IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:24-cv-00812-DDD-KAS

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

Plaintiff(s),

v.

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

Defendant(s),

MOTION FOR STAY OF THE PRELIMINARY INJUNCTION PENDING APPEAL

Defendants Philip J. Weiser, Attorney General of the State of Colorado, and Martha Fulford, Administrator of the Colorado Uniform Consumer Credit Code (collectively "Defendants") move under Fed. R. App. P. 8(a)(1)(C) and Fed. R. Civ. P. 62(d) for a stay of this Court's Order Granting Plaintiffs' Motion for Preliminary Injunction—Doc. 69—pending appeal.

Certificate of Conferral: The undersigned conferred with Plaintiffs' counsel regarding this motion. Plaintiffs oppose this motion.

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint on March 25, 2024, alleging Supremacy Clause and Dormant Commerce Clause claims. Doc. 1. Plaintiffs filed a motion for a preliminary injunction under the Supremacy Clause claim on April 2, 2024, seeking to enjoin Defendants from enforcing Colorado's Opt-Out. Doc. 24. Defendants filed an opposition to the preliminary injunction motion on April 23, 2024, Doc. 39, and Plaintiffs replied on May 7, 2024. Doc. 45.

This Court granted Plaintiffs' motion for preliminary injunction on June 18, 2024. Doc. 69. The order "enjoined Defendants from enforcing the interest rates in the Colorado UCCC with respect to any loan made by the Plaintiffs' members, to the extent the loan is not 'made in' Colorado and the applicable interest rate in Section 1831d(a) exceeds the rate that would otherwise be permitted." *Id*. at 27–28.

On July 18, 2024, Defendants appealed the Court's preliminary injunction to the United States Court of Appeals for the Tenth Circuit. *See* 28 U.S.C. § 1292(a)(1) (interlocutory order granting an injunction is appealable).

STANDARD OF REVIEW

Fed. R. App. P. 8(a)(1)(C) provides that a party must ordinarily move first in the district court for an order suspending an injunction while an appeal is pending. Fed. R. Civ. P. 62(d) provides that while an appeal is pending from an interlocutory order that grants an injunction, the district court may suspend the injunction on terms for bond or other terms that secure the opposing party's rights. In evaluating

a motion pursuant to Fed. R. App. P. 8(a), the Court must consider: (1) whether the moving party has shown they are likely to prevail on the merits of the appeal; (2) whether the moving party has shown irreparable harm if the stay is not granted; (3) whether the stay will substantially harm the other parties; and (4) where the public interests lie. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Evans v. Bd. of Cnty. Comm'rs,* 772 F. Supp. 1178, 1181 (D. Colo. 1991).

ARGUMENT

I. Defendants satisfy the requirements for a stay of the preliminary injunction pending appeal.

The standard for staying an injunction pending appeal is similar to the standard governing a preliminary injunction, and this Court has already found in Plaintiffs' favor on those factors. Nevertheless, Defendants must first pursue a stay from this Court before requesting one in the Tenth Circuit. Fed. R. App. P. 8(a)(1)(C). Defendants incorporate their legal arguments, reasoning, and exhibits from their prior submissions opposing Plaintiffs' motion for a preliminary injunction. Without waiving any of the specific arguments made, Defendants assert that each factor weighs in favor of granting a stay of the preliminary injunction pending appeal.

Defendants are likely to prevail on the merits of the appeal

Defendants are likely to prevail on the merits of their appeal for at least three reasons.

First, this Court's order enjoining Defendants' enforcement of Colorado's Opt-Out adopted a reading that is inconsistent with the text of Section 525 of the federal Depository Institutions Deregulation and Monetary Control Act ("DIDMCA"). *See* Doc. 25-1, at § 525 ("Section 525").

The Court concludes that "[t]he plain language of Section [525] . . . indicates that loans are 'made' by the bank, and that where a loan is 'made' does not depend on the location of the borrower." Doc. 69 at 19. The Court, noting the challenging grammatical structure of Section 525, reaches this conclusion even though the use of passive voice obscured the subject of the clause. *See* Doc. 69 at 15 ("Diagraming this provision is beyond the grammatical skills of this inferior court.").

The Court focuses on the fact that "made" is the past participle of the verb "to make," reasoning that "it is the lender who *makes* a loan . . . ." *Id.* at 16 (emphasis added). But a lender cannot make a loan without a borrower any more than one hand can clap without the other. Since a loan cannot be "made" without both the lender and the borrower, it is inconsistent with the text to ignore the location of the borrower when determining where the parties "made" a loan.

Further, by focusing on the term "make" instead of "made," the Court changes the meaning of the statute. Section 525 does not use the term "make." It uses the term "made," which necessarily includes the borrower. Even if it is true that a lender "makes" a loan, the loan is not "made" without the borrower. This is the more natural reading of the statute because a loan, which is a contract, cannot be "made" until both

parties enter it. *See* Doc. 38-1 at 4–7. The Plaintiffs' own declarations make clear that the terms of the loans they offer vary by customer. Doc. 26 (Personal installment loans terms vary "depending on a consumer's credit qualifications"); Doc. 29 (Personal installment loans' terms vary "depending on credit, income, or other consumer-specific . . . factors"). A loan is not a pre-baked cake off the shelf, but a contract that is only "made" by the agreement of the two parties. If these parties execute the loan in two places, then the loan occurs in two places: where the lender is and where the borrower is.

By ignoring the borrower and focusing only on the bank's location, the analysis under Section 525 of where a loan is "made" becomes functionally identical to the analysis under the National Banking Act ("NBA") in *Marquette* of where a bank is located. *See* Doc. 24 at 11-12; *see also* Doc. 69 at 18 ("[T]he answer to the question of *where* a loan is 'made' depends on the location of the bank, and where the bank takes certain actions, but not on the location of the borrower who 'obtains' or 'receives' the loan."). Indeed, it appears that the Court engaged in this very analysis. Doc. 69 at 3 ("Section 85 has been recognized to be the 'direct lineal ancestor' of section 1831d … Congress made a conscious choice to pattern section 1831d after section 85 to achieve competitive equality in the area of interest charges between state and national banks.") (internal citations omitted).

But Congress did not pattern DIDMCA after the NBA. DIDMCA includes Section 521, which preempts state law, and Section 525, which contains the Opt-Out.

See Doc. 25-1, at § 521 ("Section 521"). And Section 521, in stark contrast to Section 525, uses the term "located" while Section 525 uses the term "made." These are different terms that should have been given different meanings. *See, e.g.*, ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). Congress was armed with the *Marquette* decision and knew the meaning that the term "located" carried. If Congress wanted the Opt-Out to turn on the location of the bank, it could have simply written Section 525 to read, ". . . such State does not want this section to apply with respect to *banks located in such State*." By not doing so, Congress explicitly indicated that where a loan is "made" turns on more than just the bank's location.

Perhaps more importantly, focusing on the lender and overlooking the borrower leads to illogical and absurd results that frustrates the purpose of DIDMCA and the Opt-Out. It creates only a partial opt-out for in-state banks that has no effect on out-of-state banks. For out-of-state banks, preemption persists, and the laws of other states are forced on a state that has opted out of preemption.

Before DIDMCA went into effect, banks lending across state lines generally had to comply with the borrowers' state law. *See* TR 5/16/2024, p. 57:19–58:8 (Plaintiffs conceding that state-chartered banks had to comply with state law pre-DIDMCA). After DIDMCA, out-of-state banks were allowed to lend over the rate cap

in the borrowers' states so long as they complied with the law where the bank was located (or the federal discount rate plus 1%.) But Congress added Section 525 to DIDMCA to give states the option to return to the status quo that existed before DIDMCA when there was no federal preemption. If a state opts out, then that state's law would apply again. But under the Court and Plaintiffs' interpretation, the bank's location still controls, and out-of-state banks can still lend at the state rate permitted in that bank's location, even though they could not lend at that rate before DIDMCA, as highlighted in the chart below:

Plaintiffs' position:

	Prior to DIDMCA	**Preemption (§ 521)**	**Opt-Out (§ 525)**
In-state banks	Colorado rate	Colorado rate OR Federal discount rate + 1%	Colorado rate
Out-of-state banks	Colorado rate	Bank location state rate OR Federal discount rate + 1%	*Bank location state rate*

Defendants' position:

	Prior to DIDMCA	**Preemption (§ 521)**	**Opt-Out (§ 525)**
In-state banks	Colorado rate	Colorado rate OR Federal discount rate + 1%	Colorado rate
Out-of-state banks	Colorado rate	Bank location state rate OR Federal discount rate + 1%	*Colorado rate*

The Court and Plaintiffs' reading gives Section 525 a minimal and specific effect only for in-state banks. Congress would have stated this limited scope more clearly if it only intended to limit in-state banks' ability to lend at the federal discount rate +1%, for instance by using the term located as discussed above. But the text of Section 525 does not in any way limit its application only to in-state banks much less to in-state banks' lending at the federal discount rate. But that is the net effect of the Court and Plaintiffs' narrow reading of Section 525. By contrast, Defendants' position accords with the text of Section 525 and the structure of DIDMCA. Congress intended to preempt state law in Section 521 but gave states the authority to opt out and restore the *status quo ante* via Section 525.

Although the Court acknowledges that the Defendants' *status quo ante* argument is "somewhat persuasive," it nonetheless ignored this purpose of Section 525 based on the statute's "plain meaning." Doc. 69 at 23–24. But, as explained above, the plain language of the statute does not say banks located in a state—the statute uses the term "made" and the passive voice, which obscures the parties involved in "making" a loan. *See* Doc. 69 at 15. This does not support a plain language analysis and ambiguities remain. "[I]t can be said more generally that the resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose." READING LAW at 56. An act's purpose is an important consideration when a court must decide "which of various textually

permissible meanings should be adopted." *Id.* at 57 (emphasis omitted). That is the case here, where the operative clause does not clarify who "makes" the loan.

The Court places weight on the fact that Title 12 uses the term "make" in other sections in relation to depository institutions and loans. Title 12 is a massive title. It extensively regulates national banks and credit unions in addition to state-chartered banks. The scattered references to "make" were enacted at different times from DIDMCA and do not explain where a loan is "made." The same word used in different sections may have different meanings and should not be construed in the same manner. *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.") (alterations omitted); READING LAW at 170-73 (use of same word or phrase in a different statute, "[w]ithout more . . . does not have much force.").

These scattered references do little to explain what "made" means in Section 525. Indeed, the Court cites a provision that lists powers of Federal credit unions, including to "make loans," but that same provision also includes the authority to "make contracts." 12 U.S.C. § 1757(1) and (5). Contracts, like loans, cannot be "made" alone by a financial institution—they require at least two parties to be "made." RESTATEMENT (SECOND) OF CONTRACTS § 9 (1981). But in the end, the more relevant comparison is that in the same statute, enacted at the same time, and dealing with

exact same topic, Congress used bank location in Section 521 and "made in" in Section 525. Defendants' interpretation gives meaning to these materially different terms. Plaintiffs' does not.

The Court also relies on Section 525's reference to a "commitment to make [a] loan" in support of its conclusion that a bank can enter into the loan contract at a different time than when the "loan is made." Doc. 69 at 19. In actuality, the "commitment to make a loan" refers to the use of a commitment letter prior to the execution of the actual loan contract. *See Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1373 (D.C. Cir. 1980).[1] In essence, a commitment letter is a separate contract where a lender agrees to certain loan terms with a specific borrower in exchange for a "commitment fee." *Id.* The loan agreement itself is executed at a later date, but the commitment contractually binds both the borrower and the lender to the loan terms. *Id.* at 1373–74. If the borrower ultimately refuses to take the loan out, the lender keeps the commitment fee. *Id.* at 1374. If the lender refuses to loan in accordance with the commitment's terms, the borrower can sue. *Id.* Section 525's use of the phrase "commitment to make such loan" therefore does not support the Court's interpretation of where a loan is "made." The phrase does nothing more than clarify that a commitment letter's execution date controls whether the DIDMCA amendments apply to that loan.

[1] Notably, the D.C. Circuit issued *Postow* in June 1980—only three months after Congress passed DIDMCA. *See* Doc. 25-1 at 2.

Second, this Court's order enjoining Defendants' enforcement of Section 525 incorrectly assumes that Plaintiffs have stated a cause of action for preemption.

The Federal Deposit Insurance Act, by providing only a narrow private right of action and leaving all other enforcement to the FDIC, evinces intent not to permit implementation of federal law by private parties. *See Vill. of Old Mill Creek v. Star*, 2017 WL 3008289, at *8 (N.D. Ill. July 14, 2017), *aff'd sub nom*, *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (holding that a statute's inclusion of a limited private remedy should "be understood as intentional" and apply *Armstrong* to find no private right for injunctive relief). Indeed, the Tenth Circuit has emphasized that *Armstrong*'s holding was "motivated by the desire to preserve the federal government's 'ability to guide the implementation of federal law' … [which] counsels in favor of … permitting the United States to invoke preemption[.]" *United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 906 n.9 (10th Cir. 2016) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015)); *see also id.* (noting "the general rule that the United States may sue to protect its interests").

The Court relies on *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 146 (2d Cir. 2016) for the proposition that Congress conferring broad enforcement on authority on the FAA, and not on private parties, did not imply an intent to bar parties from bringing equitable claims. Doc. 69 at 13–14. However, the FDIA does more than confer broad enforcement authority on the FDIC. Congress also specifically provided only a limited private right of action to

borrowers to recover excess charges in Section 521 itself. 12 U.S.C. § 1831d(b). If Congress had intended a broader private action at equity in Section 521, it could have said so. But under the *expressio unius* canon, Congress did not. *See* READING LAW at 107-110.

While the parties disagree about the meaning of federal law, Plaintiffs have failed to identify a conflict between state and federal law to state a claim for preemption. Plaintiffs have failed to allege that Colorado's Opt-Out exceeded the authority granted in Section 525, or that there is a conflict between state and federal law. Even under Plaintiffs' First Amended Complaint, Plaintiffs identify no conflict between state and federal law, only a disagreement between the parties on the meaning of federal law, namely Section 525. Plaintiffs' sole remaining claim, preemption, is not likely to succeed on the merits, because the conflict in the case is not between state and federal law.

Third, the Court's order did not balance the harms to Coloradans taking out loans when it granted the preliminary injunction. This case involves a "disfavored injunction" because Plaintiffs obtained at the preliminary injunction stage "all the relief the moving party could expect from a trial win" because the injunction cannot be "undone" after it is granted. *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797–98 (10th Cir. 2019). These types of injunctions are disfavored because "a preliminary injunction that grants substantially all the relief sought . . . would render a trial on the merits largely or completely meaningless."

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1247 (10th Cir. 2001). Accordingly, Plaintiffs faced a heavier burden of proof and needed to make a "strong showing" that the balance of harm factors were in their favor. *Free the Nipple-Fort Collins*, 916 F.3d at 797.

The Court did not engage in this analysis. Rather, it considered whether the Plaintiffs got "all" of the relief they requested and held they did not because the preliminary injunction applied only to Plaintiffs and not all lenders. The Court held that the application of the disfavored injunction standard was "doubtful" because a permanent injunction would "impact infinitely more loans than the temporary relief" applicable only to Plaintiffs in the preliminary injunction. Doc. 69 at 6 n.2.

But the Court should have considered whether the injunction could be "undone." *Prairie Band of Potawatomi Indians*, 253 F.3d at 1247–48 (noting examples of preliminary injunctions that cannot be undone such as a live televised event or disclosure of confidential information). Here, the injunction cannot be undone. Even if the Plaintiffs later lose at trial, Coloradans will have already paid interest at prohibited rates under loans permitted by the injunction. Some Coloradans could default on the prohibited loans, as well as other legal loans, because of the added financial strain of unlawful rates. The Court's failure to weigh these harms in its analysis means Defendants are likely to prevail on appeal.

Defendants will suffer irreparable harm if the stay is not granted

The irreparable harm to Defendants if a stay is not granted merges with the public interest factor here because the Defendants represent the government. The Administrator is tasked with enforcing Colorado's Uniform Consumer Credit Code and protecting Colorado's consumers. C.R.S. § 5-1-102. Colorado consumers will be irreparably harmed if the injunction is not stayed. Assuming the Court is correct that Plaintiffs have sufficiently alleged injury in the loans that they would have made without an injunction then, by the same token, the injunction permits predatory lending to persist in Colorado. Consumers will pay interest at prohibited rates. The predatory lending may also force consumers to default on prohibited loans, as well as other legal loans, because of the strain of unlawful rates. A judgment at trial in Defendants' favor would do nothing to remedy this harm.

The Court has previously expressed skepticism about this harm because national banks can continue to lend above Colorado's rate caps. But the Colorado General Assembly exercised the authority granted to it by Congress—Section 525—to curtail predatory lending by out-of-state, state-chartered banks when passing the Opt-Out. Congress did not create an opt-out in the National Bank Act. This Court is not in a position to second-guess the Congress and the General Assembly's decisions.

Whether the stay will substantially harm Plaintiffs

The Court relied on declarations from Plaintiffs detailing the loans that will be affected as well as the administrative costs, lost revenue, and intangible losses like

lost customers and goodwill that the Plaintiffs' members will suffer if the full scope of Colorado's Opt Out is permitted to take effect. *See* Doc. 26 ¶¶ 11–19; Doc. 27 ¶¶ 14–22; Doc. 28 ¶¶ 12–19; Doc. 29 ¶¶ 13–20; Doc. 30 ¶¶ 10–17; Doc. 31 ¶¶ 10–13; Doc. 32 ¶¶ 8–15. This is not substantial harm. The only harms Plaintiffs identify stem from their inability to offer loans at rates that the General Assembly determined are unlawful and not in the interests of Coloradans. *Sensoria, LLC v. Kaweske*, 581 F. Supp. 3d 1243, 1258–59 (D. Colo. 2022) (court should not exercise equitable powers to facilitate unlawful conduct); *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U.S. 597, 601 (1884) ("one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."). Defendants have shown that they are likely to prevail, so Plaintiffs will not suffer substantial harm.

CONCLUSION

For these reasons and those in the Defendants' previous submissions, this Court should stay its preliminary injunction under Fed. R. App. P. 8(a)(1)(C) and Fed. R. Civ. P. 62(d) pending appeal.

PHILIP J. WEISER
Attorney General

/s/ *Kevin J. Burns*
NIKOLAI FRANT, 38716*
PHILIP SPARR, 40053*
KEVIN J. BURNS, 44527*
BRIAN URANKAR, 47519*
Consumer Credit Enforcement Unit
Consumer Protection Section
Attorneys for Defendant(s)
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6000
Kevin.Burns@coag.gov

*Counsel of Record for Defendants

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Defendants hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

s/ *Kevin J. Burns*
KEVIN J. BURNS, 44527 *

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2024, I filed a true and correct copy of the foregoing document via CM/EFC, which will generate notice by electronic mail to all counsel who have appeared via CM/ECF.

/s/ Kevin J. Burns
Kevin J. Burns