January 30, 2025

The Honorable Nathan Sosa
Chair
House Committee on Commerce and Consumer Protection
State Capitol
900 Court Street, NE
Salem, OR 97301

Re: Support HB 2561

Dear Chair Sosa, Vice-Chairs Chaichi and Osborne, and Members of the Committee:

I write on behalf of the Center for Responsible Lending ("CRL") to offer strong support for HB 2561. The bill will close a major loophole that allows out-of-state interests **to offer loans at annual percentage rates of up to 160%**, far in excess of the 36% cap that the Oregon Legislature has decided should govern loans to Oregonians.

CRL is a non-profit, non-partisan policy and research organization dedicated to building family wealth through the elimination of predatory lending and debt collection practices that push families further into poverty. CRL is affiliated with Self-Help Credit Union, a national community development financial institution that provides access to safe, affordable financial services to low-income communities and borrowers.

State interest rate limits are a vital consumer protection against loans that trap borrowers in unmanageable debt. This applies to small loans with high interest rates, and larger loans with relatively lower interest rates where charges can accumulate quickly.

Among the most irresponsible loan products in existence are higher dollar installment loans at triple digit interest rates. These loans' higher dollar amount and exorbitant interest rates combine to trap borrowers with crushing debt loads. Take one real example of an irresponsible online loan offered by Opportunity Financial ("OppFi"), which testified against the bill at Tuesday's hearing. The customer borrowed $1,700 over twenty months at 160% APR, paying **over $2,800** in finance charges and a total of payments of **over $4,500**.[1] Over the first three months of payments, the borrower paid roughly $620 total yet **only $95 of that amount went to pay down the principal**,

[1] Burned Borrowers: A Look at the Experiences of OppFi Customers, CRL (April 2023), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-burned-borrowers-oppfi-7apr2023.pdf

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with the remainder going to interest payments resulting from the sky-high rate. After those three months the **borrower still owed over $1,600 in principal** despite making over $600 in payments.

Loans such as these, which online lenders routinely make to Oregon residents, are so harmful because they misalign the incentives between lenders and borrowers. In a well-functioning loan market, the interests of lenders and borrowers are aligned, meaning that lenders only profit if borrowers pay back the loans according to their terms. With sky-high interest rates, however, borrowers pay back an amount equal to the loan principal very quickly, so the lender recoups the loan amount in far less time than the loan term. Lenders recoup their investment and cover expenses even if the borrower ultimately later defaults. In such circumstances, lenders are far less careful about assessing a borrowers' ability to repay, leading to irresponsible lending decisions. Indeed, it is no surprise that OppFi last year reported a **net charge-off rate of over 40%**.[2]

How do irresponsible lenders make 160% APR loans in Oregon despite the state's 36% APR interest rate cap? Predatory online lenders believe they can evade Oregon's interest rate caps through what are called "rent-a-bank" schemes. In these arrangements, online non-bank lenders route their loans through banks located in states without usury limits and offer predatory loans nationwide, including in states with usury limits that clearly apply to the non-bank online lender. Rent-a-bank is facilitated by the federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), which granted to state-chartered banks the right to export the interest rates of the home states to other states. These loans undermine the policy choices of states, like Oregon, that have chosen to protect their residents from predatory loans, effectively nullifying those states' usury caps.

There is a simple solution that requires all lenders to play by the same rules and abide by the Oregon legislature's reasoned decision to cap loans at 36%. The U.S. Congress, when it enacted the DIDMCA, permitted states to opt out of the Act's interest rate exportation provision. Oregon should join the jurisdictions that have exercised this power to protect its residents from high-cost out-of-state loans.

Opponents' principal argument against the bill is that it will restrict access to credit. But tolerating sky-high interest rates is not required for Oregon to have a healthy market for personal loans. Oregon's interest rate cap of 36% actually puts the state squarely in the middle of a ranking of states' interest rate cap policy choices. *See* Exhibit A, below. There is a thriving ecosystem of lenders who operate at or below that threshold, and it is not just consumer advocates that would say this. The American Fintech Counsel ("AFC"), the trade group that calls itself the "premier trade association

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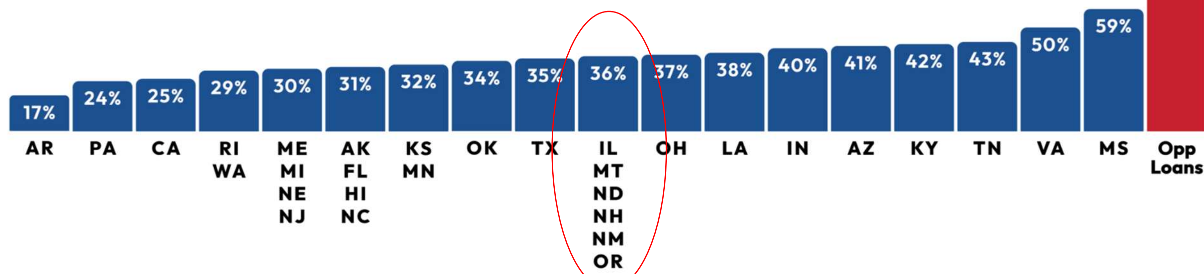
[2] OppFi Investor Presentation (Sept. 2024) at slide 24, *available at* https://s27.q4cdn.com/889956127/files/doc_presentations/2024/Sep/19/oppfi-investor-presentationv9-19-24_vff.pdf

representing the largest financial technology (Fintech) companies and innovative banks," does not admit lenders that lend above 36% APR.[3] AFC has even announced its support for a *nationwide* 36% interest rate limit on all loans.[4] It is odd indeed for AFC to oppose legislation in Oregon that would merely close a loophole in the exact rate cap that the trade group believes should govern across the country.

Exhibit A[5]



Recognizing that loans above 36% are irresponsible is non-controversial and something that many mainstream lenders, big and small, would agree with.[6] Only outlier, irresponsible lenders base their business models on trapping borrowers in unaffordable, high-cost loans above that threshold. Oregonians do not need these loans, which result only in the state's residents being preyed upon by out-of-state interests.

Opponents of the bill also point to the ongoing litigation related to Colorado's 2023 opt out. But the temporary, preliminary injunction decision limiting the scope of Colorado's opt out reflects only the

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[3] Our Mission, AFC, available at https://www.fintechcouncil.org/our-mission

[4] Federal: American Fintech Council (AFC) Announces Support For New Legislation To Create 36 Percent Interest Rate Cap On Consumer Loans (October 31, 2023), *available at* https://www.fintechcouncil.org/press-releases/american-fintech-council-afc-announces-support-for-new-legislation-to-create-36-percent-interest-rate-cap-on-consumer-loans

[5] High Cost Rent-a-Bank Watchlist, National Consumer Law Center ("NCLC") (Sept. 2024), *available at* https://www.nclc.org/resources/high-cost-rent-a-bank-loan-watch-list/

[6] *See, e.g.*, Why Cap Interest Rates at 36%, National Consumer Law Center (August 2021), *available at* https://www.nclc.org/wp-content/uploads/2022/09/IB_Why_36.pdf

views of one jurist: the district court judge that issued the decision. Notably, the decision contradicts the views of the Federal Deposit Insurance Corporation, the federal agency responsible for administering the DIDMCA, **which filed an amicus brief disagreeing with the district court in the Tenth Circuit appeal of that decision**. I have attached a copy of the FDIC amicus brief to this letter as Exhibit B. CRL expects the Tenth Circuit to reverse the district court decision when it hears the appeal in spring 2025.

Oregon's interest rate limits are sound, and the online lenders and out-of-state banks that partner with those lenders should abide by them.

Sincerely,

Andrew Kushner
Senior Policy Counsel, Center for Responsible Lending

EXHIBIT B

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, District of Colorado
The Honorable Daniel D. Domenico,
District Court Case No. 1:24-cv-00812-DDD-KAS

FEDERAL DEPOSIT INSURANCE CORPORATION'S AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF THE AMICUS AND SUMMARY OF ITS ARGUMENT

As a federal agency, amicus curiae the Federal Deposit Insurance Corporation (FDIC) is authorized to file this brief under Federal Rule of Appellate Procedure 29(a)(2). The FDIC is interested in this case because Plaintiffs' interpretation of Section 525 of the Depository Institutions Deregulation and Monetary Control Act (DIDMCA)[1] conflicts with the FDIC's prior interpretation of Section 525; misinterprets the FDIC's General Counsel's Opinion 11,[2] which addressed a different DIDMCA provision (Section 521); and conflicts with the text, structure, purpose, and history of Section 525.

Section 521 of DIDMCA amended the Federal Deposit Insurance Act (FDI Act) to add Section 27, which permits state banks to charge interest at a rate not to exceed the highest of two different rates: a federal rate, and the rate permitted by the state where the "bank" is "located." In turn, Section 525 permits a state to opt out of Section 521's interest-rate regime with respect to "loans made" in that state. The district court interpreted Section 525 to mean that a loan is made in the state where the bank is located under Section 521, and premised that interpretation on the notion that a loan is only made by the bank, without any contribution from the borrower. But where a loan is made under Section 525 cannot be equated *solely* with where a bank is located under Section 521, as demonstrated by the differing texts and purposes of those sections, well-

[1] Pub. L. No. 96-221, § 525, 94 Stat. 132, 167 (1980).
[2] General Counsel's Opinion No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. 27,282 (May 18, 1998) (Opinion 11).

established principles of statutory construction, and prior interpretive pronouncements by the FDIC.

First, the statutory text does not support the district court's interpretation that the "plain and ordinary" meaning of "loans made in such State" is that a loan is made solely in the state where the bank is located. The phrase "loans made in such State" has two key terms: "loans" and "made." The district court did not attempt to define or construe either term, which undermines its reliance on the "plain" meaning of those terms.

The definitions overlooked by the district court make clear that the court's premise that a loan is made *only* by the bank is contrary to the accepted meaning of both "loan" and "made." A "loan" is defined as a "contract" between a lender and a borrower. Therefore, the borrower is a necessary co-participant in the making of a loan. Indeed, in both common and legal parlance, a contract is made by both of its parties. In turn, to "make" is defined as to "cause to happen" or to "cause to exist, occur or appear." The bank is not the only "cause" necessary to bring the loan into existence; indeed, a loan cannot "exist, occur or appear" without a borrower. The borrower is therefore a co-maker of the loan because it causes the loan to exist, occur or appear. The court's premise is also incorrect because it unduly relies on the fact that a loan is made "by" a bank whereas Section 525 does not use the word "by" to modify the verb "made." While it is common to say that a loan is made by a bank to a borrower, it is just as common to say that a "loan" is "made between" a lender and borrower, consistent with the definition of "loan" as a contract between the two.

Second, the statutory structure strongly undermines the district court's interpretation that the state where a "loan" is made under Section 525 is the state where the "bank" is located under Section 521. Because Section 525 and Section 521 use different language, established principles of statutory construction require that these two different terms—"loans made in such State" and "the bank is located"—be given different meanings. *Bates v. United States*, 522 U.S. 23, 29–30 (1997). The district court therefore erred in equating the two terms. Had Congress intended to refer in Section 525 to the state where the bank is located, it presumably would have done so expressly, as it did in Section 521. "The short answer is that Congress did not write the statute that way," and therefore courts should "refrain" from equating different terms. *Russello v. United States*, 464 U.S. 16, 23 (1983).

Third, even if the district court's premise that a loan is made only by the bank were correct, its conclusion that a loan is necessarily made—and only made—where the bank is located does not follow from that premise. This is because the location of the "maker" is not dispositive of the question of where something is "made." Take sellers. In ordinary parlance, sellers "make" a sale and buyers make a purchase. But a sale is not necessarily made only in the state where the seller is located. Rather, as the Supreme Court has held, a sale can occur in a buyer's state even if the seller has no physical presence in that state—*i.e.*, even if the seller is not located there. *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 176–77 (2018). Circuit court decisions interpreting the dormant Commerce Clause, including from this Court, similarly confirm that interstate loans are made both in the borrower's state and in the lender's state.

Fourth, the court's interpretation also conflicts with the history and purpose of the statute, which is to afford all affected states a meaningful right of opt-out from the rate available under the law of the state where the lending bank is located.

ARGUMENT

I. The District Court's Interpretation Equating The State Where A Loan Is Made With The State Where The Lending Bank Is Located Conflicts With The Text, Structure, Purpose, and History of DIDMCA.

Since 1864, national banks have been authorized to charge interest on their loans at the maximum rate permitted by the state where the bank is "located," or at a federal rate not exceeding the 90-day commercial paper rate plus one percent, whichever may be greater. 12 U.S.C. § 85. Before 1980, this provision gave national banks a competitive advantage over state banks. A key advantage was that national banks could charge the above-described federal rate, which at the time was much higher than the rate permitted by most states. Another advantage was that a 1978 Supreme Court decision interpreted Section 85 as allowing national banks to "export" the interest rate of the state in which the bank is "located" to loans made to borrowers residing in states that impose much lower interest-rate caps. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

This competitive advantage ended in 1980, when, to ensure parity between state and national banks, Congress enacted Section 521 of DIDMCA. Section 521 amends the FDI Act to permit state banks to charge the same rates as those national banks are

allowed to charge under Section 85.[3] Section 521 also expressly preempts any contrary state law. But DIDMCA was not concerned solely with the parity between state and national banks provided by Section 521. Rather, to preserve principles of federalism, Congress also enacted Section 525 of DIDMCA, which gives each state the ability to render Section 521 inapplicable with respect to any "loans made in such State."[4] This opt-out right can be exercised at any time. By contrast, states do not have the opportunity to opt out of Section 85. Therefore, by design, Congress created a system under which parity can be eliminated by a state's exercise of statutory opt-out rights under Section 525.

This case concerns the scope of those opt-out rights, which depends on *where* "loans" are "made." Because the term "loans made in such State" appears in a federal statute, it must be interpreted as a matter of federal law.[5] Every tool of statutory construction governing that interpretation (text, structure, history, and purpose), as well as prior administrative interpretations, contradict the district court's conclusion that the state where a loan is made under Section 525 is the state where the lending bank is located under Section 521.

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[3] Specifically, Section 521 of DIDMCA added Section 27 to the FDI Act, codified at 12 U.S.C. § 1831d. While Section 521 of DIDMCA is the same as Section 27 of the FDI Act, for simplicity FDIC refers here to Section 521.

[4] *Id.* § 525.

[5] *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983); *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 603 (1971). Plaintiffs agree that the question is one of federal law.

A. Statutory Text and Structure.

The statutory text and structure do not support the district court's interpretation that the "plain and ordinary" meaning of "loans made in such State" is that a loan can *only* be made in the state where the bank is located.[6] To begin with, the phrase "loans made in such State" has two key terms: "loans" and "made." The district court did not attempt to define or construe either term, which belies its reliance on the "plain" meaning of those terms.

Section 525's text has no plain and ordinary meaning. While courts agree on the definition of "loans" (discussed more fully below), the term "'made' has several alternative meanings, none of which is entirely free from ambiguity." *Tyler v. Cain*, 533 U.S. 656, 662 (2001) ("to make" can alternatively mean "to cause to happen," "to cause to exist, occur or appear," "to lay out and construct," and "to cause to act in a certain way"). Accordingly, as the Supreme Court explained, the term "made" cannot be interpreted "in a vacuum," but must be interpreted in "context" and "with a view to [its] place in the overall statutory scheme." *Id*. When courts interpret terms in their statutory "context," they must look not only to the surrounding words, but also to the "the structure, history, and purpose" of the statute. *Abramski v. United States*, 573 U.S. 169, 179 (2014). Here, all textual and contextual clues contradict the district court's interpretation: both the court's premise that the loan is made only by the bank, and its conclusion that a loan is only made where the bank is located.

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[6] App. 459 (Vol.II). References to the Joint Appendix in this brief are in the form of "App." followed by the page number, followed by parentheses indicating the volume.

1. The district court's premise that a loan is made only by a bank is incorrect.

(a) The meaning of the terms "loan" and "made" contradict the district court's premise that the borrower does not participate in the making of a loan.

As the district court noted, it is common parlance to say that a loan is made by a bank.[7] But that common parlance does not support the additional gloss supplied by the district court: that a loan is *only* made by a bank, without any contribution from the borrower.[8] To the contrary, the ordinary meaning of the term "loan" refutes the court's premise that a loan is made only by the bank. "The classic definition of a loan" adopted by virtually all courts to address the issue (including this Court) is that "[a] loan of money is a *contract* by which [1] one delivers a sum of money to another and [2] the latter agrees to return at a future time a sum equivalent to that which he borrows." *Calcasieu-Marine Nat'l Bank of Lake Charles v. Am. Emp. Ins. Co*., 533 F.2d 290, 296–97 (5th Cir. 1976) (emphasis added). As this definition shows, a loan is a "contract" between a lender (one who "delivers a sum of money to another") and a borrower (one who "agrees to return at a future time [the borrowed] sum"). The necessary contribution of the borrower to the making of the loan is evident in this definition, since only the borrower can perform the second action—*i.e.*, make the "agree[ment] to return" the sum borrowed. *Id.*; *Gen. Motors Acceptance Corp. v. Mid-W. Chevrolet Co.*, 66 F.2d 1, 5 (10th Cir. 1933) ("A loan of money involves *an absolute agreement to return* the sum borrowed.")

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[7] App. 457 (Vol.II).
[8] App. 457 (Vol.II); *see also id.* at 459.

(emphasis added).[9]

This definition also shows that the borrower is not a mere passive recipient of the loan as the district court proposes,[10] but a necessary participant in the making of it. Without a borrower, there is no agreement to repay, and therefore no loan. By focusing solely on the bank, the district court erroneously equated the loan with lending (*i.e.*, with the first part of the definition of a loan), overlooking the equally necessary second part of that definition, which focuses on the borrower's part in the making of the loan.

To be sure, as the district court points out, Congress has in many instances referred to banks making loans. But nothing in those past references precludes the existence of a co-maker (the borrower). Therefore, those references are fully consistent with the classic definition of "loan," under which both the bank and the borrower are necessary participants in the making of the loan.

In addition, as the definition of "loan" shows, "[a] loan of money is a contract." *Calcasieu-Marine,* 533 F.2d at 296–97. Under either common parlance, legal usage, or common sense, a contract—including a loan—is "made" by both of its parties, not by one of the parties alone.

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[9] *Calcasieu-Marine* adopted the "classic" definition of a "loan" from in *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir. 1914). *In re Grand Union Co.*'s definition was also adopted by this Court in *General Motors Acceptance Corp.* and by virtually all other circuit courts to address the issue. *See, e.g.*, *In re Chambers*, 348 F.3d 650, 656–57 (7th Cir. 2003) (adopting *In re Grand Union Co.*'s definition); *Boston Univ. v. Mehta (In re Mehta)*, 310 F.3d 308, 313 (3d Cir. 2002) (same); *United Va, Factors Corp. v. Aetna Cas. & Sur. Co.*, 624 F.2d 814, 816 (4th Cir. 1980) (same); *U.S. Dep't of Health & Human Servs. v. Smith*, 807 F.2d 122, 124 (8th Cir. 1986).

[10] App. 457 (Vol.II).

Even looking at common parlance and not a legal definition, a loan is not an item that can be produced or created by one party (the lender) independently of any transaction. While bread can be made even if there is no buyer for it, a loan cannot be made without a counterparty (the borrower). It is not "common"—indeed it is impossible—to have a loan of money without a borrower.

The meaning of "made" further reinforces the conclusion compelled by the meaning of "loan." A loan is "made" by a bank because the bank "cause[s]" it "to happen," "to exist, occur or appear." *Tyler*, 533 U.S. at 662. But the bank is not the only "cause" necessary to bring the loan into existence; indeed, a loan cannot "exist, occur or appear" without a borrower. Stated differently, a loan has *two* causal agents—the bank and the borrower; both are necessary for the loan to "happen" or come into existence. Thus, a loan is also made by a borrower because the borrower "cause[s]" it "to happen," "to exist, occur or appear." *Id.*

(b) Section 525 does not use the term "by" to modify the term "loans made," which is equally susceptible of a "between" modifier.

The district court justified its interpretation by arguing that a loan is made "*by* a bank *to* a borrower."[11] But Section 525 does not use the word "by" to modify the verb "made." Therefore, the court erred in adding a limitation that Congress has not imposed. The court also pointed to several other provisions in Title 12, such as 12 U.S.C. § 4742(4), where Congress referred to loans made "by" a bank.[12] But those provisions

[11] App. 458 (Vol.II).
[12] App. 458 (Vol.II).

actually undermine the court's reliance on the word "by" because Congress omitted that modifier in Section 525. *See*, *e.g.*, *Bates*, 522 U.S. at 29–30 (courts presume that Congress did not intend for the omitted language to apply).

The district court's justification also fails because while it is common to say that a loan is made *by* a bank to a borrower, it is just as common to say that a "loan" is made "between" a lender and borrower. For example, courts have referred to "loans made between the parties during [their] marriage,"[13] to "loans made between 'related' organizations,"[14] or to "a loan made between the plaintiff and the carbon company."[15] Congress's omission of a "by" modifier for the term "loans made" in Section 525 renders the term equally susceptible of being read with a "between" modifier. Such reading is fully consistent with the definition of a "loan" as a "contract" between a lender and a borrower. *Calcasieu-Marine,* 533 F.2d at 296–97.

Just like the modifier "between," the modifier "with" also confirms that the borrower is a co-participant in the making of the loan. For example, this Court referred to an online lender who "choose[s] to make payday loans *with* Kansas consumers."[16] The lender thus does not make the loans alone, but together "with" the borrower.

The district court also noted that "[h]ad Congress sought to put the focus on the borrower, [it could have allowed States] to opt out as to loans 'made to borrowers in such

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[13] *Profetto v. Lombardi*, 137 A.3d 922, 924 (Conn. App. 2016).
[14] *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 661 (D.C. Cir. 1994).
[15] *Holmes, Booth & Haydens v. Willard*, 5 N.Y.S. 610, 611–12 (S. Ct. N.Y. 1889).
[16] *Quik Payday Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008).

State.'"[17] But Congress did not seek to put the exclusive focus on the borrower, just like it did not seek to put it on the bank. Rather, by using the term "loans made," Congress put the focus on *both* parties that are necessary to make a loan: the bank and the borrower.

Moreover, just like it did not say loans "made *to borrowers* in such State," Congress did not say loans "made *by banks* in such State," which underscores that Congress did not seek to put the exclusive focus on the lending bank. The district court erred in concluding otherwise.

2. Just like its premise, the district court's conclusion is incorrect.

(a) The statutory structure indicates that the state where a loan is made under Section 525 cannot be equated with the state where the bank is located under Section 521.

The statutory structure strongly undermines the district court's interpretation that the state where a "loan" is made under Section 525 is only the state where the "bank" is located under Section 521. As the FDIC explained in its brief as amicus below, because Section 525 and Section 521 "use considerably different language," established principles of statutory construction require that the two different terms used in these two sections—"loans made in such State" and "the bank is located"—be given different meanings. *Russello*, 464 U.S. at 23.[18] The district court erred in equating the two terms. Had Congress intended to refer in Section 525 to the state where the bank was located, it presumably would have done so expressly, as it did in Section 521. "The short answer is

[17] App. 457 (Vol.II); *id.* at 459.

[18] FDIC Amicus Br., App. 155-156 (Vol.I).

that Congress did not write the statute that way," and therefore courts should "refrain from concluding . . . that the differing language in the two subsections has the same meaning." *Id.* "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates*, 522 U.S. at 29–30 (1997).

The district court did not really grapple with the structure of DIDMCA. It did not address the FDIC's cited authorities (*Rusello* and *Bates*), nor did it acknowledge the well-established principle for which they stand: that different terms used in different sections of the same act are presumed to have different meanings. Nor did the district court acknowledge that a 1988 Interpretative Letter issued by the FDIC rejected the conclusion reached by the district court.[19] The 1988 Interpretive Letter relied on the same principle of statutory construction as these cases: use of different terms in the two sections compels the conclusion that the state where a loan is made under Section 525 cannot be equated with the state where a bank is located under Section 521.[20]

The district court's only mention of the 1988 Interpretive Letter cited the letter's statement that the determination of where a loan is made "should be based upon an analysis of the facts" in each case.[21] In the court's view, this meant that the letter did not

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[19] FDIC Advisory Opinion 88-45, *Relationship of State Usury Preemption Laws*, 1988 WL 583093 (June 29, 1988) (1988 Interpretive Letter).

[20] *Id.*

[21] App. 461 (Vol.II).

fully "resolve" the question of where a loan is made.[22] But simply because the 1988 Interpretative Letter acknowledges that the ultimate inquiry for a particular loan is a *factual* one, that does not mean that the letter did not address certain legal issues that apply generally. Specifically, the letter expressly considered, and rejected, the construction proposed by a bank there that the state where a loan is made under Section 525 is the state where a bank is located under Section 521. The district court had no answer to this legal conclusion and the principles of statutory interpretation on which it relied.[23]

Consistent with the interpretation in the 1998 Interpretive Letter, the FDIC Board in 2020 also distinguished between the state where a bank is located and the state where a loan is made. Specifically, in the preamble to a 2020 final rule, the Board explained that a bank would not be permitted to charge the "higher" rate permitted by the state where the bank is located with respect to loans that are made in a state that has opted out, which indicates that the opting-out state can be distinct from the state where the bank is located. *See* Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,153 (July 22, 2020) (Final Rule) ("[I]f a State opts out of section 27, State banks making loans in that State could not charge [under federal law] interest at a rate exceeding the limit set by the State's

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[22] App. 461 (Vol.II).

[23] The district court itself explained that even if the ultimate determination of where a loan was made is a factual one, this does not preclude the court from reaching the *legal* conclusion of whether the borrower's location is a relevant factor in that inquiry. App. 451 (Vol.II).

laws, even if the law of the State where the State bank is located would permit a higher rate."). The district court did not address this authority, either.

(b) The statutory text reinforces the distinction between the two terms.

The statutory text reinforces the distinction between the two terms suggested by the structure of the statute, indicating that the location of the bank is not the sole determinant of where a loan is made.

First, because a loan is a "contract" between a lender and a borrower, it naturally follows that the location of the borrower determines where the loan is made just as much as the location of the bank. Indeed, the district court found the bank's location to be relevant precisely because the bank is involved in making the loan.[24] But as shown above, both the borrower and the lender are actually involved in—and necessary to—the creation of a loan. Therefore, both parties' locations matter and it would be artificial to select just one location.

Second, cases examining where loans are made confirm that the location of the borrower informs where a loan is made just as much as the location of the bank. When parties enter into a loan transaction in the same state, the loan is "made" in that state. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 669 (7th Cir. 2010) (where Indiana borrower traveled to lender's state (Illinois) to enter into the loan, "contract was, in short, made and executed in Illinois"). But when the parties enter into a loan transaction in two different states—such as when a borrower physically present in one state transacts by

[24] App. 459 (Vol.II).

mail, phone, or internet with an out-of-state lender—such transaction is made in both states, and both states can regulate it because the elements of the transaction have occurred in both states. That is, "[w]hen an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract." *A.S. Goldmen & Co. v. N. J. Bur. of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999).

This Court reached the same conclusion in *Quik Payday*. In that case, an online lender located in Utah argued that Kansas could not regulate its loans to Kansas residents because it had no physical presence in Kansas and thus the transactions "happen[ed] entirely outside Kansas." 549 F.3d at 1308. This Court expressly rejected that argument, explaining that because the out-of-state internet lenders "choose to make payday loans with Kansas consumers while [the consumers] are in Kansas," the transaction at least partly happened in Kansas, and thus Kansas law did not apply extraterritorially in violation of the (dormant) Commerce Clause. *Id*. As this Court explained, the "controlling" fact was Kansas law only applied if the borrower was located in Kansas at the time it entered into the loan. *Id*.[25]

The district court rejected this Court's decision in *Quik Payday* and the other similar cases cited above because in its view "they address the separate issue of when one

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[25] *See also, e.g., Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 95 (Minn. 2015) (where Minnesota borrowers entered loans "while physically located in the state of Minnesota," applying Minnesota law to loans did not violate Commerce Clause even if lender was not located in Minnesota).

state may constitutionally regulate an activity involving conduct that occurs in another state."[26] But that distinction is flawed because the "conduct" that was alleged to have occurred in another state was precisely the making of the loan. Therefore, these cases inform *where* loans are made. As shown, they teach that in interstate transactions, the making of a loan does not occur solely in the out-of-state lender's state, but also occurs in the borrower's state, which is why the borrower's state can regulate it. There is no textual or analytical reason to distinguish between the reasoning employed in those cases and the analysis required in this case.

The district court also reasoned that even accepting the principle that a contract is made "in the state(s) where the lender and the borrower are located," that principle is inapplicable here because a loan is not a contract.[27] Specifically, the court noted that Section 525 distinguished between the "loan" and a "commitment to make a loan" by indicating that "the contract or 'commitment to make [a] loan' may be entered into at a different time than the 'loan is made.'"[28] The court then implied that this distinction indicates that the commitment to lend is "the contract,"[29] whereas the loan is not. This view is incorrect. First, the "commitment to make a loan" is an agreement to lend, it is not the loan itself, nor is it the "loan contract." It is just a different contract. *See, e.g.*, *Runnemede Owners, Inc. v. Crest Mortg. Corp.*, 861 F.2d 1053, 1056–57 (7th Cir. 1988) (a commitment is "nothing more than an agreement to consider extending a loan" and its

[26] App. 460 (Vol.II).
[27] *Id.*
[28] *Id.*
[29] *Id.*

role is "to provide the initial framework from which the parties might later negotiate a final loan agreement, if the deal works out"); *Homestead Golf Club, Inc. v. Pride Stables*, 224 F.3d 1195, 1200-01 (10th Cir. 2000) (where "letter of commitment" "stated explicitly the parties' intent to document the details of their arrangement in writing at a later time," that letter was not the loan contract itself). Thus, far from suggesting that a loan is not a contract, the "commitment" language in Section 525 merely made the unremarkable distinction between two *different* contracts: the loan and the commitment to lend.

Second, the district court's notion that a loan is not a contract is mistaken because there is nothing in Section 525's text indicating that Congress wished to depart from the traditional understanding of a loan as a contract or agreement. *Calcasieu-Marine*, 533 F.2d at 296–97 ("[a] loan of money is a contract"). Third, and in any event, *Quik Payday* and similar cases involved actual loans not mere commitments to make a loan, and therefore their teachings apply to loans, not just to mere commitments.

Additionally, by omitting the state where the borrower entered into the loan, the district court's interpretation is under-inclusive. Yet it is also over-inclusive, because it looks at the state where the bank is located, not where it made the loan, and the former is much broader than the latter. Under Section 521, banks can be deemed "located" in one state even if they perform *none* of the three lending functions related to the banks' role in the making of the loan in that state.[30] For example, where the three lending functions

[30] The three lending functions are loan approval, extension of credit, and disbursal of the loan proceeds. App. 444 (Vol.II).

occur in three different states, the bank can be deemed located in four different states: each of the three states in which a lending function is performed, *and* in its home state (even if no lending function occurs there), and the regulators permit the banks to charge the highest rate permitted by any of these four states.[31] But while three of those states arguably have some connection to the making of the loan, the fourth state—the bank's home state—has no connection to it. In such cases, while the bank is located in its home state, the loan is not made in that state. Accordingly, the term "located" is broader than the term "made."

(c) But even accepting the district court's premise that a loan is made only by the bank, the court's conclusion that the loan is made where the bank is "located" does not follow from its premise.

Most importantly, even accepting *arguendo* the district court's premise that a loan is made *only* by the bank, that premise does not support the court's conclusion that the bank's location determines where the loan is made. The realities of modern commercial life reject the court's inference that things are necessarily made in the place where their maker is located. Take sellers for example. In ordinary parlance, sellers make a sale and buyers make a purchase. But as the Supreme Court confirmed, the location of the seller does not alone determine where the sale is made. Specifically, the Supreme Court concluded that the sale occurred in the buyer's state even if the seller was an online retailer with no physical presence in the buyer's state. *Wayfair*, 585 U.S. at 176–77. Therefore, a sale is not necessarily made in the state where the seller is located.

[31] *See* App. 159 (Vol.1); *id*. at 161.

As the Supreme Court explained, the realities of modern commercial life make clear that a seller can be deemed to conduct business transactions in a state even if the seller lacked any physical presence in that state: "Although physical presence 'frequently will enhance' a business' connection with a State, 'it is an inescapable fact of modern commercial life that a substantial amount of business is transacted … [with no] need for physical presence within a State in which business is conducted.'" *Id*. The Supreme Court concluded that because the sale transaction occurred in South Dakota even if the seller was located elsewhere, South Dakota could regulate it without violating the prohibition imposed by dormant Commerce Clause against regulating conduct that occurs outside that state. Thus, just like a seller can make sales in the buyer's state even if the seller is not located there, so can a lender make loans in the buyer's state even if the lender is not located there.

B. The History and Purpose of Section 525.

The district court's interpretation also conflicts with the history and purpose of DIDMCA. Congress enacted Section 521 to enable state banks to compete with national banks by allowing them to charge the same rates as national banks, including the rate permitted by the state where the lending bank is "located," and preempting any other potentially-applicable state laws imposing lower rates. But Congress balanced that economic objective with Section 525 and its federalism objective of enabling states to maintain a meaningful measure of control over usury rates by opting out of the preemption imposed by Section 521. By depriving borrowers' states of the ability to

regulate interest rates, the district court's interpretation conflicts with the federalism concerns that animated the passage of Section 525.

The legislative history of Section 525 confirms that Congress wanted to provide all states "affected" by Section 521 a meaningful opportunity to override Section 521's preemption of their state "usury ceilings."[32] Affected states include not only the state where the lender is located (whose usury caps can be exceeded under Section 521 when the federal rate is greater), but also the state where the borrower is located (whose caps can be exceeded through both the federal rate and the exportation of the rate of the lender's state). The district court erred in permitting opt-out rights for only *some* of the states affected by federal preemption—*i.e.*, the states where the lender is located. This is especially so where those states have the *least* interest in protecting borrowers in other states, and the traditional purpose of state usury ceilings is to protect borrowers.

The online lenders argued below that Section 525 was not intended as a tool to enable opting-out states to reach into other states. But that response is unavailing. An opt-out would not enable a borrower's state to apply their laws extraterritorially: an opt-out would simply render Section 521 inapplicable to loans made within the borrower's state. Other provisions, including the dormant Commerce Clause, apply to ensure that a borrower's state does not impermissibly "reach into other states." And as the dormant Commerce Clause cases discussed above show, a loan transaction between a borrower

[32] H.R. Conf. Rep. No. 96-842, at 78-79 (1980) ("[s]tate usury ceilings on all loans made by Federally insured depository institutions ... will be permanently preempted subject to the right of *affected states* to override [preemption] at any time") (emphasis added).

physically present in that state and an out-of-state lender occurs at least partially in the borrower's state, and therefore that state would not be reaching extraterritorially into other states.

C. The District Court's Remaining Authorities Are Inapposite.

The district court's remaining authorities are inapposite because they address where a bank is located under Section 521, not where a loan is made under Section 525.

The Supreme Court's pre-DIDMCA decision in *Marquette* is inapposite because it did not assess where the loan was made—it did not use that term nor address that concept. Rather, *Marquette* addressed solely where a national bank was located for purposes of Section 85 (*i.e.*, the section after which Section 521 was later patterned). In rejecting Minnesota's argument that "a national bank which systematically solicits Minnesota residents … must be deemed to be '*located*' in Minnesota" for purposes of Section 85, *Marquette* held that "[t]he congressional debates surrounding the enactment of § 30 [Section 85's predecessor] were conducted on the assumption that a national bank was '*located*' for purposes of the section in the State named in its organization certificate," and that "Omaha Bank cannot be deprived of this *location* [*i.e.,* Nebraska] merely because it is extending credit to residents of a foreign State." *Id*. at 310-312 (emphases added). This was so even if "the convenience of modern mail permits Minnesota residents holding Omaha Bank's BankAmericards to receive loans without visiting Nebraska." *Id*.

Like *Marquette*, FDIC General Counsel's Opinion 11 is inapposite because it only addressed where a *bank* was "located" for purposes of Section 521, not where a *loan* was

made for purposes of Section 525. Specifically, while *Marquette* suggested that a bank is located in the state named in its certificate of incorporation, another Supreme Court case had concluded that a bank is considered located in any state in which it has a branch. Thus, it was unclear which of the many potential locations was intended to govern for purposes of Section 521. *See* Opinion 11, 63 Fed. Reg. at 27,283. Opinion 11 devised a test to determine a bank's location for purposes of Section 521 based on where the bank performed three lending "functions" related to a loan. *Id.*

While the district court deemed relevant Opinion 11's use of the term "made," that reliance is inapposite given that Opinion 11 did not address Section 525, and the word "made" had a different context in Opinion 11. Specifically, Opinion 11 looked at where the bank performed its part in the making of the loan (the three functions) in order to decide where the bank was located. Nothing in Opinion 11 suggested that the loan was made *solely* where the bank was located, or that the place where the borrower performed its necessary part in the making of the loan is irrelevant to where a loan is made. It is therefore an impermissible expansion of Opinion 11 to read it as concluding, *sub silentio*, that a loan is made only where the bank is located. Such expansion is particularly inappropriate given that Opinion 11 does not state that it was departing from the FDIC's prior interpretation in the 1988 Interpretive Letter that where a loan is made under Section 525 cannot be equated with where the bank is located under Section 521, nor provide any reasons for such departure. Opinion 11 does not cite nor address the 1988 Interpretive Letter.

For similar reasons, the Eighth Circuit's conclusory decision in *Jessup v. Pulaski Bank*, 327 F.3d 682, 685 (8th Cir. 2003) is also inapposite. That decision involved a different statute (12 U.S.C. § 1831u(f)) enacted almost two decades after DIDMCA. That statute had a different structure and served a different purpose from DIDMCA. *Jessup* also lacks persuasive value because it performed no statutory construction analysis of the statutory term "made," nor addressed FDIC's 1988 Interpretive Letter or any of the statutory construction arguments in this brief showing why the state where the loan is made cannot be equated with the state where the lending bank is located.

CONCLUSION

For all of the foregoing reasons, this Court should adopt the FDIC's interpretation of Section 525 and overturn the preliminary injunction.

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4)(G) and (5). This brief contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Microsoft Word 2016 was used to calculate the word count.

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/s/ Michael K. Morelli
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I hereby certify that on September 23, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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