IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:24-cv-812-DDD-KAS

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

Plaintiffs,

v.

PHILIP J. WEISER, Attorney General of the State of Colorado, and MARTHA FULFORD, Administrator of the Colorado Uniform Consumer Credit Code,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Section 525 applies only to loans "made in" the opting-out state. Banks "make" loans. Borrowers do not. And an out-of-state bank "makes" loans in an opting-out state only if the bank performs all key lending functions there.

Ignoring DIDMCA's text, context, and historical interpretation, Colorado and the FDIC advance two different—albeit equally novel—interpretations of "made in." Neither works. Colorado relies on Dormant Commerce Clause cases to argue that a loan is made where the borrower is located. The FDIC argues those very same cases support a different interpretation of DIDMCA: A loan is "made" where both the borrower *and* the lender are located. But those cases address constitutional limits on state action and shed no light on the statutory-construction issue here. And notably, the FDIC does not even assert its current view merits deference, presumably because it explicitly disavows its own prior statements in service of a new policy preference.

If Colorado and the FDIC wish individual states to have broader authority over other states' banks than DIDMCA provides, they must ask Congress to grant it. They cannot ask this Court to rewrite the statute. The Court should preliminarily enjoin Colorado from enforcing Section 3 according to Colorado's overbroad interpretation.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable.

A. Plaintiffs have standing and their claims are ripe.

Colorado argues Plaintiffs lack standing by speculating—without citing any evidence—that "the number of loans affected" by the opt-out "could be a handful … or none." Opp. 18. First of all, even a "single dollar" of injury establishes standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). Furthermore, Colorado at the same time concedes Plaintiffs would have standing if their members offer loans that, under Plaintiffs' construction of DIDMCA, should not be subject

to Colorado's caps. Opp. 18. Plaintiffs submitted seven sworn declarations showing exactly that. They describe the types of products Plaintiffs' members offer that would become subject to Colorado's rate caps, including the affected loan volume in Colorado (hundreds of thousands), and associated revenues (millions of dollars). Mot. (Dkt. 24) 8, 16-17. Colorado inexplicably ignores this evidence, and certainly does not contest it.

Colorado also dismisses Plaintiffs' evidence regarding members' compliance costs, lost goodwill, and lost revenue, arguing "banks will always incur compliance costs when the law changes, relationships will strain where impacted, and some prior sources of revenue may be prohibited." Opp. 17. This misses the point: When the change in law is *illegal*, the costs it imposes constitute an irreparable injury that provides standing. *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902-03 (10th Cir. 2012).

Finally, Colorado asserts Plaintiffs' claims are not ripe because "Plaintiffs' alleged harms are too conjectural to confer standing in a pre-enforcement context," and because Colorado will interpret the opt-out consistent with federal law. Opp. 17, 16; Fulford Decl. (Dkt. 39-1) ¶ 3 & Ex. A-1. But the "pre-enforcement nature" of this suit is not "troubling" because Plaintiffs have "alleged an actual and well-founded fear that the law will be enforced against them." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (cleaned up). Indeed, Defendants tell the Court that they explicitly interpret Section 525's opt out to apply to loans made by Plaintiffs' members—banks chartered outside Colorado—to consumers physically located in Colorado. *Compare* Opp. 11, *with* Mot. 7. This application is plainly *inconsistent* with federal law, and thus Plaintiffs' claims are ripe. *See Consumer Data*, 678 F.3d at 907.

B. Plaintiffs have pled a valid cause of action.

Colorado also argues that Plaintiffs have no private right of action. Opp. 14-16. But "if an individual claims federal law immunizes him from state regulation, the court may issue an

injunction upon finding the state regulatory actions preempted," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908)), and may "grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id*. Unlike the statute in *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286 (D. Colo. 2016) (Opp. 14-15), DIDMCA grants a federal right to Plaintiffs' members to lend at rates that Colorado intends to prohibit. Plaintiffs' cause of action is thus precisely what *Ex parte Young* and *Armstrong* authorize. Compl. (Dkt. 1) 26 (Prayer for Relief).

II. Colorado's And The FDIC's Interpretations Of The Scope Of Section 525 Ignore Its Text And Are Unsupported.

Plaintiffs detailed how the statutory text, history, regulatory interpretations, and caselaw all confirm that the Section 525 opt-out applies only to loans "made in" the opting-out state as determined by a functional analysis focused on where the bank performs core loan-making functions. Mot. 2-6, 10-15. The borrower's physical location has never been part of the analysis.

Lacking an adequate response to Plaintiffs' textual argument, Colorado instead accuses Plaintiffs of "ask[ing] this Court to fashion—from whole cloth—a new federal test for determining where a loan is made." Opp. 7. But it is Colorado and the FDIC that seek to jettison decades of caselaw and regulatory precedent (including the FDIC's own) and ask the Court to rewrite Section 525—from "loans made in [a] State" to "loans made to borrowers physically present in" a State. Opp. 11; FDIC Br. 6-7. The Court should reject these revisionist interpretations.[1]

[1] Colorado suggests that a "presumption against preemption" applies here. Opp. 4. That presumption is not applicable because the question presented is the scope of preemption under a statute containing an express-preemption provision (DIDMCA Section 521), which is a matter of ordinary statutory interpretation. *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) ("When a statute contains an express preemption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.") (cleaned up). Regardless, Colorado does not explain how a presumption would lead the Court to adopt Colorado's interpretation.

A. Lenders "Make" Loans.

As Plaintiffs explained (Mot. 10-12), the text of Section 525 refers to where loans are "made," which necessarily focuses on the party who "makes" the loan, *i.e.*, the loan originator. "Make" means to "create"—and only banks create loans, not borrowers. Mot. 11. Just like a baker "bakes" a cake in the oven, not where the buyer buys or consumes the cake, a bank "makes" a loan where the bank conducts the core functions associated with loan creation, not where the borrower receives or uses the loan funds.

This usage of "make" is not unique to Section 525. Throughout Title 12 of the U.S. Code—which governs banking—*banks* "make" loans. *See, e.g.*, 12 U.S.C. §§ 85, 371(a), 1757(5), 1785(f)(1), 1831d(a), 1831u(f), 2610, 4742(4), 5701(3); *see also, e.g.*, 12 C.F.R. § 215.3. Borrowers, by contrast, "receive" or "obtain" loans. *See, e.g.*, 12 U.S.C. §§ 2279aa(7)(c), 4742(10)(a), 5602(b)(1), 5701(9)(a). Colorado and the FDIC offer nothing to justify treating Section 525 as an exception to this uniform rule.

Congress could have chosen to expand Section 525 "to loans made ***or received*** in any State." But it did not do so, and "[a] court"—or in this case a party—"does not get to … insert convenient language to yield [its] preferred meaning." *Borden v. United States*, 593 U.S. 420, 436 (2021).

Likely because their arguments are not grounded in the actual statutory text, Colorado and the FDIC do not even agree on an alternate interpretation. Does "made in" refer to where the borrower happens to be located, as Colorado argues (Opp. 10-11)? Or is the "transaction … made in both states," as the FDIC asserts (FDIC Br. 4)? Regardless, both definitions suffer from the same flaw: Making a *loan* and making a *contract for a loan* are two different things. Thus, while "'to make a 'contract'" might, depending on state law, include such acts as "'executing, signing, or delivering'" that contract," Opp. 10-11 (quoting Black's Law Dictionary (11th ed. 2019),

DIDMCA refers only to loans, not loan contracts. *Compare Loan*, Black's Law Dictionary (6th ed. 1979) ("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*, Webster's Third Int'l Dictionary (1971 ed.) ("money lent at interest") *with Contract*, Black's Law Dictionary (6th ed. 1979) ("An agreement between two or more parties which creates an obligation to do or not to do a particular thing"; "The writing which contains the agreement of parties, with the terms and conditions, and which serves as proof of the obligation."); *Contract*, Webster's Third Int'l Dictionary (1971 ed.) ("an agreement between two or more persons or parties to do or not to do something"). Moreover, the FDIC cannot explain why federal law would impose a shifting standard for "made" that turns on state law about where contracts generally are deemed "made," rather than a uniform federal standard.[2]

B. The use of "located" in Section 521 does not change the meaning of "made," which is used in both Sections 521 and 525.

Colorado and the FDIC rely primarily on the canon of meaningful variation to argue that under principles of statutory construction there must be a distinction between where a loan is "made" under Section 525 and where a bank is "located" under Section 521, and that this distinction must "reflect differences in congressional intent." FDIC Br. 1; *see also id.* at 8-10; Opp. 7-8. Not so.

First, Plaintiffs are not arguing that where a bank "makes" a loan and where the bank is "located" for purposes of applying state interest-cap preemption statutes is identical in every case—though there is considerable logical overlap because identifying where a bank's loan-

[2] If contracting concepts governed the definition of where a loan is "made" for Section 525, governing-law provisions might also be relevant. *See* FDIC Interp. Ltr. No. 88-45, 1988 WL 583093, at *2 (June 29, 1988) ("Equally [relevant] is where the parties intend the contract to be made under the contractual provisions itself.").

making functions occur informs the determination of where a bank is "located" in connection with a particular loan. Mot. 13-14.

In any event, the "meaningful variation" argument is "'defeasible'" by other evidence. *Pulsifer v. United States*, 144 S. Ct. 718, 735 (2024) (quoting A. Scalia & B. Garner, Reading Law 170-71 (2012)), and fails here because Section 521 does not use only the word "located" when describing which state's interest-rate caps apply for preemption purposes; it *also* uses the word "made." Section 521 (like NBA Section 85) specifies the bank may "charge on any loan … *made*" interest pursuant to the cap where the bank is "located." 12 U.S.C. §1831d (emphasis added); *see also* 12 U.S.C. § 85. As courts and regulators have therefore explained, determining where a bank is "located" under Section 521 turns on where the bank performed key loan-creation functions when it "made" a particular loan. Mot. 13-15. Neither Colorado nor the FDIC explain why the analysis of where a loan is "made" should ignore the borrower's location under Section 521, but depend on it for Section 525.[3] Indeed, the consistency canon Colorado and the FDIC reference instead creates a presumption that the relevant definition of where a loan is "made" by a bank should be the same under both Section 521 and Section 525—which means the borrower's location has no bearing on where a loan is "made."

Finally, the different wording of Sections 521 and 525 reflects the different functions of the two provisions. Whereas Section 521 defines which state's interest-rate law applies to a given loan, Section 525 uses the word "made" in part to preclude retroactive application of an opt-out: "The amendments made by sections 521 through 523 … shall apply only with respect to *loans*

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[3] While both Colorado and the FDIC argue that FDIC and OCC interpretations of where a bank is "located" under Section 521 and NBA Section 85—which focus on the three "non-ministerial functions" involved in "making" a loan—do not apply to Section 525 (Opp. 9-10; FDIC Br. 10-12), neither argues that these misinterpret Section 521 and NBA Section 85.

made in any State *during the period* beginning on [DIDMCA's effective date], and ending on the date" the state opts out. DIDMCA § 525, Pub. L. No. 96-221, 94 Stat. 132, 167 (1980) (emphasis added). "Located" would not grammatically suit this context.

C. Dormant Commerce Clause authorities are irrelevant to interpreting DIDMCA.

Running even further from the text of Section 525, Colorado and the FDIC rely on Dormant Commerce Clause cases to support their interpretations of where loans are "made" for purposes of Section 525. Opp. 11 (citing *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008)); FDIC Br. 4-6 (discussing *Quik Payday* and other cases). This caselaw is irrelevant here.[4]

Quik Payday and the other cited cases 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, "[w]hen 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. FDIC Br. 4 (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 or the scope of federal preemption for loans by state-chartered banks. *See* Mot. 10-15; page 3-6, *supra*. Indeed, none of these cases deals with banks or bank regulation, and some do not even address lending.[5]

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[4] Plaintiffs' PI motion is based only on their preemption claim. *See* Mot. 9 (Arg. A).

[5] *See* FDIC Br. 5 nn.7, 8 (citing *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018) (analyzing regulation requiring online sellers to collect sales tax); *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999) (analyzing milk-sale regulations)).

D. Related statutes support Plaintiffs' interpretation.

DIDMCA represents one strand in a web of interconnected banking statutes that all reflect the consistent congressional intent to specify whether states may regulate interest rates on loans based on where banks' key loan-making functions occur—that is, where loans are "made." Mot. 11-14 (discussing history tracing from NBA, to *Marquette*, to DIDMCA, to Riegle-Neal, to Gramm-Leach-Bliley (GLBA)).

Colorado ignores these related statutes entirely. The FDIC also offers no substantive response, arguing only that later legislation cannot "control" the meaning of Section 525 and that the Eighth Circuit misunderstood another federal banking law when it held that "a loan is made … at the location of the branch that approves the loan, extends credit, and disburses the funds," *Jessup v. Pulaski Bank*, 327 F.3d 682, 685 (8th Cir. 2003) (analyzing GLBA). FDIC Br. 13, 15-16. Plaintiffs do not contend these enactments or later legislative history *control* the interpretation of Section 525. But they show consistent congressional usage of the same terminology on the same subject to refer to the same standard—the functional loan-creation-focused standard on which Plaintiffs rely, which does not turn on the location of the borrower. Colorado fails to show why only Section 525 should be construed to deviate from this otherwise-uniform statutory framework.

E. Numerous regulatory statements—including the FDIC's own past statements—support Plaintiffs' interpretation.

Federal regulators have consistently adhered to a functional approach to determining where a bank makes its loans in connection with state interest-rate-cap preemption. They have never—until this litigation—equated the state where loans are "made" for preemption purposes with where borrowers reside. Mot. 13-14; *see, e.g.*, FDIC Interp. Ltr. No. 83-16, 1983 WL 207393 (Oct. 20, 1983); OTS Letter from H. W. Quillian, 1986 WL 290314, at *2 (June 27, 1986) (explaining 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"); 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"); OCC Interp. Ltr. No. 1171, 2020 WL 8176065 (June 1, 2020). Indeed, regulator emphasis on this functional lender-based approach has only increased as the modern banking system has grown more automated and decentralized. Mot. 13.

The FDIC now swims against this tide, proposing a novel framework under which loans are simultaneously made—for opt-out purposes—in both the state where the borrower is physically located and the state(s) where the bank is located. FDIC Br. 6. Try as it might, the FDIC cannot square this new framework with its past statements, which never equated where a loan is "made" with the borrower's and lender's locations.

Most notably, the FDIC seeks to distance itself from its Opinion 11, where the agency examined the three "non-ministerial" loan-making functions to determine where a loan was "made" under Section 521. FDIC Br. 8-12. The FDIC now claims it merely "used 'made' colloquially and did not mean to suggest that the loan was actually or exclusively made in the state in which the three functions were performed." FDIC Br. 11. Even if credited, the FDIC's explanation only serves to highlight that the "colloquial"—that is, ordinary—meaning of where a loan is "made" refers to the place the bank performs the functions to create a loan.

The FDIC more enthusiastically latches on to statements in Advisory Opinion 88-45, which declared that "located" in Section 521 must mean something different from "made" in Section 525.[6] FDIC Br. 9. But the FDIC's enthusiasm for this Opinion ends there. The FDIC expressly disavows *other* language in Opinion 88-45, which addressed factors to consider when determining

[6] Again, Plaintiffs do not treat "located" as synonymous with "made," *see* page 5-6, *supra*.

where a loan is made for purposes of Section 525. FDIC Br. 9 n.12. And the FDIC ignores that Opinion 88-45 specifically referenced *Marquette* in stating that "an analysis of all the facts surrounding a transaction must be used in determining where a loan is 'made.'" 1988 WL 583093, at *2 (citing *Marquette Nat'l Bank v. First of Omaha Serv. Corp*., 439 U.S. 299, 311-12 (1978)). Notably, the FDIC now argues that *Marquette* should have no bearing on how "made in" should be interpreted for DIDMCA Section 525. FDIC Br. 13-15.[7]

Ultimately, the FDIC's inability to articulate statutory definitions that comport with the statutory text, relevant caselaw, and its own past pronouncements underscore the lack of deference this Court should afford the agency's current views.

F. The policies underlying DIDMCA support Plaintiffs' interpretation.

Colorado and the FDIC also contend that the principles of federalism animating DIDMCA require adopting their interpretation. Opp. 7-8; FDIC Br. 9. But Plaintiffs' interpretation better accords with those principles.

To ensure that state banks could compete with national banks, DIDMCA imposed the same uniform federal interest-rate limitation on state banks across the country as existed for national banks. Mot. 4-5. To soften this exercise of federal power, Section 525 granted states a limited right to opt out, allowing them to cap the rates of their own state-chartered banks. Mot. 5-6. But Section 525 does not authorize states to regulate national banks, and allows opt-out states to regulate *other* states' banks only to the extent those banks actually perform key loan-making

[7] Colorado asserts the FDIC "explicitly disclaimed Plaintiffs' proposed test" in its 2020 valid-when-made rule. Opp. 9. The FDIC did nothing of the sort—that rulemaking does not attempt to define the term "loans made in" in Section 525, *see* FDIC, Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,153 (July 22, 2020), and the FDIC does not even claim this in its brief. FDIC Br. 10.

functions in the opt-out state. *Id*. This structure balances the federal government's interest in regulating national banks with *all* states' interest in regulating their own chartered banks.

Colorado, however, demands more. It contends that under Section 525, Congress empowered Colorado to reach beyond its borders to override *other* states' interest-rate regimes and impose its own regulations on all state banks that extend credit to borrowers physically located in Colorado—even if the bank is located in and makes the loan in a different state under federal law. Opp. 11. This interpretation assumes Congress exercised federal power to grant superior rights to opt-out states, undermining both federalism and comity between the states.

Colorado also misunderstands the historical context surrounding Congress's choice to provide for interest-rate preemption in DIDMCA. *See* Opp. 7 (stating, without citation, that "[i]n response to double-digit interest rates and high inflation, Congress passed DIDMCA, preempting state rate caps so state-chartered banks could export the higher rates permitted by the bank's home state"). As the legislative history demonstrates, Congress's focus was not on rate exportation at all (although DIDMCA enabled that). Mot. 5-6. Rather, Congress's goal was to ensure, during a time of record inflation and high federal interest rates, that state banks would be on par with national banks and could lend—in their own states or elsewhere—at the greater of the federal discount rate (plus 1%) or their own states' interest-rate caps. Mot. 4-5. This history is important to understanding Congress's goal with the Section 525 opt-out—to restore states' ability to control the rates at which their own state banks loaned money by removing their ability to lend at the federal rate. Mot. 5-6. Section 525 was not intended as a tool to enable opting-out states to reach into *other* states to regulate those states' banks' interest rates.

Finally, defending Colorado's opt-out on federalism grounds not only starts from the wrong place but leads to the wrong place. If anything, its primary effect will be to prompt state banks to

convert to national banks—undermining both the dual banking system and other states' ability to continue chartering banks. Neither result advances the federalism-based goals Colorado and the FDIC purport to respect.

III. Plaintiffs' Members Will Suffer Irreparable Harm Absent A Preliminary Injunction.

Plaintiffs have demonstrated their members face irreparable harm absent the requested injunction. Mot. 16-17. Colorado's only response is to claim these harms occur "from Colorado's Opt-Out," but that the opt-out is "within the scope of Section 525." Opp. 19. That merely restates Colorado's merits argument; it does not refute Plaintiffs' evidence of unrecoverable losses.

IV. The Balance Of Equities Favors Maintaining The Status Quo.

Finally, the balance of equities and public interest favor granting Plaintiffs' motion. Mot. 17-18.

First, Colorado is wrong (Opp. 3-4, 20) that Plaintiffs seek a "disfavored injunction." Injunctive relief in the pre-enforcement context is not "disfavored." *See* page 2, *supra*. The requested injunction does not mandate action—it seeks to *prevent* the opt-out taking effect, maintaining the *status quo*, Mot. 17-18. It would not grant permanent relief and could be undone at any time.

Second, although Colorado argues Section 3 is necessary to prevent "loans at rates that the General Assembly determined are not in the interests of Coloradans," Opp. 20, Colorado overlooks that national banks will continue to offer loans at rates above Colorado's caps. Mot. 18. And neither Colorado nor the FDIC attempts to justify the significant decrease in credit availability and consumer choice, as well as uncertainty about applicable law, that their novel positions would precipitate. Mot. 2, 17-18.

Third, a preliminary injunction would not "stymie the will of Coloradans," Opp. 20. Yes, Section 3 was enacted by the Colorado legislature. Opp. 2. But by enacting its opt-out over-broadly, Colorado is stymying the will of the Nation, as expressed by Congress. The Supremacy Clause forbids this.

CONCLUSION

The Court should preliminarily enjoin Colorado from taking any action to enforce or give effect to H.B. 23-1229 Section 3 with respect to loans not "made in" Colorado as defined by the federal precedent on which Plaintiffs rely.

Respectfully Submitted,

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DATED: MAY 7, 2024

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Plaintiffs hereby certify that the foregoing pleading contains 3,991 words, and thus complies with the 4,000-word limit authorized by the Court's May 3, 2024, Order (Dkt. 43).

/s/ David M. Gossett
David M. Gossett

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2024, I filed a true and correct copy of Plaintiffs' Reply In Support Of Their Motion For Preliminary Injunction via CM/ECF, which will generate notice by electronic mail to all counsel who have appeared via CM/ECF.

/s/ David M. Gossett
David M. Gossett