24-1293

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado, and MARTHA FULFORD, in her official capacity as Administrator of the Colorado Uniform Consumer Credit Code,

Defendants – Appellants,

v.

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

Plaintiffs – Appellees.

On Appeal from the United States District Court, District of Colorado
The Honorable Daniel D. Domenico
District Judge

District Court Case No. 1:24-cv-00812-DDD-KAS

DEFENDANTS-APPELLANTS' REPLY BRIEF

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GLOSSARY

DIDMCA	Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980)
FDIA	Federal Deposit Insurance Act, 12 U.S.C. § 1811, *et seq*.
FDIC	Federal Deposit Insurance Corporation
NBA	National Bank Act, 12 U.S.C. § 21, *et seq*.
OCC	Office of the Comptroller of the Currency
UCCC	Colorado Uniform Consumer Credit Code, Colo. Rev. Stat. § 5-1-101, *et seq*.

INTRODUCTION

Different words have different meanings. When Congress drafted Sections 521 and 525 of DIDMCA, it used different words to describe the scope of the respective sections. In Section 521, Congress used language, interpreted just prior in *Marquette*, that turns on "where the bank is located." In Section 525, Congress used different language, instead focusing on where the loan was "made." This is a material change in focus from the bank's location in Section 521 to where the loan is "made" in Section 525. Congress did so to preserve the states' rights to reject both of the legal effects of Section 521: interest rate exportation and lending based on the federal discount rate. No language in Section 525 supports the Banks' claim that states can only partially opt-out of Section 521.

While the Banks extensively address so-called predecessor bills that differ materially from DIDMCA and cite to unreasoned regulatory history that does not guide the Court, they repeatedly fail to respond to Colorado and its amici's arguments:

- There is a heightened burden of "clear and manifest" intent when interpreting an ambiguous provision to preempt the states'

historic police powers. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Banks fail to even address this standard.

- The Banks' claim that a loan is different from a loan contract ignores a litany of federal cases holding the opposite.
- The Banks have no response to repeated uses in Title 12 that illustrate that "made" is used by Congress with both the lender and the borrower.
- The Banks fail to address and do not attempt to distinguish *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) and federal court decisions limiting implied private rights of action.

DIDMCA's text, structure, purpose, and relevant legislative and regulatory history are all in Colorado's favor and do not support the Banks' position. Accordingly, the District Court erred when it preliminarily enjoined Colorado's enforcement of the Colorado Uniform Consumer Credit Code ("UCCC") against state-chartered banks who provide usurious loans to Coloradans. The District Court's decision should be reversed.

ARGUMENT

I. DIDMCA's plain text, structure, and purpose show that a loan is "made" in a state if either the borrower or lender is in the state.

Section 521preempts state law and authorizes state banks to export the interest rate of their home state, or to charge at the discount-plus-one rate, whichever is greater. But to preserve the principles of federalism, Section 525 permits states to opt out of this preemption for loans "made in such State." The text, structure, purpose, relevant uses of "made" elsewhere in Title 12 of the U.S. Code, and relevant legislative and regulatory history all point toward one conclusion: a loan is "made" in the state(s) where the borrower and the lender enter into the transaction.[1]

A. The plain text and meaningful variation of Sections 521 and 525 support Colorado's reading.

Congress passed DIDMCA after *Marquette* and used the location of the lender as the focus in Section 521 but shifted the focus to loans "made in" the state in Section 525. *Marquette Nat'l Bank of Minneapolis v. First*

[1] Colorado's position has been consistent throughout this litigation. App. Vol. I at 176-77 (arguing Section 525 *includes* a focus on the borrower). This litigation has focused on out-of-state banks' ability to lend to borrowers in Colorado because trade associations representing those banks sued Colorado.

of Omaha Serv. Corp., 439 U.S. 299, 308 (1978). This meaningful variation is clear evidence that loans are not made solely at the lender's location. Congress used "materially different" terms in Section 521 and 525, so the presumption is that they have different meaning. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022); *see also Bates v. United States*, 522 U.S. 23, 29-30 (1997). The Banks offer no persuasive reason why this Court should ignore the presumption of meaningful variation and interpret "made" to mean "located." As discussed below, unrelated legislative history is not a reason to ignore the text written by Congress.

The Banks claim DIDMCA's "plain text" focuses on the lender because both Sections 521 and 525 use the word "made." Brief of Appellee ("Banks' Br.") at 32-34. The Banks claim Congress's use of the word "made" unambiguously links the making of the loan to the lender and its location "and make no mention of borrowers." Banks' Br. at 33. But, as Colorado argues, "'made' has several alternative meanings, none of which is entirely free from ambiguity." Opening Brief of Appellants ("Colorado Br.") at 34 (citing *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001)).

The Banks next claim DIDMCA "unambiguously" links "loan … made" to the lender and its location. Banks' Br. at 33. The Banks believe

this is the case because the "'State … where the bank is located' under Section 521 turns on where the bank *makes* the loan at issue." *Id.* That is not what Section 521 says. As Colorado noted, Section 521's reference to "loan … made" is contained within a preposition modifying the verbs "take, receive, reserve, and charge." Colorado Br. at 26. *Marquette* and its progeny analyze the maximum *interest* a bank can charge on a loan, and "interest" in Section 521 is modified by a prepositional phrase that turns on the bank's location. *Id.* at 29 (citing *Marquette*, 439 U.S. at 308). Where the *bank* is located may be determined according to where it performs certain loan-making functions, but "loan … made" is grammatically disconnected from "located" in Section 521. It does not logically follow that a bank's location is synonymous with where the loan is "made" just because "made" appears in Section 521. At most, use of "loan … made" in Section 521 confirms banks are involved in the making of a loan. That is undisputed.

Furthermore, Section 525 focuses on the *loan* rather than the borrower *or* the bank. The Banks claim "[l]oan contracts are different from loans." Banks' Br. at 42. Their argument conflicts with nearly every federal circuit's definition of a loan—including this Court's. *Gen. Motors*

Acceptance Corp. v. Mid-W. Chevrolet Co., 66 F.2d 1, 5 (10th Cir. 1933) ("A loan of money involves an absolute agreement to return the sum borrowed at a future time.") (citing *In re Grand Union Co.*, 219 F. 353, 356 (2d. Cir. 1914) ("A loan of money is a contract by which one delivers a sum of money to another … equivalent to that which he borrows.")); *see also* FDIC Amicus Brief ("FDIC Br.") at 13-15.[2]

Section 525 does not otherwise identify where a loan is "made" despite requiring at least two parties for loan formation. Section 525 is therefore ambiguous, and Congress must make its intentions "clear and manifest" if it intends to preempt the historic powers of the states. *Ashcroft*, 501 U.S. at 460-61. The Banks failed to acknowledge this lofty standard.

[2] The Banks make no attempt to distinguish these cases, instead choosing to rely on a handful of dictionary definitions and the District Court's analysis of Section 525's reference to "committing to make a loan." Banks' Br. at 42-43. There is no reason to resort to dictionary definitions when this Court said a loan is a contract nearly a century ago. And as Colorado previously argued, the District Court's interpretation of the "commitment to make a loan" is wrong. Colorado Br. at 32-33. The Banks provide no counter to Colorado's critique of the District Court's "commitment to make a loan" analysis—an analysis the Court raised *sua sponte* in its order without briefing. To the contrary, it appears that the Banks agree with Colorado. Banks' Br. at 43 (noting both parties can enter into a commitment agreement regarding a loan).

In statutory interpretation, "courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (internal citation omitted). The court should "begin and end [its] inquiry with the text, giving each word its ordinary, contemporary, common meaning." *Id.* (internal citation omitted). Despite this "basic and unexceptional rule," *id.*, the Banks ask this Court to read a bank-centric focus into Section 525 despite no textual support to do so.

The Banks claim that Section 525's "plain meaning" is that states can only opt out of preemption with respect to state-chartered-bank loans if the bank offering that loan performs "key loan-making functions" in the opt-out state. Banks' Br. at 32. But "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). The word "bank" does not even appear in Section 525. Congress could have easily written Section 525 to turn on where loan-making functions occur by writing Section 525 to read, "such State does not want this section to apply with respect to loans *made by banks located* in such State." That would be a "clear and manifest"

statement that Congress intended Section 525 to run on the bank's location. *Ashcroft*, 501 U.S. at 461. But Congress did not do so.

The Banks also attempt to frame state-chartered banks' DIDMCA preemption as coextensive with national banks' NBA preemption. But the Supreme Court has made clear that national banks are "National favorites" that possess "advantages … over their State competitors." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873); *see also Marquette*, 439 U.S. at 314. While Section 521 did prevent discrimination against state-chartered banks, Section 525 has no corollary in the NBA. And if parity was Congress's only concern, DIDMCA would not have Section 525.

The Banks' argument on the text of Section 525 is circular. They assume that "made in" means the bank's location, Banks' Br. at 32, then cite to the same language used in Section 525 and 521 elsewhere in DIDMCA as their evidence for the meaning of the language at issue in this case. Banks' Br. at 33 (citing 12 U.S.C. § 86a (1980) Business and Agricultural Loans (same as Section 525) and 12 U.S.C. § 1730g (1980) (same as Section 521)). The Banks cite other provisions that they claim "unambiguously link" the term "loan … made," to the lender and its

location, but these cited sections do not use the word "made" (12 U.S.C. § 1785(g)), or were not amended by DIDMCA (12 U.S.C. § 1828(o)), or both (12 U.S.C. §§ 1831e, 1831f). Banks' Br. at 33.

The Banks next claim, "'made' is a verb describing an action *the bank* takes in a particular place, not an action jointly performed by both parties (like two clapping hands)." Banks' Br. at 41 (emphasis in original). It is certainly true that "made" could, in certain contexts, refer to an action taken by a single party. A baker can make a cake alone, App. Vol. I at 213, but a loan is not a cake. It requires two parties to be made.

The Banks' logic fails in the context of Section 525 because a loan is a contract, and a contract does not exist until one party accepts the other's offer. Restatement (Second) of Contracts § 9 (Am. Law Inst. 1981). The Banks attempt to conflate "made" with "originated," but the two verbs are not the same. "Made" in common usage can be read with "to a borrower" and "by a bank." "Originated" cannot. Absent from the Banks' argument is any explanation as to how a loan could be "made" by a bank by itself "in a particular place" *without* a borrower. Banks' Br. at 41. The Banks testified that loans' terms vary based on the qualifications of the borrower. Colorado Br. at 31-32.

The Banks further claim, "[u]nder Colorado's logic, a statute that applied to 'loans *received in* such State' would refer equally to both the bank's location and the borrower's—after all, a borrower cannot 'receive' a loan without a bank having made it." Banks' Br. at 41 (emphasis in original). The Banks miss the point—a loan cannot be made without a bank *and* a borrower. Colorado does not argue that "made" is similar to "receive," which would be only borrower focused. Congress did not say "loan originated" or "loan received," each of which would have focused on one of the parties. Instead, Congress used "loan … made," which focuses on both parties. Congress used the passive voice, and did not mention the borrower *or* the lender in Section 525, because doing so would create a partial opt-out. Colorado Br. at 40-43. Nor does the phrase "such state" undermine that a loan may be "made" in the state if either the borrower or lender is in the state. Banks' Br. at 41. To give full effect to Section 525, a state must be able to opt out for loans made in the state, *i.e.*, if either the bank or the borrower are in the state.

Finally, the Banks cite to the District Court's claim that Congress could have drafted Section 525 with a focus on the borrower if it wanted. Banks' Br. at 42. First, the Banks fail to acknowledge or refute, that

drafting Section 525 in the manner the District Court suggested would lead to a partial opt-out—a result unsupported by DIDMCA's text or purpose. Second, this argument flips *Ashcroft*'s lofty burden on its head. As the Banks acknowledge, states have regulated interest rates since the colonial era. Banks' Br. at 5. There is no question Congress could have drafted Section 525 more clearly. But Congress' failure to do so makes the Banks' challenge harder to win, not easier. This Court should not "give the state-displacing weight of federal law to mere congressional *ambiguity*." *Ashcroft*, 501 U.S. at 464 (emphasis in original) (internal citations omitted). To the contrary, this Court should adopt Colorado's reading because it disfavors preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

B. Section 521 and 525's structure and purpose support both lender and borrower relevance for where a loan is made.

Congress used the passive voice in Section 525 and focused on where the loan is made rather than the location of any one party, so that opt-out states can once again regulate lending within their borders as they could before DIDMCA. Since Section 521 permits two options: discount-plus-one option and interest rate exportation, opting out of

Section 521 should eliminate both. Colorado's interpretation of Section 525 does so: banks chartered in an opt-out state cannot lend at the discount-plus-one rate, and state-chartered banks cannot export interest rates to residents of the opt-out state. Interest rates are instead determined under state law, just as they had been before DIDMCA. The Banks attempt to refute Colorado's status quo argument by arguing "[t]here was no uniform national 'status quo' prior to DIDMCA under which only the borrower's state of residence governed the interest that state banks could charge on interstate loans." Banks' Br. at 52. That mischaracterizes Colorado's argument. Colorado argues that before *Marquette* and DIDMCA, "State law controlled the terms of a loan between a lender and a borrower residing in two different states, though precisely which state law applied would often turn on the principles of conflicts of laws," not that there was a uniform standard. Colorado Br. at 1-2; 36-37.

Some states would enforce an interest rate so long as the rate was legal under the laws of *any* state with a substantial connection to the contract. *Fahs v. Martin*, 224 F.2d 387, 397 (5th Cir. 1955) (collecting cases). Other states affirmatively restricted their interest rate caps to

purely in-state transactions. *Aldens, Inc. v. Packel*, 524 F.2d 38, 48 n.15 (3d Cir. 1975). Some other states capped interest rates charged to their citizens in interstate transactions, as well as the interest charged by their in-state lenders when they dealt with out-of-state borrowers. *Id.*; Minnesota et al. Br. at 13-16. That is what happens in a federalist system—states are free to exercise their police powers how they see fit, so long as it is constitutional. And, as the *Aldens* cases show, federal circuits have uniformly upheld laws comparable to the Colorado law the Banks challenge here. Colorado Br. at 37-39.

The point is that absent DIDMCA or the NBA as interpreted by *Marquette*, interest rate caps were questions of state law. State-chartered banks could not export interest rates without DIDMCA's preemption of state law. ABA Br. at 4 ("State bank interstate credit card and consumer lending did not develop until after the enactment of DIDMCA in 1980."). Any interpretation of Section 525 should revert to that status quo, and only Colorado's interpretation accomplishes that. Even changing Section 525 to limit interest at a rate allowed "where the borrower resides," as the Banks suggest CSBS proposed, would not revert the law to the status quo. Banks' Br. at 42. CSBS's proposed change to Section 525 would

violate principles of federalism because some states have specifically chosen *not* to limit interest rates in that manner.

The Banks argue "it is apparent that, to Colorado, it is only the borrower's state that matters for purposes of Section 525." Banks' Br. at 41. Not so. The location of both parties to the loan matters, because it takes two parties for a loan to be "made." As Colorado notes, Colorado Br. at 25, if the lender and borrower enter into the loan in the same state, the loan is made in one state. If they are in separate states, then it is made in both. Where either party enters into the transaction while in an opt-out state, DIDMCA preemption is countermanded and the applicable interest rate is decided under state law. There is no dispute that when the lender is in Colorado, the loan is "made" in the state. But to give effect to the text of Section 525, the state of each party that made the loan must be considered, because it is the only way to guarantee a complete opt-out of DIDMCA's preemptive effects. Focus exclusively on either the bank or the borrower would result in a partial opt-out. Indeed, it is the Banks' position that is unworkable: it would mean that a state could pass a law that would restrict its own state-chartered banks from lending outside of

the state but would not permit the state to protect its own borrowers. Minnesota et al. Br. at 26; FDIC Br. at 4.[3]

C. Congress refers to borrowers and lenders when it uses "made" in banking statutes.

[3] Although the Banks do not raise the issue, the American Bankers Association amicus brief asserts the policy argument that state chartered banks would have to apply varying interest rates to borrowers who travel to opt-out states and use their credit cards. ABA Br. at 14. The ABA asserts that it is "well settled" that "a credit card loan is made not when the parties originally enter into the cardholder agreement, but rather when a purchase is made and credit is extended,", *id.*, but they cite dicta (*Sharp Elecs. Corp. v. Deutsche Fin. Servs. Corp.*, 216 F.3d 388, 394 (4th Cir. 2000)) and a 42-year-old Illinois state appellate court decision for the proposition *(Garber v. Harris Tr. & Sav. Bank*, 432 N.E.2d 1309, 1311 (1982)). *Garber* does not address whether the interest rate is determined at the purchase. And whether or not the court in *Garber* was correct at the time, Congress passed the CARD Act in 2009, which generally prohibits changes in terms during the first year of the account, 15 U.S.C. § 1666i-2(a), and after the first year, requires that card issuer provide 45 days advance notice of prospective term changes, including amount of finance charges, and give the consumer an opportunity to close the account. 15 U.S.C. § 1637(i)(1)-(3); 12 C.F.R. § 1026.9(c)(2). More fundamentally, the ABA's argument ignores that a state's opt-out merely removes federal preemption of state law—courts will then apply standard conflict of law principles to analyze what law applies to a loan. Courts already do so where state law is not preempted. *See, e.g.*, *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 714-16 (6th Cir. 2015). Colorado's UCCC does not purport to apply to borrowers who are not resident in the state, § 5-1-201(7), C.R.S., and in the same legislation that contained Colorado's opt-out, Colorado exempted most credit cards from its UCCC usury limits, § 5-2-213, C.R.S. Nor does the ABA cite to any case where the conflict of law analysis would apply the state law where a borrower swiped a credit card while travelling through the state.

The District Court found that various other sections of Title 12 supported its holding. App. Vol. II, 458-59. But Colorado demonstrated that many of the provisions cited by the District Court were authority-granting provisions where Congress enumerated what a bank is permitted to do. Colorado Br. at 45-46. In those provisions, Congress was explicit with every use of the word "make" to identify the bank and to use the active voice. But Congress in Title 12 used "made" with both prepositional phrases, "to the borrower" and "by the lender," or just one of those phrases. Title 12 illustrates that when Congress uses "loan made" both the bank and borrower are relevant. The Banks assert the borrower is the recipient of the loan, not the maker of the loan. Banks' Br. at 35. But a loan cannot be "made" without both a lender and a borrower. So both parties are relevant to whether a loan is made in a state.

The Banks also assert that Colorado fails to cite a statute that uses the word "made" to describe the borrower's conduct. But the Banks miss the point: Colorado identifies numerous banking provisions where Congress uses the phrase *made to a borrower*, repeatedly showing that a borrower is needed for a loan to be made. Colorado Br. at 43-44 (citing 12

U.S.C. § 1706f(c)(1); 12 U.S.C. § 2202b(a); 12 U.S.C. § 2202d(b); 12 U.S.C. § 2202(b)(2); 12 U.S.C. § 1715z-13b(c)(1); 12 U.S.C. § 4745(p)(1)(C)(i)).

The Banks argue "made" is a verb describing the action taken by the bank and attempt to equate "made" with "originated." But the two verbs are not the same: Made can naturally read "to the borrower" and "by the bank." Title 12 contains no uses of the phrase "originated to" a borrower. But it contains numerous uses of the phrase "made to" a borrower. Likewise, the Banks assume that borrowers can only "receive" or "obtain" loans. But repeated uses in Title 12 illustrate that "made" is used by Congress to reflect both the lender and the borrower. The Banks have no response.

The Banks encourage this Court to extend the Eighth Circuit's decision in *Jessup v. Pulaski*, 327 F.3d 682, 685 (8th Cir. 2003); Banks' Br. at 39. This Court should decline to do so. The Eighth Circuit interpreted a different statute enacted almost two decades after DIDMCA. The court noted the statute at issue "does not define the term 'made,' and no cases have interpreted the term." *Jessup,* 327 F.3d at 684. The statute, 12 U.S.C. § 1831u(f), allows Arkansas banks to charge the higher interest rates imported into Arkansas by out-of-state banks who

had Arkansas branches only for loans "made" in Arkansas. The Eighth Circuit gave *Chevron* deference to an OCC letter that interpreted a different statue that significantly post-dates DIDMCA and did not engage in any interpretation of the statutory text itself when it found that "made" in Arkansas meant the three-part location test. *Id.* at 685. *But see Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). The Eighth Circuit gave deference where none was due and did not engage in any of its own reasoning. In fact, the holding has perverse consequences: applying the three-part location test when all three functions were performed at offices (not branches) outside Arkansas could lead to the result that a loan is "made" in Arkansas even if the bank performed all three lending functions outside of Arkansas and the borrower entered into the transaction outside Arkansas. App. Vol. I at 162-63 (FDIC Amicus Brief in District Court). Because it is poorly reasoned, gives unwarranted deference, and creates perverse results, this Court should not extend *Jessup*.

D. DIDMCA's legislative and regulatory history support Colorado's reading of Section 525.

1. Relevant history supports Colorado's view.

The plain text, the canon of meaningful variation, and the high bar against preemption in *Ashcroft*, all supply the same answer: a loan is "made in" a state under Section 525 if the borrower or lender is in the state. This Court need not resort to legislative history. Even so, DIDMCA's relevant legislative history made clear that Congress meant for Section 525 to return usury regulation to the states. Colorado Br. at 48.

The history recited by the Banks is at best incomplete. The Banks claim *Marquette* recognized that "lending began to evolve beyond face-to-face transactions" in the 1970s. Banks' Br. at 52. But *Marquette*'s repeated references to a "developed interstate loan market" dating back to the 1800s calls the Banks' assertions into question. *Marquette*, 439 U.S. at 317-19. Congress passed DIDMCA in 1980 to address interstate lending for state-chartered banks. Regardless, the proliferation of interstate lending in the decade prior to DIDMCA's enactment—and the states' regulatory response to interest charged on those loans—is the best evidence one could ask for with respect to the status quo pre-DIDMCA.

That is precisely why the *Aldens* cases are relevant here. Colorado Br. at 34-39.

But the Banks seize upon stray testimony from legislation as far back as 1974—six years prior to DIDMCA's passage. Banks' Br. at 9-12. But this reliance shows that improperly deployed legislative history is "often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 545 U.S. 546, 568 (2005).

The Banks raise the so-called predecessors of DIDMCA for the first time in their brief—the District Court did not cite or rely on either the Brock Bill or the Borrowers Relief Act. As the Banks concede, both the Brock Bill and the Borrowers Relief Act "were not targeting interstate consumer lending." Banks' Br. at 36-38. The Brock Bill and Borrower Relief Act amended *both* the NBA and the FDIA to permit national and state-chartered banks to lend at a federal rate. Act to Authorize the Regulation of Interest Rates Payable on Obligations Issued by Affiliates of Certain Depository Institutions, Pub. L. No. 93-501, §§ 201-02, 88 Stat. 1557 (1974); Act to Authorize on a Temporary Basis Certain Business and Agricultural Loans, Notwithstanding Interest Limitations in State Constitutions or Statues, Pub. L. No. 96-104, §§ 101-02, 93 Stat. 789

(1979). Both bills focus only on permitting both types of banks to lend at a federal rate for *intra*state lending.

But DIDMCA differs fundamentally from these so-called predecessors. For the first time, Congress addressed *inter*state lending by state-chartered banks. It did so by incorporating the language of the NBA that the Supreme Court had interpreted just two years before in *Marquette* to permit interest rate exportation. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.") (internal citation omitted). As the Banks' color-coded text illustrates, Congress added the language from the NBA about a bank's "location" to the preemption provision (Section 521) in response to *Marquette*. Banks' Br. at 15-16 (blue/underscore). Notably, unlike the Brock Bill and the Borrower's Relief Act, DIDMCA did not amend the NBA, because the Supreme Court in *Marquette* had interpreted the NBA to permit interest rate exportation already. So, the Banks' attempt to conflate DIDMCA with the Brock Bill/Borrower's Relief Act falls flat—

Section 525 permits states to opt out of the new and different preemption in Section 521. Section 521 addressed *inter*state lending by state-chartered banks, not *intra*state lending for national and state banks, like the Brock Bill and the Borrower's Relief Act. So, Section 525's opt-out for loans "made in" the state is different. At bottom, the Brock Bill and Borrower's Relief opt-outs are much narrower but are consistent with Colorado's position: where the preemption is only for *intra*state lending, both the bank and borrower are in the same state, and the loan is made in that state. But Section 521 addresses *inter*state lending, so it follows that a state opt-out under Section 525 is complete, *i.e.*, if either the borrower or lender is in the state.

The Banks also cite state legislative hearings as late as fifteen years *after* DIDMCA's passage. Banks' Br. at 20-21. The Banks' attempts to cobble together an *ex-post* consensus on the effect of a state's Section 525 opt-out fail. Indeed, the best evidence of the states' understanding of the meaning of Section 525 is from Iowa, which has maintained its opt-out consistently since it first opted out in 1980. Act of Apr. 30, 1980, § 32, 1980 Iowa Acts 547-48. Iowa interprets its opt-out to apply to loans made to Iowa residents by out-of-state banks. In re Transportation Alliance

Bank, Inc., Assurance of Discontinuance, (Dec. 12, 2022), https://shorturl.at/UWFsU. Reasoned regulatory history supports Colorado's view.

The Banks argue that a few, scattered staff statements devoid of analysis are entitled to "respect" because they are "issued contemporaneously" to DIDMCA's passage. Banks' Br. at 58 (citing *Loper Bright Enters.*, 144 S. Ct. at 2258). But this Court must exercise its "independent judgment" in interpreting the statute at issue in this case. *Loper Bright,* 144 S. Ct. at 2273. The letters cited do not assist this Court in its task because they are not reasoned interpretations. *Id.* at 2258. Even prior to *Loper Bright*, the Supreme Court expressed skepticism that letters similar to those cited by the Banks represent a "binding agency policy." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 743 (1996).

The letters cited by the Banks do not aide this Court. The 1983 letter is a conclusory statement by a senior attorney with no analysis. FDIC Interp. Ltr. No. 83-16, 1983 WL 207393 (Oct. 20, 1983). The 1986 letter, which is not even from the FDIC, but a different federal agency, merely parrots the 1983 letter. OTS Ltr. from H. W. Quillian, 1986 WL 290314, at *2 (June 27, 1986). The legislative history from North

Carolina is a second-hand recitation of what was purportedly the FDIC General Counsel's view, with no analysis of Section 525 whatsoever. N.C. S. Banking Comm., 1983 HB 336, Special Mtg. Minutes (Mar. 28, 1983), at 10, https://perma.cc/8M57-U8ER. The quoted portion from the FDIC brief in *Greenwood Trust* is the final section of the brief, titled "The Provision Allowing States To 'Opt Out' Of Section 521 Is Not Relevant To The Interpretation Of The Statute In This Case" and contains no analysis of the statutory text. Brief for FDIC as Amicus Curiae, *Greenwood Trust Co. v. Massachusetts* (1992) (Nos. 91-2205, 91-8096, 92-1065), 1992 WL 12577410, at *36.

The FDIC has analyzed Sections 521 and 525 in depth and each of those support interpreting the different language in the two provisions to have different meanings. FDIC Interp. Ltr. No. 88-45, 1988 WL 583093, at *1 (June 29, 1988) ("Section 525 uses plain language … [that] differs considerably from that of section 521."); Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,153 (July 22, 2020) ("If a State opts out of [Section 521], 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."); App. Vol. I at 142-64 (FDIC Br. in District Court); FDIC Amicus Br. at 4-21. Simply put, the most pertinent regulatory history *rejects* the Banks' position, and is consistent with the FDIC's amicus briefs filed in this litigation.

II. Congress did not provide a right of action in DIDMCA for the Banks.

The Banks cannot sustain a private right of action under the FDIA. The Banks contend they have a "federal right" to "lend at rates" over Colorado's usury cap under Section 521 and that Colorado's position is "[n]onsense" and "meritless." Banks' Br. at 28-29. They contend they have a "straightforward" basis to bring their claim under *Ex parte Young* as the lower court allowed their claim to proceed. Banks' Br. at 28. However, this Court reviews *de novo* whether that was proper.

The Banks rely heavily on *Ex parte Young*, but they did not even cite the case in their original complaint. In fact, they brought a claim asserting "Violation Of The Supremacy Clause." App. Vol. I at 34. As the U.S. Supreme Court held in *Armstrong v. Exceptional Child Center, Inc.,* in 2015, this is not a valid cause of action. 575 U.S. 320, 324-25 (2015) ("the Supremacy Clause is not the source of any federal rights, … and

certainly does not create a cause of action." (quotations and citations omitted)).

The Banks are attempting to create an implied private right of action where Congress did not provide one. *Armstrong* is the most recent in a line of Supreme Court cases curtailing implied private rights of action in federal statutes that do not provide them. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (precluding a class action brought under Title VI because there was no private right of action). *Alexander* held that when there is an "express provision of one method of enforcing a substantive rule"—like 12 U.S.C. § 1831d(b) here—that "suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290. In such cases, the Court can end its *Armstrong* analysis and conclude the Banks' implied private right of action is precluded. Colorado Br. at 61-62. The Banks do not rebut this argument, and do not even address *Alexander* or the private right of action for *consumers to sue banks* under Section 521 codified at 12 U.S.C. § 1831d(b).

This would not be the first court to apply *Armstrong* to a federal statute. Since *Armstrong*, many federal courts have applied its holding to an assortment of federal statutes, including the Controlled Substances

Act, 21 U.S.C. § 801, *et seq.*, and the Federal Power Act, 16 U.S.C. § 791a, *et seq*. Colorado cited and relied on these cases and showed how they are analogous to the circumstances here. Colorado Br. at 59-61. However, the Banks, again, do not address this authority or even attempt to distinguish it.

Even though the Banks do not address this case law, they do make much of the fact that the FDIC was not "aware" of a time when it sued a state. Banks' Br. at 30. A statement made by counsel at oral argument is not authoritative. However, Colorado did cite authority in its brief, which the Banks did not address, that would give the FDIC this authority if necessary. Colorado Br. at 57. The fact that FDIC's counsel was not aware of an instance when the FDIC exercised its power simply speaks to its rarity, not an absence of authority. The FDIC supervises and regulates banks. It operates independently and separately from states. Here, Colorado opted out of a statute in the FDIA. Only one other state and one other U.S. territory (Iowa and Puerto Rico) currently do so. It is uncommon, but it did potentially put Colorado in conflict with the FDIC. But the FDIC did not sue Colorado because it agrees with Colorado's interpretation of DIDMCA. It has not sued Iowa or Puerto Rico either.

Finally, whether the FDIC has authority to sue states and whether there ultimately is a "judgment laden" standard at play here is not dispositive to find in Colorado's favor. The statute creates a private right of action for borrowers, not the Banks. The Court could conclude its analysis here and find the Banks' claim precluded.

III. The District Court should not have granted a disfavored injunction and did not properly balance the equities.

The District Court's preliminary injunction is "disfavored" because it cannot be undone. Under the injunction, the Banks' members may make high-rate loans in Colorado that would otherwise be prohibited by Colorado law. Some Coloradans will default on those loans, as well as other lawful loans, because of the financial burden of higher interest rates. This will cause a spiral of harm, leading to defaults, litigation, and collection on Colorado consumers that cannot be undone. App. Vol. I at 186.

Plaintiffs argue that this "toothpaste" — the financial harm to consumers — can go "back in the tube" if the Banks lose at trial because Colorado would be permitted to enforce its interest-rate caps. Banks' Br. at 63. But the Banks do not explain how Colorado enforcing rate caps in the future helps consumers now who have unlawful loans and are

suffering financial harm while the preliminary injunction is in place. This harm is beyond the power of the District Court to undo and thus gives rise to a disfavored injunction. *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019).

On the preliminary injunction factors, the District Court found that balancing the equities favored the entry of an injunction. App. Vol. II at 465-66. It held that the harm to Colorado borrowers was minimized because national banks offer loans in Colorado that are above Colorado's rate caps. *Id.* at 466. The Banks contend that this finding is supported by the record and cite to a declaration that the Banks' counsel submitted in support of the preliminary injunction. Banks' Br. at 64. But that declaration provides no evidence of this alleged national bank lending. App. Vol. II. at 226-336.

Instead, the declaration merely attaches printouts from websites that counsel visited. *Id.* at 248-336. The websites purport to provide general descriptions of loans offered by some lenders, but do not establish that the lenders lend in Colorado. The printouts provide no detail about the terms of Colorado loans, so the court cannot determine the loans violate Colorado's interest rate cap. For example, one website states that

the lender offers fixed rates from 8.98% APR to 35.99% APR for loans of $1,000 to $40,000. *Id.* at 273. But depending on the amount of the loan, Colorado law allows APRs as high as 36%. § 5-2-201(2)(a)(I), C.R.S. (permitting 36% APRs on loans up to $1,000). There is no way to know from the Banks' printouts whether this lender is lending above Colorado's rate caps. Based on the record, the District Court's preliminary injunction "lacks a rational basis." *Free the Nipple-Fort Collins*, 916 F.3d at 796.

In addition to the websites, the Banks contend that a balancing of the equities favors an injunction. They argue the injunction is warranted because Colorado's rate caps "actively harm[] Colorado borrowers". Banks' Br. at 64. Again, the Banks provide no evidence for this dubious assertion and it should be disregarded.

CONCLUSION

The District Court's decision should be reversed.

Dated: December 20, 2024

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