No. 24-1293

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL ASSOCIATION OF INDUSTRIAL BANKERS et al.,
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
No. 1:24-CV-00812-DDD-KAS
The Honorable Daniel D. Domenico, Judge

BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each amicus certifies that it does not have a parent corporation and no publicly held corporation owns 10 percent or more of the stock of amicus.

Dated: September 23, 2024 *<u>/s/ Andrew Kushner</u>*
Andrew Kushner

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STATEMENT OF INTEREST[1]

Amici are non-profit, public interest, and consumer advocacy organizations that believe the public should be protected from abusive lending practices. *Amici* submit this brief to support appellants' arguments why the court below erred in construing the statute governing states' right to opt out of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). Additional information about each *amicus* organization is included below. All parties have consented to the filing of this brief.

The Center for Responsible Lending ("CRL") is a non-profit organization dedicated to eliminating abusive practices in the market for consumer financial services and to ensuring that consumers benefit from the full range of consumer protection laws designed to prohibit unfair and deceptive practices by financial services providers. CRL is an affiliate of Self-Help, a nonprofit based in North Carolina, with retail credit union branches in North Carolina, Virginia, Florida, California, Wisconsin, Washington, and Illinois.

Since its founding as a nonprofit in 1969, the National Consumer Law Center ("NCLC") has used its expertise in consumer law to work for consumer

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

NCLC has long-standing expertise in consumer lending. NCLC publishes a 21-volume consumer law treatise series, including National Consumer Law Center, Consumer Credit Regulation (3d ed. 2020), updated at www.nclc.org/library, which is a 1040-page treatise providing in-depth explanations of the laws and regulations governing the regulation of credit at the state level. The treatise has sections devoted to federal preemption of state interest rate laws and to the ways that banks have enabled predatory lending.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case addresses whether states have the choice, given to them by Congress, to prevent out-of-state banks from circumventing state usury laws designed to protect consumers, charging rates as high as 200% APR. They do. The District Court's decision eliminates Congress's careful balance that enables states to reclaim their traditional power to protect borrowers from predatory lending.

In early 1980, Congress adopted section 521 of the DIDMCA, which provided two new powers to state chartered banks. As of April 1, 1980, and as a result of this law, state banks could now offer loans at: a) a 1% premium over the local federal discount rate, even if the maximum allowable interest rate in the state where the bank is located is lower than that figure ("federal rate"); and b) the rate allowed by the state where the bank is located, exporting that rate to loans to borrowers in *other* states ("rate exportation"). *See* 12 U.S.C. §1831d ("section 521"). Congress recognized, however, that granting state-chartered banks these new powers significantly infringed on states' traditional authority over usury policy, so it paired section 521 with DIDMCA section 525, which permits states to opt out of section 521 "with respect to loans made in such State." *Id.* (statutory note) ("section 525").

In this case, the District Court entered a preliminary injunction based on its erroneous conclusion that Colorado's opt out under section 525 permits the state to reclaim only *some of* its authority preempted by section 521. According to the District Court, section 525 permits states to opt out of section 521 only for loans where the "bank is located and performs its loan-making functions" in the opt out state and *not* for loans made by out-of-state banks to borrowers *in* the opt out state. App. Vol. II at 462. In other words, the District Court understood section 525 to permit states to protect its residents from the harms of loans made under section

521's federal rate, and even there, only for loans made by banks in the opt out state and not in the other 49 states; states could not opt out at all for loans made under section 521's rate exportation provision. Such a construction practically negates section 525's impact, such that—far from restoring opt out states' ability to enforce their usury laws—it leaves states with hardly any more authority than they would have had if section 525 had not been included at all. This amicus brief explains why this result is contrary to section 525's text, structure, evident purpose, legislative history, and the context in which it was enacted.

Below, *amici* expand upon the arguments made by appellants Philip J. Weiser and Martha Fulford to demonstrate why the District Court erred as a textual matter in construing section 525. The District Court believed that the single word "made" in section 525 ("with respect to loans *made* in such State") was itself sufficient to justify its construction of the statute. But this narrow view ignores that the word "made" appears not alone in the statute but as part of the phrase "made *in*." If asked "does Bank of America make loans *in* Colorado?," no one would believe the questioner to be asking *exclusively* about whether Bank of America bases its "loan-making functions" in the state and not at all about whether borrowers in the state can get Bank of America loans. The District Court's decision also ignores the basic structure of the DIDMCA and the relevant legislative history. Congress added section 525 to the Act's effective date section so that

states could "override" section 521. Yet the District Court construed section 525 not to fully reverse section 521 but instead to leave opt out states with significantly impaired authority over usury policy. Finally, the decision also ignores that the federal agency charged with interpreting and administering section 521, the Federal Deposit Insurance Corporation ("FDIC"), has long construed the opt out as Colorado does in this case, including in a notice-and-comment rulemaking finalized in 2020 during the prior administration.

ARGUMENT

I. The District Court's Preliminary Injunction Order Must Be Reversed.

A. States Have Discretion to Choose their Own Usury Policy, Including Whether to Apply Interest Rate Limits to State-Chartered Banks Extending Credit within the State.

Throughout our nation's history, usury regulation has been a paradigmatic example of American federalism in practice, with states retaining wide latitude to choose individual approaches to usury policy. Among the components of states' traditional, pre-DIDMCA usury authority is the ability to enforce usury laws against out-of-state chartered banks.

1. Since the American Revolution, Usury Policy Choices Have Been A Quintessential Domain of State Authority.

Going back to antiquity, policymakers have recognized the inherently unequal bargaining power between borrowers and lenders. For quite literally millennia, credit products have generally been subject to cost caps (principally

interest rate caps) because these products can effectively create their own demand and trap users in a cycle of debt and reborrowing that can lead to default. Without effective cost caps, lenders take advantage of desperate, marginalized consumers by trapping them in unaffordable loans that push them only further into poverty. At its most extreme, predatory lending takes the form of "set up to fail lending," where—due to the high interest rates they are allowed to command—lenders make money even if borrowers are unable to afford the loans and end in default. *See* NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016).[2]

American usury law descends from this tradition. It "represents a venerable body of legal, ethical, religious, and (sometimes) economic thought, reaching back through the Middle Ages to the foundations of western civilization." James Ackerman, *Interest Rates and The Law: A History of Usury,* 27 Ariz. St. L.J. 61, 62-63 (1981). The thirteen original American colonies aggressively regulated consumer loans with annual interest rate caps. Christopher L. Peterson, *"Warning: Predatory Lender" -- A Proposal for Candid Predatory Small Loan Ordinances*, 69 Wash. & Lee L. Rev. 893, 899 (2012). By 1886, every state had some usury limit. Ackerman, *supra* at 85.

[2] *Available at* https://www.nclc.org/resources/misaligned-incentives-why-high-rate-installment-lenders-want-borrowers-who-will-default/

The federal government has largely left it to the states to regulate the cost of credit products, as federal law does not generally limit interest rates. States have always had primary authority in the area of consumer financial protection, including establishing and enforcing usury caps to protect their residents from predatory lending. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 35-36 (2007) ("Consumer protection is quintessentially a 'field which the States have traditionally occupied'") (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) (describing "consumer protection law" as "a field traditionally regulated by the states"). Indeed, courts have long recognized that, in states that have chosen strong usury protections, usury prohibitions constitute a fundamental public policy. *See, e.g.*, *United States v. Moseley*, 980 F.3d 9, 21-22 (2d Cir. 2020); *Kaneff v. Delaware Title Loans*, 587 F.3d 616 (3d Cir. 2009); *Fleetwood Servs., L.L.C. v. Complete Business Solutions Group, Inc.*, 374 F. Supp. 3d 361 (E.D. Pa. 2019).

Notably, however, there remains significant variation in the usury policy choices of the many states. Nearly every state has interest rate caps set at some level that apply to at least some categories of consumer loans, with most well below the triple digits. *See* NCLC, *State APR Caps for $500, $2,000 and $10,000*

Installment Loans (Sept. 2024).[3] However, the specific interest rates chosen by different states vary. *Id*. For example, Arkansas has one of the strictest interest rate caps in the country, at 17% for both a $500 and $2,000 loan (the median state interest rate limit for loans of these sizes is around 40% and 33%, respectively). *Id*. At the other end of the spectrum, a small handful of states, including Idaho, Wisconsin, and Delaware, have no numerical interest rate limits at all on loans of these sizes (some of these states have no cost limits whatsoever, while others have only an "unconscionability" cap). *Id*. Colorado has chosen a middle path, with an allowable annual percentage rate, including fees, of 78% on a $500, six-month loan; 31% on a $2,000, two-year loan; and 21% for a $10,000, five-year loan. *Id.*

States are also split on the issue whether, as a matter of state law, the state's interest rate caps apply to state-chartered banks. Many states with usury caps (for example, Arizona and California) exempt state-chartered banks as a matter of state law. *See, e.g.*, Ariz. Rev. Stat. §6-602(a)(1) (exempting a person "who does business under . . . [the law of] any other state . . . relating to banks" from small dollar lending law); Cal. Fin. Code §22050(a) (same). By contrast, the usury laws of many other states, including Colorado and Iowa, contain no exemption for state-chartered banks. *See, e.g.*, Colo. Rev. Stat. §§5-1-201–02 (no similar exemption in

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[3] *Available at* https://www.nclc.org/resources/state-apr-caps-for-500-2000-and-10000-installment-loans/

Colorado Uniform Consumer Credit Code); Iowa Code §§537.1108, 537.1202 (same for Iowa).

Significant divergence in states' approaches to usury policy have long existed. Following a period of Progressive-era tightening of usury restrictions, "[i]n the mid twentieth century, each state began to chart its own course, creating exceptions to the traditional usury laws for a variety of types of lenders in a variety of ways." Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion of American Credit Pricing Limits*, 92 Minn. L. Rev. 1110, 1121 (2008). Indeed, by the late 1970s—the era in which Congress debated the DIDMCA—the states had come to very different conclusions about where, if at all, to set the state's usury cap. "As of September 1979, the legal contract rate of interest . . . ranged from seven percent per annum in Michigan, to twenty-one percent per annum in Rhode Island, to an unlimited rate of interest in Massachusetts, New Hampshire, Maine and, just recently, the District of Columbia." Maxine Master Long, *Trends in Usury Legislation-Current Interest Overdue*, 34 U. Miami L. Rev. 325, 332 (1980); *see also* Ackman, *supra*, at 107-09 (discussing state of state usury laws in late 1970s).

2. Prior to the Enactment of the DIDMCA, States Could Apply their Usury Laws to Loans by Out-of-State Banks.

While states had the freedom to, and did, chart their own courses on usury policy before the DIDMCA, there can be no dispute that in that era federal law did

not restrict states' authority to apply their usury restrictions to out-of-state state-chartered banks. Although the point may sound self-evident, it is worth noting: prior to the DIDMCA, no federal statute precluded states from applying their usury laws to loans by out-of-state chartered banks.

Consider the Supreme Court's decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299 (1978). There, the Supreme Court construed section 85 of the National Bank Act to preempt Minnesota's usury laws as applied to loans made to Minnesotans by a bank located in Nebraska. *Id*. at 301.[4] There is no suggestion in *Marquette* that, *absent section 85*, national banks could lend across state lines in violation of the laws of the borrower's state. To the contrary, the Supreme Court recognized that its construction of section 85 "significantly impair[s] the ability of States to enact effective usury laws" but that addressing such concerns required Congress to amend section 85. *Id*. at 318-19. Similarly, in the earlier Minnesota Supreme Court decision in *Marquette*, that court noted that *as a result of section 85*, out-of-state national banks could "avoid the provisions of Minnesota law relating to allowable

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[4] Section 85 allows national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located" or "at a rate of 1 per centum in excess of the" local federal discount rate. 12 U.S.C. §85. Under *Marquette*, national banks can export their local interest rates to a borrower in another state, even if that state's usury laws required a lower interest rate. 439 U.S. at 318-19.

interest rates." *Marquette National Bank of Minn. v. First of Omaha Serv. Corp*., 262 N.W.2d 358, 365 (Minn. 1977).

The DIDMCA was enacted to give state banks parity with national banks (subject, of course, to states' right to opt out of this change). *Final Rule, Federal Interest Rate Authority*, 85 FR 44146, 44147 (July 22, 2020). Prior to the DIDMCA's enactment, state banks enjoyed no comparable federal right to export their interest rates across states lines. Accordingly, up until April 1, 1980, states had traditional authority, unfettered by preemption, to adopt a usury policy a) with an interest rate of the state's choosing; and b) that applied (or did not apply) to loans made by state-chartered banks (including those chartered in other states).

B. Section 525's Opt-out Language Applies to Loans Made to Borrowers Physically Present in Colorado by Out-of-State Banks.

With this background in mind, the District Court erred as a matter of law in drastically narrowing section 525's phrase "with respect to loans made in such State" to permit states to opt out of section 521 only for loans made by a bank located, or that performs certain loan-making functions, in the state. Because the District Court's construction leaves an opted-out state with only *some* of the power over usury regulation that it could assert prior to (and in the absence of) section 521, that narrow interpretation cannot be what Congress intended.

Indeed, the District Court's construction is contrary to the text of section 525 itself. The court made two independent errors in construing this language. First, it

ignored the word "in" in the phrase "made in" and focused almost exclusively on the single word "made." *See* App. Vol. II at 457 ("In plain parlance, it is the lender who *makes* a loan") (emphasis in original). Second, the court adopted a gloss on the word "made" that is wholly without support in the statutory text. *See id*. at 463d ("where a loan is made is where the bank performs its loan-making functions"). That is a logical leap at least several steps too far, as nothing in the statute's text or legislative history indicates that Congress intended for section 525 to incorporate the highly technical "loan-making functions" test adopted by the District Court.

1. The District Court Failed to Consider Section 525's Language as a Whole.

To begin with, the District Court committed reversable error by focusing on the single word "made" in section 525. *See* App. Vol. II at 457. That is too narrow a view, for it ignores that "made" appears not standing alone but as part of the phrase "made *in*." It is, of course, true that loans are made *by* banks. But even though that is so, if someone posed the question "does Bank of America make loans *in* Colorado?" most would understand the questioner to be asking whether Bank of America lent to borrowers located in Colorado. Few would believe the questioner to be asking whether Bank of America located its loan-making operation in the state. And *no one* would understand the question to refer only to

the location of the bank's activities and to exclude all consideration of the borrower's location.[5]

Consideration of the DIDMCA's basic structure also undermines the District Court's conclusion that the phrase "made in" categorically excludes consideration of the borrower's location. The phrase "loans made in such State" appears in a statutory note to 12 U.S.C. §1831d, as part of language containing the effective date for section 521. *Id*. (statutory note) (section 521 applies "only with respect to loans *made in* any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law . . . which states explicitly and by its terms that such State does not want this section to apply with respect to loans *made in* such State") (emphasis added).

As a result of section 525, none of the preemption rights identified in section 521 apply *at all* to a loan made before April 1, 1980, and *all of them* apply to "loans *made in* any State" after that date unless a state opts out. *Id*. (emphasis

[5] The District Court's decision to overlook that section 525 refers to loans "made *in*" the opt out state also undermines its reliance on other banking statutes. According to the District Court, other statutes in the Federal Deposit Insurance Act (in which the DIDMCA appears), as well as Title 12, refer to banks as "making" loans. App. Vol. II at 457-59 (citing various statutes). All of those statutes focus on the bank's activities, so it is natural that "made" in that context relates to the bank's actions. *None* of those uses of "made" contain the key phrase "made in" that appears in section 525; *none* refer to the location of the loan; and *none* contain any geographic limitation. *Id*. Thus, the statutes shed no light on the meaning of the phrase "made in" that appears in section 525.

added). For example, there is no possible argument that, for loans "made in any state" before April 1, 1980, state-chartered banks could lawfully charge a small premium over the local federal discount rate but not export their home state's interest rate into neighboring states. That would be nonsensical.

This is so because section 525 performs a gatekeeping function that determines whether section 521 applies at all. The only natural, parallel way to read section 525's opt-out language is therefore that neither the federal funds rate nor the rate exportation parts of section 521 applies *at all* to a loan made before the effective date of the DIDMCA or after a state decision to opt out. Because section 521 does not apply at all to loans issued following an opt out, a decision to opt out must countermand all of the preemption rights identified in section 521. It is odd indeed to read the first half of section 525's effective date language to apply to *both* new powers given to state banks in section 521 yet to read the second half of that language to apply only to *one* of those powers. This is especially true because each half of the sentence contains the identical phrase "made in."

2. The District Court's Adopted Meaning of "Made" Is Wholly without Textual or Logical Support.

Compounding the error of its unduly narrow focus, the District Court also erred by adopting an extra-textual gloss on the word "made" without any textual basis. According to the District Court, a loan is "made" not necessarily where the bank is chartered or located but instead where it "performs its loan-making

functions." App. Vol. II at 462 (citing *FDIC Op. No. 11*, 63 Fed. Reg. 27282 (1998)). The court arrived at this conclusion *not* through any mode of textual analysis. Instead, it cited a line of administrative guidance that addresses a wholly different statutory term: where a bank with branches in multiple states is "located" for purposes of determining which state's usury law applies. *See FDIC Op. No. 11*, 63 Fed. Reg. at 27282; *see also* 12 U.S.C. §1831d(a) (bank may charge maximum interest rate allowed where bank is "located"). The upshot of these administrative decisions is that, for loan interest rate limit purposes, a bank with branches in multiple states is "located" in, and can charge the rates allowed by, the state where the bank conducts the "non-ministerial functions" of its loan program. Administrative guidance has further defined these "non-ministerial functions" as "the decision to extend credit, the extension of credit itself, and the disbursal of the proceeds of the loan." *Id.* at 27285-86 & n. 27.

Put simply, nothing in the text of section 525 or legislative history of the DIDMCA justifies using interpretations of where a bank is "located" for purposes of section 521 to interpret the state a loan is "made in" for purpose of section 525. The District Court did not even attempt to justify this interpretation of "made" as a textual matter, and there is no indication that Congress intended the highly technical "non-ministerial functions" test to govern the applicability of section 525. The District Court offered no argument, textual or otherwise, for imbuing the word

"made" with subtle distinctions based on the location of "the decision to extend credit, the extension of credit itself, and the disbursal of the proceeds of the loan."

Indeed, the "non-ministerial functions" test post-dates the DIDMCA's enactment by *nearly twenty years*. *See Office of the Comptroller of the Currency (OCC) Interpretive Letter #822* (March 1998) at 8-9[6]; *see also FDIC Op. No. 11*, 63 Fed. Reg at 27285 (citing OCC Interpretive Letter #822). Congress did not address interstate branching until 1994, when it enacted the Riegle-Neal Act. *See* 63 Fed. Reg. at 27282. And when it did, it expressly declared that nothing in that Act "shall be construed as affecting in any way . . . the applicability of . . . section 1831d[] of the Federal Deposit Insurance Act" (i.e. section 521). 12 U.S.C. §1811(note). It is thus exceedingly unlikely that the 1980 Congress intended "made in" in section 525 to refer to where a bank is "located" as defined by the "non-ministerial functions" test adopted 20 years later. *See* App. Vol. II at 463.[7]

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[6] *Available at* https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/1998/int822.pdf

[7] Moreover, the phrase "made in such State" appears throughout the DIDMCA's statutory text, including in sections that do not apply only to state or federally chartered banks (i.e. those to which the Riegel-Neal "loan-making functions" test applies). *See, e.g.*, Pub. L. No. 96-221, tit. V, §501(b)(2) (opt out provision for DIDMCA section preempting interest rate limits on mortgages, which applies to mortgage lenders generally and not only chartered banks); §§511, 512(2) (opt out provision for DIDMCA section preempting interest rate limits on certain agricultural or business loans made by "persons," not just chartered banks). This further undercuts the District Court's conclusion that "made in" in section 521 should be interpreted using administrative guidance that applies only to state and federally chartered banks.

C. The DIDMCA's Legislative History Confirms Congress's Intent, in Section 525, to Preserve States' Authority to Choose their Own Usury Policy.

While the text of section 525 unambiguously supports Colorado's construction, the legislative history resolves any possible doubt about the provision's meaning. Congress added section 525 to the DIDMCA to enable states to revoke interest rate preemption created by section 521 and reassert their traditional authority over usury policy. The provision was designed to assuage concerns about the Act's patent intrusion on an area of traditional state authority. Section 521 intrudes on that traditional state authority in two different ways: first, by allowing state-chartered banks to offer loans, to both in-state and out-of-state borrowers, at 1% over the local Federal Reserve discount rate (notwithstanding state interest rate limitations, including in the state where the bank is located); and second, by allowing state-chartered banks to export the interest rate of the state where the bank is located into other states. *See* 12 U.S.C. §1831d(a), (b).

An interpretation of section 525 that revokes only the first of these intrusions on traditional state authority, and only with respect to loans made by banks in one of the 50 states, is plainly at odds with the legislative history, which reflects significant debate about section 521's serious incursion into areas of traditional state control and section 525's power to override that incursion. The legislative history is clear that Congress intended section 525 to allow states to restore the

usury authority they enjoyed prior to the DIDMCA's enactment, which, as discussed above, included the right to apply state usury caps to loans by out-of-state chartered banks.

On November 1, 1979, Senators Bumpers and Pryor of Arkansas first broached the idea for the legislation that ultimately became section 521. Proceedings and Debates of the 96th Congress, H.R. 4986, 126 Cong. Rec. 30655 (1979). Not even a full year after the *Marquette* decision, they noted that section 85 of the National Bank Act gave "national banks an unfair advantage over many State banks and other financial institutions," and so proposed extending section 85's powers to state chartered banks. *Id.* at 30655.

Senator Proxmire of Wisconsin, who was the Chair of the Senate Banking Committee, expressed immediate concerns about preempting state usury laws, stating "[w]hat this would do would be to provide a national usury limit for everybody. We override all State laws as far as State banks are concerned." *Id*. He added further that "we should be very chary about overriding State usury laws." *Id*.

The Senate bill as introduced, like sections 521 and 525 today, both preempted state usury limits *and* provided to states the ability to reassert their control over local usury policy by opting out. *A bill to equalize competition between state and national banks, and for other purposes*, S. 1988, 96th Congress

(Nov. 7, 1979).[8] Thus, from the beginning Congress recognized that section 521's intrusion into areas of state control should be tempered with states' right to opt out of that arrangement.

The following month, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on S. 1988. At that hearing, there was significant discussion of the bill's careful balance between preemption and federalism concerns. The below colloquy between Fredrick Schultz, the Vice Chairman of the Board of Governors of the Federal Reserve System, and Senator Proxmire captures this focus on preserving state control over local usury policy:

> Mr. SCHULTZ . . . . As I said, all members of the Board are concerned about the issue of States rights and preemption. . . . The majority felt that the critical nature of the problem brought us down in favor of this kind of a bill which would preempt on the condition that the States could override if they decided to do so. . . . It just seemed to me that under the circumstances, because of the critical nature of the problem, it was worthwhile giving them the opportunity to go at it from the other direction—to say that *these usury laws will be preempted but you can reinstate them, you can override, if you wish to do so*.
>
> THE CHAIRMAN [Senator Proxmire] We do exactly that, as you know . . . . We say that we provide this override unless and until such State legislatures adopt laws stating in substance that such State does not want such amendment or amendments made to the statute with respect to this.[9]

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[8] *Available at* https://www.congress.gov/bill/96th-congress/senate-bill/1988?s=5&r=1&q=%7B%22search%22%3A%22s1988%22%7D

[9] Statement of Frederick H. Schultz, Vice Chairman, Board of Governors of the Federal Reserve System, Usury Lending Limits, Hearing on S. 1988 Before the Comm. On Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess., at 48-49 (Dec. 17, 1979) (emphasis added); *see also id.* at 35 (Section 525 "would honor

The language that ultimately became section 521 later emerged through the conference process as part of H.R. 4986, the bill that ultimately became the DIDMCA. The conference report for that House bill makes it clear that section 521 and 525 reflect a careful balance that protects state authority over usury policy. The conference report explains that "[s]tate usury ceilings . . . will be permanently preempted *subject to the right of affected states to override at any time* . . . . In order for a state to override a federal preemption of state usury laws provided for in this title the override proposal must explicitly and by its terms indicate that the state is overriding the preemption."[10]

When the Senate debated H.R. 4986, preservation of local authority over usury policy emerged as a key aspect of the legislation. Senator Proxmire stated that "I think that one of the most important parts of this bill is the fact that when we override usury statutes we do it in a way *that permits States to restore their usury statute if they wish*."[11] He later explained: "Under the usury provisions, each

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State prerogatives by enabling legislatures to reject the rate flexibility provisions of this bill through passage of a new State law reaffirming existing regulations. In the view of the majority of the Board, this approach would provide adequate preservation of State authority to regulate lending practices.").

[10] H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. (Mar. 21, 1980) (emphasis added).

[11] Proceedings and Debates of the 96th Congress, H.R. 4986, 126 Cong. Rec. S 3235-46 (daily ed. Mar. 28, 1980) (statement of Senator William Proxmire) (emphasis added).

State may reimpose its usury limits, if it so desires. We do not take that away from the States. *They can put those usury laws back into effect*." *Id*. (emphasis added).

This legislative history further refutes the argument that Congress intended section 525 to permit states to regain only *some of* their pre-DIDMCA usury authority. Instead, it confirms that section 525 was included to allow states to go back to the circumstances in existence prior to the DIDMCA's enactment. Those circumstances included the power to enforce usury restrictions against out-of-state chartered banks, and the District Court's construction of section 525, which denies that power to opted-out states, is at odds with history and the legislative record.[12]

D. Formal FDIC Guidance Confirms that Section 525 Applies to Loans to Borrowers in An Opted-Out State.

Rather than relying upon inapposite administrative guidance about "essential loan-making functions," the District Court should have heeded the FDIC's

[12] States cannot opt out of section 85 of the National Bank Act. But it is unsurprising that the DIDMCA Congress did not address the interaction of section 85 and state usury laws. The specific issue created by section 521 was preemption of state usury restrictions for state-chartered banks, and it makes sense that, when debating and passing the DIDMCA, Congress would address the consequences only of that specific expansion of federal law. Any proposed changes to the *Civil War-era* National Bank Act would potentially implicate different issues, upset long-held expectations, and draw different sources of opposition.

Moreover, "national banks have been national favorites." *Cappalli v. Nordstrom FSB*, 155 F.Supp.2d 339, 345 (E.D. Pa. 2001) (quoting *Tiffany v. Nat'l Bank of Missouri*, 18 Wall. 409, 85 U.S. 409, 413 (1873)). This may further explain why Congress did not choose to cover national banks in provisions aimed purely at state-chartered banks.

determination that loans "made in" the opt-out state include those to borrowers in the opt-out state by out-of-state banks. When consumer groups raised to the FDIC the issue of predatory out-of-state lenders abusing section 521 to evade state usury caps, the agency responded that states could combat this problem *exactly* as Colorado has chosen here: by opting out under section 525. *See infra* at 24-27. The FDIC's interpretation is persuasive and is entitled to respect. *See Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2257 (2024) ("[c]areful attention to the judgment of the Executive Branch" is still appropriate when construing ambiguous statutory language); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

1. Predatory Lenders Have Abused Section 521 to Evade State Law and offer Loans at 200% or More APR.

The rate exportation enabled by the DIDMCA has been exploited by predatory and high-cost lenders that partner with banks located in states without usury caps. *See* NCLC, *High-Cost Rent-a-Bank Loan Watch List* (updated Jan. 2024).[13] Because of the DIDMCA and the choice of certain states to forgo usury limits, *no* interest rate limits apply to certain state-chartered banks. *See generally NCLC*, Consumer Credit Regulation §3.5.4.[14] In some cases, out-of-state banks may make loans directly to consumers in another state at rates that exceed those

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[13] *Available at* https://www.nclc.org/resources/high-cost-rent-a-bank-loan-watch-list/

[14] *Available at* www.nclc.org/library

allowed in the consumer's state. In other, especially unscrupulous cases, online non-bank lenders route their loans through banks located in states without usury limits and offer egregiously predatory loans nationwide, including in states with usury limits that clearly apply to the non-bank online lender (called "rent-a-bank" lending). These business models undermine the policy choices of states that have chosen to protect their residents from predatory loans, nullifying usury caps across the nation and effectively allowing banks chartered in a small subset of states to set interest rate policy nation as a whole.

At the most extreme, some banks originate loans at 200% APR or more. NCLC, *High-Cost Rent-a-Bank Loan Watch List*, *supra*. Others limit themselves to APRs of 36% or less. They do so, however, even on very large loans for which an APR at that amount is unaffordable and exceeds Colorado's rate limits (as well as those of most states). The online non-bank Prosper, for example, offers loans up to $50,000, routing them through WebBank, a state-chartered bank in Utah, which has no rate cap.[15] As noted, Colorado caps the allowable interest rate, including fees, of 78% on a $500, six-month loan; 31% on a $2,000, two-year loan; and 21% for a $10,000, five-year loan. Most other states also have declining rate caps as loans get larger, with median rates for those loans at 39.5%, 32.5% and 27%,

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[15] *See* Prosper Website, https://www.prosper.com at n.1 ("All personal loans made by WebBank.").

respectively. NCLC, *Larger Loans Need Lower Rates: A 50-State Survey of the APRs Allowed for a $10,000 Loan* (Mar. 6, 2024).[16]

While 36% is a widely accepted maximum rate cap for small loans, most states require rates well below that number for larger loans. The borrower will pay the interest on a larger amount over a longer period of time, leading to far more interest than on a smaller, shorter loan. An interest rate that is reasonable for a small loan can lead to explosive and unaffordable interest on a larger loan. Increasing the interest rate from 25% to 36% adds over $4,000 to the cost of a $10,000, 5-year loan. *Id.*

Due to section 521, out-of-state banks are able to offer predatory and high-cost loans in Colorado and other states notwithstanding these states' decisions to adopt more protective interest rate limits.

2. The FDIC Has Expressly Recognized Opting Out under Section 525 as a Remedy for States Interested in Combatting this Problem.

For years, consumer advocates have raised the alarm about abuses of section 521 by predatory state-chartered banks and the online lenders that partner with them. In response, the FDIC has identified opting out under section 525 as a

[16] *Available at* https://www.nclc.org/resources/larger-loans-need-lower-rates-a-50-state-survey-of-the-aprs-allowed-for-a-10000-loan/

solution for states concerned about these schemes, confirming that the agency understands the opt out to apply as Colorado does here.

In 2020, the FDIC adopted, following notice and comment rulemaking, a final rule addressing whether events following a state-chartered bank's issuance of a loan affect the legality of that loan's interest rate (for example, changes to a state's interest rate limits or a sale or assignment of the loan to another entity). In that rulemaking, consumer groups raised the concern that the proposed rule would encourage predatory lending by out-of-state banks that partner with online non-banks and ignore the interest rate laws of the borrower's state. *See* Comments of Consumer Groups on FDIC Notice of Proposed Rulemaking, Federal Interest Rate Authority, 12 CFR Part 331, RIN-3064-AF21 (Feb. 4, 2020).[17] In response, in the final rule the FDIC stated that states "may opt out of the coverage of section 27 [DIDMCA section 521] if they choose," and "if a State opts out of section 27, State banks *making loans in that State* could not charge interest at a rate exceeding the limit set by the State's laws, *even if the law of the State where the State bank is located would permit a higher rate*." *Final Rule, Federal Interest Rate Authority*, 85 FR at 44153 (emphasis added). And if that were not clear enough, the agency added that, regarding the rent-a-bank schemes discussed above, that "if States have

[17] *Available at* https://www.nclc.org/wp-content/uploads/2022/08/comment-groups-fdic-rentabank-feb2020-1.pdf

concerns that nonbank lenders are using partnerships with out-of-State banks to circumvent State law interest rate limits, *States are expressly authorized to opt out of section 27*." *Id*. (emphasis added).

The only possible interpretation of these passages is as confirmation that the FDIC construes the opt out to apply to banks located outside the opt-out state. The description of the opt-out language quoted above refers to two different states: the state that has opted out (State A) and another state, which is home to a state-chartered bank (State B). It explains that even if State B has *not* opted out, banks located in that state cannot lend to borrowers in State A at any higher, State B rates. It cannot be that the phrase "making loans in" in the above passage refers to the state where the bank is located or conducts certain loan-making functions. This is so because the passage quoted above already refers to banks located outside the opt out state (e.g. those in State B), and expressly states that those banks must follow the lending laws of the opt-out state (State A).

In addition, the reference to opting out as a countermeasure to rent-a-bank schemes erases all possible doubt about the FDIC's construction of section 525. Such schemes necessarily involve non-banks lending through out-of-state chartered banks into another state at rates otherwise unlawful for the non-bank. *See supra* at 22-24. For this reason, rent-a-bank loans necessarily involve loans for which the "essential loan-making functions" occur outside of the borrower's state.

Yet the FDIC nonetheless recognizes that opting out would permit a state to enforce its usury restrictions against these loans. This is so because the agency, like Colorado, rightly construes "made in" to include the state of the borrower. Contrary to plaintiffs-appellees' argument below (*see* App. Vol. I at 218), the agency has consistently taken this position, in fact during both Republican and Democratic administrations. *See Trump-appointed FDIC chair to resign*, CNN (Jan. 1, 2022).[18]

CONCLUSION

The District Court's decision must be reversed.

Dated: September 23, 2024

Respectfully submitted,

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[18] *Available at* https://www.cnn.com/2022/01/01/politics/fdic-jelena-mcwilliams-resignation/index.html

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because this brief contains 6,298 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: September 23, 2024

/s/ Andrew Kushner
Andrew Kushner

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

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Dated: September 23, 2024

/s/ Andrew Kushner
Andrew Kushner

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2024, I electronically filed a copy of the foregoing Brief of *Amicus Curiae* using the CM/ECF system, which will send notification of this filing to all counsel of record.

Dated: September 23, 2024

/s/ Andrew Kushner
Andrew Kushner