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),

REPLY IN SUPPORT OF 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") submit their Reply in Support of their Motion (Doc. 76) for Stay of the Preliminary Injunction Pending Appeal, which was filed one day after Defendants filed their timely notice of appeal.

I. DIDMCA Section 521 changed the status quo for interstate lending

With their motion to stay the preliminary injunction, Defendants identified an illogical result inherent in the Court's interpretation of the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA"). Doc. 76 at 6–7. Namely, Congress created the opt-out in Section 525 to allow states to undo Section 521's preemption and restore the status quo. Yet the Court's interpretation permits

Colorado only a partial opt-out, for Colorado banks and for the Federal Discount Rate. This narrow result cannot be drawn from the text of Section 525.

At the preliminary injunction hearing, Plaintiffs agreed that the law of the borrower's state generally applies absent DIDMCA preemption. Doc. 64 at 57:19–58:8. Plaintiffs now back away from this admission, asserting that that their statement at the hearing was taken out of context and implying, that by relying on this admission, Defendants concede that there is no "case law or statutory, regulatory, or historical sources" supporting their position. Doc. 86 at 4, n. 1. To the contrary, the case law shows that interstate lending was well-established pre-DIDMCA and that courts often applied the law of the borrower's state to disputes over loans, through conflict of law principles. *E.g.*, *Trinidad Indus.l Bank v. Romero*, 466 P.2d 568, 571 (N.M. 1970) (applying conflict of law principles to hold that New Mexico usury law applied to loan made by Colorado lender to New Mexico resident); *O'Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830, 834 (Wash. 1978), *supplemented*, 605 P.2d 779 (Wash. 1980) (applying usury law of the borrower's state despite provision in interstate loan agreement providing for the law of the lender's state).

Indeed, before DIDMCA, courts in multiple jurisdictions rejected an effort by an Illinois lender with "substantial" interstate lending to hold that the application of the law of the borrower's state was unconstitutional. *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978); *see also Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975);

and *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977). These cases show that interstate lending was established in the 1970s, and that the law of the borrower's state applied in those cases. Even *Marquette* illustrates that, absent NBA preemption, national banks had to apply the law of the borrower's state to interstate loans. *Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 306 (1978).

Against this backdrop, Section 521 gave state banks two new powers—(1) the power to export the rates of their home states without regard to the interest rate limits in the borrower's state; and (2) the power to lend based on a Federal Reserve discount rate (again, without regard to a state's rate limits). The clear intent of the Section 525 opt-out thus was to allow states to undo preemption and return to the status quo. *See* H.R. CONF. REP. NO. 96-842, at 78–79 ("State usury ceilings on all loans made by Federally insured depository institutions . . . will be permanently preempted, *subject to the right of affected states to override [preemption] at any time*." (emphasis added)) The Court's preliminary injunction, by permitting preemption to persist in Colorado despite Colorado's opt-out, does not return Colorado to the status quo, and it fails to implement Congress's intent.

II. Plaintiffs fail to state a Preemption cause of action

The key inquiry under *Armstrong* is whether Congress, when enacting the Federal Deposit Insurance Act ("FDIA"), intended to foreclose private equitable relief under the Act. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015).

Plaintiffs note that a focus of the Supreme Court's analysis in *Armstrong* was whether the statute at issue in *Armstrong* was "judicially unadministrable" and assert that Defendants make "no effort" to make this showing. Doc 86 at 6-7. To the contrary, Defendants have argued that the FDIA creates a "centralized system with substantial authority and discretion vested with the FDIC." Doc. 52 at 12. This creates a "judgment-laden standard" that renders the FDIA judicially unadministrable. *See Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1293 (D. Colo. 2016), aff'd sub nom. *Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017) ("There certainly can be no more 'judgment-laden standard' than that which confers almost complete discretion on the Attorney General … Allowing private litigants to interfere with that [discretion] would create precisely the type of 'risk of inconsistent interpretations and misincentives' which strongly counsel against recognizing an implicit right to a judicially created equitable remedy.")

Moreover, the holding in *Armstrong* does not call for the "application of a simple, fixed legal formula." 575 U.S. at 333 (2015) (Breyer, J., concurring). Courts applying *Armstrong* have recognized that "[t]he first factor alone—the existence of a comprehensive remedial scheme—can demonstrate Congress's intent to foreclose private equitable suits." *Lawrenceburg Power, LLC v. Lawrenceburg Mun. Utilities*, 410 F. Supp. 3d 943, 955 (S.D. Ind. 2019), *citing Seminole Tribe v. Florida*, 517 U.S. 44, 73–74 (1996); *Coal for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 566 (S.D.N.Y. 2017), *aff'd sub nom. Coal. for Competitive Elec., Dynergy Inc.*

v. Zibelman, 906 F.3d 41 (2d Cir. 2018) ("There is no indication in *Armstrong* that both factors must be satisfied in order to conclude that Congress intended to foreclose equitable relief to private parties.")

Here, there can be no question that the FDIA is a comprehensive remedial scheme with broad powers vested in the FDIC. Plaintiffs point out that the FDIC stated at oral argument that its "enforcement authority is limited to banks and those who work for them." Doc 86 at 7. While this may be true, there is a difference between an enforcement action for violations of the FDIA and an action to establish that a state law is preempted. With respect to the second category, it is well-established that federal agencies have the inherent authority to pursue such claims. *E.g.*, *United States v. Iowa*, Nos. 4:24-cv-00162-SHL-SBJ and 4:24-cv-00161-SHL-SBJ, 2024 WL 3035430, at *11 (S.D. Iowa June 17, 2024) (collecting cases) ("both before and after *Armstrong*, courts have consistently entertained lawsuits brought by the United States in equity to enjoin a state law based on the Supremacy Clause.").

Finally, Plaintiffs argue that although DIDMCA created a private right of action for borrowers, that does not indicate an intent to foreclose the private action here. It reasons that the borrower right of action, expressly authorized by DIDMCA, is irrelevant because it is "'not the rules or rights' Plaintiffs' bank members seek to enforce." Doc 86 at 7. But "private rights of action to enforce federal law must be created by Congress" and the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v.*

Sandoval, 532 U.S. 275, 286, 290 (2001). Here, the substantive rule is interest-rate exportation, and it does not fundamentally change because a bank is seeking to enforce it versus a borrower. Moreover, the Court in *Armstrong* noted that the absence of a cause of action does not mean that private parties have no mechanism to assert preemption arguments. 575 U.S. at 326. Rather, if Plaintiffs are sued for usury violations, they may raise preemption as a defense in that case, and "the court may issue an injunction upon finding the state regulatory actions preempted." *Id*. The FDIC can also issue regulations interpreting the scope of preemption, as it has done before. Federal Interest Rate Authority, 85 Fed. Reg. 44146 (July 22, 2020). Plaintiffs could petition for such a rulemaking.

III. The Court granted a disfavored injunction

Plaintiffs argue that the preliminary injunction is not disfavored because it does not grant Plaintiffs all the relief they could expect from a trial win. Doc 86 at 8. As justification, Plaintiffs state only that the injunction is preliminary and not permanent. *Id*.

Plaintiffs cite no authority to support this argument. Defendants contend that no such authority exists because this is not a tenable rule. Indeed, if this were the rule, no preliminary injunction would be disfavored under the law because such injunctions are by definition preliminary, and not permanent. Yet examples of disfavored preliminary injunctions abound. *See Schrier v. Univ. Of Colorado,* 427

F.3d 1253, 1258–59 (10th Cir. 2005) (listing types of disfavored preliminary injunctions).

Plaintiffs also argue that the preliminary injunction is not disfavored because it can be undone. Doc 86 at 8. But in making this argument, Plaintiffs fail to explain how to remedy the harm the preliminary injunction will cause to consumers. These consumers will receive unlawful loans and may default on other legal loans because of the financial strain. Doc 76 at 13. This cannot be undone, which is why the injunction is disfavored.

IV. The stay would not substantially harm Plaintiffs

Instead of addressing the substance of Defendants' argument regarding substantial harm, Plaintiffs resort to hyperbole. (Doc. 86 at p. 10). Defendants cited case law standing for the proposition that when a party is engaged in unlawful conduct, the courts should not exercise equitable powers to facilitate that conduct. Doc. 76 at p 15. Plaintiffs provide no substantive response.

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.

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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).

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 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/ *Nikolai Frant*
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