No. 24-1293

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Phillip J. Weiser,

Appellant,

vs.

National Association of Industrial Bankers,

Appellee.

On Appeal from the United States District Court
for the District of Colorado, 1:24-cv-00812

BRIEF OF AMICI CURIAE STATES OF ARIZONA, CALIFORNIA, CONNECTICUT, HAWAII, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW YORK, PENNSYLVANIA, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, IN SUPPORT OF APPELLANT AND REVERSAL

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RULE 29(a)(4)(D) STATEMENT OF IDENTITY

Arizona, California, Connecticut, Hawaii, Maine, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Oregon, Vermont, Washington, and the District of Columbia submit this brief by and through their respective attorneys general, who are authorized to defend and enforce state laws and interests in court ("the Amici States"). The Amici States have great interest in this appeal because the order below nullifies authority granted to the states by Congress to retain statutory protections of consumers from abusive lending practices by out-of-state lenders. It does so based on a strained and improper reading of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), which expressly reserves to states the right to override the preemptive application of that federal law and despite the Colorado Legislature so voting in 2023. The order threatens to eviscerate the careful balancing of federalism principles embodied in DIDMCA and the states' ability to protect their consumers from new forms of predatory lending, especially at a time when high-interest online lending is increasing. The Amici States submit this brief pursuant to Fed. R. App. P. 29(a)(2), which permits participation without party consent or the Court's leave.

SUMMARY OF ARGUMENT

Usury statutes are perhaps the oldest consumer-protection laws in existence and have been long recognized as the core sovereign domain of states. For this reason

Congress, while enacting DIDMCA to allow state-chartered banks to lend at higher rates via "rate exportation" available to national banks during a credit crisis, granted states the right to override such preemption and resume protecting consumers from usury involving such lenders. The FDIC interpreted the law in 1988 to confirm that an out-of-state bank must comply with usury laws of a state that has exercised this override when engaging in lending in that state. And state banks have previously avoided engaging in nationwide predatory lending that might prompt many states to exercise DIDMCA override. But recent trends in internet lending have changed these dynamics—namely, tech companies partnering with banks in states without usury limits to market and lend nationwide to financially desperate consumers at astronomical rates. In response, Colorado exercised its right to override DIDMCA preemption in 2023. Whether or not other legislatures agree with that decision, the Amici States support Colorado's right to make it as granted by Congress.

This brief analyzes such state interests and Congress's intent to preserve them via DIDMCA's override provision. Part I analyzes how (a) usury laws apply to all sales or loans made to consumers in our states; (b) the National Bank Act, as interpreted in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), created an exception by allowing "rate exportation" for national banks, (c) Congress responded to the credit crisis in the late 1970s by passing DIDMCA, which allowed state banks to export home-state rates but also authorized states to

reinstate usury laws to protect consumers, and (d) DIDMCA has been workable as states have considered override based on consumer-protection interests and credit trends, including recent "rent a bank" schemes. Part II then explains how the decision below thwarts the federalism principles that motivated DIDMCA and Congress's respect for critical state interests. Ultimately, the text and history of DIDMCA's preemption-and-override sections make clear that a state's override restores its preexisting ability to protect resident consumers from usury, wherever the lender is located. The Court should thus reverse the decision below to the extent it disrupts this careful Congressional balancing and will allow online lenders to flout usury laws in states that override DIDMCA preemption.

ARGUMENT

I. DIDMCA Afforded "Rate Exportation" to State Banks Subject to the States' Ability to Restore Usury Laws to Protect Consumers from In- and Out-of-State Lenders.

A. Our States' Usury Laws Protect Consumers From Predatory Lending in Each State, Regardless of the Lender's Location.

Legislatures have long maintained the responsibility to protect their residents from oppressive business practices and preserve the integrity of the consumer marketplace in each state. This includes consumer-fraud laws, competition and anti-monopoly laws, and oversight of trades subject to risks of abuse. Federal courts respect this "long history" of "statutory remedies against … unfair business practices" as an important domain "traditionally regulated by the States." *California*

v. ARC Am. Corp., 490 U.S. 93, 101 (1989). Courts have also recognized the obvious principle that such laws apply to all businesses, wherever located, to the extent they elect to engage in marketing and make sales in a state.[1] It is thus uncontroversial that states may require entities located in other states to register their corporation,[2] obtain necessary licenses,[3] pay taxes on sales,[4] and exercise jurisdiction over such business activity[5]—that is, to the extent they transact business in that state.

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[1] *E.g., Watson v. Employers Liab. Corp.*, 348 U.S. 66, 72 (1954) (upholding Louisiana insurance law's application to business located in Massachusetts for sales to Louisiana consumers); *BMW v. Gore*, 517 U.S. 559, 572–573 (1996) (noting that state laws are valid against out-of-state companies when "supported by the [s]tate's interest in protecting its own consumers or its own economy"); *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 919-21 (Cal. 2006) (holding that out-of-state business's telephone marketing into California "plainly arises directly out of [its] business activity in this state" and is subject to California law); *Consumer Prot. Div. v. Outdoor World Corp.*, 603 A.2d 1376, 1382 (Md. Ct. Spec. App. 1992) (affirming order to stop out-of-state business from sending misleading advertising into state).

[2] *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210 (1944) ("The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State.").

[3] *California v. Thompson*, 313 U.S. 109, 113 (1941) (affirming validity of state law requiring out-of-state and in-state persons alike engaging in subject business in the state to be licensed).

[4] *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 183 (2018) ("[T]here is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection.").

[5] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (holding that out-of-state businesses that "purposefully direct[their] activities at residents" of the state

(Footnote Continued on Next Page)

This means that when corporations located in one state engage in commerce in another, conflict-of-law issues may arise.[6] And courts capably manage such issues by applying standards that consider, inter alia, "the relevant contacts and resulting interests of the State whose law was applied." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 n.10 (1981); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (fraud and other tort claims), § 188 (contract claims), § 221 (equitable claims). When such questions concern consumer protection, the state where the consumer is located during the sale typically has the most significant interest. *E.g.*, *Pilgrim v. Univ. Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2009) ("[T]he State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by its *consumer*-protection laws—are harmed by it.").[7]

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are subject to its jurisdiction from "alleged injuries that arise out of or relate to those activities").

[6] *Watson*, 348 U.S. at 72 ("[A] consequence of the modern practice of conducting widespread business activities throughout the entire United States [is that] more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states.").

[7] *See also, e.g., Elvig v. Nintendo of Am., Inc.*, 696 F. Supp. 2d 1207, 1215 (D. Colo. 2010) ("It is reasonable to assume that most consumers expect to be protected by the laws applicable in the state where they live, purchase a product and use it."); *In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. 208, 228 (D. Colo. 2024) (applying law of consumers' home states to fraud, unjust enrichment, and contract claims); *Corder v. Ford Motor Co.*, 272 F.R.D. 205, 212 (W.D. Ky. 2011) (holding that "the place

(Footnote Continued on Next Page)

These principles equally apply when lenders sell financing to consumers, an area of special concern to states based on unique risks of abuse. *E.g., Lewis v. BT Invest. Managers*, 447 U.S. 27, 38 (2009) ("[S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people[.]"). Accordingly, legislatures in most every state require oversight of lenders that do business there and have developed regulations concerning mortgages, auto loans, small-dollar lending, and other financial products. *E.g.*, Minn. Stat. ch. 46-49. The most fundamental of these protections are usury laws that have existed since the Founding Era and prevent exploitative lending to consumers facing financial distress. *See Fowler v. Equitable Trust Co.*, 141 U.S. 384, 403 (1891) (describing policy of usury laws to protect vulnerable consumers); *Massie v. Rubin*, 270 F.2d 60, 63 (10th Cir. 1959) ("Usury statutes are enacted to protect borrowers from the demands of unscrupulous lenders[].").

Early cases addressing lending between a lender and a borrower located in different states applied historical contract principles to decide choice-of-law questions but generally developed a "regime for usury cases involving consumers that almost always resulted in the application of the law of the borrower's jurisdiction." Peter V. Letsou, *The Political Economy of Consumer Credit*

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of contracting and place of negotiation of the contract would [be] the state in which each purchaser bought his or her truck" subject to claims).

Regulation, 44 EMORY L.J. 587, 660 (1995). In the modern economy, courts also apply usury laws of the state where the consumer enters into a loan contract and becomes indebted.[8] This includes the Tenth Circuit. *See Quik Payday, Inc. v. Stork*,

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[8] *See Otoe Missouria Tribe v. N.Y. State Dep't of Fin. Serv.*, 769 F.3d 105, 113 (2d Cir. 2014) (affirming application of New York usury law because "[m]uch of the commercial activity at issue takes place in New York[,] where the borrower is located; the borrower seeks the loan without ever leaving the state, and certainly without traveling to the [lender's location]."); *CFPB v. CashCall*, 35 F.4th 734, 743 (9th Cir. 2022) (holding loans subject to usury law of state where consumers resided when they took out loans); *Hengle v. Treppa*, 19 F.4th 324, 352-53 (4th Cir. 2021) (same); *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230, 239 (3d Cir. 2022) (same); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 751 (7th Cir. 1977) (upholding Wisconsin usury law for out-of-state lender because it "protect[s] Wisconsin citizens from usurious credit terms imposed when they are residents of the state"); *Aldens, Inc. v. Packel,* 524 F.2d 38, 42-50 (3d Cir. 1975) (same as to Pennsylvania law applied to out-of-state seller); *Minnesota v. Integrity Advance LLC*, 870 N.W.2d 90, 92-93 (Minn. 2015) (holding that Minnesota usury law applied to loans entered into by Minnesota consumers with out-of-state online lender); *Gingras v. Think Finance, Inc*., 922 F.3d 112, 121 (2nd Cir. 2019) (holding that Vermont law applies to online lender doing business with Vermont consumers); *S.C. Dep't of Consumer Affairs v. Cash Central*, 865 S.E.2d 789 (S.C. App. 2021) (holding that out-of-state online lender had to comply with South Carolina rate cap when lending to South Carolina consumers); *CashCall, Inc. v. Mass. Div. of Banks*, 2015 WL 5173531, *3 (Mass. Super. Sept. 1, 2015) (applying Massachusetts law to out-of-state online lender where "[a]ll of the loans were applied for, paid from, and collected from Massachusetts"); *Cash America Net of Nevada, LLC v. Com., Dept. of Banking*, 8 A.3d 282 (Pa. 2010) ("We [] reject [online lender's] attempt to avoid … limits on the rates it may charge simply by operating over the Internet rather than by being physically present in the Commonwealth."); Letsou, *supra*, at 660 (stating that, under modern jurisprudence, "[c]onsumers [have been] commonly permitted to assert defenses arising under the consumer credit laws of their home states, notwithstanding the law of the lender's jurisdiction or any explicit agreement between the borrower and the lender regarding choice of law").

549 F.3d 1302 (10th Cir. 2008) (affirming Kansas lending law's application to out-of-state internet lender); *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978) ("Physical presence of [the lender] in Oklahoma is not required to subject its credit rates to state regulation in transactions with Oklahoma residents.").

Legislatures have also confirmed application of usury laws to all loans within their states. *See* Letsou, *supra*, at 659 ("[M]ost states provide that local consumer credit regulations apply to all transactions involving in-state borrowers…."). The Uniform Consumer Credit Code, for example, has since at least 1975 provided that a "consumer credit transaction" subject to a state's law is one in which a resident executes the loan agreement and receives proceeds in the state. UNIFORM CONSUMER CREDIT CODE OF 1975 § 1.201(2). This reflects the "strong interest" of states "in protecting [their] residents from predatory lending, enforcing consumer protection laws, and providing a forum for litigating violations of [their] [] lending statutes." *Rilley v. MoneyMutual LLC*, 884 N.W.2d 321, 338 (Minn. 2016); *accord Aldens*, 524 F.2d at 43 ("We think it clear beyond question that Pennsylvania has a substantial interest in the rates paid by its residents to foreign companies for the use of money and in the contracts setting those rates."). Thus certain aspects of lending can occur in more than one state and invoke more than one state's laws, but the state where the consumer is located typically has the greater interest in usury protections.

B. *Marquette* Recognized a Federal Exception for National Banks to "Export" Home-State Usury Caps Nationwide.

As an exception to the law outlined above, the National Bank Act (NBA) provides its own statutory scheme that displaces state usury laws for federally chartered banking. 12 U.S.C. §§ 85, 86. State usury laws do not apply to such lending regardless of the location of the bank, consumer, or any aspect of the loan. *Id*. Instead, the NBA sets a usury cap 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." *Id*.[9]

In 1978, the Supreme Court in *Marquette* interpreted this language as applied to loans involving a national bank in one state and consumers in another. 439 U.S. at 311-12. There, the bank in Nebraska was sued by a competing national bank in Minnesota for making loans in Minnesota at rates above those allowed under Minnesota law. *Id*. at 302-06. The Court thus had to interpret section 85 of the NBA to determine if the defendant bank was "located" in Nebraska or Minnesota. *Id*. at 308. In doing so, it observed that "the whereabouts of each [loan] transaction" posed a different inquiry than construing the NBA's "location of the bank" statutory

[9] The NBA does not tip the scale in any state's favor under a conflict-of-law analysis. Rather, it creates its own claim that "arises from federal law" and "refer[s] to the state law [where the bank is located] only to determine the maximum permitted rate." *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 114 (1919).

language. *Id.* at 312. Ultimately, since the bank was headquartered in and organized under Nebraska law, it was deemed "located" there for purposes of section 85 and could "[]not be deprived of this location merely because it is extending credit to residents of a foreign State." *Id*. at 310. Thus, the Court concluded that section 85 allowed the defendant to lend at the higher of Nebraska's allowed rate or 1% above the federal discount rate, effectuating Congressional intent to "give advantages to National banks over their State competitors." *Id*. at 313-14. As a result, national banks operate under a "notable exception" to the "conflict of laws regime whereby states apply their consumer credit laws to all transactions involving local borrowers." Letsou, *supra*, at 662-63.

The Nebraska bank's position in *Marquette* was opposed by the states as infringing traditional sovereign interests. Minnesota intervened to assert its "sovereign determination as to the limit of interest its citizens should have to bear for the every-day necessity of consumer credit" and urged the Court to prevent "other states [from] impos[ing] their usury statutes upon the citizens of Minnesota." 1978 WL 206921, *36 (July 6, 1978). The Conference of State Bank Supervisors (representing all states) supported Minnesota to "preserv[e] the integrity" of state "usury laws in the face of [] out-of-state national bank[s] seeking to charge a higher rate of interest than is permitted under state law." 1978 WL 206927, *2 (July 6, 1978). And Iowa supported Minnesota, seeking to prevent "a gross injustice … in

many other states" where "outside national banks are seeking to charge higher interest rates than allowed by the state where the borrower resides." 1978 WL 223585, *7 (July 10, 1978).

The Court noted these arguments but recognized the issue as a matter of Congressional prerogatives, stating that the "exportation of interest rates" under the NBA would "impair the ability of States to enact effective usury laws," but "[t]his impairment … [was] implicit in the structure of the [NBA]" and a matter of "legislative policy" that would be "better addressed to the wisdom of Congress." *Id*. at 318-19; *Tikkanen v. Citibank*, 801 F. Supp. 270, 279 (D. Minn. 1992) ("The *Marquette* Court reached [its] holding notwithstanding the fact that the exportation principle erodes state authority to enforce consumer protection laws."). The Supreme Court thus recognized that the NBA may infringe on states' preexisting authority to protect consumers when banks are located out-of-state; but that was Congress's decision in its regulation of national banking.

C. *Marquette* Prompted Congress to Enact DIDMCA to Give Similar Lending Privileges for State Banks During a Credit Crisis—But Allowed States to Override Such Provisions to Protect Consumers.

Two years after *Marquette* and in the face of unprecedented borrowing costs and a resulting credit crunch, Congress enacted DIDMCA to immediately give state-chartered banks the same rate privileges afforded national banks. Pub. L. No. 96-221, 94 Stat. 161. Specifically, Part C of Title V set rates and preempted state usury

laws for loans by federally insured state banks, savings associations, and credit unions. *Id*. §§ 521-523.[10] It did so by "engraft[ing] … language" from the section 85 of the NBA. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992); *Usury Lending Limits Report* at 27 (discussing section 85's language in DIDMCA). Thus DIDMCA permitted state banks to, like national banks, lend at "a rate of not more than 1 per centum in excess of the [federal discount rate] or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater." 94 Stat. 161, § 521. This "transfused … the principle of exportation" to state banks, allowing them "to use the favorable interest laws of [a bank's] home state in certain transactions with out-of-state borrowers." *Greenwood*, 971 F.2d at 827.

However, as a "necessary political gesture to the states' rights advocates"—concerns akin to those raised by the states in *Marquette*—DIDMCA differed from the NBA by including "state-override provision[s]" that allowed legislators to stop such preemption within their states. Coreen S. Arnold Ralph, *The 'Most Favored Lender' Doctrine for Federally Insured Financial Institutions—What Are Its*

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[10] Relevant history for DIDMCA includes a report from the Senate Committee on Banking, Housing and Urban Affairs, which can be accessed in full at the Committee's website for the 96th Congress. It is referred to herein as *Usury Lending Limits Report*.

Boundaries?, 31 CATH. U. L. REV. 1, 48 (1981).[11] Specifically, section 525 allowed states to override preemption any time after DIDMCA's enactment:

> [S]ection 521 through 523 of [DIDMCA] shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date … on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, 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 ….

94 Stat. 161, § 525. DIDMCA thus allowed states to reinstate state usury caps to protect consumers in a way the NBA did not.[12] In this sense, DIDMCA was "hardly a Congressional expression of distaste with state usury laws generally, but a compromise with the ideals of such laws … in a time of crisis." *In re Russell*, 72 B.R. 855, 867 (Bankr. E.D. Pa. 1987); *accord* Vandenbrink, *supra*, at 6. Indeed,

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[11] *See also McInnis v. Cooper Communities, Inc.*, 611 S.W.2d 767, 771 (Ark. 1981) (stating that the override provision "reflect[ed] a desire or accommodation by Congress to allow the states to continue to assert their usury limits if they so wish"); Donna C. Vandenbrink, *Usury Ceilings & DIDMCA*, FEDERAL RESERVE BANK OF CHICAGO (1985) ("Congress acceded to the states' historical role in regulating usury ceilings and their concerns about the consumer protection function of ceilings by giving states the opportunity to override any or all portions of Title V.").

[12] *See* Ralph, *supra*, at 9 (stating that, "[d]espite the similarities between the language of section 85 of the [NBA] and sections 521-523," DIDMCA "contain[ed] an important difference" allowing "a state [to] elect not to have the amendments contained in sections 521-523 apply"); *Greenwood Trust*, 776 F. Supp. 21, 34 (D. Mass. 1991) ("The most notable divergence between the [NBA] and [DIDMCA], of course, is that states were given no escape from [NBA] supremacy, while section 525 of [DIDMCA] allows states to override the preemptive effect … by reasserting state usury ceilings otherwise preempted.").

senators and supporters of the bill emphasized how it provided immediate flexibility to banks while affording legislatures long-term authority to protect state residents if they determined rate exportation was overly harmful:

> [T]he [preemption] legislation is not mandatory. Each State is given a 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.

Usury Lending Limits Report at 11.[13]

D. States Have Exercised Override Sparingly, but High-Interest Internet Lending Has Created Renewed Consideration of DIDMCA Override.

Since DIDMCA, some states have exercised their right to override based on commercial, practical, and policy interests considered in each state. Iowa and Puerto Rico have consistently maintained overrides of preemption via sections 521 through

[13] *Accord* at 39 ("The preemptions of State law mandated by the bill would be effective until such time as State legislatures adopted laws stating, in effect, that the Federal override was not wanted."); 41 ("S. 1988 … would honor State prerogatives by enabling legislatures to reject the rate flexibility provisions of this bill through passage of a new State law reaffirming existing regulations. In the view of the majority of the [Federal Reserve] Board, this approach would provide adequate preservation of State authority to regulate lending practices"), 54 ("[B]ecause of the critical nature of the problem, it was worthwhile giving [state legislatures] the opportunity to go at it from the other direction—to say that these usury laws will be preempted but you can reinstate them, you can override, if you wish to do so. This is a very hard problem for State legislatures to deal with."); 206 (stating that the bill "leaves the State legislature of Texas, if they want to override this, the opportunity to do it").

523. 1980 Iowa Acts, ch. 1156, sec. 32; 10 L.P.R.A. § 998l. DIDMCA's formula thus instilled a workable state-by-state compromise allowing legislatures to respond to possible predatory aspects of "rate exportation" if the need arises.

Section 525's application as to out-of-state lenders was also interpreted by the FDIC soon after DIDMCA's enactment. Specifically, the FDIC issued an opinion in 1988 confirming that override "enable[s] States to recover authority [to protect consumers from usury] that section 521 had taken away" and that determining which state a loan is "made in" for purposes of which state's determination controls is based on "the facts surrounding the extension of credit" under a "traditional conflict-of-laws analysis." *Relationship of State Usury Preemption Laws*, FDIC, 1988 WL 1741336 (June 29, 1988).[14] And state banks largely operated under the FDIC's opinion for decades without controversy.

Colorado, however, is the most recent state to override DIDMCA preemption in response to high-interest lending by tech companies operating via "partnerships" with banks in states without usury limits. *See* HB 23-1229 (amending Colo. Rev.

[14] The 1988 opinion was the only direct statement from the FDIC on the override provision before this case and is thus especially instructive. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024) (stating that agency interpretations closer to legislation's enactment and which remained over time "may be especially useful in determining [a] statute's meaning"). The online lenders and the district court below wrongly relied on comments in a much later FDIC opinion letter from 1998 that does not mention the override provision and had nothing to do with interpreting it. 63 FR 27282-01.

Stat. § 5-2-214). These arrangements have exploded in the last decade and provoked renewed consideration as to whether to override. *See* Adam J. Levitin, *Rent-A-Bank: Bank Partnerships and the Evasion of Usury Laws*, 71 DUKE L.J. 329, 370-390 (2021) (discussing model used by high-interest online lenders). Such arrangements also recently prompted Iowa to enforce violations (based on its prior override) as to an out-of-state online lender. *See, e.g.*, *In re Transp. Alliance Bank*, Assurance of Discontinuance (Iowa AG Dec. 12, 2022) (https://perma.cc/ERD7-Y97N). And they are why other states have renewed consideration of override legislation. *See* H.F. 3680, 93rd Leg. (Minn. 2023-24); S.B. 2275, Reg. Sess. (R.I. 2024); B25-0609, 25th Council (D.C. 2023-24).[15]

II. THE DECISION BELOW MISCONSTRUES DIDMCA'S TEXT, NULLIFYING STATE LEGISLATION CONTRARY TO CONGRESSIONAL INTENT.

"[T]he purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotations omitted). Courts discern such intent by "looking to the text and context of the law in question and guided by the traditional tools of statutory interpretation." *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019). Also, if language is "susceptible of more

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[15] This brief does not take a position as to whether the rising "bank partnership" model or other considerations mean states *should* override DIDMCA preemption. That issue is for state legislators or voters to consider and evaluate based on the facts, values, and interests in their states. This brief merely aims to preserve the states' sovereign prerogative to make that determination as Congress authorized.

than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption in areas of traditional state regulation." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 129 (2008) (cleaned up); *accord Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Here, the online lenders' lawsuit and the decision below contort the context surrounding DIDMCA and subject usury laws to undermine the federal statute's text and purpose, nullifying the override that Congress deemed necessary to respect states' authority to protect their consumers.

A. DIDMCA's Override Option is Designed to Allow States to Restore Application of Usury Laws to Protect Resident Consumers.

As fully explained in sections I.B and I.C, the NBA displaced preexisting state laws and choice-of-law norms in favor of a federal usury cap for nationally chartered banks by "exporting" a bank's home-state rate for loans wherever made and Congress enacted section 521 of DIDMCA to allow state banks to do the same. Section 521 thus created rate exportation for state-chartered banks in a way that did not exist before. That is why nonbank tech companies now partner with banks in states without usury limits—to engage in high-interest lending they could not do but for the bank's involvement. But as DIDMCA's text and history make clear, Congress also enacted section 525 to empower states to shield themselves from DIDMCA's preemptive sword and revert to preexisting state law. This override provision, as analyzed fully in section I.C, has no equivalent in the NBA and thus uniquely allows states to opt out of DIDMCA-based rate exportation. In bringing this action,

appellees attempt to profit from rate exportation that exists because of DIDMCA while nullifying the override provisions that made its passage possible.[16]

The context analyzed in section I also dispels appellees' novel theory that the override was only meant to apply to a state's own chartered banks without affecting consumer loans with out-of-state lenders. (Compl. ¶¶ 35, 38.) As an initial matter, the theory makes no sense: there is no reason a state would inhibit its own home-state banks' lending *with consumers nationwide* while allowing out-of-state banks to ignore those restrictions for loans *with consumers in that state*. Again, the purpose of usury laws is to protect financially vulnerable resident consumers. That was the very interest Congress expressed when it included DIDMCA's override provision soon after *Marquette*.[17] But under appellees' theory, the override would have no

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[16] The online lenders argue it is unfair for out-of-state national banks to be able to charge higher rates in states that override DIDMCA preemption. But national banks are subject to centralized federal supervision by the OCC, whereas state banks are primarily supervised by a state financial regulator. Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 5 (1977). And, as recognized in *Marquette*, Congress has traditionally "give[n] advantages to National banks over their State competitors." 439 U.S. at 314. Whether for these or other reasons, Congress expressly allowed state override under DIDMCA but not the NBA. Like the *Marquette* Court told the states, any complaint with that result is "an issue of legislative policy" and "better addressed to the wisdom of Congress" than the courts. *Id*. at 318-19.

[17] *Usury Lending Limits Report* at 26 ("Usury laws are intended to protect small and low-income borrowers from unscrupulous money lenders and to limit the power of lenders to charge whatever interest rate they want."), 43 (noting that "usury

(Footnote Continued on Next Page)

relationship to this core police power recognized by Congress and instead mostly govern lending to out-of-state consumers. Appellees' theory thus eviscerates the careful balance of federalism principles and respect for state sovereignty recognized by Congress.

For this reason, it is unsurprising that citations to the legislative history offered in support of appellees' theory do no such thing. At no point does any bill supporter describe the override as concerning only banks chartered or located in the overriding state and lending nationwide. For example, the only aspect of Senator Proxmire's statement cited in paragraph 35 of appellees' Complaint that addresses the override *supports* that it is intended to allow states to retake their sovereign power to protect consumers from usury as it existed before DIDMCA preemption:

> The presumption of usury laws does not derogate State authority. Under the usury provisions, each State may reimpose its usury limits, if it so desires. We do not take that away from the States. They can put those usury laws back into effect.

126 Cong. Rec. 7070 (1980). Appellees also cited the *Usury Lending Limits Report*, but the report's discussion of the override only includes senators stressing the need for legislatures to be able to resume the *status quo ante* as to their usury laws'

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laws" are "traditionally a State concern" that is "interfered with" by DIDMCA), 236 ("Usury laws have evolved from an ethically rooted prohibition against all interest charges to become a system of rate ceilings designed to protect unsophisticated consumers from the exploitive practices of lenders with differential market power.").

application. (*See* notes 13 and 17 and accompanying text.) As discussed above, that *status quo ante* allowed states to protect consumers from predatory lending without an exemption for lenders located or headquartered out-of-state.

B. Caselaw Analyzing Where Loans Are Made for Purposes of Usury Laws Confirms Congress's Intent that DIDMCA Override Applies to All Lending in a Given State.

The override provision's text confirms its intended application to *all* lending in a state. As analyzed above, Congress authorized states to override DIDMCA preemption as to all "loans made in such state." 94 Stat. 161, § 525. This reference to the state which loans *are made in* is, of course, in contrast to the same section's reference to the state in which banks *are located*. *See Sosa v. Alvarez–Machain*, 542 U.S. 692, 711, n. 9 (2004) (stating "general rule" that Congress's use of "certain language in one part of the statute and different language in another" indicates that "different meanings were intended"). *Marquette* in fact acknowledged that "the whereabouts of each [loan] transaction" is a different inquiry than "the location of the bank." 439 U.S. at 312. These are distinct concepts—the state in which the bank is located and the state in which the loan is made—that the decision below wrongly conflated.

Consistent with these concepts, the caselaw described in section I.A uses similar language and reasoning in applying a state's usury laws to loans in each state, regardless of the lender's location. Indeed, if the "making" of sales or loans did not

take place (at least in part) in the borrower's state, that state's laws could not apply and the borrower's state would have no interest under a choice-of-law analysis. But that is not how courts, including this Circuit, have held.[18]

In fact, this Circuit used the same phrasing as Congress when it held in *Quik Payday* that an online lender's loans "*made* … *to* 972 borrowers" were not "commerce that happens entirely outside Kansas" because Kansas residents either applied for loans while in Kansas or "the transfer of loan funds to the borrower would naturally be to [the consumer's] bank in Kansas." 548 F.3d at 1304, 1308-09. In doing so, this Court recognized Kansas's statute that "deemed [a loan] to have been *made in* Kansas if the creditor induces the consumer who is a resident of [Kansas] to enter into the transaction by solicitation in this state by any means, including but not limited to: [m]ail, telephone, radio, television or any other electronic means." *Id.* at 1305 (emphasis added). This precedent—determining which state a loan is "made in" and subject to a state's usury law—applies common sense and is necessary in interpreting the override provision. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (stating that "interpretation of a word or phrase depends upon reading

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[18] *Quik Payday*, 549 F.3d at 1308 (holding that loans by online lender to Kansas residents did not occur "wholly outside Kansas"); *Aldens*, 571 F.2d at 1161-62 (holding that loans by mail-order seller to Oklahoma residents concerned "sales in Oklahoma" accompanied by "credit applications and charge account agreements" that took place Oklahoma and were validly subject to Oklahoma law); *see also supra* notes 7 and 8 and accompanying text.

the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis").

The holding in *Quik Payday* and similar cases also aligns with common sense and usage. The "making" of a loan may reasonably refer to the contractual "making" of the loan agreement between parties.[19] It may refer to the transfer of funds from one party to and receipt of such funds by another pursuant to such an agreement.[20] Or it may refer more generally to the way in which the agreement or any aspect of the lending is brought about or "made."[21] Regardless, as the caselaw recognizes, important aspects of any of these activities for purposes of usury undeniably occur in the state where the borrower is located (i.e., where the loan contract is executed, funds are paid out and received, and the debt incurred). That is precisely why the usury law of the state where the borrower is located both applies and generally controls under conflict-of-law analyses.

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[19] BLACK'S LAW DICTIONARY at 844 & 861 (5th ed. 1979) (defining *make* as "to cause to exist"; *make a contract* as "to agree upon, and conclude or adopt, a contract"; and *loan* as "the creation of debt by the lender's … agreement to pay money to the debtor [or] the forbearance of debt arising from a loan").

[20] *Id*. (defining "loan" as "delivery by one party to and receipt by another party of sum of money upon agreement … to repay it with our without interest").

[21] *Id*. (referring to "loan" as "a lending"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1363-64 (1971) (defining "make" as "to bring about" or "to cause to exist, occur, or appear: bring to pass" among other like definitions).

Instead of looking to this history of the same phrasing and relevant law as to usury, the decision below erroneously fixates on whether the lender or borrower is more involved in the "making" of a loan. This is misplaced and unnecessary. All business activity subject to consumer-protection laws involves two sides of a transaction: a seller *makes* a sale to a buyer; an advertiser *markets* to a consumer; a fiduciary *advises* a client; a health professional *treats* a patient. As the caselaw in section I.A. makes clear, these are voluntary commercial acts whereby out-of-state businesses enter our states and transact with our states' consumers. By their very nature, they take place to significant degree in the state where the consumer is located and invoke the sovereign consumer-protection interests for that state. The doctrines applying the consumer-protection law of the state where that protected party is located reflect this common-sense approach and must inform any interpretation of DIDMCA's override provision.

CONCLUSION

The Amici States respectfully request that this Court reverse the injunctive order and, if the case is deemed properly brought and ripe for adjudication, issue an opinion that preserves the states' sovereign duty to protect consumers within their borders from usury as expressly directed by Congress.

Dated: September 20, 2024

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(g)(1)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4)(G) and (5) because this brief contains 6,330 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

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