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' MOTION FOR PRELIMINARY INJUNCTION

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LOCAL RULE 7.1(a) CERTIFICATION

I hereby certify, pursuant to Rule 7.1(a) of the Local Rules of Practice of the United States District Court for the District of Colorado, as follows:

Plaintiffs filed their Complaint in this matter on Monday, March 25, 2024. Later that same day, the parties held a meet-and-confer by videoconference to discuss the litigation and Plaintiffs' plan to seek a preliminary injunction, after which the parties exchanged a series of follow-up emails. On Wednesday, March 27, Defendants informed Plaintiffs by email that they would not consent to a preliminary injunction.

/s/ David M. Gossett______

DATED: April 2, 2024

INTRODUCTION

Colorado seeks to do what Congress said it cannot—limit the interest rates and fees that out-of-state state-chartered banks may charge on loans they make *outside* Colorado's borders to Colorado residents. Plaintiffs National Association of Industrial Bankers, American Financial Services Association, and American Fintech Council challenge this law, Section 3 of H.B. 23-1229, 74th Gen. Assemb., Reg. Sess. (Colo. 2023), which will take effect on July 1, 2024. Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs ask the Court to preliminarily enjoin enforcement of Section 3 for loans not "made in" Colorado under federal law.

First, Plaintiffs are likely to win on the merits. Section 3 purports to opt Colorado out of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, 94 Stat. 132, 164-65 (1980). DIDMCA Section 521 provides that a state-chartered bank may lend nationwide at rates up to the higher of (i) its home state's interest-rate caps, or (ii) a federal interest-rate cap. Congress authorized states to opt out of Section 521—allowing opting-out states to mandate compliance with their state interest-rate caps—but it limited that opt-out right to loans "made in" the opting-out state. DIDMCA § 525, 94 Stat. 167. Under federal law, a non-Colorado bank "ma[kes]" a loan "in" Colorado only when all the key functions associated with originating the loan—including the bank's decision to lend, communication of that decision, and disbursal of funds—occur in Colorado.

Colorado's purported opt-out does not adhere to the federal definition of where a loan is "made," and thus exceeds Colorado's authority to opt out under DIDMCA. Colorado seeks to impose its state interest-rate caps on *all* "consumer credit transactions in" Colorado, H.B. 23-1229 § 3, which Colorado sweepingly defines to include any loan to a Colorado resident by a bank that advertises by any means in Colorado. *See* Colo. Rev. Stat. § 5-1-201(1). DIDMCA does not authorize states to expand the opt-out in this way.

Second, unless Section 3 is enjoined as to loans not "made in" Colorado, Plaintiffs' member state-chartered banks will be irreparably harmed. They are already expending considerable resources to prepare to comply with it. If it goes into effect, they stand to lose significant revenue, suffer irreparable damage to goodwill, lose opportunities for new customers and clients, incur ongoing compliance costs, and face the risk of lawsuits and enforcement actions.

Third, the balance of the equities weighs in favor of maintaining the status quo. Colorado promoted the opt-out as targeting "payday"-style lending, but the law is an ill fit for that aim. It will instead prevent Plaintiffs' members—who are not payday lenders—from offering a wide variety of useful, everyday credit products, such as personal installment loans and store-brand credit cards, to many Colorado consumers. These products are offered at a range of rates and fees legal under DIDMCA's home-state/federal rate cap rule—but sometimes, to account for the borrower's credit risk, above Colorado's caps. Colorado's opt-out will make it economically impracticable for Plaintiffs' members to offer these products to those Colorado consumers who, because of their credit-risk profiles or thin credit history, have less access to credit generally. At the same time, national banks will still offer these same products at rates above Colorado's caps, because the National Bank Act (NBA) shields national banks from state interest-rate caps—but unlike DIDMCA, contains no state opt-out mechanism. Coloradans will lose choice but not gain the State's supposed protections.

BACKGROUND

A. DIDMCA preemption and the DIDMCA "opt-out"

1. The National Bank Act preempts state rate and fee caps for national banks.

Banks in the United States may choose to be chartered and regulated either by a state or by the federal government. This "dual-banking" system predates the enactment of the NBA in 1864.

See Office of the Comptroller of the Currency (OCC), *National Banks and The Dual Banking System*, at 1 (Sept. 2003), https://perma.cc/AR2U-98NY. Whereas state banks are regulated by both the federal government and the state in which they are chartered, under the NBA, national banks are governed primarily by federal standards administered by the OCC.

The NBA preempts certain state laws from applying to national banks. In particular, NBA Section 85 provides that national banks may charge "interest at the rate allowed by the laws of the State … where the bank is located, or at a rate [1% higher than the federal discount rate], whichever [is] greater." 12 U.S.C. § 85.

In 1978, the Supreme Court unanimously held that NBA Section 85 allows a national bank to apply the interest rates permitted in the state where the bank is "located" when making loans to consumers who reside in other states. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). *Marquette* held that a national bank headquartered in Nebraska could make credit card loans to Minnesota residents without regard for Minnesota's rate limits. *Id.* at 311-12. The Supreme Court explained that the bank was "located" where it was chartered: Nebraska. *Id.* at 309. The court then emphasized that even though the borrowers were Minnesota residents, (i) credit was "extended … in Nebraska," (ii) "[f]inance charges … [we]re assessed by the bank in Omaha," (iii) "payments … [we]re remitted to the bank in Omaha," (iv) credit cards were "issue[d] … in Omaha," and (v) "credit assessments" prior to card issuance were conducted in Omaha. *Id.* at 311-12. Under those circumstances, applying Nebraska interest rate laws made sense because "Minnesota residents were always free to visit Nebraska and receive loans in that State" and "[i]t has not been suggested that Minnesota usury laws would apply to such transactions." *Id.* at 310-11.

The Court later clarified that Section 85 preemption extends beyond "numerical" rates to other fees and charges, including late fees. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 745-47 (1996). Thus, under the NBA, Colorado's rate and fee caps do not apply to loans issued by national banks with key lending operations outside Colorado.

2. DIDMCA extends this preemption to state-chartered banks.

Shortly after *Marquette*, Congress chose to put state-chartered banks on an equal footing with national banks. During the soaring inflation of the late 1970s, when the Fed raised interest rates (like it has done recently), state-chartered banks in states with low interest-rate caps saw their *own* cost of borrowing exceed those caps, preventing them from profitably offering consumer credit. *See* 125 Cong. Rec. 30655 (1979) (Statement of Sen. Pryor); 126 Cong. Rec. 6965-66 (1980) (Statement of Rep. Reuss). State banks thus found themselves "at a distinct competitive disadvantage with national banks" operating alongside them, which could lend at higher rates under Section 85. 126 Cong. Rec. 6907, 7070-71 (1980) (Statements of Sens. Bumpers, Proxmire); *Usury Lending Limits: Hearing on S. 1988 Before the Comm. on Banking, Hous., & Urb. Affs.*, 96 Cong. 1, 2-3 (1979) (Statements of Sen. Proxmire, Gov. Bill Clinton).

By enacting DIDMCA, Congress threw a line to state-chartered banks. *See Stoorman v. Greenwood Tr. Co.*, 908 P.2d 133, 135 (Colo. 1995) (discussing DIDMCA as "response to economic conditions affecting the banking industry"). Section 521 of DIDMCA amended the Federal Deposit Insurance Act "to prevent discrimination against State-chartered insured depository institutions," 12 U.S.C. § 1831d(a), by authorizing state-chartered banks to lend at rates up to the same levels as national banks—preempting the restrictive rate-cap laws constraining state-chartered banks in their home states. Like NBA Section 85 for national banks, Section 521 expressly "preempt[s]" any State law that would interfere with a state-chartered bank's ability to "charge … interest" at the "greater" of (1) a specified federal rate; or (2) "the rate allowed by the laws of the State … where the bank is located." *Id.*[1]

3. DIDMCA allows states to opt out of preemption, but only for loans "made in" the opting-out state.

Given concerns that DIDMCA preemption would encroach on states' authority to regulate their own state-chartered banks, Congress allowed states to "opt out" of the rate preemption provisions in DIDMCA Sections 521-523, but only for loans "made in" the opting-out state according to federal law. *See* 126 Cong. Rec. 7070 (1980) (Statement of Sen. Proxmire); *Usury Lending Limits*, 96 Cong. 47-49.

Specifically, Section 525 of DIDMCA provides:

> The amendments made by sections 521 through 523 … shall apply only with respect to loans made in any State during the period beginning on April 1, 1980 [DIDMCA's effective date], and ending on the date … on which such State adopts a law … which states explicitly and by its terms that such State does not want the amendments made by such sections to apply *with respect to loans made in such State*[.]

DIDMCA § 525, 94 Stat. 167 (emphasis added).

DIDMCA's legislative history confirms Congress designed Section 525 to allow states to restore their pre-DIDMCA ability to restrict *their own in-state banks* from lending above their own state rate limits, without regard for the federal rate. *See, e.g.*, 125 Cong. Rec. 30655 (1979) (Statements of Sens. Pryor, Bumpers); 126 Cong. Rec. 6906-07 (1980) (Statements of Sens. Proxmire, Bumpers); 126 Cong. Rec. 7070-71 (1980) (Statement of Sen. Proxmire). There is no suggestion in Section 525's legislative history that Congress intended to allow states to use the opt-out to restrict the rates that *out-of-state banks* physically operating outside a state could charge

[1] DIDMCA Sections 522 and 523 similarly preempted state interest-rate caps for state-chartered savings-and-loan associations and credit unions. *See* 94 Stat. 165-66.

when lending to borrowers living in an opting-out state—that is, the issue decided in *Marquette* just two years earlier.

4. Post-DIDMCA opt-outs

Shortly after Congress enacted DIDMCA, seven states (including Colorado) and Puerto Rico invoked Section 525 to opt out of DIDMCA Sections 521-523. *See, e.g.*, 1981 Colo. Sess. Laws, ch. 73, § 1. But as inflation continued to rage into the 1980s, six of those states—including Colorado—rescinded their opt-outs. *See, e.g.*, 1994 Colo. Sess. Laws, ch. 272, § 12; *see also* Comm. Hearing on 1988 Neb. Laws, LB 913, at 9335, 9342-43, 9347-48 (discussing competitive disadvantages created by opt-out).

B. Colorado's rate and fee limits

Colorado's Uniform Consumer Credit Code (UCCC) governs consumer credit transactions in Colorado. Colo. Rev. Stat. § 5-1-201; *see, e.g. id.* § 5-1-301(12), (15)(a). Most common consumer loan products are capped at a 21% "finance charge." *See id*. § 5-2-201(2)(a), (3)(a). The UCCC also limits certain loan fees. *See id.* §§ 5-2-202, 5-2-203, 5-2-212.

Colorado has moved aggressively in recent years to combat so-called "payday"[2] and "alternative-charge"—extremely high-cost, small-dollar, short-term—loans. In 2018, Colorado amended the UCCC to limit rates and fees on payday loans to 36%. *See id*. § 5-3.1-101.5.

C. H.B. 23-1229 Section 3

On June 5, 2023, Colorado enacted H.B. 23-1229, which will take effect in relevant part on July 1, 2024. *See* H.B. 23-1229 § 6(4). Colorado promoted the law as part of its overall efforts

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[2] The Consumer Financial Protection Bureau explains that "[w]hile there is no set definition of a payday loan, it is usually a short-term, high cost loan, generally for $500 or less, that is typically due on your next payday." CFPB, *What is a payday loan?* (Jan. 17, 2022), https://perma.cc/E95D-BSYW.

to address payday-style lending, and H.B. 23-1229 includes a provision, not at issue here, intended to curb "alternative charge loans." *Id.* § 2. Central to this lawsuit, however, H.B. 23-1229 also includes a renewed DIDMCA opt-out:

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

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

Contrary to the definition of "made in" used in federal law, *see infra* at 10-16, the UCCC defines a "consumer credit transaction" as "made in" Colorado—and hence subject to Colorado's opt-out—whenever:

> (a) A written agreement evidencing the obligation or offer of the consumer is received by the creditor in this state; or
>
> (b) A consumer who is a resident of this state enters into the transaction with a creditor who has solicited or advertised in this state by any means, including but not limited to mail, brochure, telephone, print, radio, television, internet, or any other electronic means.

Colo. Rev. Stat. § 5-1-201(1)(a)-(b).[3]

D. Section 3's effects

Plaintiffs' members include state-chartered banks, chartered and headquartered in various states. *See* Boren Decl. ¶¶ 1-3; Bowman Decl. ¶¶ 1-7; Gelbard Decl. ¶¶ 1-10; Goldfeder Decl. ¶ 9; Himpler Decl. ¶¶ 1-11; Jackson Decl. ¶¶ 1-6; Pignanelli Decl. ¶ 10. None is headquartered or chartered in Colorado, and none performs key loan-origination functions there. *See id.* Plaintiffs'

[3] Section 5-1-201(2) clarifies that "[n]otwithstanding paragraph (b) … a consumer credit transaction is not made in this state if a resident of this state enters into the transaction while physically present in another state."

members do not offer payday or similar loans. *See* Boren Decl. ¶¶ 3-7; Bowman Decl. ¶¶ 3-11; Gelbard Decl. ¶¶ 3-8; Goldfeder Decl. ¶¶ 3-5; Himpler Decl. ¶¶ 8-10, 23; Jackson Decl. ¶¶ 3-10; Pignanelli Decl. ¶¶ 7-10. Rather, they offer to consumers nationwide—including in Colorado—a wide variety of useful, familiar, everyday credit products, such as personal installment loans, buy-now-pay-later loans, and store-brand cards. *Id.* These products are subject to a range of rates and fees, depending on credit, income, and other consumer-specific or product-specific factors, that are lawful under DIDMCA's home-state-or-federal-rate rule. *Id.*

Because DIDMCA permits Plaintiffs' members to offer loans at rates above the 21% UCCC cap, Plaintiffs' members currently offer credit to Colorado consumers whose credit profiles are too risky to lend to at a rate under that cap. *See* Boren Decl. ¶¶ 6-7; Bowman Decl. ¶¶ 10-11; Gelbard Decl. ¶ 8; Goldfeder Decl. ¶¶ 3-7; Himpler Decl. ¶¶ 8-10; Jackson Decl. ¶¶ 9-11; Pignanelli Decl. ¶¶ 8-9. Indeed, being able to charge a higher rate or fee to account for risk of default (or to deter default) often means the difference between being able to offer a consumer a loan and determining that doing so would be uneconomical. *See* Ctr. Cap. Mkts. Competitiveness, *The Economic Benefits of Risk-Based Pricing for Historically Underserved Consumers in the United States*, at 3-4 (Spring 2021), https://perma.cc/5EUG-DPZC. If Colorado's opt-out goes into effect as formulated, Plaintiffs' members will have to curtail lending to some or all Colorado residents, reducing Coloradans' access to responsible, popular, useful consumer credit products. *See* Boren Decl. ¶¶ 11-13; Bowman Decl. ¶¶ 15-17; Gelbard Decl. ¶¶ 15-17; Goldfeder Decl. ¶¶ 11-13; Himpler Decl. ¶¶ 22-23; Jackson Decl. ¶ 16; Pignanelli Decl. ¶ 20.

At the same time, the opt-out will not affect national banks that lend to Colorado consumers. These banks remain shielded by NBA preemption. Yet national banks offer similar products to Colorado consumers, with comparable APRs and rates—often exceeding UCCC caps. *See* Gossett Decl. ¶¶ 5-7 (collecting examples).

ARGUMENT

This Court Should Preliminarily Enjoin Section 3 As Invalid And Unenforceable With Respect To Loans Not "Made In" Colorado Under Federal Law.

A plaintiff seeking a preliminary injunction must demonstrate that (1) the plaintiff "is likely to succeed on the merits"; (2) the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [the plaintiff's] favor"; and (4) "an injunction is in the public interest." *Denver Homeless Out Loud v. Denver, Colo.*, 32 F.4th 1259, 1277 (10th Cir. 2022). When, as here, the government is the opposing party, the final two factors merge. *Id.* at 1278. An injunction is warranted here.

A. Plaintiffs are likely to succeed on the merits because the opt-out is preempted by DIDMCA for loans that are not "made in" Colorado under federal law.

DIDMCA Section 521 expressly "preempt[s]" "any State constitution or statute" that purports to limit the ability of state-chartered banks to lend at their home-state rates with respect to loans not covered by a Section 525 opt-out. 12 U.S.C. § 1831d(a). Section 3 does exactly that. It purports to impose Colorado rate caps on loans not "made in" Colorado according to federal law, and thus not subject to the Section 525 opt-out. As applied to that broad class of loans, Colorado's opt-out contravenes DIDMCA and the Supremacy Clause, U.S. Const. art. VI, cl. 2.[4]

1. Federal law governs where a loan is "made" for purposes of Section 525.

"Federal, not local, law applies in the interpretation and application of federal statutes." *Hill v. Whitlock Oil Servs., Inc.*, 450 F.2d 170, 173 (10th Cir. 1971) (citing *Prudence Realization Corp. v. Geist*, 316 U.S. 89, 95 (1942)). Courts must "generally assume, in the absence of a plain

[4] Colorado's opt-out also violates the Dormant Commerce Clause. *See* Compl. ¶¶ 81-85.

indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. 101, 104-05 (1943).

Because Section 525 is a federal statute, and does not incorporate any state definitions, a uniform federal definition of where a loan is "made" governs DIDMCA opt-outs, not any state's chosen definition. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citing *Jerome*, 318 U.S. at 104); FDIC Interp. Ltr. 88-45, 1988 WL 583093, at *2 (June 29, 1988) ("Section 525 is a federal statute. It must be interpreted as having a single meaning throughout the nation.").

While Congress conferred on states the authority to *enact* opt-outs from DIDMCA, Congress did not authorize the *scope* of the opt-outs to be interpreted with reference to the opting-out state's laws. There is no "plain indication"—in the statutory text, its legislative history, or otherwise—suggesting that Congress intended to let states determine where a loan is "made" for purposes of Section 525, as Colorado purports to do. *See, e.g.*, 126 Cong. Rec. 6892-6913, 7062-73 (1980). Nor would such a reading make sense. Multiple states could deem a single loan "made in" their state, subjecting banks to a patchwork of inconsistent regulation.

2. "Made," for purposes of Section 525, turns not on the location of the customer but on where the bank approves and extends the loan.

The text, history, regulatory interpretations, and case-law all confirm that DIDMCA Section 525's use of the words "made in such State" requires an analysis of where the lending bank engages in the process of creating and extending a loan; it is not a reference to the state where the customer resides. This Court should not break new ground in holding otherwise.

a. The statutory text focuses on loan creation, not borrower location.

Section 525 permits states to "opt-out" of DIDMCA "with respect to loans made in such State." DIDMCA § 525, 94 Stat. 167. The critical feature of Section 525 is that it points to where *a* "*loan[]*" is "made," not to where the *borrower* resides.

Colorado would apply its opt-out to essentially any loan to a Colorado consumer—including by any bank that has ever advertised in the state, apparently without temporal limit. Colo. Rev. Stat. § 5-1-201(1)(a)-(b). Colorado's *recipient*-focused trigger strays far from what Congress authorized. Rather, Congress's word choice—"made"—reflects a functional focus on the core tasks associated with a *lender* creating a loan. *See Make*, Webster's New Collegiate Dictionary 694 (1975 ed.) ("[M]ake" means to "create" or "come into being"). As explained below, courts and regulators agree that the core tasks associated with a lender's acts in creating a loan—most notably approval, communication, and disbursement—do not depend on where a consumer is located.

This was the lesson of *Marquette*, decided just two years before DIDMCA's enactment, and of which Congress is presumed to have been aware. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). In *Marquette*, the Supreme Court addressed the authority of a state to restrict an out-of-state national bank's lending program. The Court determined where the bank was "located" for NBA Section 85 rate-limit-preemption purposes by assessing where the loan was made, in addition to where the bank was chartered and headquartered. And in determining where loans are made, the Court looked to where the bank's lending operations physically occurred, not where the customers lived or used their credit cards. The Court noted that "the convenience of modern mail permits Minnesota residents holding Omaha Bank's BankAmericards to receive loans without visiting Nebraska," but stressed that "credit on the use of their cards is nevertheless … extended by Omaha Bank *in Nebraska*." 439 U.S. at 311-12 (emphasis added). Among other things, "[f]inance charges on the unpaid balances of cardholders are assessed by the bank in" Nebraska; "payments on unpaid balances are remitted to" Nebraska; "the bank issues its BankAmericards in" Nebraska; and "credit assessments [are] made by the bank" in Nebraska. *Id.* By tying the DIDMCA opt-out to where a *loan* is *made*, Congress incorporated *Marquette*'s functional, loan-creation-focused analysis into Section 525.

b. Congressional understanding confirms a loan-creation-focused approach.

Congress later confirmed its *Marquette*-informed understanding that the phrase "made in" turns on the steps involved in offering a loan, not the borrower's residence. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994), sought to harmonize the ability of federally and state-chartered financial institutions to operate across state lines under a more uniform interstate banking and branching regime. The law contains a "savings clause," which specifies that its provisions do not affect DIDMCA preemption. *See* Riegle-Neal § 111. In explaining the savings clause during hearings preceding the law's passage, Senator Roth described "the widespread congressional understanding" that DIDMCA preemption is "applied on the basis of the branch *making* the loan." 140 Cong. Rec. 24463, 24487 (1994) (Statement of Sen. Roth) (emphasis added). "[M]aking" a loan in a particular location, Senator Roth explained, entails "the decision to extend credit, the extension of credit itself, and the disbursal of the proceeds of a loan." *Id.* Other functions, distinguished as merely "ministerial"—such as "providing loan applications, assembling documents, providing a location for returning documents necessary for making the loan, providing loan account information and receiving payments"—are not part of the federal calculus for where a loan is made. *Id.* at 24488.

c. Federal regulators consistently endorse a loan-creation-focused methodology.

For decades, federal banking regulators have confirmed a functional approach to determining where a bank is located and makes its loans—and have never equated where a loan is "made" with where the borrower resides. Both the OCC and the FDIC have consistently explained in related contexts that a bank making a loan is "located" in the state in which it is chartered *unless all three* "non-ministerial" functions involved in making that loan—(1) loan approval; (2) disbursal of loan proceeds; and (3) communication of the credit decision— physically occur in another state. *See, e.g.*, FDIC Gen. Counsel's Op. No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. 27,282 (May 18, 1998); *see also* FDIC, Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,148, 44,153 (July 22, 2020). Although the statutory terms "located" (as used in DIDMCA Section 521 and NBA Section 85) and "made in" (as used in Section 525) need not be coextensive, they do overlap significantly. And because they are both focused on functional inquiries into the extension of credit, regulators and courts have considered the factors interchangeably, applying *Marquette*'s functional approach in considering where a loan is "made." *See, e.g.*, FDIC Interp. Ltr. 88-45, 1988 WL 583093, at *2; 63 Fed. Reg. at 27,285; *infra* at 14-15 (court interpretations).

In 2020, the OCC reaffirmed the utility of this functional approach to determining where a loan is made when clarifying the meaning of "loan approval" in modern lending scenarios—where individual loan underwriting decisions are often made automatically, in real time, through electronic and online systems (not in a single physical location, by a human). OCC Interp. Ltr. No. 1171, 2020 WL 8176065 (June 1, 2020). The OCC focused on "all the facts and circumstances," including where approval and disbursement occurred and where the policies underlying extensions of credit were devised. *Id.* But critically, it did not consider the location of the consumer applying for the loan even relevant to the determination where a loan is "made" for NBA Section 85 purposes.

d. Judicial precedent confirms this federal, loan-creation-focused methodology.

Courts, notably including Colorado's Supreme Court, have (i) confirmed that DIDMCA should be interpreted according to federal law, and (ii) adopted the functional, federal approach to determining where a loan is "made." On the former issue, in *Stoorman v. Greenwood Trust Co.*, 888 P.2d 289 (Colo. App. 1994), the Colorado Court of Appeals had relied on the Colorado UCCC to determine where a loan is "made" for purposes of DIDMCA Section 525. *See id.* at 294. Although Colorado had repealed its first DIDMCA opt-out by the time *Stoorman* reached Colorado's Supreme Court, that court specifically declined to adopt the lower court's Colorado-UCCC-based analysis, *see Stoorman*, 908 P.2d at 134 ("we base our decision on different grounds"), holding that the meaning of DIDMCA is "a matter of federal law." *Id.* at 135.

On the latter, the Eighth Circuit applied the federal methodology to interpret another federal statute affecting state-law rate caps that, like DIDMCA, uses the words "made in" within its scoping provision. *Jessup v. Pulaski Bank* involved a credit card loan by an Arkansas bank to a borrower living in Texas. *See* 327 F.3d 682, 684 (8th Cir. 2003). The court focused on where the bank "approve[d] the loan, extend[ed] credit, and disburse[d] the funds" to determine that the loan was "made" in Arkansas. *Id.* at 684-85 (relying on regulatory interpretations referencing Congress's understanding of "made in" when enacting Riegle-Neal, as discussed *supra* at 12-13).

Similarly, the district court in *MorEquity, Inc. v. Naeem* interpreted DIDMCA Section 521 to determine that, even though a California-chartered thrift maintained a physical office in Illinois and the plaintiff-borrowers' mortgage broker submitted their mortgage application to that office, the thrift was not located in and therefore did not make loans in Illinois. *See* 118 F. Supp. 2d 885, 898 (N.D. Ill. 2000), *aff'd on reconsideration*, No. 99C735, 2001 WL 1426518, at *1 (N.D. Ill. Feb. 8, 2001). Because plaintiffs had not alleged that the thrift had approved the loan, disbursed the loan proceeds, or communicated the credit decision in Illinois, the court reasoned, Illinois' rate limits were preempted under DIDMCA. *See id.*

3. Colorado's interpretation of "made in" is wrong and undermines DIDMCA.

The federal interpretation of "made in" set out above is workable and promotes a consistent standard for modern-day, interstate, online banking—while still preserving the state sovereignty Congress intended to protect with Section 525. By contrast, Colorado's definition of "made in" does not fall within any conceivable understanding of where a loan is "made." And it is unworkable in a world of interstate banking. If each opting-out state could apply its own interpretation of "made in" to Section 525, a single loan could be deemed "made in" multiple states, rendering it unclear which state's rate caps apply.

The Supreme Court rejected Colorado's proposed patchwork approach in *Marquette*. Marquette Bank and the State of Minnesota had argued that because Omaha Bank "systematically solicits Minnesota residents for credit cards," who then used those cards in Minnesota, Omaha Bank was located in Minnesota for purposes of NBA preemption. *See Marquette*, 439 U.S. at 310-12. But as the Supreme Court pointed out, "Minnesota residents can … use their Omaha Bank BankAmericards to purchase services in the State of New York or mail-order goods from the State of Michigan." *Id.* at 312. Under Minnesota's approach, a "national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85." *Id.* This would "stretch[]" the meaning of "located" so far "as to throw into confusion the complex system of modern interstate banking." *Id.* So too here.

Colorado's insistence that its DIDMCA opt-out applies to virtually any transaction with a Colorado resident where the creditor's only activity in the state is advertising or customer solicitation, Colo. Rev. Stat § 5-1-201(1)(b), or to a transaction with a resident of *any* state if a "written agreement evidencing the obligation … is received by the creditor" in Colorado, *id.* § 5-1-201(1)(a), is not what Congress authorized when it enacted the DIDMCA opt-out. Like the Supreme Court in *Marquette*, this Court should "not choose to invite these difficulties by rendering so elastic," 439 U.S. at 312, DIDMCA's opt-out for loans "made in" the opting-out state.

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Plaintiffs are likely to demonstrate that H.B. 23-1229 Section 3 is void and unenforceable as applied to loans not "made in" Colorado as defined by federal law.

B. Plaintiffs' members will suffer irreparable harm in the absence of a preliminary injunction.

To show irreparable harm, a plaintiff must demonstrate injury that "cannot be adequately atoned for in money, or when the district court cannot remedy the injury following a final determination on the merits." *Barrington v. United Airlines, Inc.*, 566 F. Supp. 3d 1102, 1113 (D. Colo. 2021) (cleaned up). Plaintiffs' members will suffer irreparable harm if Colorado's opt-out is permitted to take effect as written.

First, Plaintiffs' members are already incurring significant costs in preparing to comply with Colorado's opt-out—and will continue to incur these costs without an injunction. Boren Decl. ¶¶ 8-9; Bowman Decl. ¶¶ 12-13; Gelbard Decl. ¶¶ 11-12; Goldfeder Decl. ¶¶ 10-11; Himpler Decl. ¶¶ 15-16; Jackson Decl. ¶¶ 12-13; Pignanelli Decl. ¶¶ 14-15. These include costs associated with preparing updated disclosures; updating, testing, validating, and monitoring computer systems to ensure accurate integration of Colorado-specific rate and fee caps into what is currently a uniform national system; modeling the effect on revenue and operations and developing strategies to address those effects; developing new training materials; diverting employee time; and engaging outside consultants, vendors, and attorneys. *Id*. Costs of complying with a law later held to be invalid are non-recoverable and hence irreparable. *See Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010).

Second, Plaintiffs' members are already experiencing strained relationships with current customers and brand and merchant clients, and face the prospect of irreparable loss of goodwill if they must determine whether and to which Colorado consumers they can profitably offer their products. *See* Boren Decl. ¶¶ 11-14; Bowman Decl. ¶¶ 15-18; Gelbard Decl. ¶¶ 15-18; Goldfeder Decl. ¶ 11; Himpler Decl. ¶ 11; Jackson Decl. ¶¶ 15-17; Pignanelli Decl. ¶ 18. Plaintiffs' members have invested significant time and resources over many years to establish that goodwill—by providing popular consumer-loan products on competitive terms. *Id.* Once lost, that goodwill will be impossible to recover. *See Barrington*, 566 F. Supp. 3d at 1113.

Third, if the opt-out takes effect it will result in immediate—and for some of Plaintiffs' members, business-jeopardizing—lost revenue. Boren Decl. ¶ 10; Bowman Decl. ¶ 14; Gelbard Decl. ¶¶ 13-14; Goldfeder Decl. ¶ 11; Himpler Decl. ¶¶ 17-20; Jackson Decl. ¶ 14; Pignanelli Decl. ¶¶ 16-17. The fact that lost revenue might be quantifiable does not render it reparable, because Plaintiffs could never recover it. *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Edmondson*, 594 F.3d at 771.

C. The balance of equities favors maintaining the status quo.

The balance of equites favors a preliminary injunction. Colorado "does not have an interest in enforcing a law that is likely constitutionally infirm." *Id*. And an injunction here will not harm Colorado or its citizens; it will simply maintain the status quo. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). By contrast, Colorado consumers—whom Defendants are charged with protecting—will be harmed by the law. Consumers, particularly those at the lower end of the credit spectrum, will have reduced access to the responsible, needed credit products offered by Plaintiffs' members, who will find it economically impracticable to lend to riskier consumers in Colorado. Yet national banks will continue to offer these same products at rates above what the UCCC allows. With reduced competition from state banks, national banks will have less incentive to constrain their rates. And consumers will have less choice.

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 federal law.[5]

[5] Alternatively, because the merits of this litigation turn entirely on questions of law, the Court could award summary judgment to Plaintiffs. *See* Fed. R. Civ. P. 56(f)(3); *e.g.*, *Orizon Aerostructures, LLC v. Crumley*, No. 2:23-CV-02069-EFM, 2023 WL 3376774, at *2 (D. Kan. May 11, 2023) (*sua sponte* granting summary judgment on preliminary injunction motion), *appeal dismissed*, No. 23-3110, 2023 WL 8642999 (10th Cir. Nov. 29, 2023).

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Plaintiffs hereby certify that the foregoing pleading contains 5,496 words, and thus complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

/s/ David M. Gossett
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2024, I filed a true and correct copy of Plaintiffs' Motion For Preliminary Injunction via CM/ECF, which will generate notice to the following via electronic mail:

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