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.

UNOPPOSED MOTION OF AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

Pursuant to Rule 7.1(a) of the Local Rules of Practice of the United States District Court for the District of Colorado, counsel for the American Bankers Association ("ABA") and Consumer Bankers Association ("CBA") consulted with counsel for the parties about their proposed filing of an amici curiae brief in support of Plaintiffs. On May 7, 2024, Defendants' counsel informed counsel for the ABA and CBA that they consented to the filing of the brief. Plaintiffs' counsel have also consented to the filing of the amicus brief.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $23.7 trillion banking industry and its 2.1 million employees. ABA members provide banking services in each of the 50 states and the District of Columbia. Among them are state banks and savings associations of all sizes.

The Consumer Bankers Association ("CBA") is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans. Like the ABA, the CBA members include state banks of all sizes.

The ABA and CBA have many state-chartered member banks located outside Colorado who make loans in the states where they are located in conformity with those states' usury limits to borrowers who reside in Colorado, and their lending programs would be significantly impacted by the outcome of this litigation.

Amici's members have a significant interest in this case. First, their participation here was precipitated in large part by the amicus curiae brief filed recently by the Federal Deposit Insurance Corporation ("FDIC"), which contends, for the very first time since DIDMCA' enactment in 1980, that under Section 525 of DIDMCA, loans are "made in the state where the borrower enters into the transaction just as much as they are made in the state in which the lender enters the transaction." (FDIC Br. at 5). Section 525 allowed states to opt out of the DIDMCA preemption provisions, but *only* "with respect to loans *made in* such State[.]," 94 Stat. 167, not "*received*," "*obtained*," or "*executed*" in that state, and loans are made by banks, not by their borrowers. The notion that a loan by an out-of-state bank is "made in" the state "where the borrower enters into the transaction" is wholly unsupported by the language of Section 525, prior precedent, the legislative history of DIDMCA, or *any* prior rule, regulation, or opinion letter by the FDIC. The FDIC's novel position in its amicus brief that interstate loans are made in both the lender and borrower's states came entirely out of the blue 44 years after DIDMCA's enactment and is not entitled to any deference. If adopted for the first time here, it would have

profound ramifications far beyond the confines of this case. It would disrupt the parity and uniformity that Congress intended when it enacted DIDMCA. It would also create massive uncertainty for all federally-insured depository institutions, subjecting them to multiple and inconsistent state laws.

Federally-insured state banks, savings and loan associations, savings banks, and state-chartered federally-insured credit unions outside Colorado which make loans in their states to Colorado residents in conformity with their own states' usury laws would be irreparably harmed if this Court were to adopt the unfounded position by the Defendants and the FDIC that Section 3 of the Opt-Out Legislation empowers Colorado to impose its own interest rate and fee limitations on such loans. They would be placed at a severe competitive disadvantage vis-à-vis national banks that make loans to Colorado borrowers. Under the interpretation advocated by Defendants and the FDIC, Section 3 would impose the interest rate and fee limitations of Colorado law on state-chartered depository institutions from other states that make loans to Colorado borrowers, but those Colorado interest rate and fee limitations would remain preempted under Section 85 of the National Bank Act, 12 U.S.C. § 85, insofar as national banks are concerned. That competitive inequality would fly in the face of the express and overriding Congressional intent to create parity between all federally-insured depository institutions and national banks when Congress enacted Sections 521-523 of the DIDMCA. Section 521 was enacted "[i]n order to prevent discrimination against State-chartered insured depository institutions" by authorizing them to lend at the same rates as the national banks with which they compete. 12 U.S.C. § 1831d(a). The legislative history of DIDMCA shows that the purpose of Section 525 of DIDMCA was to enable states to reimpose their own usury ceilings on loans made in their own states by their own state-chartered depository institutions to their own citizens.

The ABA and CBA often file amicus curiae briefs in federal and state cases raising important banking law issues that affect their members. They believe that their proposed brief will assist the Court in its consideration of the complex issues raised in connection with Plaintiffs' Motion for Preliminary Injunction and the amicus curiae brief filed by the FDIC in support of Defendants. Therefore, the ABA and CBA respectfully request that the Court grant their unopposed motion for leave to file their proposed amici curiae brief, which is attached hereto.

Dated: May 10, 2024

Respectfully submitted,

/s/ Matthew A. Morr
Matthew A. Morr, #35913
morrm@ballardspahr.com
Ballard Spahr, LLP
1225 17th Street, Suite 2300
Denver, CO 80202-5596
303.299.7366

Alan S. Kaplinsky (pro hac vice forthcoming)
kaplinsky@ballardspahr.com
Burt M. Rublin (pro hac vice forthcoming)
rublin@ballardspahr.com
Ballard Spahr, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215.665.8500

Ronald Vaske (pro hac vice forthcoming)
vasker@ballardspahr.com
Ballard Spahr LLP
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2119
612.371.3215

Thomas Pinder (pro hac vice forthcoming)
tpinder@aba.com
Andrew Doersam (pro hac vice forthcoming)
adoersam@aba.com
American Bankers Association
1333 New Hampshire Ave. NW
Washington, DC 20036
800.226.5377

David Pommerehn (pro hac vice forthcoming)
dpommerehn@consumerbankers.com
Consumer Bankers Association
1225 New York Ave. NW, Suite 1100
Washington, DC 20005
202.552.6368

Attorneys for Proposed Amici Curiae
American Bankers Association and
Consumer Bankers Association