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Oregon House Committee on Commerce and Consumer Protection
State of Oregon General Assembly

Re: House Bill 2561; Position: Oppose

Mr. Chair and members of the committee:

I am outside counsel to the American Financial Services Association (AFSA). Further to my testimony today before the Committee regarding HB 2561, Oregon's proposed "opt-out" from the Depository Institutions and Monetary Control Act of 1980 (DIDMCA), I submit the following documents to the Committee:

- The June 18, 2024 Order Granting Motion for Preliminary Injunction of Judge Daniel D. Domenico of the United States District Court for the District of Colorado in *National Association of Industrial Bankers; American Financial Services Association; and American Fintech Council v. Philip J. Weiser and Martha Fulford*, 24-cv-00812-DDD-KAS. This order enjoined Colorado from enforcing its DIDMCA opt-out law against out-of-state, state banks that do not "make loans" in Colorado, that is, that do not have lending operations in the state of Colorado as explained in the judge's order – without regard to where the consumer resides or is physically located. Colorado appealed this decision, and oral argument on the appeal will be heard in the United States Court of Appeals for the Tenth Circuit on March 18, 2025.

- The November 15, 2024 Plaintiffs-Appellees' Brief of AFSA, the American Fintech Council, and the National Association of Industrial Bankers, submitted to the United States Court of Appeals for the Tenth Circuit. This brief explains the legislative and regulatory background of DIDMCA and the opt-out, and why Congress did not intend for states to be able to regulate *other states*' banks by opting out of DIDMCA.

Thank you for the opportunity to explain today, on behalf of AFSA, the legal limitations of HB 2561, based on our experience challenging a similar law in Colorado. We welcome any questions or further discussion at the Committee's convenience.

Sincerely,

Davis Wright Tremaine LLP

Chava Brandriss

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:24-cv-00812-DDD-KAS

NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS;
AMERICAN FINANCIAL SERVICES ASSOCIATION; and
AMERICAN FINTECH COUNCIL,

Plaintiffs,

v.

PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado; and
MARTHA FULFORD, in her official capacity as Administrator of the Colorado Uniform Consumer Credit Code,

Defendants.

ORDER GRANTING MOTION
FOR PRELIMINARY INJUNCTION

The plaintiffs—National Association of Industrial Bankers, American Financial Services Association, and American Fintech Council—are trade associations whose members include (or partner with) state-chartered, FDIC-insured banks that engage in consumer lending. A federal statute, 12 U.S.C. § 1831d, caps the interest rates that such banks may charge on loans, and that statute expressly preempts any lower interest-rate caps that may be imposed by state law. A state may, however, opt out of Section 1831d's application "with respect to loans made in" that state, and Colorado has done so.

The dispute here is over what it means for a loan to be "made in" Colorado. The plaintiffs contend that Colorado has attempted to exceed the scope of its opt-out authority by interpreting "loans made in"

Colorado to include all loans made to borrowers located in Colorado, regardless of where the lender is located, which the plaintiffs say is beyond the statutory scope of that phrase. They move to preliminarily enjoin the defendants—Colorado Attorney General Philip J. Weiser and Colorado Uniform Consumer Credit Code Administrator Martha Fulford (collectively, "the State")—from enforcing Colorado's lower interest-rate caps with respect to loans made by lenders that are not located in Colorado. Doc. 24.

For the following reasons, I agree with the plaintiffs that the determination of where a loan is "made" under Section 1831d depends on where the lender performs its loan-making functions, not the borrower's location. The plaintiffs' motion for a preliminary injunction is therefore granted, and the defendants are enjoined from enforcing the interest rates in the Colorado UCCC with respect to any loan made by the plaintiffs' members, to the extent the loan is not "made in" Colorado and the applicable interest rate in Section 1831d(a) exceeds the rate that would otherwise be permitted.

BACKGROUND

Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (often referred to in case law as "DIDA" or "DIDMCA") added a new Section 27 to the Federal Deposit Insurance Act, which is now codified at 12 U.S.C. § 1831d. Under Section 1831d, a state-chartered bank may charge interest on loans at a rate up to the greater of (a) 1% above the Federal Reserve discount rate in the Federal Reserve district "where [the] bank . . . is located" ("discount-plus-one rate"), or (b) the rate allowed by the laws of the state "where the bank is located." 12 U.S.C. § 1831d(a). Section 1831d expressly preempts any lower interest-rate caps that may be imposed by state law. *Id.* ("[I]f the applicable rate prescribed in this subsection exceeds the rate [a] bank

. . . would be permitted to charge in the absence of this subsection . . . any State constitution or statute . . . is hereby preempted for the purposes of this section . . . ."). The statute states that it was enacted "to prevent discrimination against" state-chartered banks, *id.*, because the National Bank Act similarly permits national banks to charge interest at a rate up to the greater of the discount-plus-one rate or the rate allowed by the laws of the state where the bank is located, 12 U.S.C. § 85. *See also FDIC Gen. Counsel's Op. No. 11*, 63 Fed. Reg. 27282-01, 1998 WL 243362, at *27283 (May 18, 1998) ("Section 85 has been recognized to be the 'direct lineal ancestor' of section 1831d . . . . Congress made a conscious choice to pattern section 1831d after section 85 to achieve competitive equality in the area of interest charges between state and national banks.").

One effect of these statutes is that a bank chartered in a particular state (its "home" state) may charge interest to borrowers in that state at the discount-plus-one rate, even if that rate exceeds the rate permitted by the home state's laws. Another effect is that a bank may "export" the interest-rate caps of the state "where the bank is located" (which is often, but not always, its home state) when lending to borrowers who reside in a different state (the "host" state), even if the rate cap of the state where the bank is located exceeds the rate permitted by the host state's laws. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (national banks); *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992) (state-chartered banks). The state "where [a] bank is located" for purposes of Section 1831d and Section 85 depends on the state in which the bank is chartered, the state(s) in which it maintains branches, and the state(s) in which three "non-ministerial" functions of loan-making occur: loan approval (*i.e.*, the decision to extend credit), extension of credit (*i.e.*, the first communication of final approval of the loan), and disbursal of the loan proceeds (which is

distinguished from delivery of the disbursed funds to the borrower). *See FDIC Op. No. 11*, 1998 WL 243362, at *27285. A bank "is located" in its home state and may export its home state's interest-rate caps when lending to a borrower in a different state unless (a) all three non-ministerial functions are performed by a branch or branches located in the borrower's host state, or (b) at least one non-ministerial function occurs in the host state and "based on an assessment of all of the facts and circumstances, the loan has a clear nexus to the host state." *Id.*

Section 525 of DIDA, which, somewhat oddly, is codified not in a statutory section of the United States Code, but only in the "Effective Date" note to Section 1831d, allows a state to opt out of Section 1831d by adopting a law stating that it "does not want [Section 1831d] to apply with respect to loans made in" that state.[1] 12 U.S.C. § 1831d note (Effective Date). If a state opts out, then whenever a loan is "made in" the opt-out state by any state-chartered bank, that loan is subject only to the opt-out state's interest-rate caps, which may be higher or lower than that of the bank's home state or the federal discount-plus-one rate.

On June 5, 2023, Colorado adopted such an opt-out law, which states that, effective July 1, 2024, "the state of Colorado does not want the amendments to the 'Federal Deposit Insurance Act', 12 U.S.C. sec. 1811 et seq. . . . made by [12 U.S.C. § 1831d], prescribing interest rates and preempting state interest rates to apply to consumer credit transactions in this state." Colo. Rev. Stat. § 5-13-106. Defendant Fulford, as Colorado's UCCC Administrator, has issued an interpretive opinion letter regarding the scope of this opt-out statute, which states that she "interprets § 5-13-106 to apply only to consumer credit transactions 'made in'

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[1] Section 85 of the National Bank Act does not contain any opt-out provision with respect to the preemptive federal interest-rate caps that apply to loans made by national banks. *See* 12 U.S.C. § 85.

Colorado in accordance with [12 U.S.C. § 1831d]"; she "understands and interprets § 5-13-106's language of 'in this state' to be wholly congruent and identical with the opt out authorized by Section [1831d] for loans 'made in' the state"; and she "will limit her enforcement, if any, of violations of the opt out, if any, to loans 'made in' Colorado, pursuant to § 5-13-106 and [12 U.S.C. § 1831d]." Doc. 39-1 at 5.

The plaintiffs agree with that, but they argue that the State interprets "made in" too broadly. They say that the determination of where a loan is "made" turns only on where the *bank* is located and performs the above-noted non-ministerial functions. The State contends that a loan is "made in" *both* the state where the *bank* enters into the transaction *and* the state where the *borrower* enters into the transaction. *See* Doc. 38-1 at 10-13 (FDIC's position, which the State explicitly adopted at the preliminary-injunction hearing). The plaintiffs' complaint alleges that any attempt by the State to enforce the interest-rate caps in the Colorado UCCC with respect to loans that are not "made in" Colorado (as that phrase is properly construed under federal law) would exceed the scope of Colorado's opt-out authority under Section 1831d and violate both the Supremacy Clause and the Dormant Commerce Clause of the United States Constitution. *See* Doc. 1.

The plaintiffs move to "preliminarily enjoin Colorado from taking any action to enforce or give effect to [the opt-out in Colo. Rev. Stat. § 5-13-106] with respect to loans not 'made in' Colorado as defined by federal law." Doc. 24 at 26. The plaintiffs' motion asserts only Supremacy Clause preemption arguments as the basis for preliminary injunctive relief. *See generally* Doc. 24. The motion is fully briefed, *see* Docs. 26-32, 39, 45; *see also* Docs. 38-1, 48, and a hearing was held on May 16, 2024, Doc. 56.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019). One may be granted "only when the movant's right to relief is clear and unequivocal." *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018).

To succeed on their motion for preliminary injunction, the plaintiffs must show: (1) that they are "substantially likely to succeed on the merits"; (2) that they will "suffer irreparable injury" if the injunction is denied; (3) that their "threatened injury" without the injunction outweighs the State's under the injunction; and (4) that the injunction is not "adverse to the public interest." *Mrs. Fields*, 941 F.3d at 1232; *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The third and fourth preliminary-injunction factors "merge" where, as here, the government is the party opposing the injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Movants seeking an injunction of a "disfavored" type face a heavier burden and must make a "strong showing" that the first and third factors weigh in their favor. *Mrs. Fields*, 941 F.3d at 1232. A disfavored preliminary injunction is one that: (1) mandates action (rather than prohibiting it); (2) changes the status quo; or (3) grants all the relief that the moving party could expect from a trial win. *Id.* The State contends that the injunction the plaintiffs seek here is of the third disfavored type. I find that doubtful,[2] but I need not resolve that question, because, as

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[2] The relief the plaintiffs seek in a final ruling would be to permanently enjoin the State from giving effect to Colorado's opt-out statute under the State's interpretation of "loans made in" Colorado, which would impact infinitely more loans than the temporary relief sought here.

discussed further below, the plaintiffs have made a showing as to their likelihood of success on the merits and threatened irreparable harm sufficient to satisfy even the heightened standard required for disfavored injunctions.

DISCUSSION

I. Subject-Matter Jurisdiction

As a threshold matter, the State contends that the plaintiffs lack standing and that their claims are not ripe. Doc. 39 at 16-19.

A. Standing

To demonstrate standing, the plaintiffs must show that: (1) they have suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendants; and (3) the injury is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The State challenges only the injury-in-fact prong of the standing inquiry, arguing that the plaintiffs have not shown a sufficiently concrete and imminent injury. The State does not challenge the plaintiffs' organizational standing to bring suit on behalf of their members. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023).

As to injury in fact, the plaintiffs assert that (1) their members are already incurring significant administrative costs to comply with the interest-rate caps in the Colorado UCCC and will continue to incur such costs in the event the State's interpretation of "loans made in" Colorado prevails and its asserted scope of the opt-out is found to be valid; and (2) their members will lose both revenue and customer goodwill if they can no longer profitably offer their loan products to certain Colorado consumers because of the lower interest-rate caps in the Colorado UCCC. Doc. 24 at 24-25. These injuries are sufficient to confer standing.

When plaintiffs take preventative measures and forego lawful conduct in order to avoid a credible threat of enforcement of an allegedly unlawful statute, then they have suffered a cognizable injury for standing purposes. *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 902-03 (10th Cir. 2016); *accord Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012) (cognizable injury where plaintiff association's members were "in an unenviable double-bind: submit to the preempted law and endure the costs of modifying otherwise uniform procedures, or violate the law and face the likelihood of lawsuits and penalties"). A threat of enforcement is generally credible where (1) a challenged statutory provision on its face proscribes the conduct in which a plaintiff wishes to engage, and (2) the state has not disavowed any intention of invoking the provision against the plaintiff. *Supreme Ct. of N.M.*, 839 F.3d at 901. "[T]he existence of a statute implies the threat of its enforcement . . . ." *Consumer Data*, 678 F.3d at 902.

The threat of enforcement of the Colorado UCCC against the plaintiffs' members if they continue to offer loans to Colorado consumers at interest rates above Colorado's caps after the July 1 effective date of the opt-out is a credible one. As discussed above, the State's interpretation of "loans made in" Colorado is at odds with what the plaintiffs contend is the correct statutory construction of Section 1831d's opt-out provision, so there is a live controversy. And the State has not disclaimed enforcement against the plaintiffs' members if they violate Colorado's interest-rate caps on loans that fall within the State's broader interpretation of "loans made in" Colorado. *See* Doc. 39-1 at 5. The plaintiffs' members need not risk actual enforcement to have standing to challenge the scope of the opt-out and the State's probable future enforcement of allegedly preempted Colorado UCCC interest rates. *Supreme Ct. of N.M.*, 839 F.3d at 901.

The State argues that the plaintiffs' asserted injuries are "too conjectural to confer standing in the pre-enforcement context because determining where a loan is 'made,' and even what [Colorado UCCC] rate applies, is necessarily fact intensive, and th[e] Court cannot determine whether Colorado has exceeded Section [1831d]'s opt-out until it has an actual loan to analyze." Doc. 39 at 17-18. The State notes that "[t]he only loans that could confer standing here are those that Plaintiffs' members would only offer if they could exceed Colorado's caps, *and* they must be loans that do not meet [Section 1831d]'s definition of 'made in' but are nonetheless subject to Colorado's caps by the Opt-Out," and argues that "the number of loans affected could be a handful of loans, or none." *Id.* at 18. It is true that to confer standing, a plaintiff's injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). But the plaintiffs have submitted declarations from their executive officers and from officers of several of their member banks detailing the loans that will be affected as well as the administrative costs, lost revenue, and intangible losses like lost customers and goodwill that the plaintiffs' members will suffer if the full scope of Colorado's opt-out (under the State's interpretation of "made in") is permitted to take effect. *See* Doc. 26 ¶¶ 11-19; Doc. 27 ¶¶ 14-22; Doc. 28 ¶¶ 12-19; Doc. 29 ¶¶ 13-20; Doc. 30 ¶¶ 10-17; Doc. 31 ¶¶ 10-13; Doc. 32 ¶¶ 8-15. The plaintiffs need not precisely quantify the number of loans that will be affected or the dollar amount of revenue that will be lost in order to demonstrate an injury in fact. The injuries asserted are sufficiently concrete and particularized.

As noted above, the State does not challenge the traceability and redressability prongs of the standing inquiry, and it seems uncontroversial that the asserted injuries to plaintiffs' members are traceable to the challenged opt-out statute, and that enjoining the Colorado Attorney

General and UCCC Administrator from enforcing Colorado UCCC interest-rate caps with respect to loans to which Section 1831d's preemption allegedly still applies would provide relief for the plaintiffs' members. The plaintiffs have successfully demonstrated standing.

B. Ripeness

As to ripeness, the State contends that the plaintiffs' asserted injuries have not matured sufficiently to warrant court intervention. Ripeness involves both constitutional and prudential components. *Supreme Ct. of N.M.*, 389 F.3d at 903. The requirements of standing and constitutional ripeness overlap—if an injury is sufficiently imminent to establish standing, as it is here, constitutional ripeness will necessarily also be satisfied. *Id.* Prudential ripeness turns on both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id.* Where the possibility of an enforcement action rests on uncertain or contingent future events, a claim may not be prudentially ripe for judicial review if waiting for those contingencies to play out would significantly advance a court's ability to deal with the legal issues presented. *Id.* at 904.

In this case, waiting would not aid the Court in resolving the parties' dispute. The plaintiffs' preemption claim turns on a matter of law that can be resolved without further factual development—the proper statutory construction of "loans made in" Colorado under federal law. Though the State is correct that the determination of where any particular loan is made will be a case-by-case factual inquiry, those factual distinctions make no legal difference as to the scope of the federal statue's opt-out language. To resolve the dispute in this case, I need only decide whether the location of the borrower is one of the facts that should be taken into account in deciding where a loan is "made" under the opt-out provision. The plaintiffs' claims are both constitutionally and prudentially ripe for

review. *See Consumer Data*, 678 F.3d at 907 ("[R]ipeness is seldom an obstacle to a pre-enforcement challenge . . . where the plaintiff faces a 'credible threat' of enforcement, and 'should not be required to await and undergo [enforcement] as the sole means of seeking relief.'").

II. Preliminary-Injunction Factors

A. Likelihood of Success on the Merits

The plaintiffs have made a strong showing that they are substantially likely to succeed on the merits of their preemption claim. They have pleaded a viable cause of action, and their proffered construction of "loans made in" Colorado is likely to prevail over the State's proposed construction.

1. Cause of Action

The State unpersuasively contends that the plaintiffs' claim cannot proceed because there is no private right of action under the Supremacy Clause or Section 1831d. Doc. 39 at 14-16. A three-step analysis applies to the question of whether a plaintiff has a cause of action. A court must determine: (1) what alleged substantive rights the plaintiff is seeking to vindicate; (2) what putative causes of action the plaintiff is raising based on those rights; and (3) which, if any, of those causes of action are viable with respect to the relief requested. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 899 (10th Cir. 2017) (citing *Davis v. Passman*, 442 U.S. 228, 239-41 & n.18 (1979)).

The right the plaintiffs are seeking to vindicate is that of their members to charge interest at the rates specified in Section 1831d on loans as to which Colorado cannot opt out of the statute's application. For a statute to create private rights, it must be phrased in terms of the persons benefited rather than focused on the persons regulated. *Id.* at 903. Section 1831d(a) satisfies this inquiry, as it states that its purpose is "to

prevent discrimination against" state-chartered banks, and that such banks "may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . charge on any loan" the greater of the discount-plus-one rate or the rate allowed by the laws of the state where the bank is located. 12 U.S.C. § 1831d(a). The putative cause of action the plaintiffs raise is a claim in equity under *Ex parte Young*, 209 U.S. 123 (1908).[3] Doc. 1 at 26; Doc. 45 at 7-8. The State does not raise any arguments as to these first two steps of the cause-of-action analysis.

As to the third step, the State contends that the asserted cause of action is not viable because banks are not among the class of litigants that may enforce the rights created by Section 1831d. "Congress may displace the equitable relief that is traditionally available to enforce federal law" if the statute creating the rights at issue displays an "intent to foreclose" the availability of such relief. *Armstrong*, 575 U.S. at 328-29; *accord Davis*, 442 U.S. at 241 ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner."). The "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," particularly when Congress vests an agency with authority to administer a complex statutory scheme. *Armstrong*, 575 U.S. at 328-29. The State argues that is the case here because the Federal Deposit Insurance Act, of which Section 1831d is a part, "expressly

[3] Although the plaintiffs' complaint styles their claim as one for violation of the Supremacy Clause, *see* Doc. 1 ¶¶ 71-80, their reply brief clarifies that they are bringing an equitable claim under *Ex parte Young*. Doc. 45 at 7-8. The State is correct that the Supremacy Clause does not create a cause of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015).

and impliedly precludes private enforcement actions, primarily vesting authority with the FDIC." Doc. 39 at 15 (citing 12 U.S.C. § 1818 (FDIC may suspend or terminate bank's insured status or issue cease-and-desist order if bank violates applicable laws or regulations); 12 U.S.C. §§ 1831d(b), 1831g(c)-(d) (borrowers may bring civil action against bank to recover excess interest, but no private right of action to enforce bank compliance with requirement to engage in sound business practices)). The statutory enforcement mechanisms the State points to, however, are all remedies *against* a bank for violations of applicable laws or regulations. Those are not the rules or rights that the plaintiffs seek to enforce in this suit.

The plaintiffs, unlike the plaintiffs in *Armstrong* who sought affirmative relief in the form of additional Medicaid payments, instead seek to use *Ex parte Young* as a shield against allegedly preempted state action. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (parties may use *Ex parte Young* as shield against enforcement of preempted state laws, "[b]ut matters differ when litigants wield *Ex parte Young* as a cause-of-action-creating *sword*"). "[I]f an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong*, 575 U.S. at 326. That is precisely the type of equitable relief that the plaintiffs seek, and neither Section 1831d nor the Federal Deposit Insurance Act as a whole display congressional intent to foreclose the availability of such relief. The plaintiffs therefore have a viable cause of action. *Cf. Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 146 (2d Cir. 2016) (fact that Congress conferred broad enforcement authority on FAA and not on private parties did not imply intent to bar parties from bringing claim "not to enforce the federal law themselves, but to preclude a municipal entity

from subjecting them to local laws enacted in violation of federal requirements").

2. "Loans Made In" Colorado

The effect of a state's opt-out of Section 1831d, how to determine where a loan is "made," and whether the opt-out provision permits states to reassert control over the interest rates charged by out-of-state banks to borrowers residing in those states have been open questions since the statute's inception,[4] as the opt-out provision uses language inviting uncertainty and disagreement. These questions have yet to be decided by any court.

a. Statutory Text

In cases of statutory interpretation, a court must "begin and end [the] inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017); *accord Commonwealth of P.R. v. Franklin Cal. Tax-free Tr.*, 579 U.S. 115, 125 (2016) (when interpreting express preemption clause, court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent," and inquiry begins and ends with statutory language when its meaning is plain). The textual inquiry, though, is not limited to a specific section in isolation— "the text of the whole statute gives instruction as

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[4] *See* Jeffrey I. Langer & Jeffrey B. Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks*, 42 Consumer Fin. L.Q. Rep. 4, 27-28 (1988), https://www.dltlaw.com/wp-content/uploads/sites/1602755/2020/06/FavorableLender-1.pdf ("[T]he application of a state override provision to an interstate loan made by a federally-insured state bank to a borrower residing in the opt-out state is . . . unclear."; noting that FDIC had issued conflicting opinion letters on the issue and advising state-chartered banks to "carefully evaluate their authority to export interest rates . . . into an opt-out state").

to its meaning," and courts should "look to the provisions of the whole law" to determine the meaning of the section at issue. *Star Athletica*, 580 U.S. at 414.

The opt-out provision reads:

> Section [1831d is] applicable only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law . . . which states explicitly and by its terms that such State does not want this section to apply with respect to loans made in such State, except that this section shall apply to a loan made on or after the date such law is adopted . . . if such loan is made pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted . . . .

12 U.S.C. § 1831d note (Effective Date). Diagraming this provision is beyond the grammatical skills of this inferior court. *Cf. United States v. Rentz*, 777 F.3d 1105, 1106, 1109 (10th Cir. 2015) (providing simplified diagram of statutory sentence and noting: "That bramble of prepositional phrases may excite the grammar teacher but it's certainly kept the federal courts busy."); *United States v. Rosales-Garcia*, 667 F.3d 1348, 1356 (10th Cir. 2012) (Gorsuch, J., dissenting) ("This has to be a sentence only a grammar teacher could love. We have here our old nemesis the passive voice, followed by a scraggly expression of time . . . then a train of prepositional phrases linked one after another and themselves rudely interrupted by a pair of parenthetical punctuations."). Suffice it to say that the clause in dispute here is "made in such State," and that "made" in this context is a passive past participle of the verb "to make."

Both sides attempt to tie their argument to this text. *See, e.g.*, Doc. 39 at 10-11 ("made in such State" "includes a focus on the location of the borrower"); Doc. 45 at 9 ("where loans are 'made' . . . necessarily focuses

on the party who 'makes' the loan"); Doc. 38-1 at 10 ("loans are ordinarily understood to be made in the states where the parties enter into the loan transaction"). In the State's view, a loan is "made" by two parties—the bank and the borrower. Doc. 38-1 at 13 ("For a loan to be made, there needs to be both a borrower and a lender . . . ."). But in the plaintiffs' view, while the borrower "obtains" or "receives" a loan, only the bank "makes" a loan. Doc. 45 at 9-10. And it is the plaintiffs' view that is more consistent both with the ordinary colloquial understanding of who "makes" a loan, and, more importantly, with how the words "make" and "made" are used consistently throughout the text of the Federal Deposit Insurance Act, including the DIDA amendments, as well as throughout the rest of Title 12 of the United States Code, which governs "Banks and Banking" and includes the National Bank Act.

While a passive past participle makes the interpretive task harder than it might have been, Congress's use of "made" puts the focus on the act of making a loan. In plain parlance, it is the lender who *makes* a loan; nobody thinks of themselves as "making a loan" when they borrow money from a family member or put a charge on a credit card. Had Congress sought to put the focus on the borrower, as the State argues, it could have done so in many ways. Most easily, for example, by allowing states to opt out as to loans "made to borrowers in such State." Or without even changing the structure of the sentence, Congress could have simply used a borrower-focused word like "accepted" or "obtained" "in such State." Instead, it put the focus on where a loan is "made," which puts the focus on the lender, as the plaintiffs argue.

This interpretation is supported by a look at the broader context, too. Section 1831d itself says that a "State *bank* . . . may . . . charge on any loan or discount *made*," interest up to the specified rates—which implies that it is the bank that "makes" a loan. 12 U.S.C. § 1831d(a) (emphases

added). Other sections of the Federal Deposit Insurance Act consistently use "make" and "made" in the same way, *i.e.*, a loan is "made" *by* a bank *to* a borrower. *See, e.g.*, 12 U.S.C. § 1828(o)(3) ("a loan *made by* an *insured depository institution*[5] . . . ." (emphases added)); 12 U.S.C. § 1831b(a) ("No *insured depository institution* . . . [or] *bank* which is not an insured depository institution, shall *make* any . . . loan . . . ." (emphases added)).

Various other sections of Title 12 reinforce this understanding. *See, e.g.*, 12 U.S.C. § 83(a) ("No national *bank* shall *make* any loan . . . ." (emphases added)); 12 U.S.C. § 85 ("Any *association*[6] may . . . charge on any loan . . . *made* . . . interest at the rate allowed . . . ." (emphases added)); 12 U.S.C. § 143 (an "*association* shall not increase its liabilities by *making* any new loans" (emphases added)); 12 U.S.C. § 371(a) ("Any national *banking association* may *make* . . . loans or extensions of credit . . . ." (emphases added)); 12 U.S.C. § 1757(5) ("A Federal *credit union* . . . shall have power . . . to *make* loans . . . ." (emphases added)); 12 U.S.C. § 1785(f)(1) ("Every insured *credit union* is authorized to . . . *make* loans . . . ." (emphases added)); 12 U.S.C. § 2610 ("No fee shall be imposed . . . by a *lender* in connection with a . . . loan *made by* it . . . ." (emphases added)); 12 U.S.C. § 4742(4) ("a loan *made by* a participating *financial*

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[5] An "insured depository institution" includes "any *bank* . . . the deposits of which are insured by" the FDIC. 12 U.S.C. § 1813(c)(2) (emphasis added).

[6] An "association" means an "[a]ssociation for carrying on the business of *banking*." 12 U.S.C. § 21 (emphasis added); *accord* 12 U.S.C. § 37.

institution" (emphases added)).[7] In contrast, when Title 12 speaks to action by borrowers, it states that borrowers "receive" or "obtain"—but not "make"—loans. *See, e.g.*, 12 U.S.C. § 2279aa(7)(C) ("a loan . . . by a cooperative lender to a *borrower* that has *received* . . . a loan" (emphases added)); 12 U.S.C. § 4742(10)(A) ("depositing all required premium charges paid . . . by each *borrower receiving* a loan" (emphasis added)); 12 U.S.C. § 5602(b)(1) ("protecting *borrowers* with respect to the *obtaining* of . . . loans" (emphases added)).

Taken as a whole, the consistent use of "make" and "made" throughout the statutory text indicates that the plain and ordinary answer to the question of *who* "makes" a loan is the bank, not the borrower. It follows, then, that the answer to the question of *where* a loan is "made" depends on the location of the bank, and where the bank takes certain actions, but not on the location of the borrower who "obtains" or "receives" the loan.

The FDIC (whose position the State has adopted) argues, though, that a loan is "made" by both the lender and the borrower. Doc. 38-1 at 10-13. It bases this argument on what it says are "established federal principles" for determining where a contract is made, and it cites to various cases holding that, in the Dormant Commerce Clause context, when parties in two different states enter into a contract, the contract is made in both states. *See id.* Similarly, the State cites to *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), also a Dormant Commerce Clause case, for the proposition that "the Tenth Circuit, interpreting federal

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[7] *See also, e.g.*, 12 U.S.C. § 1706f(c)(1) ("loan or extension of credit *made to* a *borrower*" (emphases added)); 12 U.S.C. § 2202b(a) ("If a Farm Credit *Bank* forgives . . . any of the principal outstanding on a loan *made to* any *borrower*" (emphases added)) 12 U.S.C. § 2202d(b) ("*lender* may not require any borrower to reduce the outstanding principal balance of any loan *made to* the *borrower*" (emphases added)).

law, has held that where a borrower is in one state and the lender is in another, the loan is made in the state of the borrower's physical location, so that the borrower's state may regulate the loan." Doc. 39 at 11. But these Dormant Commerce Clause cases are of little value with respect to the statutory construction issue in this case, as they address the separate issue of when one state may constitutionally regulate an activity involving conduct that occurs in another state.

The effective-date context of the opt-out provision also undermines the argument that a loan is "made" in the state or states where the bank and the borrower enter into the loan contract. The provision provides that a state's the opt-out law does not apply

> to a *loan made* on or after the date such law is adopted . . . if such *loan is made* pursuant to a *commitment to make such loan* which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted . . . .

12 U.S.C. § 1831d note (Effective Date) (emphases added). In other words, the contract or "commitment to make [a] loan" may be entered into at a different time than the "loan is made." So even if the State is correct that the contract for a loan is made by both the lender and the borrower, and in the state(s) where the lender and the borrower are located when they enter into the contract, that is not determinative of where the loan itself is "made" within the meaning of the statute.

The plain language of Section 1831d's opt-out provision, viewed in the context of the statutory scheme as a whole, indicates that loans are "made" by the bank, and that where a loan is "made" does not depend on the location of the borrower.

b. Policy and Legislative History

The statutory text, scraggly and bramble though it may be, ultimately reveals its plain meaning and supports the plaintiffs'

interpretation, which is enough to resolve the question. *Franklin Cal. Tax-free Tr.*, 579 U.S. at 125 (statutory construction begins "with the language of the statute itself," and when its meaning is plain, that "is also where the inquiry should end"). I nevertheless will briefly address the parties' policy arguments and the persuasive authorities they cite. I find that these policy arguments and persuasive authorities are mostly inconclusive or irrelevant and therefore unhelpful. But to the extent they do shed light on the issues, they further support the conclusion that loans are "made" by the bank, and that where a loan is "made" therefore depends on where the bank is located and takes various actions but not on the location of the borrower.

Both sides cite to opinions, interpretive letters, and the like issued by the FDIC and other federal agencies involved in banking regulation. Neither side has addressed what level of deference, if any, must be given to these agency interpretations. Generally, when faced with a problem of statutory construction, a court should give "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Colo. Public Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1578-79 (10th Cir. 1991). But here, most of the agency interpretations in the record touch only tangentially on the Section 1831d opt-out provision and the issue of where a loan is "made" for purposes of that provision. Only one interpretive letter squarely addresses the question, and it does not resolve it. *See Interpretive Letter*, FDIC-88-45, 1988 WL 583093 (June 29, 1988) ("The determination of where a loan is made should be based upon an analysis of the facts surrounding the extension of credit," but "[t]his office is not in a position to analyze [the relevant factors] or determine whether we have all the facts in order to reach a conclusion."); Michael C. Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 Consumer Fin. L.Q. Rep. 152, 157 (1989), https://www.dltlaw.com/wp-content/uploads/sites/1602755/2020/06/In

terstateConsumerCredit-1.pdf (this letter "provide[s] no express direction regarding the precise method of analysis to be undertaken"). The agency interpretations in the record are therefore inconclusive and do not contain any statutory interpretation for me to defer to; they are persuasive at best.

To the extent the agency interpretations are helpful, they support the conclusion that in common parlance, a loan is "made" *by* a bank and therefore *where* the bank is located and performs its loan-making functions. *See, e.g.*, *FDIC Op. No. 11*, 1998 WL 243362, at *27285 ("If . . . [a] Bank [branch] *in a single host state* performs all the non-ministerial functions (approval of an extension of credit, extension of the credit, and disbursal of loan proceeds to a customer) related to a loan, it '*makes*' the loan *to* the customer . . . and the loan should be governed by the usury provisions of the *host state*."; "[The] distinction . . . of the 'disbursal' function between 'the actual disbursal of proceeds' and 'delivering previously disbursed funds to a customer' is indicative of the type of inquiry Congress intended in order to identify non-ministerial functions which effect *where a loan is made* for purposes of determining the state law to be applied to a loan." (emphases added)); Federal Interest Rate Authority, 85 Fed. Reg. 44146-01, 2020 WL 4192852, at *44146, *44148 to *44151, *44153 (July 22, 2020) (codified at 12 C.F.R. pt. 331) ("*banks* can transfer enforceable rights in the *loans they made*"; contrasting "a loan [that] cannot be said to be *made in* a host State" with one where a host-state branch "approves the loan, extends the credit, and disburses the proceeds to a customer"; "functions involved in *making* the loan"—"loan approval, disbursal of the loan proceeds, and communication of the decision to lend"—are "performed *by*" a bank; "the right to assign loans is a component of *banks'* Federal statutory right to *make* loans" (emphases added)). Though these agency interpretations do not directly address the

statutory construction question at issue in this case, the FDIC's acknowledgment that they "use[] 'made' colloquially," Doc. 38-1 at 17, reinforces that the ordinary colloquial understanding of who makes a loan is the bank, and where a loan is made is where the bank performs its loan-making functions.[8]

Both sides also point to the legislative history behind Section 1831d and its opt-out provision, arguing that Congress's intended policy underlying the statute's enactment supports their proffered construction of "loans made in" a state. The State argues, somewhat persuasively, that the purpose of the opt-out provision was to allow individual states to "return to the status quo ante"—in other words, no federal preemption as to the interest rates that state-chartered banks, wherever located, could charge on loans to borrowers in an opt-out state. Doc. 39 at 7; *see also* Doc. 38-1 (FDIC arguing that "[t]he opt-out puts the state in the same position it would have been in had Section [1831d] never been enacted"). The plaintiffs argue that the purpose behind the opt-out provision was to "soften" Section 1831d's exercise of federal power by allowing opt-out states to "restore [their] ability to control the rates at which their own state banks loaned money by removing their ability to lend at the federal rate," but that it "was not intended as a tool to enable opting-out

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[8] *See also Jessup v. Pulaski Bank*, 327 F.3d 682, 685 (8th Cir. 2003) (deferring to agency interpretation of "loan made in any State" in 12 U.S.C. § 1831u(f)(2)(A)(i), another section of the Federal Deposit Insurance Act, that where loan is "made" depends on where "the loan was approved, credit was extended, and loan proceeds were disbursed," "without regard to where the borrower resides"); Tomkies, *supra*, at 158 (arguing that because agency and D.C. Circuit previously "interpreted a provision similar to the [opt-out] provision used in section [1831d] in an analogous context to mean that a loan 'is made' where the loan is approved and funds disbursed, it may be presumed that Congress intended the language employed in section [1831d] to have the same meaning").

states to reach into *other* states to regulate those states' banks' interest rates." Doc. 45 at 15-16.

Ultimately, though, the parties' differing views regarding the legislative purpose behind the opt-out provision are irrelevant, because "policy reasons cannot trump the plain language of the statute." *EagleMed LLC v. Cox*, 868 F.3d 893, 904 (2017). Congress certainly could have been clearer regarding its intention behind the opt-out provision. *See* Tomkies, *supra*, at 157 ("The statute could have been written far more clearly by specifying that the state where the institution is located or the state where the borrower resides could [opt out], if either of these standards reflected the Congressional intent."). But courts cannot rewrite a statute to reflect their "perception of legislative purpose." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010). "Any deficiency in the plain language of the statute or the scope of its [opt-out] coverage must be corrected by Congress, not this court." *EagleMed*, 868 F.3d at 904.

The plain meaning of Section 1831d's opt-out provision is that what state a loan is "made in" depends on where the bank is located and performs its loan-making functions and does not depend on the location of the borrower. The plaintiffs have therefore made a strong showing that they are substantially likely to succeed on the merits of their claim that Colorado cannot opt out of the preemptive federal interest-rate caps as to loans that plaintiffs' member banks make outside of Colorado, even if those loans are made to Colorado borrowers. To the extent the heightened standard for a disfavored injunction applies, the plaintiffs' showing on this factor is sufficient to meet that heightened standard.

B. Irreparable Injury

To show a threat of irreparable harm, a plaintiff must demonstrate "a significant risk that he or she will experience harm that cannot be

compensated after the fact by money damages." *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016).

As discussed above, the plaintiffs have shown that their members will incur administrative costs, lost revenue, and lost customers and goodwill if they must comply with the interest-rate caps in the Colorado UCCC with respect to all loans made to Colorado consumers. While some of those losses may in theory be the sort that are typically compensable with damages, monetary losses in this context are likely not recoverable because a state is generally immune from suit for retrospective monetary relief. *Chamber of Com. of U.S. v. Edmonson*, 594 F.3d 742, 770-71 (10th Cir. 2010); *Kan. Health Care Ass'n v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994). And the plaintiffs have presented evidence that absent an injunction, they will be forced to stop offering their loan products altogether to certain Colorado consumers, and once gone, those customers—and their goodwill along with that of the banks' business partners—may be gone forever. Even if the plaintiffs' members could recover money damages from the State, loss of customers, loss of goodwill, and erosion of a competitive position in the marketplace are the types of intangible damages that may be incalculable, and for which a monetary award cannot be adequate compensation. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1264 (10th Cir. 2004).

The plaintiffs have made a strong showing that their members will suffer irreparable harm if an injunction is not granted.

C. Balance of Harms and the Public Interest

The third factor of the preliminary-injunction test requires balancing the harm to the plaintiffs' members of not granting an injunction against the harm to the State if an injunction is granted. *See Fish*, 840 F.3d at 755-56. And where, as here, the government is the opposing party,

the balance-of-harms factor merges with the fourth factor, which requires that the injunction not be adverse to the public interest. *See Nken*, 556 U.S. at 435.

The State notes that if an injunction is issued, the plaintiffs' members "will be free to enter into contracts that include terms prohibited under the UCCC," and argues that "[e]ven if Plaintiffs later lose, Coloradans will have already paid interest at prohibited rates," which could not be remedied by a final judgment in the State's favor. The State and the public certainly have an interest in preventing usurious loans to Coloradans. But as the plaintiffs note, even if the State prevails and its asserted scope of the opt-out is found to be valid, it will not be able to prevent national banks from making loans to Coloradans at above-UCCC rates, because the National Bank Act does not contain any opt-out provision with respect to its preemptive federal interest-rate caps. *See* 12 U.S.C. § 85. So without an injunction, the plaintiffs' member state-chartered banks will be at a disadvantage with respect to national banks, but Colorado consumers will have only marginally more protection from higher interest rates. And the public interest favors enjoining enforcement of likely invalid provisions of state law. *Chamber of Com.*, 594 F.3d at 771.

On the whole, given the plaintiffs' strong showing that they will likely be successful on the merits and their strong showing that they will be irreparably harmed if the State is not enjoined, I find that the balance of harms weighs in the plaintiffs' favor. And to the extent that the heightened standard for a disfavored injunction applies, the plaintiffs' showing on this factor is sufficient to meet that heightened standard.

III. Terms of Preliminary Injunction

A. Actions to Be Restrained

In fashioning injunctive relief against a state official, a district court must ensure that the relief ordered is "no broader than necessary to remedy the [federal] violation." *EagleMed*, 868 F.3d at 905. In a preemption case, "enjoining Defendants from enforcing the preempted statute . . . [is] sufficient to remedy this federal violation." *Id.* at 905-06. Here, although the plaintiffs' motion asks to enjoin enforcement of Colorado's opt-out law, the preempted statute is actually the Colorado UCCC, and only to the extent the interest-rate caps therein exceed those in Section 1831d(a) and are applied to loans that are not "made in" Colorado. Consistent with the statutory interpretation outlined above, the State may only opt-out of Section 1831d for loans made by lenders in Colorado. It may not apply its UCCC to loans made to Colorado residents otherwise.

Injunctive relief also should generally be limited to the parties before the court. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit . . . . [that] raise[s] serious questions about the scope of courts' equitable powers under Article III."). That is a bit complicated here, because it is the plaintiffs' members, not the plaintiffs themselves, who would be harmed by enforcement of the preempted interest rates. "[A]ssociational standing creates a mismatch: Although the association is the plaintiff in the suit, it has no injury to redress. The party who needs the remedy—the injured member—is not before the

court." *FDA v. Alliance for Hippocratic Med.*, Nos. 23-235, 23-236, 602 U.S. —, slip op. at 5 (U.S. June 13, 2024) (Thomas, J., concurring) (questioning current organizational standing doctrine that gives associations standing based on their members' injuries rather than their own). The Supreme Court's associational standing doctrine, though, has been "consistently applied," *id.* at 9, and is not challenged here, so the injunction will prohibit the State from enforcing the preempted interest rates against the plaintiffs' members.

B. Security

"The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The parties have not briefed this issue. In the Tenth Circuit, district courts have "wide discretion" in determining whether to require security. *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). Where there is "an absence of proof showing a likelihood of harm" to the enjoined party, waiving security is permissible. *See id.* The State has not suggested that an injunction would cause it any monetary damages, nor has it requested any security. Given the current record, therefore, I find it appropriate to waive the security requirement in this case.

CONCLUSION

It is **ORDERED** that:

Plaintiffs' Motion for Preliminary Injunction, **Doc. 24**, is **GRANTED**;

Pending a final determination of the plaintiffs' claims on the merits, the defendants, their officers, agents, servants, employees, attorneys, and any others who are in active concert or participation with them are

PRELIMINARILY ENJOINED from enforcing the interest rates in the Colorado Uniform Consumer Credit Code with respect to any loan made by the plaintiffs' members, to the extent that (a) the applicable interest rate in 12 U.S.C. § 1831d(a) exceeds the rate that would be permitted in the absence of that subsection, and (b) the loan is not "made in" Colorado within the meaning of the Effective Date note to 12 U.S.C. § 1831d as explained above; the State may only apply its UCCC interest rates to loans made by lenders in Colorado, regardless of the location or residence of the borrower.

DATED: June 18, 2024

BY THE COURT:

Daniel D. Domenico
United States District Judge

No. 24-1293

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado, and MARTHA FULFORD, in her official capacity as Administrator of the Colorado Uniform Consumer Credit Code,

Defendants-Appellants,

v.

AMERICAN FINTECH COUNCIL, NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS, and AMERICAN FINANCIAL SERVICES ASSOCIATION,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the District of Colorado
Case No. 1:24-cv-00812-DDD-TPO, Hon. Daniel D. Domenico

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STATEMENT OF RELATED CASES

We are aware of no prior or related appeals.

GLOSSARY

CFPB	Consumer Financial Protection Bureau
CSBS	Conference of State Bank Supervisors
DIDMCA	Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980)
FDIA	Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq*.
FDIC	Federal Deposit Insurance Corporation
NBA	National Bank Act, 12 U.S.C. § 21 *et seq*.
OCC	Office of the Comptroller of the Currency
UCCC	Uniform Consumer Credit Code

Note: We cite to Defendants-Appellants' Appendix to Opening Brief, ECF No. 42-2, as App.Vol.__[volume number].P.__[page number].

We cite to the District Court's opinion, which is attached to Colorado's brief, as Op. XX. That opinion is also contained in the Appendix at App.Vol.II.P.442-69.

INTRODUCTION

Congress enacted Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) to place state-chartered banks on equal footing with national banks, authorizing both to charge the same interest rates and preempting state laws to the contrary. Congress did so to ensure state banks retained competitive equality with national banks operating alongside them during a time of soaring inflation.

At the same time, Congress enacted DIDMCA Section 525 to allow states to opt out of that preemption, so they could reassert control over their own state-chartered banks. Given that federalism-based purpose, the opt-out only applied to loans "made in" the opting-out state. Congress thus gave states flexibility to reject the offer of state-bank/national-bank interest-rate parity and retain control over banks operating *in* the opting-out states. But Congress did not authorize an opting-out state to tread on other states, or on the competitive equality DIDMCA Section 521 granted to banks operating *outside* the opting-out state's borders.

Now, over forty years after DIDMCA was enacted, Colorado reaches far beyond the boundaries of Section 525 to impose its interest-rate caps

on loans that other states' banks make outside Colorado, but to borrowers located in Colorado. The District Court—after extensively analyzing the text of Colorado's opt-out statute—correctly preliminarily enjoined that law as preempted.

First, the District Court properly rejected Colorado's argument that Plaintiffs cannot ask a court to secure the express preemption rights DIDMCA grants them. *Ex parte Young* clearly authorizes Plaintiffs' action, and nothing in DIDMCA or the Federal Deposit Insurance Act (FDIA), which DIDMCA amended, precludes it.

Second, the District Court correctly held that, under Section 525, a loan is "made in" the state where the lending bank performs its loan-making functions, not where the borrower happens to be. Section 525 does not authorize Colorado to limit the interest rates of loans that out-of-state state banks make *outside* Colorado, even if the loan recipient is located in Colorado.

This plain-text meaning is confirmed by the statute's context and history. Indeed, Congress, courts, and regulators have consistently—including, significantly, close in time to the statute's enactment—determined that, for purposes of interest-rate preemption laws and

corresponding opt-out rights, a loan is "made" where the bank performs its key loan-making functions, not where the borrower is located.

Colorado tries to reframe Section 525 as a consumer-protection measure—but that effort is misplaced. "Protecting" consumers from loans made by banks outside their state was not the purpose of the opt-out. Rather, Congress was simply ensuring states could reclaim control over banks within their borders, as a nod to federalism. Regardless, consumers will not be protected by Colorado's opt-out because *even if* Colorado's interpretation were correct, under the National Bank Act national banks need not abide by Colorado's interest-rate caps. By cutting off state-bank competition with national banks, Colorado's statute would only reduce Colorado consumers' credit options.

Finally, the District Court properly determined that the balance of the equities supports a preliminary injunction, and did not wrongly grant a "disfavored" injunction.

ISSUES PRESENTED

1. Whether the FDIA precludes Plaintiffs from relying on *Ex parte Young* to bring an action in equity challenging a state's

imposition of interest-rate restrictions that are expressly preempted by DIDMCA.

2. Whether, for purposes of the DIDMCA Section 525 opt-out, an opting-out state may regulate interest rates for all loans received by borrowers in the opting-out state, or only for loans where the lending bank performs key loan-making operations in the opting-out state.

3. Whether a preliminary injunction was proper, where both the merits and the balance of equities favor Plaintiffs.

STATEMENT

A. Statutory and regulatory background.

1. The dual-banking system.

Banks in the United States may choose to be chartered, and primarily regulated, either by a state or by the federal government. This "dual-banking" system "has been a hallmark of banking in the United States for nearly 200 years." Office of the Comptroller of the Currency (OCC), *National Banks and The Dual Banking System*, at 1 (Sept. 2003), https://perma.cc/W7B8-MG9W; *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10-11 (2007). The vitality of this system depends on the "policy of equalization first adopted in the National Bank Act of 1864 [(NBA)],"

which seeks "to place national and state banks on a basis of 'competitive equality'" while still allowing state and federal bank regulators to make different policy choices. *First Nat'l Bank of Logan, Utah v. Walker Bank & Tr. Co.*, 385 U.S. 252, 261 (1966); *see also Lewis v. Fid. & Deposit Co. of Md.*, 292 U.S. 559, 564-65 (1934).

Under the NBA, national banks are governed primarily by federal standards administered by the OCC, not by states. *See* OCC, Final Rule Regarding Office of Thrift Supervision Integration & Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,554 (2011). State banks are regulated by both the federal government and the state in which they are chartered.

2. State interest-rate laws.

As Colorado notes, American interest-rate restrictions began in the colonial era, and were historically state-imposed. Br. 6-7 (citing Steven M. Graves & Christopher L. Peterson, *Usury Law and the Christian Right: Faith-Based Political Power and the Geography of American Payday Loan Regulation*, 57 Catholic U. L. Rev. 637 (2008)).

Colorado does not mention, however, that following the 1787 publication of Jeremy Bentham's *Defence of Usury*, these early

restrictions faced growing criticism from the emerging field of economics. *Id*. at 639, 693. Indeed, in the following decades, newly admitted states "allowed far higher rates than in the East" due to settlers' greater need for access to credit—and "[a] number of states … repealed their usury laws" altogether. Lawrence M. Friedman, *A History of American Law* 412 (3d ed. 2005). Today, states continue to make different policy choices regarding interest rates, in accordance with longstanding principles of federalism. *See* D. Vandenbrink, *Usury Ceilings & DIDMCA* 25, 29 (1985) ("evolution in usury legislation has left a multiplicity of state interest rate ceilings").

3. National Bank Act preemption.

The NBA preempts certain state laws, preventing them from applying to national banks. As relevant here, under Section 85 of the NBA, a national bank "may … charge on any loan … made, … interest at the rate allowed by the laws of the State … where the bank is located, or at a rate [1% higher than the federal discount rate], whichever [is] greater." 12 U.S.C. § 85. Section 85 preempts all other state interest-rate restrictions. National banks thus "have a choice" between these rates, which "gives advantages to national banks over their State competitors,"

which were historically limited by their state's caps. *Problems Encountered Under State Usury Laws*, *Hearing on S. 3817 Before the Subcomm. on Fin. Insts. of the Comm. on Banking, Hous. & Urb. Affs.* 93rd Cong. 114-117 (July 31, 1974) ("*State Usury Laws*").

In 1978, the Supreme Court clarified that a national bank is "located" for purposes of NBA Section 85 in either the state where it is chartered, or in the state where it actually performs its key loan-making functions—but not where the borrower resides. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). Specifically, *Marquette* held that a national bank headquartered in Nebraska could make credit card loans to Minnesota residents at Nebraska interest rates, which were above Minnesota's caps. *Id.* at 311-12. The Supreme Court explained that the Nebraska bank was "located" where it was chartered: Nebraska. *Id.* at 309.

The Court further emphasized that even though the borrowers were Minnesota residents, the bank's loan-making functions occurred in Nebraska—cementing its location there for purposes of applying state interest-rate caps. *Id.* at 311-12. Under those circumstances, applying Nebraska interest-rate laws made sense because "Minnesota residents

were always free to visit Nebraska and receive loans in that State," and "[i]t has not been suggested that Minnesota usury laws would apply to such transactions." *Id.* at 310-11.

4. DIDMCA precursors.

Unlike national banks, state banks did not have access to an alternative federal interest-rate cap. So long as the federal discount rate remained low, this did not result in a noticeable advantage for national banks, because they had no need to rely on the rate limit tied to the federal discount rate to trump the rate limits allowed under their home state's laws. *See State Usury Ceilings, Hearing on H.R. 2515 Before the Subcomm. on Fin. Insts. of the Comm. on Banking, Hous. & Urb. Affs.* 96th Cong. (Apr. 3, 1979) ("*State Usury Ceilings*") at 27.

In the 1970s, this changed. To tame soaring inflation, the Federal Reserve significantly raised the interest rates that banks paid for loanable funds, driving up market rates for borrowers as well. *See, e.g.*, 125 Cong. Rec. 30,655 (1979). In particular, low interest-rate caps in certain states "constrained … the interest" all banks—but especially state banks that could not lend at the higher federal rate—could charge, "which often made loans economically unfeasible" given the banks' own

borrowing costs. *Greenwood Tr. Co. v. Commonwealth of Mass.*, 971 F.2d 818, 826 (1st Cir. 1992). *See also, e.g.*, 125 Cong. Rec. 30,655 (Statements of Sens. Pryor & Bumpers).

The affected states lobbied Congress to help solve this credit crunch. They asked Congress both to raise the federal rate caps for their in-state national banks, and to simultaneously give their state-chartered banks access to that higher federal cap.

In response, Congress enacted a series of statutes, initially focused on business and agricultural loans. These laws temporarily raised NBA rate caps for national banks, and permitted state-chartered banks also to make loans at those rates. These rates were available only during the effective period of each statute, and a state could choose to end that period early—that is, "opt out"—to prevent its banks from accessing these higher rates.

a. Brock Bill of 1974.

Congress enacted the first temporary interest-rate parity statute—the "Brock Bill," introduced by Senator Brock of Tennessee—in 1974, to address the inflation-fueled credit squeeze for businesses and farms in three states, Tennessee, Arkansas, and Montana. Those states had very

low interest-rate caps that—unlike most states'—applied not only to consumer borrowing but also to business borrowing. *See* Pub. L. No. 93-501, 88 Stat. 1557 (1974); *see also State Usury Laws* at 1.

State *and* national banks in these states were "caught in a pinch" because banks had to "pay up to 13 percent for money bought through the Federal Reserve System" at the "federal funds" rate, S. Rep. No. 93-1120 at 105 (1974), but could not charge borrowers interest above that rate. That is because the maximum interest rate for business borrowers authorized by state law in these states was 10 percent, *id.*, and the federal rate at which national banks could alternatively lend at that time pursuant to NBA Section 85 (based on the Fed's discount rate) was 9%—"no help for corporate borrowers." *State Usury Laws* at 140 (testimony of Rex Morthland, American Bankers Association).[1]

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[1] The federal discount rate is the rate at which banks may borrow money directly from the Federal Reserve banks, if funds cannot be obtained elsewhere. *Discount Window Lending*, Bd. of Governors Fed. Rsrv. Sys., https://perma.cc/U73C-QELL. Banks otherwise borrow money from other banks at the "federal funds rate," which is typically cheaper—but economic conditions in the 1970s created anomalous circumstances. *Compare Discount Rate for United States*, Fed. Rsrv. Bank of St. Louis, https://fred.stlouisfed.org/series/INTDSRUSM193N (last visited Nov. 15, 2024), *with Federal Funds Effective Rate*, Fed. Rsrv. Bank of St. Louis, https://fred.stlouisfed.org/graph/?g=1B3KI (last visited Nov. 15, 2024).

To solve this, the Brock Bill temporarily amended NBA Section 85 to permit national banks to make certain business and agricultural loans at up to five percent (rather than one percent) above the federal discount rate. Pub. L. No. 93-501 § 201.

Alone, this new provision would have allowed national banks in these three states to survive, but left state banks to fail. Thus, "[i]n order to prevent discrimination against State-chartered insured banks with respect to interest rates," the Brock Bill also permitted state banks in these three states to make business and agricultural loans at the same heightened federal rate. Pub. L. No. 93-501 § 202. *See State Usury Laws* at 20 (testimony of Grady Perry, Jr., Federal Home Loan Bank Board).

As originally introduced, the new formula for calculating interest-rate caps in the Brock Bill—federal-rate-plus-5%—would have expired after three years. However, after the Conference of State Bank Supervisors (CSBS) objected to federal encroachment on their regulatory turf, the Senate amended the bill to allow covered states to choose to end access to that higher federal rate at any time during the law's effect. *State Usury Laws* at 28 (testimony by Lawrence E. Kreider); *see* S. Rep. No. 93-1120 at 18-19. As enacted, the federal interest-rate cap applied to

business and agricultural "***loan[s] made in any State***" between the law's effective date and *either* (1) the sunset date *or* (2) "the date … on which the State enacts a provision of law which prohibits the charging of interest at the rates provided in the amendments made by this title." Pub. L. No. 93-501 § 206 (emphasis added).

All subsequent interest-rate parity statutes—culminating in DIDMCA—followed this same structure.

b. Borrowers Relief Act of 1979.

After a brief respite, in 1978, the Federal Reserve began to raise interest rates even more aggressively. By then, the Brock Bill had expired, but Arkansas still had not amended its constitutional interest-rate restrictions.[2] S. Rep. No. 96-364 at 1-3 (1979); *see also State Usury Ceilings* at 14, 16 (testimony of Reps. Alexander & Hammerschmidt). As borrowing costs for Arkansas banks once again spiked above the state's interest-rate caps, the state legislature urged Congress to restore the Brock Bill until voters could ratify amendments to the state's

[2] Tennessee and Montana raised their 10-percent interest-rate caps after passage of the Brock Bill, to try to avoid the same problem in the future. 125 Cong. Rec. H8,344, H8,347 (daily ed. Sept. 24, 1979) (testimony of Rep. Alexander).

constitutionally imposed interest-rate caps in the 1980 election. *Id.* at 192-93; *see also id.* at 16-17 (testimony of Rep. Hammerschmidt).

The state's representatives co-sponsored the "Borrowers Relief Act" of 1979 to do just that. *Id.* at 17-18 (testimony of Rep. Hammerschmidt); S. Rep. No. 96-364; 125 Cong. Rec. H8346 (testimony of Rep. Alexander). The bill reinstated the Brock Bill's heightened federal limit for business and agricultural loans for both national and state banks, using identical language. Pub. L. No. 96-104, 93 Stat. 789 (1979) §§ 101-02; *see also* 125 Cong. Rec. H8347. This time, however, the bill was tailored to apply only in Arkansas. *See* Pub. L. No. 96-104 § 301 (limiting application to states with constitutional interest-rate caps identical to Arkansas').

Following the Brock Bill's model, the Borrowers Relief Act was a temporary measure containing an opt-out allowing Arkansas to end its effective period early. *Id.* § 107; *see also* page 37*, infra* (quoting § 107). The sponsors explained that a court, in upholding the constitutionality of the Brock Bill, had favorably cited its opt-out provision. The sponsors therefore believed such a provision "may be necessary in order to qualify for the constitutionality of a law of this type," even though it was unlikely Arkansas would want to opt-out after having specifically requested the

law in the first place. *State Usury Ceilings* at 23 (testimony of Rep. Alexander); *see also id.* (testimony of Rep. Hammerschmidt); 23-24 (testimony of Rep. Bethune) (citing *Stephens Sec. Bank v. Eppivic Corp.*, 411 F. Supp. 61, 62-63 (W.D. Ark. 1976), *aff'd mem.* 553 F.2d 102 (8th Cir. 1977)).

5. DIDMCA.

By the time the Borrowers Relief Act cleared the Senate in early October 1979, the Federal Reserve had raised rates again[3]—and the interest-rate crisis had now spread from Arkansas to more than a dozen other states with low interest-rate caps.

To provide relief to these states, the Senate amended a pending omnibus financial reform bill—which became DIDMCA—to extend the provisions of the Borrowers Relief Act to cover business and agriculture loans in all states. *See* 125 Cong. Rec. S15,257, S15,259 (1979) (testimony of Sen. Cochran). This nationwide version of the Borrowers Relief Act was ultimately enacted as Title V, Part B of DIDMCA. Pub. L. No. 96-221, 94 Stat. 132, 164 §§ 511-12. *See also* Pub. L. No. 96-161, 93 Stat. 1233 (1979) (temporarily extending Borrowers Relief Act until DIDMCA passed).

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[3] *See Discount Rate for United States*, *supra.*

Arkansas's senators also inserted the provisions at issue in this case—Sections 521 and 525—into DIDMCA, as Title V, Part C, so that interest-rate parity would apply not only to business and agricultural loans, but also to *consumer* loans.[4]

To draft the text of these two provisions in DIDMCA, Congress spliced together the substantive rate-preemption language from NBA Section 85 and the sunset-period language from the Borrowers Relief Act (drawn, in turn, from the Brock Bill).

Section 521 of DIDMCA consists almost entirely of language that originated either in the Brock Bill or NBA Section 85. Here is Section 521, with the text coming from the ***Brock Bill*** marked in ***bold/red/italics***, from NBA Section 85 in underscore/blue, and new text in roman/black:

> ***In order to prevent discrimination against State-chartered insured banks,*** including insured savings banks and insured mutual savings banks, or insured branches of foreign banks ***with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank*** or insured branch of a foreign bank ***would be permitted to charge in the***

[4] Congress enacted similar provisions, DIDMCA §§ 522-523, preempting state interest-rate caps for state-chartered savings-and-loan associations and credit unions.

> ***absence of this subsection***, such ***State bank*** or such insured branch of a foreign bank ***may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section***, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

DIDMCA § 521, 12 U.S.C. § 1831d(a).[5]

Likewise, DIDMCA's "opt-out," Section 525, was drafted as an "Effective Date" provision based on the sunset provision in the Borrowers Relief Act—but with the sunset date deleted to make it permanent. Here is Section 525 next to the earlier provision, with identical text highlighted in **bold/green/underline**:

[5] Although the second half of DIDMCA Section 521 is drawn entirely from NBA § 85, the order of the two alternative interest rates is reversed.

Borrowers Relief Act § 107	DIDMCA § 525
The amendments made by this title … shall apply only with respect to loans made in any State during the period beginning on the date of the enactment of this Act **and ending on** the earlier of—,	**The amendments made by** section 521 through 523 of **this title shall apply only with respect to loans made in any State during the period beginning on** April 1, 1980, **and ending on**
(1) July 1, 1981;	
(2) **the date**, after the date of the enactment of this Act, **on which such State adopts a law** stating in substance **that such State does not want the amend-ments made by** this title and the provisions of this title **to apply with respect to loans made in such State**....	**the date**, on or after April 1, 1980, **on which such State adopts a law** … which states explicitly and by its terms **that such State does not want the amendments made by** such sections **to apply with respect to loans made in such State**....
Pub. L. No. 96-104, 93 Stat. 789.	Pub. L. No. 96-221.[6]

As with the Borrowers Relief Act and the Brock Bill, the purpose of DIDMCA Section 521 was to "provide competitive equality among all financial institutions with respect to State usury lending limits." *Usury Lending Limits, Hearing on S. 1988 Before the Comm. on Banking, Hous.,*

[6] Section 525 of DIDMCA currently appears in the U.S. Code as statutory notes to 12 U.S.C. §§ 1785 & 1831d. Westlaw and LexisNexis either omit or do not accurately reflect the text of these statutory notes. The notes can be found at pages 901 and 1145 of the current official printing of Title 12, available at https://perma.cc/B7AM-49NX. App.Vol.II.P.227.

& Urb. Affs., 96th Cong. 1 (1979) ("*Usury Lending Limits*") (testimony of Sen. Proxmire). *See also id.* at 19, 41-42 (testimonies of co-sponsors Sens. Pryor & Bumpers). The Senate heard extensive "testimony on the problems resulting from present unequal treatment of national banks on one hand and of other financial institutions on the other." *Id.* at 2 (testimony of Sen. Pryor); *see also id.* at 3 (testimony of Governor Bill Clinton). In short, DIDMCA Section 521—like each of its predecessors—eliminated the competitive advantage national banks enjoyed over state banks in the same state by allowing those state banks to make the same loans at the same rates.

DIDMCA Section 525—like each of its predecessors—allowed states to opt out of that offer of parity and deny their local banks access to national bank rates.[7] The Arkansas State Banking Commissioner emphasized that "the legislation is not mandatory. Each State is given a

[7] At the time DIDMCA and its predecessors were enacted, there was very little lending by state-chartered banks across state lines. *See, e.g.*, *Marquette*, 439 U.S. at 311; Patrick Mulloy & Cynthia Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. Legis. 255 (1995) (describing emergence of interstate banking in 1980s). Accordingly, rejecting the national rate for state-chartered banks operating within a state was functionally the same as reimposing the state's interest-rate limits on banks the state itself chartered.

chance to decide whether or not it desires to receive the benefits which this legislation will confer. The various State legislatures are given the ability to curtail the operations of this legislation with respect to their own particular States and situations." *Id.*; *see also id.* at 35 (testimony of Frederick Schultz, Vice Chairman, Bd. of Governors of the Fed. Rsrv.).

There is no suggestion in Section 525's history that Congress intended to allow states to use the opt-out to restrict the rates that *out-of-state banks* functionally operating outside a state could charge when lending to borrowers living in an opting-out state. Rather, the opposite is true. The CSBS proposed deleting NBA Section 85's federal rate entirely, urging Congress to limit "an out-of-state association" to charging "interest at the rate allowed … by the laws of the State, Territory, or District ***where the borrower resides***." *Usury Lending Limits* at 154 (testimony of E.D. Dunn) (emphasis added). Congress declined to adopt CSBS's proposal that interest-rate regulation should be determined by reference to the borrower's location, and neither DIDMCA nor NBA Section 85 make any reference to "where the borrower resides."

6. Post-DIDMCA opt-outs.

Shortly after Congress enacted DIDMCA, seven states (including Colorado) and Puerto Rico invoked Section 525 to opt out of DIDMCA Sections 521-523. *See, e.g.*, 1981 Colo. Sess. Laws, ch. 73, § 1. But as inflation continued to rage into the 1980s, six of those states—including Colorado—rescinded their opt-outs. *See, e.g.*, 1994 Colo. Sess. Laws, ch. 272, § 12. States came to realize that opting out only hampered their state banks from remaining competitive as more banks expanded into national credit card lending. *See*, *e.g.*, Comm. Hearing on 1988 Neb. Laws, LB 913, at 9335, 9342-43, 9347-48 (discussing competitive disadvantages created by opt-out).

Opting-out states did *not*, at the time, generally understand their opt-outs to prevent out-of-state banks from lending to opt-out-state consumers at out-of-state rates. As one consumer financial services expert who testified before the Maine legislature explained, "Maine's opt out as to credit card programs has only one clear effect, disabling *Maine* banks that choose to go out of state." Maine Joint Standing Comm. on Banking & Ins., 117th Legis., Pub. Hearing L.D. 49 at 19-22 (Apr. 4, 1995) (testimony of Richard P. Hackett). When considering whether to

opt out, North Carolina's Commissioner of Banks was advised by the FDIC's General Counsel that "if a State were to override the preemption of Section 521, a State bank located in another State would still be able to charge North Carolina residents the highest rate allowed in the State bank's home state." *See* N.C. S. Banking Comm., 1983 HB 336, Special Mtg. Minutes (Mar. 28, 1983), at 10, https://perma.cc/8M57-U8ER.

B. Factual background.

1. Colorado opts out of DIDMCA Section 521.

In June 2023, Colorado enacted H.B. 23-1229, opting out of DIDMCA as of July 1, 2024:

> In accordance with section 525 of [DIDMCA], the general assembly declares that the state of Colorado does not want the amendments … made by sections 521 to 523 of [DIDMCA], prescribing interest rates and preempting state interest rates to apply to consumer credit transactions in this state. The rates established in articles 1 to 9 of this title 5 control consumer credit transactions in this state.

Id. § 3 (codified at Colo. Rev. Stat. § 5-13-106).

Colorado currently contends that its opt-out strips DIDMCA Section 521's protections not only from loans that state banks actually make in Colorado, but also from loans that state banks make in other

states if the borrower is physically located in Colorado "when the parties agree to the loan." Br. 3.[8]

2. Effects of the opt-out on Plaintiffs' members.

Plaintiffs' members include state-chartered banks from across the country, none of which is headquartered or chartered in Colorado or performs its key loan-making functions there. App.Vol.I.P.53. Plaintiffs' members do not offer payday or similar loans. *Id.* at 53-54. Rather, they offer consumers nationwide—including in Colorado—a wide variety of useful, familiar, everyday credit products, such as personal installment loans, buy-now-pay-later loans, and store-brand cards. *Id.* at 54. These products are subject to a range of rates and fees—depending on credit,

[8] Colorado's interpretation of the reach and scope of its opt-out has shifted since it was enacted and over the course of this litigation. Colorado's interest-rate limits, as codified in Colorado's UCCC, purport to apply to all loans made by lenders who *advertise* in Colorado. Colo. Rev. Stat. § 5-1-201(1); App.Vol.I.P.13, 25, 35. After Plaintiffs filed suit, Defendant Fulford issued a letter interpreting "§ 5-13-106 to apply only to consumer credit transactions 'made in' Colorado in accordance with Section 525 of DIDMCA … [and] interpret[ing] § 5-13-106's language of 'in this state' to be wholly congruent and identical with the opt out authorized by Section 525 for loans 'made in' the state." App.Vol.I.P193-94. In its district court brief, Colorado argued that a loan is "made in" *only* the state where the borrower receives it. App.Vol.I.P.176-77. After the FDIC's district court amicus brief proposed a novel "both states" definition, Colorado adopted that new interpretation. App.Vol.II.P.363-64.

income, and other consumer-specific or product-specific factors—that are lawful under DIDMCA Section 521. *Id.*

Because DIDMCA permits Plaintiffs' members to offer loans at rates above the 21% finance charge cap found in Colorado's UCCC, *see* Colo. Rev. Stat. § 5-2-201(2)(a), (3)(a), Plaintiffs' members currently offer credit to Colorado consumers whose credit profiles are too risky to lend to at a rate under that cap. *Id.* Indeed, being able to charge higher rates to account for risk of default (or to deter default) often means the difference between being able to offer a consumer a loan and determining that doing so would not be economical. *See* Ctr. for Cap. Mkts. Competitiveness, *The Economic Benefits of Risk-Based Pricing for Historically Underserved Consumers in the United States*, at 3-4 (Spring 2021), https://perma.cc/5EUG-DPZC. Under Colorado's interpretation of DIDMCA Section 525, Plaintiffs' members would have to curtail lending to some or all Colorado residents, reducing Coloradans' access to responsible, popular, useful consumer credit products. App.Vol.III.P.527-28.

At the same time, Colorado has never disputed that the opt-out does not apply to national banks that lend to Colorado consumers, which

remain shielded by NBA preemption. Yet national banks offer similar products to Colorado consumers, with comparable rates that often exceed Colorado's caps. App.Vol.III.P.528-29 nn.7-9 (collecting examples). Under Colorado's interpretation, these national banks would gain a competitive advantage over state banks—including Plaintiffs' members—lending to borrowers in Colorado.

C. Procedural History.

1. Plaintiffs' lawsuit.

On March 25, 2024, Plaintiffs filed suit, challenging Colorado's application of its interest-rate limits to Plaintiffs' members. App.Vol.I.P.12. Plaintiffs then moved for a preliminary injunction to prevent Colorado from applying its opt-out statute to loans not "made in" Colorado as that term is defined under federal law. App.Vol.I.P.39.

After Plaintiffs' motion was fully briefed, Colorado moved to dismiss the lawsuit. App.Vol.II.P.357.

2. The District Court's injunction.

Following oral argument, the District Court granted Plaintiffs' motion and preliminarily enjoined Colorado from enforcing its interest-rate caps as to loans that are not "made in" Colorado—that is, where the

state-chartered bank does not "perform[] its loan-making functions" in Colorado. Op. 23.

First, in response to Colorado's contention that Plaintiffs sought a "disfavored injunction" subject to a "heavier burden," the court found Colorado's argument "doubtful," but held it unnecessary to decide the question because "the plaintiffs have made a showing as to their likelihood of success on the merits and threatened irreparable harm sufficient to satisfy even the heightened standard required for disfavored injunctions." *Id.* at 6-7, 23.[9]

Second, the court rejected as "unpersuasive[]" the argument that Plaintiffs lack a cause of action in equity under *Ex parte Young*, 209 U.S. 123 (1908), explaining that "[t]he statutory enforcement mechanisms the State points to [in the FDIA] … are all remedies *against* a bank for violations of applicable laws or regulations. Those are not the rules or rights that the plaintiffs seek to enforce in this suit." Op. 13.[10]

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[9] The court also rejected Colorado's arguments that Plaintiffs lacked standing and that their claims are not ripe. *Id.* at 451-54. Colorado does not challenge those holdings on appeal.

[10] After the court granted the preliminary injunction, Plaintiffs amended their complaint to eliminate any confusion regarding the applicable cause

Third, turning to the merits, the court held that the "plain meaning of Section 1831d's opt-out provision is that what state a loan is 'made in' depends on where the bank is located and performs its loan-making functions," rather than on the borrower's location. *Id.* at 23. The court confirmed this interpretation by looking to Section 525's statutory and historical context, including consistent usage of the same words in other sections of DIDMCA and related banking statutes. *Id.* at 14-15.

Finally, the court ruled that Plaintiffs satisfied the showing necessary on the remaining preliminary injunction factors: "[W]ithout an injunction, the plaintiffs' member state-chartered banks will be at a disadvantage with respect to national banks, but Colorado consumers will have only marginally more protection from higher interest rates" because national banks could still lend at those higher rates. *Id.* at 24-25.

This appeal followed.

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of action. App.Vol.III.P.506. The court denied Colorado's motion to dismiss as moot in light of the amended complaint. App.Vol.I.P.10.

SUMMARY OF ARGUMENT

I. *Ex parte Young* allows Plaintiffs to bring an action in equity to challenge the State of Colorado's attempted incursion on their rights under DIDMCA. The fact that the FDIA provides a right of action to individuals and the FDIC to sue banks is not inconsistent with banks having a cause of action in equity to prevent a state from violating the banks' rights.

II. DIDMCA Section 525 permits an opting-out state to regulate only the interest rates on loans "made" by a state-chartered bank in the state. A bank "makes" a loan in an opting-out state only if the bank has undertaken key loan-making operations in the state. Opting out does not allow the state to regulate the interest rates of loans issued *to* a state's residents *from* banks operating in states that have *not* opted out of DIDMCA Section 521. This is clear from the text of Section 525, as well as its context, legislative history, relevant caselaw, and regulatory guidance.

III. Finally, the equities plainly favor a preliminary injunction. Colorado cannot articulate why the District Court's preliminary injunction—which does not permanently prevent the enforcement of

Colorado's interest-rate caps—is a "disfavored injunction." Nor can it show that matters. Under any standard, the District Court correctly found that the merits of Plaintiffs' lawsuit, and the balance of the equities, strongly favor preliminarily enjoining Colorado's preempted rate caps.

This Court should affirm.

ARGUMENT

The District Court did not abuse its discretion, *see Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016), in concluding that a preliminary injunction was appropriate.

I. Plaintiffs Have Pleaded A Valid Cause Of Action.

Colorado argues that Plaintiffs lack a cause of action in equity to challenge Colorado's violation of DIDMCA's preemption provision, and thus that the District Court erred in hearing this case at all. Br. 55-62. Although this argument is logically precedent to the merits, Colorado buries it in its brief—presumably realizing it is meritless.

As the District Court held, Plaintiffs' right to sue is straightforward under *Ex parte Young*. Plaintiffs seek to vindicate their members' substantive right "to charge interest at the rates specified in

Section 1831d"; bring an equitable cause of action under *Ex parte Young*; and "seek to use *Ex parte Young* as a shield against allegedly preempted state action." Op. 11-13. (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326, 328-29 (2015); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 899 (10th Cir. 2017)).

Colorado counters that the FDIA implicitly precludes *Ex parte Young* suits. It first argues that because Section 525 allows borrowers to assert claims *against banks* for charging interest at prohibited rates, Congress silently intended to strip all equitable rights *from* banks to challenge the statute itself. Br. 56-57. Nonsense. As the District Court held, neither DIDMCA nor the FDIA "as a whole display congressional intent to foreclose the availability of such relief." Op. 13. Although Colorado relies on *Armstrong*, Br. 56-57, the Supreme Court there found equitable relief unavailable only because Congress provided an express administrative enforcement mechanism for the violation of *the specific obligation at issue*. *Armstrong*, 575 U.S. at 328. Here, DIDMCA does not create an exclusive—or, indeed, any—mechanism to address *state officials' violations* of the statute's interest-rate preemption provisions. *See* Op. 13.

Colorado next contends that the very *existence of the FDIC* is sufficient to bar *Ex parte Young* claims because the FDIC has general regulatory authority to enforce the FDIA. Br. 57. Colorado ignores that the FDIC admitted below that it lacks authority to bring a preemption claim against a state on a bank's behalf:

> THE COURT: … [H]as the FDIC ever taken enforcement action against a state?
>
> MR. MORELLI: I'm not aware of any, Your Honor, no. The FDIC's enforcement authority under the FDI Act is limited to banks and those who work for them.

App.Vol.III.P.580 (Tr. 54:15-20). Colorado not only fails to cite a single case in which the FDIC has ever brought such a claim; it cites multiple cases in which circuit courts have permitted preemption claims brought by banks. *See* Br. 57 n.10.

Nor can Colorado satisfy the second requirement under *Armstrong*—showing that preemption claims under DIDMCA are "judicially unadministrable" because they commit a "judgment-laden standard" to agency discretion. *Armstrong*, 575 U.S. at 328-29. Once again, Colorado cites only the existence of the FDIC. According to Colorado, the risk that private litigation may create "inconsistent interpretations" is sufficient to establish the necessary "judgment-laden

standard." Br. 61. But as this Court has recognized, *Armstrong* did not even foreclose an equitable right of action to enforce a different paragraph in the *same statute*. *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1227 (10th Cir. 2018) (holding different provision of 42 U.S.C. § 1396a(a) was not "unadministrable" because it "is tethered to an objective benchmark"). Here, that the FDIC can enforce other provisions of DIDMCA against other parties does not create a risk of inconsistency, and certainly does not render equitable preemption claims somehow unadministrable.

II. The District Court Correctly Held That Plaintiffs Are Likely To Succeed On The Merits.

"In order to prevent discrimination against" state banks, DIDMCA Section 521 authorizes state banks to charge the same interest rates as national banks on "any loan … made": the "greater" of (1) the federal rate or (2) "the rate allowed by the laws of the State, territory, or district where the bank is located." 12 U.S.C. § 1831d(a). DIDMCA Section 525 allows states to reject this offer of competitive equality by opting out of federal preemption "with respect to loans made in such State"—that is, loans issued by banks chartered by, or performing their key loan-making functions in, the opting-out state. An out-of-state state-chartered bank is

unaffected by a state's opt-out unless that out-of-state bank performs its key loan-making functions in the opting-out state.

As the District Court held, Colorado improperly seeks to impose its interest-rate caps on loans that out-of-state state banks make *in other states* when the borrower is located in Colorado. DIDMCA's text, context, legislative history, and policy, along with related court rulings and regulatory guidance, all support the District Court's conclusion: the "state a loan is 'made in' depends on where the bank is located and performs its loan-making functions and does not depend on the location of the borrower." Op. 23.

A. DIDMCA's statutory text and context demonstrate that the opt-out applies only to state-chartered banks performing key loan-making functions in an opting-out state.

1. DIDMCA's plain text focuses on the lender who makes the loan, not the borrower who receives it.

The plain meaning of DIDMCA Section 525 is that a state may opt out of preemption with respect to state-chartered-bank loans only if the bank offering that loan performs its key loan-making functions in the opting-out state—that is, for state banks that "make" loans in that state. Critically, Section 525 looks to where a "loan[]" is "made," *not* where the

borrower is located. As the District Court explained, "Congress's use of 'made' [in Section 525] puts the focus on the act of making a loan" and on "the lender" who performs that act: "In plain parlance, it is the lender who *makes* a loan; nobody thinks of themselves as 'making a loan' when they borrow money from a family member or put a charge on a credit card." Op. 16.

Other provisions of DIDMCA confirm that the phrase "made in such State" focuses on where the bank's loan-making functions occur. As the District Court observed, Section 521 "itself says that a 'State *bank* … may … charge on any loan or discount *made*,' interest up to the specified rates—which implies that it is the bank that 'makes' a loan." *Id.* (quoting 12 U.S.C. § 1831d(a)). Thus, the only other uses of "made" in related sections of DIDMCA, *see* 12 U.S.C. §§ 86a, 1730g, 1785(g), 1828(o)(3), 1831e, 1831f, unambiguously link the "loan … made" to the lender and its location—and make no mention of borrowers.

This is because the "State … where the bank is located" under Section 521 turns on where the bank *makes* the loan at issue. 12 U.S.C. § 1831d; *see also* 12 U.S.C. § 85. In *Marquette*, the Supreme Court determined where the bank was "located" under NBA Section 85 by

assessing where the loan was made, in addition to where the bank was chartered and headquartered. 439 U.S. at 310-13. To do so, the Court looked to where the bank's lending operations physically occurred, not where the customers lived or used their credit cards. *Id.*

The Court noted that "the convenience of modern mail permits Minnesota residents holding Omaha Bank's BankAmericards to receive loans without visiting Nebraska," but stressed that "credit on the use of their cards is nevertheless … extended by Omaha Bank *in Nebraska*." *Id.* at 311-12 (emphasis added). By incorporating NBA Section 85's language into DIDMCA Section 521 verbatim, Congress adopted this lender-focused approach—based on where a bank performs its key loan-making functions—to determining where banks make loans. The same principle applies in 2024, when banks lend via "the convenience of modern" technologies, such as the internet and mobile apps.

2. Other banking statutes consistently use the words "make" or "made" when referring to actions taken by banks with regard to loans.

The District Court also correctly noted that provisions throughout Title 12 of the United States Code—which covers banks and banking and includes the FDIA— "consistently use 'make' and 'made' in the same way,

i.e., a loan is 'made' *by* a bank *to* a borrower." Op. 17.[11] "In contrast, when Title 12 speaks to action by borrowers, it states that borrowers 'receive' or 'obtain'—but not 'make'—loans." *Id.* at 18.[12]

Colorado attempts to minimize this uniform use of the word "made" by citing various provisions that refer to loans "made to a borrower," arguing that "made" refers equally to both the lender and borrower. Br. 43-47; *see* FDIC Br. 10-11. But "made *to*" reflects that the borrower is the *subject* of the active verb "make"—*i.e.*, the recipient of the loan—not the *maker* of the loan.[13] Indeed, Colorado fails to cite a single statute regulating bank activity that uses the word "made" to describe a *borrower's* conduct in connection with the regulated activities.

3. DIDMCA's history confirms its plain meaning.

The proper reading of the text of Section 525 is confirmed by the statute's legislative context and history. *See, e.g.*, *Nat'l Credit Union*

[11] *See, e.g.*, 12 U.S.C. §§ 83(a), 143, 371(a), 1757(5), 1785(f)(1), 1828(o)(3), 1831b(a), 2610, 4742(4).

[12] *See, e.g.*, 12 U.S.C. §§ 2279aa(7)(C), 4742(10)(A), 5602(b)(1).

[13] *See, e.g.*, 12 U.S.C. § 3018(c) ("the Bank may guarantee … any loan made by any State or federally chartered lending institution to any borrower"); 12 U.S.C. § 4745(p)(1)(C)(i) ("a participating financial institution makes a loan to a borrower"); 12 U.S.C. §§ 1715z-13b(c)(1), 2202b(a), 2202d(b), 5704(e)(7)(A).

Admin. Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1209-17 (10th Cir. 2014) (examining legislative context surrounding Congress's enactment of law, including Congress's legislative actions).

Congress enacted each interest-rate preemption statute in the 1970s, from the Brock Bill to DIDMCA, to ensure that state banks could maintain parity with national banks in the face of record-high inflation and corresponding record-high interest rates. *See* pp. 8-19, *supra*. Congress thus increased the maximum federal interest rate at which national banks could make certain business and agricultural loans in the affected states, and then offered parity to state-chartered banks in those same states. To avoid constitutional questions about federal regulation of state banks, each DIDMCA predecessor statute allowed the affected states to decline the offer of parity in favor of retaining control over their own banks' interest-rate caps—and each predecessor statute used the same language for these opt-out provisions. *See* pp. 8-14, *supra*.

These predecessor bills were not targeting interstate consumer lending. To the contrary, these bills authorized increased interest-rate caps in only a small number of states, to address credit crunches experienced by banks lending to farms and other businesses *in those*

states; and their opt-out provisions correspondingly applied only to banks operating in those states.

The Borrowers Relief Act, for example, authorized only banks *in Arkansas* to lend at increased rates. *See* Pub. L. No. 96-104 § 301. Its opt-out provision terminating access to those rates for "loans made in such State," *id.* § 107, therefore, could refer only to loans made by Arkansas banks. Congress could not have intended the phrase "loans made in such state" to refer to loans that were merely *received* in Arkansas (but made by banks operating elsewhere), because no other states were covered by the Borrowers Relief Act in the first place. Nor could the language "loans made in" have reflected a congressional intent to provide opting-out states with a means to "protect" consumers from receiving "predatory" loans—given the language was initially used in the precursor statutes in connection with business and agricultural, not consumer, loans.

DIDMCA Section 521 made the offer of parity that began with the Brock Bill and Borrower's Relief Act permanent—using the same language—and extended it to encompass consumer loans. That offer was subject to each state's choice, through Section 525—also using the same language as the precursor laws—to reject preemption and prevent their

own state banks from accessing those rates. These statutes are necessarily focused on banks making loans, not on borrowers *receiving* those loans. The consistent use of "made" rather than "received" throughout these statutes is in line with the statutes' purpose.

4. Congress used the same phrasing in another interest-rate parity statute to refer to the state where a bank performs its loan-making functions.

Beyond the fact that Congress generally has understood that it is a bank's actions that determine where a loan is "made," Congress used *precisely* the same phrasing as in Section 525—"loans made in any State"—in another interest-rate preemption statute, which the Eighth Circuit has held turns on the bank's location, not the borrower's.

Once again, Arkansas's interest-rate limitations, which remained below the caps in most states even after Arkansas amended its constitution, needed preempting. *See Jessup v. Pulaski Bank*, 327 F.3d 682, 684 (8th Cir. 2003); Ark. Const. Art. 19, § 13 (1982). The Gramm-Leach-Bliley Act (GLBA), Pub. L. 106-102, 113 Stat. 1338 (1999), allowed Arkansas banks to make loans at the same interest rates as any out-of-state bank with a branch office in Arkansas. 12 U.S.C. § 1831u(f). The statute's scoping provision states that it does not "supersed[e] or affect[]"

preemption under NBA Section 85 or DIDMCA or "the authority of any insured depository institution to take, receive, reserve, and charge interest on any *loan made in any State* other than" Arkansas. 12 U.S.C. § 1831u(f)(2) (emphasis added).

In *Jessup*, an Arkansas state bank issued a credit card by mail to a Texas borrower who used the card "solely in Texas." 327 F.3d at 684. The card's interest rate exceeded Texas's cap, and the borrower argued that the GLBA did not permit the rate because the loan was "made in" Texas, where he received and used the credit card. *Id.* The Eighth Circuit rejected this argument, holding that the loan is "made in" the state where the bank performs its loan-making functions and not "where the borrower resides." *Id.* at 684-85 (quoting OCC Opinion Letter (Aug. 2001)); *see* Op. 22 n.8.

Colorado asks this Court to split with the Eighth Circuit and adopt a different interpretation of "made in" for purposes of DIDMCA Section 525 than the Eighth Circuit adopted for the GLBA, arguing that "reliance on [an OCC letter] and the bank location test may present perverse results." Br. 51 n.8; *cf.* FDIC Br. 23. Colorado does not explain what "perverse results" would be presented. Rather, it is Colorado that urges

a perverse result here—misconstruing DIDMCA to prohibit out-of-state banks from competing with national banks on the equal footing that Congress enacted DIDMCA to provide.

B. Colorado's alternative reading of the text of Section 525 does not work.

Attempting to escape the plain meaning of the text, Colorado and its amici spend nearly 34 pages contorting canons of statutory interpretation, attempting to infuse inelegant grammatical structures with clearly unintended meaning, and making much of small textual variations. *See* Br. 25-35; FDIC Br. 6-18; CRL Br. 11-16; States Br. 24-25 & 28-31. This Court should reject these convoluted textual gymnastics.

1. Colorado's "loan is made in two states" theory is incoherent.

Colorado does not deny that a loan is "made in" the state where the bank performs its loan-making functions. *See* Br. 30, 46. Rather, Colorado contends that a loan is *also* "made in" Colorado if a bank makes the loan in another state, but the borrower *receives* that loan in Colorado. Br. 42-43. This theory makes no sense.

For starters, it is apparent that, to Colorado, it is only the borrower's state that matters for purposes of Section 525. Why insist that a loan is "made" in two states if only one of those states matters?

Colorado's two-state theory also fails on the plain text, because DIDMCA contemplates that the loans at issue are "made" in "*such* State"—that is, a *singular* state. Congress tied the opt-out provision to the *single* state where a loan is "made" because it was referring only to *one* state, not two.

Beyond that, Colorado declares that because "[a] bank cannot make a loan without a borrower any more than one hand can clap without the other," a loan is "made" equally where each party is located. Br. 29. But "made" is a verb describing an action *the bank* takes in a particular place, not an action jointly performed by both parties (like two clapping hands). Under Colorado's logic, a statute that applied to "loans *received in* such State" would refer equally to both the bank's location and the borrower's—after all, a borrower cannot "receive" a loan without a bank having made it. This is absurd. Words that refer to the borrower's action—*e.g.*, "received" or "obtained"—look to the borrower's location

(where location is relevant). And words that refer to the lender's action—*e.g.*, "made" or "originated"—look to the bank's location.

As the District Court observed, "[h]ad Congress sought to put the focus on the borrower, as the State argues, it could have done so in many ways. Most easily, for example, by allowing states to opt out as to loans 'made to borrowers in such State.'" Op. 16. In fact, Congress was presented with just such an option by CSBS—the state bank regulator group that had pressed for the original opt-out provision in the Brock Bill—during deliberations on DIDMCA. *See* page 19, *supra* (advocating limiting both state and national bank interest rates to "the rate allowed … by the laws of the State …where the borrower resides"). Congress turned down that request.

2. Loan contracts are different from loans.

Relatedly, Colorado faults the District Court for drawing a distinction between a loan and a loan contract under Section 525, arguing that a *loan* must be "made" by both parties because a *loan contract* is "entered" into by both parties. *See* Br. 32-33 (citing Op. 19); *see also* FDIC Br. 10. But a bank *making a loan* is different than two parties *entering a*

contract for a loan, and the District Court was correct to observe the distinction between the two. *See* Op. 19.

A "contract" is an "agreement between two or more parties which creates an obligation to do or not do something." *Contract*, Black's Law Dictionary (6th ed. 1979). It thus requires "executing, signing, or delivering" that contract, App.Vol.I.P.177 (quoting Black's Law Dictionary (11th ed. 2019)). By contrast, a loan is "anything furnished for temporary use to a person at his request, on condition that it shall be returned … with or without compensation for its use." *Loan*, Black's Law Dictionary (6th ed. 1979); *see also Loan*, Webster's Third Int'l Dictionary (1971 ed.) ("money lent at interest"). Congress chose to confine the opt-out to "loans made" in the opting-out state, rather than "loan contracts entered by one of the parties" there.

Banks and borrowers take different actions with regard to a loan—including applying for a loan (an action only a borrower takes); committing to make a loan (an action only a bank takes); entering into a commitment agreement regarding a loan (as Colorado refers to in its brief, Br. 32-33, an action both a bank and a borrower take); entering into

a loan agreement (an action both a bank and a borrower take); and—as relevant here—actually *making* the loan, an action only a bank takes.

3. The canon of "meaningful variation" does not apply.

Colorado argues that the canon of "meaningful variation" requires that where a loan is "made" under Section 525 must differ from where a bank is "located" under Section 521. Br. 25-27; *see also* FDIC Br. 11-14; State Br. 28-31; Center Br. 14-16. According to Colorado, Congress tied Section 525 to where a loan is "made" in order "to pivot away from the location of the lender in Section 525," as interpreted in *Marquette*. Br. 27. This argument does not hold water. The canon of meaningful variation is "defeasible" by other indications of congressional intent, *Pulsifer v. United States*, 601 U.S. 124, 149 (2024) (quoting A. Scalia & B. Garner, Reading Law 170-71 (2012))—which are overwhelming here.

Fundamentally, Colorado tries to drive a wedge between Sections 521 and 525 that does not exist in the statutory text. As discussed above, *both* sections refer to "loans made" because both focus on the actions of the lender when making a loan in a particular state. Section 521 explicitly ties the applicable interest-rate limit on "any loan … made" to the state where the bank is "located,"—that is, where the

bank performs its loan-making functions. Section 525 also focuses on where the loan is "made." The two sections should be construed consistently, rather than forcing conflict into a statute where none exists. *See Negonsott v. Samuels*, 933 F.2d 818, 819 (10th Cir. 1991) ("statutes should be construed so that their provisions are harmonious with each other"). Given the clear link between the bank's "location" and where a loan is "made," Colorado fails to show that where loan is "made" under Section 521 should differ from where it is "made" under Section 525.

History also underscores that Congress did not use the word "made" in Section 525 to "pivot away" from the "State … where the bank is located" under DIDMCA Section 521 and NBA Section 85. Br. 26-27. Indeed, that argument gets the chronology backward. Throughout the 1970s, statutes preempting state interest-rate caps for banks allowed states to opt out of a higher federal rate as to loans "made in" that state—beginning before *Marquette* was decided or DIDMCA Section 521 first authorized state banks to lend at the rates in the "State … where the bank is located." The "made in" phrase used in these predecessor statutes could not have been intended to "pivot away" from a court's future

interpretation of language (*Marquette*) in a future statute (DIDMCA Section 521).

Instead, the opt-out provisions in those statutes were designed to permit states to reject competitive equality and maintain their interest-rate caps for their own state banks. Far from "pivot[ing] away" from this purpose, DIDMCA Section 525 retained the language of prior opt-outs because it had the same effect: to allow each state to deny state banks operating *within the opting-out state* authority to make loans at national bank rates.[14]

Colorado thus places more weight on minor differences in word choice than DIDMCA can bear. DIDMCA Sections 521 and 525 were cobbled together from existing statutes enacted over a century apart. Slight variation in phrasing between language from an 1864 statute copied into Section 521 and language from a series of 1970s statutes copied into Section 525 is not "meaningful."

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[14] Other sections of DIDMCA also refute Colorado's theory. DIDMCA Sections 511-12 extended the Borrowers Relief Act's increased rate nationwide; they therefore do not contain the "State … where the bank is located" language from NBA Section 85, but they nevertheless contain an opt-out provision with the same "made in" language as DIDMCA Section 525.

4. The use of passive voice does not carry the significance Colorado assigns to it.

Colorado next argues that "Congress intentionally used the passive voice" in Section 525 to allow states to opt out of "rate exportation" under DIDMCA. Br. 39. This is plainly *not* what Congress intended. Section 525 uses the passive voice to describe *when* loans are subject to DIDMCA, not to alter the scope of the opt-out: "The amendments made by sections 521 through 523 … shall apply only with respect to *loans made* in any State *during the period* beginning on [DIDMCA's effective date], and ending on the date" the state opts out. DIDMCA § 525 (emphasis added). Congress used the word "made" only to delineate the temporal nature of *which* loans would be covered by Section 521 if a state opted out under Section 525.

Again, Congress drew the language of Section 525 directly from its predecessors' sunset provisions, which specified that their terms applied only "to loans made in any State" before the sunset date or the date the state opted out. *See* pp. 14-19, *supra*. This consistent use of "made" to describe loans "made" during a certain time period dates to the earliest version of the Brock Bill—predating both *Marquette* and DIDMCA. Just as it had in these prior statutes, Congress used this phrase in DIDMCA

Section 525 to refer to loans that dated to (that is, were "made" during) the period between the date of DIDMCA and the date a state opted out. By recycling this phrasing, Congress was not, as Colorado and its amici argue, *see* Br. 25-27; State Br. 28-31; Center Br. 12-14; FDIC Br. 11-14, intentionally adopting the passive voice to differentiate Sections 521 and 525.

C. Colorado misunderstands the purpose of DIDMCA Section 525.

Colorado's and its amici's briefs are infused with outrage that an out-of-state bank could lend to a Colorado consumer at rates the State thinks are too high—and Colorado believes that Section 525 was designed to allow it to prevent such lending. *See* Br. 10-14; Bell Br. 4-13; Center Br. 5-11. But this position is ahistorical and based on a fundamental misunderstanding of the purposes of DIDMCA Section 525—which was instead focused on preserving states' ability to regulate their own state-chartered institutions. Regardless, Colorado's overly broad interpretation of the opt-out would not even advance Colorado's consumer-protection goals.

1. The opt-out was designed to allow states to decline interest-rate parity, not to encroach on other states' interests in regulating their own banks.

As explained above (at pp. 14-19), Congress enacted DIDMCA Section 521 to ensure competitive equality between national and state banks by extending the benefits of NBA Section 85 to the latter. Section 525, the opt-out provision, allows states to reject that offer of preemptive parity for its own banks. It does not permit states to interfere with *other* states' regulation of banks operating within *other states'* borders, thus undermining the competitive equality of those institutions. But that is precisely what Colorado attempts to do when it insists that under Colorado's opt-out statute, any loan *received by a borrower* in Colorado is subject to Colorado's rate caps.

Colorado concedes that NBA Section 85 preempts Colorado's interest-rate caps as applied to a loan made by an out-of-state *national* bank, even when the borrower is a Colorado resident. *See* Br. 2, 11. Yet Colorado urges the Court to adopt an interpretation of Section 525 under which state banks in a state that *chose not to opt out* would no longer be able to make loans on the same terms available to national banks *in that same non-opt-out state* under NBA Section 85. Rather than ensure parity

between state and national banks, Colorado's interpretation would drive a discriminatory wedge between them. This is not what Congress intended.

Rather, Congress drafted Section 525, in the model of its predecessor statutes, to operate as the District Court interpreted it: to permit states to reject federal intervention in their regulation of their *own* banks. Neither Section 525, nor its predecessors, permits opt-out states to reach into *other* states to regulate banks performing their loan-making functions in those other states.

As the legislative history demonstrates, *see* pp. 8-14, *supra*, the sponsors of interest-rate preemption bills in the 1970s were uncertain of the constitutionality of forcing states to allow their own chartered banks to loan at a federal rate. Their solution was to include opt-out provisions to allow states to re-prohibit their banks from making loans at the federal rate. Even the Borrower Relief Act contained an opt-out provision permitting Arkansas to reject those rates and hold its own banks to the existing state-law caps, using the same opt-out language that was later imported into DIDMCA Section 525. *See* pp. 16-17, *supra*. Yet the Borrower Relief Act was specifically requested by the state of Arkansas,

applied only in Arkansas, and could not as a practical matter have applied to banks chartered and operating in other states.

Given this history and context—and utter lack of legislative history pointing in another direction—it cannot be that Congress suddenly and silently decided, when extending interest-rate relief to banks in the rest of country through DIDMCA, to allow opting-out states to trample the rights of non-opting-out states in the manner Colorado and the FDIC now advocate.

Failing to grasp this history, Colorado objects that the District Court's interpretation of Section 525 permits only a "partial opt-out," under which Colorado cannot entirely avoid "rate exportation" into the state. Br. 40-43. Setting aside that Colorado cites nothing for the proposition that halting "rate exportation" into opting-out states was Congress's concern or purpose when it enacted Section 525 and its predecessors, Colorado's interpretation *also* would not avoid rate exportation. After all, NBA Section 85 would continue to preempt Colorado's caps for national banks lending to Colorado residents. Indeed, as noted above (at page 19), the CSBS asked Congress to expressly cap

interest rates *for all banks* at the level permitted in the state "where the borrower resides." But Congress declined.

2. There was no pre-DIDMCA "status quo" for state regulation of state-bank interstate lending.

Colorado also argues that "Congress crafted Section 525 so that states could reject Section 521 and return to the *status quo ante* should they choose to do so." Br. 39; *see* State Br. 27-28. According to Colorado, under this status quo "a state [could] choose to regulate interest rates charged to its residents, even if a lender ha[d] no other footprint within the forum state." Br. 9; *see also id.* 34, 40.

This argument, too, lacks historical merit. There was no uniform national "status quo" prior to DIDMCA under which only the borrower's state of residence governed the interest that state banks could charge on interstate loans. As the Supreme Court recognized in *Marquette*, it was only in the 1970s that lending began to evolve beyond face-to-face transactions—and it was primarily *national* banks that began to lend across state lines, using the mail, through credit card lending. *See* App.Vol.I.P.16-34; *Marquette*, 439 U.S. at 311.

In support of this supposed pre-DIDMCA consensus, Colorado cites (Br. 37-40) a series of 1970s cases addressing a single mail-order

merchant. That merchant, Aldens, sometimes "extended credit to customers to facilitate … purchases." *Id.* at 37. Alden's credit agreements all purported to be governed by Illinois law—where Aldens was based—but a series of courts rejected the company's choice-of-law argument and held that other states could apply their usury laws to the loans.

The Aldens cases are irrelevant here. For starters, the cases themselves expressly acknowledge "the lack of uniformity" and "extent of disparity in state treatment" of interstate credit transactions at that time, *Aldens, Inc. v. Packel*, 524 F.2d 38, 48 n.15 (3d Cir. 1975), thus defeating any notion of a clear pre-DIDMCA status quo. In any event, Aldens was not a bank, let alone one chartered by and regulated by a single state. Furthermore—as Colorado recognizes—those cases addressed only whether the application of another state's usury laws to Aldens' loans would "violat[e] … the Commerce Clause [or the] Due Process Clause." Br. 37. As the District Court explained, "Dormant Commerce Clause cases are of little value with respect to the statutory construction issue in this case, as they address the separate issue of when one state may constitutionally regulate an activity involving conduct that occurs in another state." Op. 19. Such cases shed no light on where a loan

is "made" for purposes of applying bank preemption law—only about which states may constitutionally regulate those loans *absent* a contrary federal rule.

Nor was there a clear status quo with respect to the interstate regulation of contracts more generally in the 1970s, *contra* Colorado's oversimplified chart. *See* Br. 40.

Under the traditional rule, the law of the "place of performance" applied regardless where the contract was entered: "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury." *Seeman v. Phila. Warehouse Co.*, 274 U.S. 403, 407 (1927) (citations omitted).

Colorado law—references to which are conspicuously absent from Colorado's brief—followed this traditional rule, and specified that the place of performance was the *lender's* location: "As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable

at the place where the creditor resides, or at his place of business … and it is ordinarily the duty of the debtor to seek the creditor for the purpose of making payment." *Gill v. Just. of Peace Ct. No. 2 of City & Cnty. of Denver*, 139 P.2d 271, 272 (Colo. 1943) (citation omitted).

Over time, some states—including Colorado—moved away from the traditional rule and adopted the factors set forth in the Restatement (Second) of Conflict of Laws §§ 188 and 203. But this meant courts applied a case-by-case analysis resulting in a variety of different outcomes. *See, e.g.*, *Pirkey v. Hosp. Corp. of Am.*, 483 F. Supp. 770, 772, 773-74 (D. Colo. 1980); *Shull v. Dain, Kalman & Quail Inc.*, 267 N.W.2d 517, 519-20 (Neb. 1978).

Nor does Colorado's adoption of the UCCC in 1971 support the existence of a halcyon "status quo" in which loans were "made" where the borrower was located. Rather, at that time, the UCCC stated just the opposite: "A loan or modification of a loan agreement is made in this state if a writing signed by the debtor and evidencing the debt ***is received by the <u>lender</u> in this state***." Colo. Rev. Stat. § 73-1-201(1)(c) (1971) (emphasis added). The lender's location controlled until the statute was amended in 1975 to cover loans where the borrower "receives … the cash

proceeds of the loan in this state," in which case the statute specified that it "shall apply ***as though*** the … loan were entered into in this state." *Id.* § 73-1-201(12) (1975) (emphasis added). Neither version of Colorado's pre-DIDMCA UCCC recognized a loan as ***actually*** being "made in" Colorado if the borrower resided there; the borrower-focused UCCC language Colorado references was not adopted until over a decade ***after*** DIDMCA. Colo. H.B. 00-1185 (2000).

At bottom, Colorado provides no evidence that Congress recognized any uniform national rule governing interstate transactions when it enacted DIDMCA. Or that Congress added Section 525 to restore that supposed rule.

D. Colorado's cases are irrelevant to interpreting Section 525.

As discussed above (at pp. 38-40), the District Court's interpretation of Section 525 is precisely the same as the Eighth Circuit's interpretation of the exact phrase at issue here in the context of a closely related interest-rate preemption statute. *Jessup*, 327 F.3d at 684. Colorado, by contrast, is unable to find any relevant caselaw to support its interpretation of Section 525. Instead, Colorado relies on Dormant Commerce Clause cases to show where loans (or contracts generally) are

supposedly "made." Br. 36-39, 52-55; *see* FDIC Br. 15; State Br. 29. The District Court wisely declined to contort DIDMCA Section 525 to conform to this unrelated body of law. Op. 19.

Quik Payday, Inc., v. Stork, 549 F.3d 1302 (10th Cir. 2008), and the other cases Colorado cites (like *Aldens*, discussed above) address only the question whether activity affects a given state sufficiently to allow that state to regulate the conduct within the bounds of the Constitution. *Quik Payday*, 549 F.3d at 1312 (characterizing question as akin to whether Kansas could exercise "specific jurisdiction" over transaction). It may generally be true that, "when an offer is made in one state and accepted in another, … both states have an interest in regulating the terms and performance of the contract" for purposes of the constitutional minimum for Due Process. Br. 54 (quoting *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999)). But that says nothing about the meaning of "made in" under Section 525; nor about the scope of federal preemption for loans by state-chartered banks. Indeed, none of these cases deals with banks or bank regulation. The fact that Colorado must wander so far afield exposes the weakness of its position.

E. Federal regulators have traditionally endorsed a lender-focused approach.

Contrary to Colorado's arguments, Br. 49-52, the pronouncements of relevant federal regulators—and in particular, those issued roughly contemporaneously with the enactment of the statute—confirm that the District Court correctly interpreted Section 525. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024) (interpretations "issued roughly contemporaneously with enactment of the statute" entitled to "respect").

The FDIC has consistently advised regulated parties that loans are "made" under DIDMCA where the lender is located. Shortly after DIDMCA's enactment, the FDIC advised state banks that they "may rely on the federal law that incorporates the interest provisions of the state where the bank is located in extending credit to the residents of its state *and of other states*"—including "when *making loans to citizens of states that have rejected the federal preemption*." FDIC Interp. Ltr. No. 83-16, 1983 WL 207393 (Oct. 20, 1983) (emphasis added); *accord* N.C. S. Banking Comm., 1983 HB 336, *supra* p. 21 (FDIC advised North Carolina bank commissioner that "if a State were to override the preemption of Section 521, a State bank located in another State would still be able to

charge North Carolina residents the highest rate allowed in the State bank's home state"). The Office of Thrift Supervision concurred, explaining that lenders "may offer loans to out-of-state customers at interest rates authorized in the state where the institution is located, even if the state where the borrower lives … has exercised its 'opt out' authority under section 525." OTS Ltr. from H. W. Quillian, 1986 WL 290314, at *2 (June 27, 1986).

The FDIC reiterated this interpretation in one of the earliest significant cases applying DIDMCA, *Greenwood*, 971 F.2d 818. In its amicus brief there, the agency addressed whether DIDMCA permitted a Delaware state bank to charge late fees—which qualify as a component of interest—even though Massachusetts, the borrower's state, prohibited late fees. FDIC Br. in *Greenwood*, 1992 WL 12577410, at *35-36. The FDIC explained that Massachusetts' opt-out (which was eventually repealed) did not permit it to extend its prohibition on late fees to Delaware state banks because "the right to 'opt out' of Section 521, by the express terms of Section 525, 'belongs to the State where the loan is made.'" *Id.* (quoting FDIC Interp. Ltr. No. 88-45, 1988 WL 583093 (June

29, 1988)). Because the *lender's state* had not opted out, Section 525 did not "have any bearing on this case at all":

> Section 525 clearly does not confer on states that elect to opt out of Section 521 extraterritorial authority to apply their own lending laws to loans made in other states by banks chartered in other states, ***merely because the borrower happens to be a resident.***

Id. (emphasis added).

The FDIC has simply ignored its earlier brief throughout this litigation, instead proposing a novel framework in the District Court—that a loan is "made by both of its parties," FDIC Br. 2—which Colorado embraced for the first time at oral argument below. App.Vol.II.P.407 (Tr. 29:3-14). But try as they might, neither the FDIC nor Colorado can square this new theory with the FDIC's and other regulators' past statements, which never equated the *borrower's* location with where a loan is "made."[15]

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[15] *See also, e.g.*, OCC Interp. Ltr. No. 686, 1995 WL 786842, at *3 (Sept. 11, 1995) ("the key fact in determining the permissible interest rate applicable to a loan is not where the customer resides"); FDIC Gen. Counsel's Op. No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. 27,282, 27,286 (May 18, 1998) (for purposes of DIDMCA, a loan is "made" in the bank's home state by default and is only "governed by the usury provisions of the host state" where it "performs all" its key loan-making functions in that state) Federal Interest Rate Authority, 85 Fed.

The FDIC tries to distinguish other of its pronouncements, but to little effect. For instance, the FDIC approvingly cites its 1988 interpretative letter to support its current position. FDIC Br. 12-13 (citing FDIC Interp. Ltr. No. 88-45). But that letter merely rejected the suggestion that a loan is necessarily "made" in a bank's "*home state*," and instead supports adopting a functional approach to determine where a loan is "made" for purposes of DIDMCA Section 525, citing the Supreme Court's analysis in *Marquette*. *Id.* (emphasis added); *see also* App.Vol.I.P.59. That is the exact approach Appellees endorse here.

The FDIC then stridently dismisses the relevance of its 1998 General Counsel opinion because that opinion discusses where a loan is "made" in connection with Section 521, rather than Section 525. FDIC Br. 21-22 (citing Opinion 11, 63 Fed. Reg. at 27,283). But where a loan is "made" for the purposes of interest-rate preemption is certainly relevant to where a loan is "made" for purposes of opting out of that preemption. And, according to Congress, courts, and decades of regulator opinions, a

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Reg. 44,146, 44,148 (July 22, 2020) ("If all three non-ministerial functions involved in making the loan are performed by a branch or branches located in the host State, the host State's interest provisions would apply to the loan[.]").

loan is "made" where the bank performs its loan-making functions—not where a borrower happens to receive it. Try as it might, the FDIC cannot avoid its heretofore consistent view that a loan is "made" where the lender is located. Certainly its abrupt change in position warrants no deference here.

* * * * *

The District Court correctly ruled that Plaintiffs are likely to prevail because their interpretation of DIDMCA Section 525 is supported by the text, context, legislative history, caselaw, and regulatory guidance.

III. The District Court Did Not Issue A Disfavored Injunction, And Correctly Found That The Equities Favor Plaintiffs.

Colorado's arguments regarding the remaining preliminary injunction factors also fail.

To start, the District Court did not issue a "disfavored injunction." That heightened standard applies only where "the issuance of an injunction will render a trial on the merits largely or partly meaningless"—such as in "a case involving the live televising of an event scheduled for the day on which preliminary relief is granted" or "the disclosure of confidential information." *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 35 (2d Cir. 1995); *see also Free the Nipple-*

Fort Collins v. City of Fort Collins, 916 F.3d 792, 798 n.3 (10th Cir. 2019) (citing *Tom Doherty*). In the case Colorado cites, involving a challenge to a law criminalizing public breast exposure except for breastfeeding, this Court noted that applying this heightened standard "was likely in error" since "we probably *can* put the toothpaste back in the tube" by allowing the defendant city to "enforce its ordinance" if it prevailed on the merits. *Free the Nipple*, 916 F.3d at 798 n.3.

Same here: In the unlikely event Colorado prevails at trial, the toothpaste can go back into the tube, and Colorado would be permitted to enforce its interest-rate caps. *See* Br. 63 (speculating what would happen if Plaintiffs "lose at trial"). Colorado's argument that borrowers will continue to have access to loans with interest rates in excess of Colorado's interest-rate caps during the pendency of the case ignores that (1) they will be able to borrow at those rates from national banks regardless of the outcome of this lawsuit; and (2) if the state wins, it will be able to prevent out-of-state, state-chartered banks from so lending prospectively.

Regardless, as the District Court held, Plaintiffs are entitled to a preliminary injunction no matter the standard. Op. 23, 25. In addition to Plaintiffs having demonstrated a likelihood of success, the balance-of-

equities and public-interest factors favor Plaintiffs. An unconstitutional law is never in the public interest. *See Chamber of Com. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). And Plaintiffs did in fact present evidence that national banks offer loans to Colorado borrowers at interest rates exceeding Colorado's caps, App.Vol.II.P.226-28, and thus that the Colorado law would provide only "marginally more protection" for the public even under Colorado's view of the public interest. Op. 25; *contra* Br. 64.

Finally, Colorado is simply wrong in asserting that Plaintiffs' members are actively harming Colorado borrowers by offering loans at rates higher than Colorado would permit. Br. 63. It is Colorado's law that would harm Coloradans—particularly those at the lower end of the credit spectrum—by reducing competition and denying them access to needed credit. *See* App.Vol.III.P.529-30.

CONCLUSION

The Court should affirm the District Court's preliminary injunction.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs agree that oral argument would be appropriate in this case, and would likely assist the Court in reaching a decision.

Respectfully Submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(B).

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