OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: BARBARA SMILEY, Petitioner v. CITIBANK (SOUTH DAKOTA), N.A.

CASE NO: 95-860

PLACE: Washington, D.C.

DATE: Wednesday, April 24, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BARBARA SMILEY, :

4 Petitioner :

5 v. : No. 95-860.

6 CITIBANK (SOUTH DAKOTA), N.A. :

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8 Washington, D.C.

9 Wednesday, April 24, 1996

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:05 a.m.

13 APPEARANCES:

14 MICHAEL D. DONOVAN, ESQ., Haverford, Pennsylvania; on

15 behalf of the Petitioner.

16 RICHARD B. KENDALL, ESQ., Los Angeles, California; on

17 behalf of the Respondent.

18 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the United States, as amicus curiae,

21 supporting the Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in number 95-860, Barbara Smiley v. the CitiBank of

5 South Dakota.

6 Mr. Donovan.

7 ORAL ARGUMENT OF MICHAEL D. DONOVAN

8 ON BEHALF OF THE PETITIONER

9 MR. DONOVAN: Mr. Chief Justice, and may it

10 please the Court:

11 This case concerns the meaning of the phrase

12 "interest at the rate" in Section 85 of the National Bank

13 Act, which was passed by Congress originally in 1864. In

14 particular, this case brings before the Court the question

15 of whether Congress intended "interest" and "rate" in that

16 section -- in that phrase to include some certain late

17 fees that are not measured by time or based upon an unpaid

18 balance or unpaid late payment, so as to preempt State

19 contract laws, State laws governing liquidated damages

20 that regulate such late fees in a borrower's home State.

21 The briefs of the parties here, Your Honors,

22 have presented three contrasting views as to what Congress

23 meant when it used the phrase "interest at the rate" in

24 Section 85. In Petitioner's view, Congress meant a charge

25 measured by time, based upon an unpaid balance. In



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1 Respondent's view, Congress meant all lending charges;
2 that is, all charges that have an impact upon the
3 borrower/lender relationship so as to affect the yield
4 that the lender receives from a loan.
5 There's a third contrasting view here, and
6 that's presented by the Government that has filed an
7 amicus brief in support of the bank in this case. That
8 view, espoused by the OCC recently, is that "interest at
9 the rate" does not mean all lending charges, even though
10 it might have meant that at one point, but it means
11 something now or something less than all lending charges,
12 but the agency will tell us precisely what interest
13 charges are interest at the rate and what interest charges
14 are not interest at --
15 QUESTION: Well, Mr. Donovan, if -- if the term
16 "interest" is open to some interpretation, there either is
17 or is going to be, I gather, a comptroller's
18 interpretation of the term.
19 MR. DONOVAN: That is correct, Your Honor.
20 QUESTION: Do we owe any deference to that,
21 where it will expressly include late fees?
22 MR. DONOVAN: The question of deference to the
23 comptroller ought to be looked at initially by looking at
24 the Statute itself, to determine whether the Statute
25 itself addresses that, so as to whether there should be

1 any need to turn to the comptroller. And here, we believe
2 that there are at least four phrases in the Statute or in
3 the National Bank Act itself which give guidance to this
4 Court as to why neither deference is appropriate and why
5 "interest at the rate" mean -- means what Petitioner says
6 it means.

7 First, Your Honors, is the phrase "interest at
8 the rate" itself. Interest, both in 1864 and commonly
9 today, was conceived of a charge that was somehow
10 connected to the time during which money is received by a
11 borrower and the time in which it's paid back. It is also
12 a charge that has some relationship to the amount of money
13 received by the borrower and -- and the time in which the
14 borrower would then have to return that amount.

15 Another phrase that is in the Statute itself,
16 Section 85 of the National Bank Act, is found further down
17 in the Section, and it refers to a common type of lending
18 practice that was prevalent in the mid-1800's, and that
19 was the advance collection of interest on discounted
20 notes, where a borrower would tend -- tender his notes in
21 exchange for a currency, and the bank would discount that
22 note at the outset to collect interest. Upon that --

23 QUESTION: That's still done now, isn't it?
24 That -- that's not disappeared?

25 MR. DONOVAN: No. In fact, it still happens



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1 today, Justice Scalia. But what Congress allowed in
2 Section 85 was that you may collect interest in advance --
3 and I'll -- and using the words of this Statute,
4 "reckoning the days for which the note, bill or other
5 evidence of debt has to run." Now, reckoning isn't a
6 common word today, but it was referring to some sort of
7 calculation of time and amount, reckoning the two.
8 QUESTION: Well, that -- that shows that it does
9 include that kind of interest, the -- the normal kind, but
10 it doesn't show that it excludes the other kind. The
11 trouble I have with your position, Mr. Donovan, is I don't
12 see how effective this provision in the Bank Act would be,
13 which was intended to be a usury provision, if it said
14 it's perfectly okay so long as you put in the loan
15 agreement "interest shall be 6 percent per year, plus $10
16 a week no matter what the outstanding balance is." I mean
17 that would be wonderful usury, and it -- and it would not
18 at all be protected by -- protected against by Section 85.
19 I -- I cannot believe that that's what Congress intended.
20 MR. DONOVAN: Well, taking your question,
21 Justice Scalia, as, Why -- why would Congress do something
22 like this? The -- the simple answer to that is that
23 Congress -- that's all they were asked to do. That's all
24 they were focusing on doing in -- in terms of allowing
25 banks to charge a rate of interest that was tied to the

1 bank's home State.

2 QUESTION: So any bank could charge 10 bucks a

3 week on the outstanding balance?

4 MR. DONOVAN: Well, Congress --

5 QUESTION: Not -- not matter what the

6 outstanding balance was, you pay $10 a week to the bank;

7 they could do that under this provision?

8 MR. DONOVAN: That -- Your Honor, that would be,

9 under our view of "interest," an interest charge. That

10 would be a charge that would be based upon the outstanding

11 balance.

12 QUESTION: Well, it's not based on --

13 MR. DONOVAN: It would be a time-based charge.

14 It would not be based upon the outstanding balance. The

15 Congress --

16 QUESTION: You have to do both; didn't you say

17 you have to do --

18 MR. DONOVAN: You would have to do both, yes.

19 QUESTION: So it wouldn't be covered by your

20 provision?

21 MR. DONOVAN: No. That -- that's absolutely

22 correct.

23 QUESTION: It doesn't make sense to me.

24 MR. DONOVAN: How -- however, a State could not

25 authorize that type of charge if it just was across the

1 board, if the $10 did not vary based upon the outstanding
2 balance at all. And the reason why was because Congress
3 was focusing on rate ceilings, so that those rate ceilings
4 could be gauged, both by the borrower and the bank at the
5 outset, to determine whether there was compliance with the
6 usury ceiling.
7 QUESTION: Mr. Donovan, suppose that CitiBank,
8 instead of having a flat $15 a month late payment said the
9 late payment is 1 percent on arrears, but not less than
10 $15; would that then qualify as an interest rate?
11 MR. DONOVAN: The -- let me see if I understand
12 the -- Your Honor's question.
13 QUESTION: Instead of the $15 a month -- you're
14 in arrears, the $15 a month no matter what the balance is
15 -- instead, the provision is 1 percent, but not less than
16 15. So it could be more, but it's going to be at least
17 15.
18 MR. DONOVAN: If the 1 percent, Your Honor, were
19 calculated on the amount of the late payment, not on the
20 entire outstanding balance of the revolving account. Then
21 the 1 percent, if it varied based upon time -- in other
22 words, it could have --
23 QUESTION: It would. But for people who would
24 -- it -- it would have to be at least $15. If it -- the
25 1 percent turns out to be less than $15, you still have to

1 pay $15.

2 MR. DONOVAN: The 15 would be the ceiling?

3 QUESTION: Not less than, the floor. The 15 is

4 the floor.

5 MR. DONOVAN: The floor. The 15 there would not

6 be an interest rate. It would not be something that would

7 be exportable by the bank in one State to override the

8 laws of the borrower State. If the 1 percent, Your Honor,

9 were something that was charged not on the late payment --

10 not on the outstanding balance, the aggregate balance, but

11 on the late payment balance itself, which are not the

12 facts here -- here we have a charge that's imposed by

13 CitiBank, calculable on the entire outstanding balance, so

14 that it's a flat charge, the .65 percent I'm referring to

15 -- but if the 1 percent were calculated on the late

16 payment amount, and that 1 percent accrued or ran, in the

17 words of this -- of this Court, then that would be an

18 interest charge.

19 QUESTION: Given your answer to Justice

20 Ginsburg, why don't you try -- why don't you challenge the

21 50-cent charge in this case?

22 MR. DONOVAN: In terms of the cash advance fee

23 or the minimum finance charge that is involved here?

24 QUESTION: I -- I think it's the minimum finance

25 charge, isn't it. No matter what your balance is, you've

1 got to pay at least 50 cents a month, isn't that what it
2 provides?
3 MR. DONOVAN: That -- that is CitiBank's
4 practice. We did not -- we do not allege that in the
5 complaint here.
6 QUESTION: But that -- if you're correct, that
7 -- that is forbidden, too, or that is not covered by the
8 -- by the Statute?
9 MR. DONOVAN: The -- the 50-cent charge that is
10 the minimum finance charge for when a borrower chooses to
11 revolve is -- would be a charge that would not fit our
12 definition of interest rate.
13 QUESTION: Just like the $15 in Justice
14 Ginsburg's example? It's a floor.
15 MR. DONOVAN: It --
16 QUESTION: And it's -- it's a floor without
17 reference to -- to a particular amount over a particular
18 time.
19 MR. DONOVAN: Yes.
20 QUESTION: So it would be outside the Statute,
21 just as the $15 would be, isn't that right?
22 MR. DONOVAN: The difference, Justice Souter,
23 would be that the $15-charge, if it is imposed looking
24 backward, based upon a default, as opposed to looking
25 forward, which is -- which is what the 50-cent charge is

1 -- the 50-cent charge is a charge that when you do not
2 clean up your revolver at the end of the month, the
3 minimum that you're going to have is -- is 50 cents.
4 QUESTION: Yes.
5 MR. DONOVAN: And that's a going-forward charge,
6 because it's anticipated that for each day that you
7 revolve that balance, that you will then be accruing a
8 finance charge at the 19.8 percent interest rate. It,
9 too, would not have the characteristics that we have
10 identified.
11 QUESTION: Maybe California didn't prohibit
12 that. Maybe that's why it wasn't in your complaint.
13 MR. DONOVAN: At the time, we focused on the
14 late fee here, Justice Scalia. So, to be honest, we just
15 did not include that in the complaint. I -- I don't have
16 the California law here, so --
17 QUESTION: May I ask you a -- a slightly changed
18 version of Justice Ginsburg's question. Forget about the
19 $15 for a moment and assume the charge was 1 percent of
20 the arrearage on the 30th day of the month, period.
21 Regardless of how long the arrearage was taking place, but
22 every 30th day, it's 1 percent. Would that be an interest
23 charge?
24 MR. DONOVAN: No, it would not, Your Honor,
25 because that 1 percent charge would not vary based on



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1 time.

2 QUESTION: Okay.

3 MR. DONOVAN: If the arrearage were only 2 days

4 --

5 QUESTION: I understand. I just wanted to be

6 sure that was your position.

7 MR. DONOVAN: Yes, that -- that is -- that is

8 our position.

9 Looking back --

10 QUESTION: But I -- I thought that interest

11 historically a payment for damages -- originally -- was a

12 payment for damages for the money that wasn't paid in

13 time. And it seems to me that this charge that's in

14 question here fits very well within that definition. Is

15 your point that our understanding of interest or the

16 meaning of interest changed from, say, the 1700's to the

17 time when of the Civil War, when this statute was enacted?

18 MR. DONOVAN: No, Justice Kennedy. Our point is

19 that the definition you identify, a charge for the use of

20 forbearance or detention of money, whereas damages of its

21 detention describes when interest may be charged. It

22 doesn't describe what interest is. It doesn't describe

23 what the components of interest are.

24 The case here questions what the components of

25 interest are. We don't deny that this would be a

1 detention situation, so that an interest charge could be
2 imposed. What we state here is that the charge -- the
3 form of the charge here does not have the components of an
4 interest charge. In fact, the components here are the
5 components of a liquidated damage of penalty charge.
6 QUESTION: We'll accept that in -- in the
7 context, I suppose -- I don't know if the argument has
8 been -- been made -- of ease of administration. A flat
9 charge, it seems to me, may very well reflect the cost to
10 the lender of administering a large scheme like this.
11 MR. DONOVAN: The distinction, Your Honor, is
12 that here the flat charge is imposed in addition to a
13 daily accruing finance charge, an interest charge that's
14 measured by time and amount, which is accruing on the
15 entire detained balance. Here, if you detain the late
16 payment, you still have the accrual of the interest
17 finance charge going on, and you have a special damage
18 amount imposed on top of that.
19 QUESTION: Why should there be a difference if
20 it's in addition in -- in -- in -- or in lieu of? You --
21 you suggested if it's in lieu of, it would be permissible?
22 MR. DONOVAN: If --
23 QUESTION: Why does it cease to be interest?
24 It's just greater interest, it seems to me.
25 MR. DONOVAN: I'm not suggesting that it's in



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1 lieu of. I am suggesting that it's a different type of
2 charge that is not a greater -- greater interest charge.
3 Here, CitiBank could impose a greater interest charge, and
4 we don't dispute that. If CitiBank said, If you were late
5 on a payment, you must pay an additional 3 percent, so
6 that your interest rate will raise from 19.9 percent to
7 15.9 percent. What CitiBank may not do -- because that
8 charge would then vary, depending upon how much the credit
9 card holder had and how much time was involved.
10 What CitiBank may not do, though, is impose a
11 sum-certain charge that doesn't vary whether the payment
12 is $20 or $2,000, and it doesn't vary whether the payment
13 is 1 day late or 2 day -- 2 days late. The reason being,
14 Your Honors, is the difference between -- if I -- if I may
15 focus on the words "rate" and "amount" in the statute that
16 Congress enacted. Here, Congress envisioned a difference
17 between the words "rate" and "amount," and used the words
18 differently in Section 85.
19 When Congress was referring to rate, it was
20 referring to a charge that was reckonable, to use the
21 words of the Statute, over the number of days that the
22 note, bill or other evidence of debt were -- were
23 outstanding. That word "rate" is used in the first part
24 of Section 85, or the first part of Section 30, which
25 enacted both Section 85 and 86.

1 The word "amount" is used in Section 86, and it
2 refers to a flat penalty-type of provision, an aggregate
3 sum, that's a -- a calculable sum. And it refers to what
4 the bank owes the borrower when the bank overcharges or
5 commits usury. So an amount is a flat amount that the
6 bank has to write a check and pay back to the borrower
7 when the bank violates the usury ceiling.
8 The rate is a ratio -- just basic English -- is
9 a ratio charge. So, the difference that I am trying to
10 explain I -- hopefully -- is that the rate here -- or the
11 charge here -- is not a rate charge. It's a flat amount
12 that's imposed on a default.
13 QUESTION: But you wouldn't object to a flat
14 amount as a ceiling, would you? I mean you explained to
15 me that you would as a floor. But suppose it's 2 percent,
16 but never more than $50 a month; that would be okay, even
17 though the -- the $50 is a -- is a flat amount, as opposed
18 to what you call a rate?
19 MR. DONOVAN: No. The -- the --
20 QUESTION: Two percent of the arrears, but never
21 more than $50 a month.
22 MR. DONOVAN: Yes. The -- the $50 a month,
23 again, would be a increment, but would not be an interest
24 charge. It would be a penalty charge or a noninterest
25 charge. The 2 percent, if it was varying based upon the



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1 amount that you owed and the time that you owed it -- in
2 other words, you -- you're saying 2 percent a month, Your
3 Honor, but I'm not sure, by that hypothetical, whether you
4 -- whether you're -- you mean --
5 QUESTION: On the arrears.
6 MR. DONOVAN: And -- and if the arrears are paid
7 back on the 2nd day of the month, do I have to pay the
8 entire 2 percent for the -- for the 30 days?
9 QUESTION: No. I'm -- I'm just giving you, in
10 both cases, what you define as interest, but in one case
11 with a flaw and the other case with a cap.
12 MR. DONOVAN: Understood. In both cases, the
13 flat sums in those hypotheticals would be noninterest
14 charges. Whether the percentage charges in both cases are
15 interest charges depends upon whether that percentage is
16 being calculated or reckonable over the days. So it can't
17 just be a 1 percent for 30 days.
18 QUESTION: But Mr. -- Mr. Donovan, you're --
19 you're hinging your -- your whole argument upon "at the
20 rate allowed." But, you know, any flat charge can be
21 expressed as a rate. For example, if you have a State law
22 that says you may charge $100 a year on any loan, you
23 know, $100 loan processing charge may be -- may be applied
24 to any loan. You there have a State law which allows
25 interest at the rate of $100 -- at the rate of what --



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1 MR. DONOVAN: One hundred dollars per loan you
2 would have. You wouldn't have 100 --
3 QUESTION: You would know what the maximum rate
4 it allows, assume a -- assume a 1 penny loan. You know,
5 as much as you have to multiply 1 penny to get $100,
6 that's the rate. Any -- any flat amount can be converted
7 into a rate, once you know what the -- what the -- you
8 know, what the outstanding loan that the flat amount is
9 applied to is. It's -- it's simply a matter of
10 mathematics. Any flat amount is -- is -- is a rate of the
11 loan to which it is applied.
12 MR. DONOVAN: Justice Scalia, to be sure, after
13 the fact here a rate can be calculated once you know --
14 once a late fee is imposed --
15 QUESTION: Right.
16 MR. DONOVAN: -- and you know what the balance
17 is --
18 QUESTION: Right.
19 MR. DONOVAN: -- that it's being imposed against
20 --
21 QUESTION: Right. So why can't the Statute be
22 read that way, "interest at the rate"? Now, if you have a
23 flat fee that's permitted by State law, you can't go above
24 the rate that that flat fee would amount, assuming the
25 smallest possible loan.

1 MR. DONOVAN: Here the fact is that you cannot
2 calculate that rate until after the fact, after the
3 imposition of the charge. In the other instances that you
4 describe --
5 QUESTION: Why is that crucial? Why do you have
6 to be able to calculate --
7 MR. DONOVAN: Because -- I'm sorry, Your Honor,
8 because if you cannot calculate that rate after -- until
9 after the charge has been imposed, one, it's a rate
10 looking backwards and not forwards; and, two, it's not a
11 rate that somebody can anticipate, either borrower or a
12 bank, in order to determine whether the charge is
13 complying with Section 86's usury ceiling. And it's
14 unlikely or implausible that Congress would have intended
15 to subject banks to the severe forfeiture penalties of
16 Section 86 if the bank couldn't know whether it was
17 complying with 86 until after it violated that Section.
18 QUESTION: But, Mr. Donovan, don't you have a
19 simpler answer to that example? It also is not a function
20 of the time that the arrearage is -- is in effect.
21 MR. DONOVAN: Well, in this --
22 QUESTION: Isn't that your -- your basic answer?
23 MR. DONOVAN: Yes.
24 QUESTION: It's a one-time charge. And your --
25 your answer is one-time charges are never a rate of

1 interest; they always have to be a function of time?

2 MR. DONOVAN: Yes --

3 QUESTION: But my point is that you -- you

4 derive that argument from the word "rate," and that it --

5 that -- it need not be derived from the word "rate,"

6 because you can convert a flat charge into a rate, once

7 you know what the amount that the flat charge is applied

8 to.

9 MR. DONOVAN: Well, Justice Scalia, here the --

10 the rate that -- that you're deriving is a rate that is

11 only applied after the number of days have already been

12 identified, after the imposition of the charge has been

13 imposed. So that it is not a rate that's accruing as the

14 days they go on. It's not a reckonable charge.

15 QUESTION: I understand. But we're only looking

16 for the maximum rate that the State allows. So all you

17 have to figure out is the shortest amount of time to which

18 this could possibly apply under State law, and the

19 smallest amount of money to which this could possibly

20 apply under State law, and, voila, you have the maximum

21 rate allowed by State law.

22 MR. DONOVAN: That maximum rate allowed by State

23 law, Your Honor, would make it very difficult for a bank

24 to know what that maximum rate is, because it would

25 obviously vary, in this instance, by each consumer with



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1 whom the bank dealt. So that -- because obviously that
2 rate is going to change depending upon the number of days
3 that the consumer pays that late payment.
4 QUESTION: Mr. Donovan, are we talking about
5 something that would be eminently fixable by CitiBank if
6 it said, forget Federal law, we're going to put a
7 choice-of-law clause into every application, credit
8 application, and we're going to say that all terms and
9 conditions of this agreement shall be construed in
10 accordance with the law of South Dakota. So this
11 agreement is governed by the law of South Dakota, which
12 permits these charges.
13 Would that be binding?
14 MR. DONOVAN: First, Your Honor, there is such a
15 clause that says -- that's similar to that in the CitiBank
16 agreements. CitiBank makes its agreements subject to
17 South Dakota and Federal law. Second, in many States,
18 including my client's State, the State provides that
19 notwithstanding choice-of-law agreements by companies in
20 consumer contracts, this State will apply its
21 choice-of-law provisions where those are form contracts
22 and the customer, in this case, accepted the solicitation
23 in the State and signed the solicitation in the State. So
24 those are common types of choice-of-law provisions under
25 consumer laws in various States.



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1 What we would then have would be a conflict
2 between the choice-of-law language selected by CitiBank
3 and the State public policy, and we would basically have a
4 conflicts of law question, which is not the question
5 that's at issue here, Your Honors. The -- the question at
6 issue here is that CitiBank can override those
7 choice-of-law provisions by a broad construction of the
8 word "interest" that makes it a Federal choice-of-law
9 provision; which we believe was not intended by Congress
10 by the simple use -- use of the word "interest" and "rate"
11 in Section 85.
12 The other evidence of the Congress's intent when
13 it passed this Statute was what Congress was looking at.
14 At the time, Congress was looking at other State interest
15 ceilings that were in existence. And all of the
16 legislative debates that refer to this section demonstrate
17 that the members of Congress were focusing on a
18 time-based, amount-based charge.
19 They refer to the percentage ceiling in my State
20 as 10 percent per annum, the common law that has been
21 issued by this Court, beginning in the mid-1800's and
22 proceeding since then, has all recognized a difference
23 between flat penalty charges that are imposed on top of
24 prejudgment interest for processing costs or for
25 collection costs.

1 In fact, in the case decided by this Court, New
2 Orleans v. Piaggio, this Court recognized that there was a
3 difference between special damages on top of prejudgment
4 interest and prejudgment interest. In United States v.
5 Texas, this Court recognized that as well.
6 If I may, Your Honors, to get back to Justice
7 O'Connor's question about deference to the OCC. In
8 addition to the statutory language that we have here,
9 there are two important reasons why the OCC's position is
10 not entitled to deference. First, the OCC's recent
11 interpretation of "interest at the rate" does not purport
12 or even attempt to rely on any of the agencies' expertise
13 in banking or finance.
14 There is no textual analysis of the Statute.
15 There is no functional characteristic analysis by the OCC,
16 because the OCC has not examined what the differences are
17 between an annual fee, for example, and an appraisal fee
18 or a document preparation fee. There is not even an
19 economic study or even a banking basis for the OCC's
20 interpretation here. In fact, what the OCC admits is that
21 it is interpreting the Statute --
22 QUESTION: Have we required that sort of thing
23 before we defer?
24 MR. DONOVAN: You have, Your Honor, in your
25 post-Chevron line of authorities. In fact, one -- one

1 case involving the Federal Reserve Board against Dimension
2 Financial and in other cases cited in this Court's
3 decision. In Adam's Fruit, you have required at least
4 some sort of explanation by the agency as to its
5 interpretation. In other words, when the Court has
6 required a reasonable construction of the Statute, it's
7 required reasons. Here, the OCC --
8 QUESTION: One thing the controller gave as a
9 reason: I think the banks want this.
10 (Laughter.)
11 MR. DONOVAN: I would submit -- I would submit,
12 Your Honors, that -- that this Court would hold that that
13 is not a reasonable construction of the Statute; that that
14 is an irrational, biased construction. If that is the
15 reason here, I would submit that that type of
16 interpretation would have to be found to be an irrational,
17 biased construction of the Statute.
18 QUESTION: Why would it be irrational if the
19 banks want it? Because it makes banks generally more
20 solvent and more profitable and so forth, it protects
21 depositors. I mean you could add a little language, but
22 the basic bottom line is banks want it because they think
23 it's healthy for the banking industry. Why is that
24 irrational?
25 MR. DONOVAN: Well, in -- in the economic sense,



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1 it's rational for the banks, because it makes them better
2 off. The question, though, is whether it's a rational
3 reading or a rational interpretation of the statutory
4 text. Here, it would not be a rational interpretation,
5 because then the statutory text would mean whatever the
6 banks want, they can do. And that's not what Congress
7 asked.
8 QUESTION: Well, what you're doing is taking out
9 the expertise of the agency in regard to what's good for
10 the banking industry and so forth. That -- it just has to
11 be an expert in reading statutes.
12 MR. DONOVAN: No.
13 QUESTION: That's what you're saying.
14 MR. DONOVAN: No, I don't mean to imply that,
15 Your Honor.
16 QUESTION: Fine.
17 MR. DONOVAN: What I mean here is that what the
18 agency has not done is it has not gone and looked at what
19 is the economic basis or the functional characteristics of
20 these charges. For example, when this Court examined
21 whether -- whether deposits and commercial loans were
22 similar, or annuities even, it has focused on the fact
23 that the OCC has determined or the regulator has
24 determined that these are functionally similar to
25 different types of financial products.



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1 The OCC has not done that with -- well, late
2 fees are functionally similar to interest and appraisal
3 fees aren't; attorney's fees are functionally similar, but
4 -- but -- but these other document preparation fees
5 aren't. That's not what it's done here. It has instead
6 said, We make this interpretation because that's what the
7 current case law says. Well, what the OCC is asking for,
8 then, is deference not to an expert view, but to lower
9 court opinions. And this Court doesn't need an agency to
10 tell it whether to defer to lower court decisions or not.
11 In addition, here the agency has not explained
12 the fundamental or important distinctions between those
13 fees that it has now determined are noninterest and those
14 fees which it considers to be interest. It doesn't tell
15 us what's the difference between -- what about an
16 appraisal fee makes it noninterest and what about a
17 prepayment charge or an attorney's fees or a late fee
18 would make those interest. It has absolutely no
19 explanation whatsoever that this Court can look to and
20 say, Oh, that's a reasonable -- that's a reasonable
21 explanation, or, We can -- we can respect that
22 determination. That's not what it does at all.
23 The omissions from the list are -- equally
24 demonstrate the irrationality of the OCC's position.
25 I see that my time has almost expired. I will

1 reserve the remainder.

2 QUESTION: Very well, Mr. Donovan.

3 Mr. Kendall.

4 ORAL ARGUMENT OF RICHARD B. KENDALL

5 ON BEHALF OF THE RESPONDENT

6 MR. KENDALL: Mr. Chief Justice, and may it

7 please the Court:

8 Petitioner concedes that if this higher charge

9 were stated as a percentage, no matter how high, then it

10 would be interest.

11 QUESTION: I don't think that's right. He said

12 it's not interest unless it's based on the function of

13 time. I asked him that very question. Because I was

14 unclear from his brief.

15 MR. KENDALL: But if it's stated as a percentage

16 as a function of time, he would say --

17 QUESTION: Right, if it's a function of time.

18 MR. KENDALL: So -- so, to begin with, he would

19 say that if CitiBank were to charge 100 percent interest

20 --

21 QUESTION: Per period of time.

22 MR. KENDALL: -- per unit of time.

23 QUESTION: Right.

24 MR. KENDALL: And I'd like to address in a

25 moment, Justice Scalia, the question of the unit of time.

1 But per unit of time, then that would be interest.

2 Now, that would mean that CitiBank could charge

3 50 -- 50 percent each month, 100 percent each month, or,

4 to take Justice Ginsburg's example, why couldn't CitiBank

5 charge 50 percent each month but, up to a cap, and then

6 just say, We won't charge any more? Why should it matter

7 that the late charge happens to be stated in another way?

8 It is still a price that the lender is charging the

9 borrower for using and detaining its money. So the

10 function of this charge has not changed because of the way

11 it was expressed. The form of the charge does not alter

12 its function.

13 QUESTION: Well, I'm -- I'm not sure that that

14 analysis is entirely consistent with the Statute. The

15 Statute talks about a -- a rate of interest. And, you

16 know, you can have all sorts of hypothetical examples that

17 posit one situation and posit another. But there is a

18 considerable difference between a late charge that is not

19 based on the amount that is overdue and that is not based

20 on any stated rate, as compared to a percentage of

21 interest on -- on, say, a loan of $1,000. You say you're

22 going to charge him 7 percent or 2 percent per month or

23 something. There -- there is that difference. And all

24 the hypotheticals in the world don't obscure it.

25 MR. KENDALL: The case law of the time and the

1 statutes of the time when Congress enacted the National
2 Bank Act deal directly with this issue, Your Honor. Many
3 of the State statutes -- in fact, by my count, all of the
4 State statutes use a phrase to set the ceiling of -- of
5 interest, whether it's prematurity interest or
6 postmaturity interest, they use a phrase "the rate of
7 interest." And the statutes say a lender can charge
8 interest up the rate of X. And generally that rate is
9 stated as a percentage.
10 And it has always been the case that that phrase
11 "rate of interest," in a statute regulating the amount of
12 interest that could be charged, captured all forms of
13 charges, and it has to. Because if it didn't, a lender --
14 let's say that the rate is 15 percent, a lender could say,
15 Well, I'm going to charge you 14-and-a-half percent, plus
16 a $1,000. And the $1,000 isn't interest, so I don't have
17 to worry about the rate ceiling.
18 The phrase "rate of interest" not only has a
19 dictionary definition that includes all forms of charges,
20 but it was always used by statutes and by courts
21 interpreting those statutes to capture all forms of
22 lending charges that had to do with the use or detention
23 of money.
24 QUESTION: I take it you're talking about the
25 State statutes as of 1864, when this was enacted?

1 MR. KENDALL: That's correct.

2 And to respond to Justice Stevens' point about
3 the unit of time, in the Citizens Banks against Donnell
4 case that was decided by a unanimous Court, authored by
5 Justice Holmes, one of the questions that arose was
6 whether the method of calculation as to unit of time in
7 compounding was something that the Statute, that Section
8 85, gave to the law of the State. In other words, did the
9 -- did the language allowed by the laws of the State in
10 Section 85 adopt the manner in which the rate of interest
11 was to be calculated? Because in that particular case,
12 there was a dispute about how many times per year it was
13 compounded.

14 And, Justice Stevens, I believe that the opinion
15 by Justice Holmes is very clear on this point, that the
16 question of the unit of time is up to the law of the State
17 where the bank is located. Like the amount of the charge,
18 like the ceiling rate, if you will, the manner of
19 computation -- the unit of time -- is committed to the
20 legislature of the State where the bank is located.

21 QUESTION: Mr. Kendall, I think -- the biggest
22 problem I have with -- with your -- with your case is that
23 I don't see how the -- how the alternative set forth in
24 the Statute makes sense unless you're dealing with a
25 charge that is expressed as a rate. That is to say,

1 Section 85 reads that any national bank may -- may charge
2 interest at the rate allowed by the laws of the State
3 where the bank is located or -- here's the alternative --
4 or at a rate of 1 percent in excess of the discount rate
5 on 90-day commercial paper, whichever may be greater.
6 That alternative doesn't make any sense when
7 it's applied to a flat $1,000 charge. And -- and that
8 suggests that -- that what goes before the alternative
9 only describes nonflat charges. Do you understand my
10 point?
11 MR. KENDALL: I -- I do. And I respectfully
12 disagree, and here's why. The State statutes of the day
13 had a very similar phrase and very similar language.
14 They, too, had rate caps expressed in the forms of
15 percentages. And lenders have always had to determine (A)
16 how much interest have we charged this particular
17 borrower? (B) what's the amount of the loan? (C) how
18 long has this loan been outstanding? And then (D) perform
19 a simple mathematical calculation, have we exceeded the
20 cap?
21 And so, to apply the alternative Federal rate,
22 which of course was added in 1933, but, nevertheless, is
23 an existing alternative standard --
24 QUESTION: Right.
25 MR. KENDALL: -- CitiBank would have to act in

1 just the following way, Your Honor. First, it happens to
2 be in a State, South Dakota, that does not have a rate
3 ceiling. So this is not a problem for CitiBank under --
4 the first part of the --
5 QUESTION: The alternative --
6 QUESTION: You say -- you say it happens to be
7 there?
8 (Laughter.)
9 QUESTION: It moved, didn't it?
10 (Laughter.)
11 MR. KENDALL: When --
12 (Laughter.)
13 QUESTION: Right, right, it happens to find
14 itself in a State, how about that?
15 (Laughter.)
16 MR. KENDALL: It happens to find itself.
17 QUESTION: In that banking metropolis of Rapid
18 City.
19 QUESTION: Right.
20 MR. KENDALL: We -- in -- in complying with a
21 percentage rate ceiling, whether it would be a Federal one
22 or if were in a State that had a percentage rate ceiling,
23 would simply have to analyze what is the total interest
24 charged and compute it against the rate cap to see whether
25 it had been exceeded. And --

1 QUESTION: Convert to a rate, in other words, as
2 -- as I was discussing earlier with --
3 MR. KENDALL: That's right. And banks have
4 always been required to do just that. And we have cited
5 the cases on page 24, a half dozen or so cases that show
6 that that in fact has always been the law.
7 But, further, I would point out that the
8 statutory language "rate" and "amount" does not have any
9 percentage limitation, in any event. First, within the
10 Statute, I would point out that the third sentence --
11 QUESTION: But before you go on, let me ask you
12 how that works if -- suppose you have a State that, on all
13 loans, allows a 5 -- no matter what the amount of the
14 loan, anybody can charge a $500 loan -- loan servicing
15 charge or whatever. Now, how do you convert that into the
16 alternative clause? That means, you know, 1 penny for
17 what -- 1 penny for 1 year, I guess 1 penny for 1 day and
18 $500 is the interest on that. Wow, that's a very high
19 rate.
20 MR. KENDALL: You wouldn't be able to --
21 QUESTION: And my -- and that means that the
22 alternative "or," you know, the -- my goodness, the State
23 -- the State interest would -- would have no usury limit
24 at all then, right?
25 MR. KENDALL: If you were in a State that

1 provided for a charge that would, if computed against a
2 Federal rate cap, would cause you to exceed the cap, you
3 simply couldn't charge the charge. If -- if you say to
4 me, I will loan you $100 and at 10 percent interest,
5 you're not going to be able to also charge me $50 extra
6 without being subject to the rate cap.
7 QUESTION: I don't see how it works. If --
8 well, let's assume that -- that -- that the smallest
9 amount of money for the shortest amount of time, with a
10 $500 minimum flat charge, amounts to a million percent
11 interest. I -- I don't know what it does. Let's say it
12 amounts to a million percent interest. That means that
13 any State that allows a 500 percent -- a $500 flat charge
14 permits interest at the rate of a million percent. Is --
15 is that what you're saying?
16 MR. KENDALL: Well --
17 QUESTION: Or do you have to consider not
18 interest in gross, but you have to say, oh, only flat
19 charges of the same type that the State allows can be
20 charged at that rate?
21 MR. KENDALL: Well, let's not mix up now what a
22 State is allowing, because that's a question you answer
23 under the first clause of Section 85, with what the
24 Federal Government alternative rate would permit. We have
25 -- it's important to keep those analytically distinct. So

1 if a -- let's -- let's take the section of Section 85 that
2 we are focusing on here in this case. South Dakota allows
3 any rate of interest, as did Arizona in the Daggs case
4 that this Court considered in 1900.
5 And what that means is that a national bank
6 located in the State of South Dakota is entitled to charge
7 whatever rate of interest is agreed upon between itself
8 and a borrower, just like all the other lenders in South
9 Dakota, because that's the most-favored-lender principle.
10 Now, if the bank, instead of using the South
11 Dakota law as its basis for the charge, were to use the
12 provision of the Statute that comes later that, Justice
13 Scalia, you are referring to, it would have to have a
14 ceiling of a 7 percent or whatever that -- that cap would
15 come out to -- just as if it had been under a State
16 statute in 1862, before the National Bank was enacted. It
17 would have been under a State cap of, say, 7 percent.
18 And what would have happened was -- would have
19 been that -- that a court reviewing whether a charge was
20 usurious would have asked the following question: How
21 much interest has been charged? Let's now compute it as a
22 percentage and annualize it over a year. And would that
23 exceed 7 percent?
24 QUESTION: Well, does this mean that every --
25 every charge made by the bank against the $1,000, say,

1 that's loaned, has to be considered interest? I mean,
2 supposing that a bank says, We're going to charge you $15
3 for quick processing. In other words, you pay us $15 and
4 you can have your loan processed in 5 days. Other people
5 have to wait 30 days. Now, is that interest?
6 MR. KENDALL: In your example, yes, Your Honor,
7 because it is the price that the bank is charging for
8 making available the credit and the use and -- and money
9 on the terms provided. There are many, many different
10 terms and different relationships, and expedited money may
11 cost more.
12 QUESTION: Well, what -- what if the bank says
13 you're going to have to pay $40 for an insurance premium
14 on your life?
15 MR. KENDALL: Your Honor, we would argue that
16 that is not for the extension of credit. That is a
17 discrete service. That is -- now you're not being charged
18 for the borrowing of the money -- in -- in the
19 hypothetical as you stated it -- you're being charged for
20 a separate service.
21 QUESTION: And how -- how can you tell which is
22 the separate service and which isn't? How can you tell
23 the -- the separate service in the first hypothetical
24 isn't the quick process?
25 MR. KENDALL: Well, to take the credit card

1 example as one, after you get a credit card, you'll often
2 find -- or after you get a mortgage, you'll often find
3 you'll receive in the mail solicitations from people who
4 will say, We'd like to give you insurance in case you are
5 disabled. You didn't have to pay that charge in order to
6 get the credit. And it's a separate service entirely.
7 It's not for the extension of credit.
8 QUESTION: I can understand that when the thing
9 comes in the mail after the loan is complete. But if the
10 bank asked it right at the time, I don't quite understand
11 the distinction.
12 MR. KENDALL: If it -- if it was a condition of
13 providing the credit in the first place, it was required
14 and it is integral to the making available of the credit,
15 then in that situation -- which is not the ordinary case
16 -- in that situation it might be interest. That's not the
17 ordinary case, which is why I believe, in the OCC
18 regulation, it is not considered ordinarily interest, and
19 we do not normally -- we do not consider it ordinarily
20 interest, and I don't think it would be.
21 The key question is: Is this a price that's
22 being charged for actually making available credit and for
23 the use and detention of the bank's money?
24 QUESTION: Well, how do you answer Mr. Donovan's
25 argument that you could put all these extra charges in,

1 and you could call everything interest, it would all fit
2 into your definition?
3 MR. KENDALL: If -- if what Mr. Donovan is
4 saying is that our definition is inclusive of all charges
5 that are for the use or detention of money, then we would
6 say that that definition has a proud history in the usage
7 of the term "interest," the usage of the term "rate," the
8 statutory history, the statutory purpose, and the
9 administrative agencies' interpretation.
10 So we are not suggesting that charges that are
11 not for those purposes constitute interest, but we do --
12 we do believe -- and -- and this Court has -- has a
13 definition since the mid-19th century that interest is --
14 is what a lender is charging for the use and detention of
15 money.
16 QUESTION: May I ask you to tell me again why
17 you think the Citizens National Bank opinion by Holmes
18 helps you?
19 MR. KENDALL: Yes.
20 QUESTION: I'm not sure I caught your point
21 before.
22 MR. KENDALL: There are two -- two ways in which
23 it -- it helps us. There -- there are two points that are
24 made in that opinion. The opinion, first, addresses
25 whether the method of compounding that was used by the

1 bank violated the -- violated Section 85 because it
2 exceeded the method of compounding permitted by the home
3 State. And the answer was, by Justice Holmes, yes.
4 Because instead of compounding only once per year, which
5 was his analysis of what the State required as to the unit
6 of time, the bank had compounded oftener than that.
7 And so I offer that -- that part of Donnell for
8 the proposition that the law of the State as to the method
9 of computation is adopted by Section 85. In other words,
10 that -- that question --
11 QUESTION: Because that's where the law of the
12 State prohibited rather than permitted it?
13 MR. KENDALL: Correct.
14 QUESTION: Yes. I -- I see your point there.
15 MR. KENDALL: And then, of course, Donnell also
16 makes another point which is very important. Which is
17 that a charge, even if it could be labelled a penalty,
18 because it's too high in someone's estimation, is still
19 interest and thus that -- what the parties contended --
20 what the borrower was contending was -- what the bank,
21 excuse me, was contending was penal interest and therefore
22 not usurious, not covered by Section 85. They lost that
23 argument, Justice Holmes saying you have to forfeit all of
24 that interest. It is interest even though it was penal.
25 And of course, this Court, in Library of

1 Congress against Shaw, has said the same; that the
2 character of interest does not change even if a charge
3 could aptly be called a penalty.
4 The purpose of this Statute requires a meaning
5 of interest that would, for example, prevent a State where
6 a bank is located from saying to a credit union, You can
7 charge late fees, but not giving that privilege to other
8 lenders. Because then we could become the least-favored
9 lender in the State. Interest has to have a capacious
10 definition for the purpose of capturing those lending
11 charges that could be the basis for discrimination.
12 This Court has -- in -- in the Tiffany case, in
13 the Marquette case, shown that the congressional purpose
14 to favor national banks has to be respected in
15 understanding the meaning of the -- of the statutory
16 terms.
17 The case comes to the Court on this issue of the
18 meaning of the term "rate of interest," with not only the
19 history of the word "interest," the -- the word "rate,"
20 which Black's Law Dictionary defines, without any
21 reference to the form of a charge, as simply the amount of
22 a charge. Noah Webster, in 1828, a similar definition:
23 Price or amount stated or fixed on anything.
24 What I would want to emphasize is that the term
25 "rate of interest," that was simply the cap -- that --

1 that is the way that States, and then the Federal
2 Government, went about regulating the amount that could be
3 charged. The term "rate" and "amount" is used
4 interchangeably in the Statute. The last sentence of the
5 Statute, which happens to deal with foreign bank branches
6 -- branches of national banks located outside the United
7 States -- uses those terms interchangeably.
8 QUESTION: Along with the rate goes the manner.
9 I mean if -- if -- if a State allows a million percent as
10 a late charge, you couldn't charge a million percent as
11 something other than a late charge?
12 MR. KENDALL: That's right, Your Honor.
13 QUESTION: Okay.
14 QUESTION: Thank you, Mr. Kendall.
15 Mr. Gornstein, we'll hear from you.
16 ORAL ARGUMENT OF IRVING L. GORNSTEIN
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE RESPONDENT
19 MR. GORNSTEIN: Mr. Chief Justice, and may it
20 please the Court:
21 The Comptroller of the Currency has issued an
22 interpretive regulation concluding that late fees are
23 interest. Our position is that the Comptroller's
24 interpretation is reasonable and that under established
25 principles of administrative deference, the Court should

1 defer to that interpretation.

2 QUESTION: Just as a matter of curiosity,

3 Mr. Gornstein, I've been on the Court 23 or 24 years and

4 heard a number of these cases. And I've never heard of a

5 case in which the Comptroller ruled against the banks.

6 (Laughter.)

7 QUESTION: Do you know of any?

8 MR. GORNSTEIN: Do I know of any case in which

9 the Comptroller has ruled against --

10 QUESTION: I mean gave an interpretive

11 regulation which was adverse --

12 MR. GORNSTEIN: Adverse to the banks?

13 QUESTION: Yes.

14 MR. GORNSTEIN: Well, I -- I would suggest that

15 this very regulation that you find here favors the banks

16 in some respects and does not favor the bank in other

17 respects. And so -- because some of the charges are --

18 are treated as interest and some are not, whereas probably

19 the banks would like to have all of them treated as

20 interest so that they could be exported.

21 QUESTION: Why is -- why is this a matter that

22 the Comptroller must resolve for himself in performing his

23 duties under the Act?

24 MR. GORNSTEIN: The Comptroller has the

25 responsibility to make sure that national banks comply

1 with all provisions of the National Bank Act, including
2 the limit set on taking interest in Section 85. Section
3 85 says that a bank can take no more interest than the
4 most favored lender in the State in which the bank is
5 located.
6 QUESTION: And he has enforcement
7 responsibility?
8 MR. GORNSTEIN: He does.
9 QUESTION: So he must interpret it in the course
10 of executing that?
11 MR. GORNSTEIN: That -- that's right. That
12 under -- because of that enforcement responsibility, under
13 this Court's decisions in Chevron and in NationsBank, that
14 carries with it the authority to issue reasonable
15 interpretations of the meaning of interest under Section
16 85.
17 QUESTION: Does the Comptroller actually monitor
18 these rates? Is there an office down there that's keeping
19 track of all the rates that are being charged?
20 MR. GORNSTEIN: I -- I don't know the answer to
21 that question, Justice Souter.
22 The --
23 QUESTION: Does the administrative fee, the $15,
24 have to bear some reasonable relationship to the
25 administrative cost?

1 MR. GORNSTEIN: Under the Statute, it has to be
2 based on the law of the State in which the bank is located
3 to determine whether the fee is excessive or not, once it
4 is interest.
5 QUESTION: Suppose it bears no relationship to
6 the administrative cost associated with the lateness.
7 MR. GORNSTEIN: It is still interest, and it is
8 excessive interest by some States' standards -- perhaps
9 California's -- but it is not excessive interest when
10 judged by South Dakota's standards, where the national
11 bank is located.
12 The second --
13 QUESTION: If -- if you're breaking out of the 9
14 percent they normally charge that portion of the 9 percent
15 that reflects not the payment for refraining from
16 consumption, but the payment for the associated
17 administrative costs, and charging it in the form of a
18 flat fee -- if that's the theory of what's going on, how
19 could you justify an excessive amount? And if it isn't
20 the theory of what's going on, what is?
21 MR. GORNSTEIN: On a late fee, it is -- the
22 Comptroller concluded that a late fee does two things, at
23 least. One, it accounts for the increased risk that
24 somebody who pays late presents to the bank. It is a
25 bigger credit risk, and therefore banks want to charge a

1 higher rate of interest to account for that risk. And the
2 second thing the Comptroller concluded that the late fee
3 accounts for is the administrative costs associated with
4 that.

5 But once you --

6 QUESTION: Suppose the State does not allow a
7 late fee, how do you decide whether, in charging a late
8 fee, a bank violates the rate specified in the Statute --
9 namely, 1 percent above whatever it is? Do you follow me?

10 MR. GORNSTEIN: Well, I think that -- that you
11 -- again, there are two --

12 QUESTION: The State rate is the alternative.
13 It's either that or the federally specified rate,
14 whichever is higher. Now, how do you know whether a $15
15 late fee violates the federally specified rate?

16 MR. GORNSTEIN: You do not look to State law to
17 determine that. You look to just the percentage ceiling
18 and you look to the rate it charges --

19 QUESTION: Okay.

20 MR. GORNSTEIN: -- together with whatever late
21 fee they impose, to see whether that exceeds the
22 percentage ceilings set under the Federal standard. The
23 State law would have nothing to do with that.

24 QUESTION: Okay.

25 QUESTION: In practice, does that Federal limit

1 ever operate or is it nowadays that the bank picks a State
2 and the State --
3 MR. GORNSTEIN: I believe it hardly ever
4 operates. I'm told that it may operate in Arkansas,
5 still, where there is a constitutional limitation on the
6 taking of interest, but -- above a certain amount -- but
7 everybody else, I believe, is following the -- the law of
8 the State in which the bank is located.
9 The -- the second point I wanted to make here is
10 that the Comptroller reasonably started with the premise
11 that a -- interest in the lending context could
12 potentially include any charge for the use or the
13 detention of money. That is the formulation that this
14 Court adopted in Brown against Hiatt at around the time
15 that the Statute was enacted. And it was clearly not
16 unreasonable for the Comptroller to adopt that same basic
17 approach to the meaning of "interest."
18 The third point I want to make is that the
19 Comptroller here did reasonably conclude that late fees
20 are interest. A late fee is a charge that a borrower pays
21 as a condition of receiving an extension of credit. It is
22 imposed when the borrower fails to pay on time. It is
23 part of the price for using the credit card, and therefore
24 reasonably viewed as a charge for the use of detention of
25 money.

1 And the final point I want to make is that the
2 Comptroller reasonably determined that it should not make
3 any difference, for purposes of Section 85, whether the
4 late fee is charged as a percentage of the outstanding
5 balance or whether it is charged at a flat rate, such as
6 $15 per month. That is a matter of form rather than
7 substance. If you have a State which has, for example, a
8 10 percent limit on late fees and you have a borrower with
9 a balance of $100, it should not make any difference
10 whether a national bank charges 15 percent late fees or a
11 $15 flat late fee.
12 QUESTION: Mr. -- Mr. Gornstein, this Statute
13 came on the books, I guess, what, 1864?
14 MR. GORNSTEIN: Yes.
15 QUESTION: And the Comptroller never had a -- a
16 regulation until February of this year?
17 MR. GORNSTEIN: That's correct. No, I -- I -- I
18 take that back. The Comptroller did have a regulation on
19 the books, which is still part of the regulation here.
20 QUESTION: Is that the one in February 1955?
21 MR. GORNSTEIN: I -- I cannot give you the date
22 on the other regulation. But at page 3a of our brief,
23 where it says "(b) Authority," it -- it -- it ran
24 something like the second sentence of that, which is: If
25 State law permits interest charges on specified classes of

1 loans, a national bank making such loans is subject only
2 to the provisions of State law relating to that classes of
3 loans that are material to the determination of the
4 permitted interest rate.
5 And in deciding a lot of questions about what
6 was or wasn't interest before the issuance of this
7 regulation, the judgment was made about whether it was
8 quote, unquote, material to the determination of the rate
9 of interest that the innovation of this regulation, which
10 was built on the 1995 Williams letter that preceded it,
11 which stated the Comptroller's view, was to adopt a
12 Federal definition of interest that tracked this Court's
13 definition in Brown v. Hiatt as the basic concept of
14 interest, but to still leave the material to the
15 determination of interest, but not have it play so big a
16 role in determining what the meaning of interest was under
17 Section 85.
18 If the Court has no further questions --
19 QUESTION: Thank you, Mr. Gornstein.
20 Mr. Donovan, you have a minute remaining.
21 REBUTTAL ARGUMENT OF MICHAEL D. DONOVAN
22 ON BEHALF OF PETITIONER
23 MR. DONOVAN: Thank you, Your Honor. I'll be
24 brief.
25 Three points. One, the definition adopted and

1 proposed by the OCC here has no real logical stopping
2 point, which is the primary problem with the definition of
3 use, forbearance or detention. Virtually any charge can
4 be characterized as a charge for a detention of money: an
5 attorney's fee, a court cost, any collection fee.
6 However, Congress did not intend to embrace all of those
7 charges into "interest at the rate" in Section 85. In
8 fact, Congress had another provision, Section 24, which
9 authorized banks to make contracts and to -- subjected
10 those banks to State contract laws.
11 The Comptroller admits that that section
12 prevents discrimination by home States against banks with
13 regard to contract charges such as these. That section
14 takes care of Respondent's credit union hypothesis, that
15 there could be discrimination unless Section 85 means
16 everything. That can't happen, and it's not the case
17 here. They haven't challenged the credit union measure.
18 CHIEF JUSTICE REHNQUIST: Thank you,
19 Mr. Donovan.
20 MR. DONOVAN: Thank you.
21 CHIEF JUSTICE REHNQUIST: The case is submitted.
22 (Whereupon, at 12:06 p.m., the case in the
23 above-entitled matter was submitted.)
24
25

# *CERTIFICATION*

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*BARBARA SMILEY, Petitioner v. CITIBANK (SOUTH DAKOTA), N.A.*
*CASE NO: 95-860*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Mari Federico

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