is the interest rate paid by the card user.

QUESTION: I understand.

MR. BORK: And that is the section 85 issue. And I would like to make --

QUESTION: Mr. Bork, I want to go back if I may to

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your very beginning.

You said, and it may well be right but I'm just trying to think it through, that in one transaction where the card user goes to Nebraska and signs the -- gets a card, comes back, everything that's done with that card would be a Nebraska transaction. It would not be -- would be exempt from the Minnesota usury law.

MR. BORK: That's what counsel just said, Mr. Justice Stevens.

QUESTION: That's perfectly clear, is it?

MR. BORK: Well, that -- I took that from counsel's statement just now.

QUESTION: Well, have any cases so held? I mean, the thing that troubles me -- I'm just trying to think it through myself -- it would seem to me that the extension of credit on which interest is paid does not occur until so many days after a purchase of a meal or something like that in Minnesota or wherever it's being used.

The extension of credit is not when you sign the -- get the line of credit.

MR. BORK: No, I understand that, but I --

QUESTION: [illegible] is not credit extended in Minnesota, whether or not the card is gotten by mail or by a personal visit to Nebraska?

MR. BORK: No, the credit is extended when the Omaha

lkw 45 bank pays the merchant, whether that merchant is in Minnesota or Iowa or New York or Los Angeles or Bangkok.

QUESTION: All right.

MR. BORK: That credit is extended at that point. It is extended at Omaha, Nebraska. And it is repaid --

QUESTION: Well, if that's true, if it's Omaha rather than Minnesota, isn't it equally Omaha, whether or not the credit card is obtained by mail as opposed to be a personal visit to Omaha?

MR. BORK: That was my point, Mr. Justice Stevens, that Minnesota was saying, we don't attempt to follow our residents if they drive across the state line, but if they write across the state line, our law goes with them.

QUESTION: Yes, but under your view -- if you're correct, as I understand you -- neither transaction would be subject to the Minnesota usury law.

MR. BORK: That is correct, because of section 85 of --

QUESTION: No, no, even entirely apart from section 85.

MR. BORK: Oh, you mean if they entered into a contract, about what law applied?

QUESTION: No, no, the contract is, the contract is whether it's made by a personal visit or by mail, is that when you buy a meal you would get credit extended to you from

dkw 46 Nebraska, if I understand you.

MR. BORK: Yes.

QUESTION: So you're just not subject to the Minnesota law under -- regardless of the section 85.

MR. BORK: I think not. I think not.

QUESTION: So you don't even rely on the federal statute, if your presentation is correct?

MR. BORK: No, I would much prefer, if I may, to rely on the federal statute, Mr. Justice Stevens.

QUESTION: Well, I just don't -- there's something -- I haven't quite followed your argument.

MR. BORK: Well, I was trying -- my point about that -- I've spent much, much to much time developing it, I'm afraid -- is that we were started with a characterization of this case which was intended to make what happened sound very unfair, as if Nebraska was invading Minnesota with an interest rate.

And I'm just trying to point out that what happens here is that somebody goes to Omaha, or writes to Omaha, and every step in the transaction takes place in Omaha; and that's all I wanted to -- I merely wanted to place the case in some perspective.

QUESTION: Do you or do you not contend that there's a difference between a transaction by mail and a transaction by personal visit?

MR. BORK: I think there is no difference whatsoever.

kw 47 The Minnesota statute, I am told by counsel, makes one. But I really -- my argument really is that section 85 governs. I have already made the point, I think, that its plain language governs any text.

Now the question is -- there are only two arguments made against that. And each of them is completely specious.

The first one is that there is a policy of competitive equality which has to be read into section 85. And it's specious because that policy derives from later enactments which have nothing to do with section 85.

And if you look at the Marquette bank's brief, Marquette bank itself, on page 13 as I recall, agreed that a state bank -- pardon me, a national bank in a state gets the rate that the general lender gets, or the rate that the state bank gets, whichever is higher.

That's not a policy of equality. That, on the face of the statute, is a policy of favorite lender.

Now, that is exactly what Tiffany held, and Tiffany was right.

Now it is said, but since then we had a policy of competitive equality, which somehow argued backwards to overcome the language of 85.

In fact, that is not true. If you will look at section 85, you will see that in 1933 it was amendment to give national banks, but not state banks, freedom from state

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regulation by giving national banks the option of charging one percent above the federal discount rate, which option was not extended to state banks.

And what that means is, at the beginning, competitive equality as to discount, as to interest rate, was never intended by Congress; competitive equality as to interest rates is not intended by Congress today.

And I think I've sufficiently pointed out that there is no competitive inequality in fact in this case, because it's a dispute over advertising techniques. They have a technique they could use as well as the one we have used.

The other argument is that Congress simply could not have intended section 85 to apply to an interstate transaction, because there was no interstate lending back in those days, or nothing to speak of.

That assertion is incredible. Before the American revolution, there was intercolonial lending. In their book, The Stamp Act Crisis, Helen and Edmund Morgan point out that the Stamp Act crisis caused by the closing of the colonial courts, and that states -- or colonies, rather -- such as Connecticut were delighted because that meant that out of colony creditors couldn't enforce their judgments in Connecticut.

Before the American revolution, there was an

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international trading. London factors financed our tobacco trading. George Washington himself was engaged in that kind of financing.

When we come to the constitution itself, it's clear that interstate lending follows interstate commerce, bill of exchange and so forth which are mentioned specifically in section 85.

And one of the reasons for holding a constitutional convention was to deal with control at the federal level over interstate commerce. And it is quite clear, I think, that in the writing of the constitution, the framers were contemplating interstate lending, because they took care to make it a federal power to write a uniform bankruptcy law, obviously to prevent discrimination against out of state creditors by states.

Now if we come to the period after the revolution, I refer simply to the brief filed by the First National Bank of Chicago, which gives examples of bank interstate lending in the 1830s. I would refer the Court also to Carl Swisher's history of this court in the Tawney years, the Holmes history of this court, in which he points out that in 1839, this court was deciding the right of corporations to deal in bills of exchange in states other than where they were incorporated.

And he points out that President Van Buren had to address Congress in a special session about the problem

posed by bills of exchange, to transfer capital from one region of the country to another.

If that Congress didn't understand that interstate lending was going on all around it, it must have been incredibly obtuse or else it was hermetically sealed. And it was neither.

And once we assume that Congress understood that interstate lending existed around it in 1864, then we cannot assume that Congress, for the only time in history, reversed the constitutional patter and chose to legislate entirely as to intrastate transactions, and leave to the states control of interstate transactions.

That turns the thing entirely upside down. So I think there is no -- I would close with the remark that this industry would be thrown into chaos if we have now -- not just the credit card industry; the entire industry -- if we have now to take the 48 million credit cardholders out there, follow their residences as they move around the country, recompute interest, recalculate the way it's done, follow the laws of all the jurisdictions. I don't know whether this kind of business, or the interstate mortgage business, or the automobile loan business, is going to be doable.

There are enormous costs involved that simply aren't in this record that ought to be taken into account by Congress. Congress has amended this section 85 many times.

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Congress has taken up the credit card issue in terms of how you compute these rates.

In 1977 a bill was introduced on that. It is not as if Congress was inactive.

And we have a trillion -- many trillions of dollars -- interstate loan business, which simply ought not to be thrown into confusion by overturning a law that has been so clear, and been regarded so clear, and been interpreted so consistently for over 100 years.

And for that reason, because of the law, because of Tiffany, because of the understanding, because of the financial industry that has been built around it, we ask that the judgment of the Supreme Court of Minnesota be affirmed.

QUESTION: If it should be found that your client bank, the Omaha bank, had located itself in Minnesota by opening up this wholly owned subsidiary agency, then 85 clearly would apply, wouldn't it, to -- and make the Minnesota rate of interest applicable to business done by the wholly-owned subsidiary with Minnesota residents.

MR. BORK: Well, I suppose -- let me repeat, Mr. Justice Stewart, that I think the policy reasons that led to the expansion of the word, located, in Bougas, lead precisely to the confinement of the word located here, because you're going to upset a major industry without knowing exactly what is happening, without knowing the result of the ruling, without

w 52 having the option of the information before you.

So Bougas, I think reads against it.

But if one said that a bank is located wherever it does -- has some activity --

QUESTION: No, no, not wherever it has some activity, not where it does business by mail, but wherever it opens a wholly-owned subsidiary for this business.

After all, the Minnesota court, while the Minnesota statute says the defendant has to be a bank, the Minnesota court in this case apparently held that this subsidiary was a gank within the meaning of that statute.

MR. BORK: That's a point that has to be raised yet below, because I think we have problems under section 86, the venue provision, by treating First of Omaha as a bank.

QUESTION: Right.

MR. BORK: But that wasn't decided below, or argued.

QUESTION: Right at the tail end of your brief.

MR. BORK: But the problem would not be solved by expanding the word, located, when you incorporate a subsidiary to do this. Because obviously, a subsidiary doesn't have to be incorporated to do this.

I think the only way the word located could be enlarged in order to take care of that -- to say that any time a bank does business across a state line, it is located across the state line.

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QUESTION: Well, you wouldn't need to go that far.

MR. BORK: But I don't think, Mr. Justice Stewart, with respect, if the policy would be consistent unless you did go that far. And if you did go that far, or ever this far, you would have really enormous impact upon a --

QUESTION: But what if a subsidiary sold credit cards, actually issued credit cards?

MR. BORK: I don't think the selling of credit cards would, in fact, be the making of a loan.

QUESTION: You think if -- before Minnesota law would govern at all, or the bank could be said to be located in Minnesota, is if it were extending credit in Minnesota.

MR. BORK: If it engaged in the act of making a loan in Minnesota, which would require a branch, it would be then located in Minnesota.

But it is not located, within the meaning of section 85, and cannot be, because it's not permitted by law to branch into Minnesota.

But all banks do business across state lines. And all banks will be affected by a ruling that -- of this sort.

QUESTION: Mr. Bork, your argument about the trillions of loans that would be affected by this case prompts me to ask why the banking industry apparently has taken so little interest in this case. I don't see a vast number of amici briefs. Has the American Bankers Association filed a

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brief in this case?

MR. BORK: I don't think the American Bankers Association has.

QUESTION: One by the bank examiners, but --

MR. BORK: Well, there's one by the consumer bank association.

QUESTION: Yes.

MR. BORK: Which is an association of banks. And one by the First National Bank of Chicago.

I cannot answer you as to why other banks have not filed amicus briefs.

QUESTION: Every major bank in the United States solicits loans in virtually every state, as well as foreign countries. And I understand your argument to be that this case would control the interest rates --

MR. BORK: Well, since section 85 is certainly not a credit card, but a loan statute --

QUESTION: That's right.

MR. BORK: -- it would certainly control all those things.

I cannot offer you an explanation, Mr. Justice Powell.

QUESTION: Mr. Bork, there are some controller regulations under 85 that would indicate some administrative construction of this statute down through the years, or not.

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MR. BORK: There is -- Mr. Justice White, if I can find it, there is in our brief the comptroller of the currency regulation, which rests upon Tiffany -- which rests upon Tiffany, and states the policy of Tiffany --

QUESTION: Well, never mind, I can find it.

There is a regulation --

MR. BORK: At 12 C.F.R. there is a comptroller of the currency --

QUESTION: Is that old?

MR. BORK: I'm not aware of how old it is. It's been around for awhile, but I'm not aware of how old it is.

QUESTION: And does that say that the rate of interst on an interstate loan is going to be governed by the state of the bank --

MR. BORK: Well, I would feel more confident if I could locate the --

QUESTION: Is it in your brief?

QUESTION: Bottom of page 17, Mr. Bork.

MR. BORK: Bottom of page 17.

Well, it says -- formerly recognized -- but I don't see the quote there at the bottom of 17.

It is -- I regret to say, Mr. Justice White, that I cannot locate it swiftly. It is in the briefs.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

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The case is submitted.

(Whereupon, at 2:59 o'clock, p.m., the case was submitted.)